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THE
ENGLISH AND EMPIRE DIGEST

WITH

COMPLETE AND EXHAUSTIVE

ANNOTATIONS.

VOLUME I.

THE ENGLISH AND EMPIRE DIGEST

WITH

COMPLETE AND EXHAUSTIVE

ANNOTATIONS

BEING

A COMPLETE DIGEST OF EVERY ENGLISH CASE REPORTED FROM EARLY TIMES TO THE PRESENT DAY, WITH ADDITIONAL CASES FROM THE COURTS OF SCOTLAND, IRELAND, THE EMPIRE OF INDIA, AND THE DOMINIONS BEYOND THE SEAS,

AND INCLUDING

COMPLETE AND EXHAUSTIVE ANNOTATIONS GIVING ALL THE SUBSEQUENT CASES IN WHICH JUDICIAL OPINIONS HAVE BEEN GIVEN CONCERNING THE ENGLISH CASES DIGESTED.

VOLUME I.

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ACTION.

ADMIRALTY.

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THE general policy of THE ENGLISH AND EMPIRE DIGEST is controlled by a Board of Editors, acting under the advice of Lord Halsbury, with Sir Thomas Willes Chitty as Managing Editor.

After the most careful consideration and consultation, both with many leading members of the Bench and Legal Profession in Great Britain and with the leading Judges of the Dominions and India, it was decided that the vast work of preparing THE ENGLISH AND EMPIRE DIGEST should be undertaken.

The Publishers desire to record their gratitude to the Editorial Board for their interest in this undertaking and to the Managing Editor, Sir Thomas Willes Chitty, who has undertaken the great task of finally reviewing and passing the proof sheets of this work. Lord Halsbury's "Laws of England" has already gained the reputation of being the Premier Legal Work of the English-speaking world—it is not too much to say that it has become famous for all time. It is gratifying to know that many of the leaders of legal thought and eminent lawyers who contributed to "The Laws of England" are connected with this work.

The work is unique in aim and form, and in completeness and comprehensiveness it exceeds anything hitherto attempted, and it is believed that the work will be considered as being, jointly with "The Laws of England," the most important legal compilation that has yet appeared and will be regarded as the port of entry to the whole region of the Case Law of the British Commonwealth of Nations. It is in fact the reports in miniature and supplies a concise statement of the effect of each reported case; so that the practitioner or jurist will know where to look and what he may expect if he examines the report itself.

The purpose of this work is to supply the whole Case Law of England, together with a considerable body of cases from the Courts of Scotland, Ireland, the Empire of India, the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, and the other Colonies beyond the seas, in the most convenient and easily accessible form, and with exhaustive and absolutely complete annotations giving all the subsequent cases, in which judicial opinions have been given concerning the English cases digested.

A detailed review of the objects and scope of this immense undertaking may not be out of place. Our law, except so far as it is statutory, is based on precedents. Those precedents are embodied in the decisions and opinions of the Judges, which are recorded in some hundreds of thousands of cases reported in thousands of volumes of "reports" and "abridgments." The convenience and utility of having all the cases bearing on each subject and point which are scattered over many series of volumes collected together in one place will be at once apparent. The legal profession and the public require a complete and comprehensive guide and index to those reported cases, and as a guide this work enables the reader to ascertain whether there is any reported case deciding or bearing on any particular point and what was decided in each reported case, and as an index to the reported cases this work enables him to ascertain exactly in what volume or volumes of the reports any particular case is reported.

In preparing this work all the English reports from the earliest time have been carefully searched through, and all the cases of any possible use to the legal profession or student of law will be found in the text. The search for the cases was commenced with the Year-books and was carried on through the Black-letter reports and all the other reports down to the present time. As one result of this search it will be found that much hidden law and many useful cases, which for one reason or another have been for the time lost sight of and have remained unnoticed by the text-book writers, are brought to light. Just as a single instance, it may be mentioned that in *R.* v. *Levy, Ex p. Hobbs*, [1916] W. N. 30; 32 T. L. R. 238, the question was raised whether it is an indictable offence to personate a juryman. No authority appears to have been cited in that case, but in fact the point was raised and decided in 1640 in *Anon.*, March, 81, pl. 132 (see ACTION, p. 25, *post*). Thus, by the aid of this work, it is believed that what in law remains obscure will be enlightened, what is new will be shown merely to be a fresh setting of the old, and what is old and sure will be revealed to be the more firmly established.

The principle which has been adopted is that all cases should be included except those which are clearly obsolete for all purposes except those of the antiquarian. In the case of the Year-books and the Black-letter reports this principle has not been so strictly followed, and cases of no present interest have been excluded, but in the later reports the principle has been strictly adhered to.

Some difficulty has been experienced with reference to the exclusion of cases which are in a sense replaced and rendered obsolete by provisions in Codes such as the Sale of Goods Act, the Bills of Exchange Act, and the Marine Insurance Act. As, however, these cases are at least useful as showing the state of law before the Code and the law still in force in some parts of the British Empire, and are still frequently referred to, they are included and references to the English codifying statute added.

The scheme of arrangement and classification has been a matter to which the greatest attention has been paid. As far as possible the selection and arrangement adopted in "The Laws of England" has been followed. This arrangement has been found convenient and effective, and the legal profession throughout the English-speaking world is now familiar with it.

The table of contents or synopsis at the commencement of each title shows how the cases have been arranged and gives the reader a guide to the scope and contents of the title. At the end of the table of contents, and also throughout the text whenever it is thought likely that a particular subject might be looked for, cross-references are added showing where such subjects will be dealt with.

In the arrangement of cases the rule has been to group together all the cases dealing with each particular point and to present them as far as possible in chronological order. To avoid duplication of cases it has not always been possible to conform to this rule completely, but by means of the annotations and cross-references its object is effected.

Where a case is reported under the same name both on appeal and in the court below references to the reports in the appellate court only are given. This has been done to save space and avoid confusion. Where, however, the name is altered in the report of the decision on appeal, or any difficulty can arise, as, for instance, where a case is reported in the lower court in one set of reports only, and in the Court of Appeal in another set only, references are given to the reports in both courts.

The date of each decision is entered after the name of the case. References are added in each case to all the contemporaneous reports in which the case is reported on the particular point or points involved. In many cases it is useful to refer to more than one report of a case, as it often happens that a particular report is not complete for all purposes, and sometimes a particular report is incorrect, and reference to the other reports is necessary to understand the real decision.

An outstanding feature of this work is the system of annotation of cases, by means of which each English case has appended to it a note of all the subsequent cases, if any, in which judicial opinions or decisions have been expressed or given with regard to it. The annotations have been obtained by making a complete examination of every report of every English case from a very early date, and by noting every instance in which any previous case was referred to in any judgment, or by any judge in the course of the arguments, and the particular kind of reference which was made to it. To give an idea of the extent of the labour involved it may be stated that a very large staff have been continuously engaged on the work for five years.

These notes have then been collected and attached to the various cases, showing as regards each such case the subsequent cases in which it has been approved, followed, distinguished, overruled, or otherwise referred to. The complete annotations follow after the most important paragraph when the case appears more than once in a title. Where the case only appears once the full annotations follow it except where the case is only cited on points having no relation to the point of the paragraph. In this event a cross-reference will be found to the title in which the case will appear with its full annotations.

Thus there is afforded a complete history of the judicial comments upon any English case which enables its present authority to be ascertained. No such complete system of annotation is believed to be in existence. Incidentally it forms in effect a complete noter-up to every reported English case and every English report.

As regards the Scottish and Irish cases a selection has been made, but all cases of not merely local application are inserted in this work.

A special feature of this undertaking is the inclusion of the whole case law of the Dominion of Canada with the exception of cases turning on the Codes in the Province of Quebec, and a considerable body of the reported decisions of the courts in the Empire of India, the Commonwealth of Australia, the Dominion of New Zealand, and the other

Colonies where English law is in force. The reported decisions of these courts have been examined and considered, and all the cases bearing on English law which appear to be of interest outside the particular dominion or country where they were decided have been included in the work. The inclusion of these cases will, it is believed, be found of great use throughout India, the Dominions and the Colonies, especially in the coming years of the closer Imperial union of the Empire. The English lawyer will find many cases on points as to which there is no English decision. He will also find in some cases decisions opposed to the decisions of the English courts, which will afford him great assistance in the higher tribunals. The legal profession in other parts of the Empire will find the decisions of their courts and a ready clue to the English decisions as well as to those of the other Dominions and Colonies.

In dealing with the Scottish and Irish decisions and the decisions of the Overseas Dominions the effect of each case is stated in a concise form. To distinguish them from the English decisions they are printed in a smaller type in three columns and placed below a line drawn horizontally across the page. These cases follow as far as possible the arrangement of the English cases, and where they deal with the same subject-matter, so that they can be justifiably connected with specific English cases, that fact is indicated by giving them the same number as the English case bears, followed by Roman numerals where there are more than one Scottish or Irish case or decision of the Overseas Dominions on the same point. Cases that cannot be joined in this manner to specific English cases are marked with a letter of the alphabet and are placed as near as possible to the English case that is most similar to it.

Volume I. contains all the cases reported down to January 1st, 1918, and each succeeding volume will contain all the reported cases down to the end of the year preceding the date of its publication.

As the attention of the Editors is fully engaged in the preparation of the remaining volumes, it is particularly requested that all communications in connection with the work be addressed in the first instance to the Publishers, who will welcome any suggestions or criticisms and be responsible for their early consideration by the Editors.

BUTTERWORTH & CO.

BELL YARD,
TEMPLE BAR,
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February 1st, 1919.

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ADMINISTRATION OF ASSETS.

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ADULTERATION.
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ADULTERY.
See HUSBAND AND WIFE.

ADVANCEMENT.
See DESCENT AND DISTRIBUTION; INFANTS AND CHILDREN; TRUSTS AND TRUSTEES; WILLS.

ADVERSE POSSESSION.
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ADVERTISEMENTS.
See COMPANIES; CONTRACT; CRIMINAL LAW AND PROCEDURE; TRADE MARKS, TRADE NAMES AND DESIGNS.

ADVOWSON.
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AFFIDAVIT.
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AFFILIATION.
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AFFIRMATION.
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AGREEMENTS.
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REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS

A. C. (preceded by date)	Law Reports, Appeal Cases, House of Lords, since 1890 (*e.g.* [1891] A. C.)	Eng.
A. D.	South African Law Reports, Appellate Division	S. Af.
A. Jur. Rep.	Australian Jurist Reports	Aus.
A. L. R.	Alberta Law Reports	Can.
A. L. R.	Argus Law Reports	Aus.
A. L. T.	Australian Law Times	Aus.
A. R.	Ontario Appeals	Can.
Act.	Acton's Reports, Prize Causes, 2 vols., 1809—1841	Eng.
Ad. & El.	Adolphus and Ellis's Reports, King's Bench and Queen's Bench, 12 vols., 1834—1842	Eng.
Adam	Adam's Justiciary Reports (Scotland), 1893—(current)	Scot.
Add.	Addams' Ecclesiastical Reports, 3 vols., 1822—1826	Eng.
Agra	Agra High Court	Ind.
Agra F. B.	Agra High Court, Full Bench	Ind.
Alc. & N.	Alcock and Napier's Reports, King's Bench (Ireland), 1 vol., 1813—1833	Ir.
Alc. Reg. Cas.	Alcock's Registry Cases (Ireland), 1 vol., 1832—1841	Ir.
Aleyn	Aleyn's Reports, King's Bench, fol., 1 vol., 1646—1649	Eng.
All.	New Brunswick Reports (Allen)	Can.
Alta. L. R.	Alberta Law Reports	Can.
Amb.	Ambler's Reports, Chancery, 2 vols., 1725—1783	Eng.
And.	Anderson's Reports, Common Pleas, fol., 2 parts in one vol., 1535—1605	Eng.
Andr.	Andrews' Reports, King's Bench, fol., 1 vol., 1737—1740	Eng.
Anst.	Anstruther's Reports, Exchequer, 3 vols., 1792—1797	Eng.
App. Cas.	Law Reports, Appeal Cases, House of Lords, 15 vols., 1875—1890	Eng.
App. Ct. Rep.	Appeal Court Reports	N.Z.
Argus L. R.	Argus Law Reports	Aus.
Arkley	Arkley's Justiciary Reports (Scotland), 1 vol., 1846—1848	Scot.
Arm. M. & O. (or Arm. Mac. & Og., or Arm. & O.).	Armstrong, Macartney, and Ogle's Civil and Criminal Reports (Ireland), 1840—1842	Ir.
Arn.	Arnold's Reports, Common Pleas, 2 vols., 1838—1839	Eng.
Arn. & H.	Arnold and Hodges' Reports, Queen's Bench, 1 vol., 1840—1841	Eng.
Ashb.	Ashburner's Principles of Equity, 1902	Eng.
Asp. M. L. C.	Aspinall's Maritime Law Cases, 1870—(current)	Eng.
Atk.	Atkyns' Reports, Chancery, 3 vols., 1736—1754	Eng.
Ayl. Pan.	Ayliffe's New Pandect of Roman Civil Law	Eng.
Ayl. Par.	Ayliffe's Parergon Juris Canonici Anglicani	Eng.
B.	Barber's Gold Law	S. Af.
B. & Ad.	Barnewall and Adolphus' Reports, King's Bench, 5 vols., 1830—1834	Eng.
B. & Ald.	Barnewall and Alderson's Reports, King's Bench, 5 vols., 1817—1822	Eng.
B. & C.	Barnewall and Cresswell's Reports, King's Bench, 10 vols., 1822—1830	Eng.
B. & S.	Best and Smith's Reports, Queen's Bench, 10 vols., 1861—1870	Eng.
B. C. R.	British Columbia Reports	Can.
B. Dig.	Bose's Digest	Ind.
B. L. R.	Bengal Law Reports	Ind.
B. L. R. A. C.	Bengal Law Reports, Appeal Cases	Ind.
B. L. R. P. C.	Bengal Law Reports, Privy Council	Ind.
B. L. R. Sup. Vol.	Bengal Law Reports, Supp. Vol.	Ind.
B. W. C. C.	Butterworths' Workmen's Compensation Cases, 1907—(current)	Eng.

Bac. Abr.	Bacon's Abridgment...	Eng.
Bail Ct. Cas.	Bail Court Cases (Lowndes and Maxwell), 1 vol., 1852—1854 ...	Eng.
Baild.	Baildon's Select Cases in Chancery (Selden Society, Vol. X.) ...	Eng.
Ball & B.	Ball and Beatty's Reports, Chancery (Ireland), 2 vols., 1807—1814...	Ir.
Bankr. & Ins. R. ...	Bankruptcy and Insolvency Reports, 2 vols., 1853—1855 ...	Eng.
Bar. & Arn.	Barron and Arnold's Election Cases, 1 vol., 1843—1846 ...	Eng.
Bar. & Aust.	Barron and Austin's Election Cases, 1 vol., 1842	Eng.
Barn. Ch.	Barnardiston's Reports, Chancery, fol., 1 vol., 1740—1741 ...	Eng.
Barn. K. B.	Barnardiston's Reports, King's Bench, fol., 2 vols., 1726—1734...	Eng.
Barnes	Barnes' Notes of Cases of Practice, Common Pleas, 1 vol., 1732—1760	Eng.
Batt. (or Batty) ...	Batty's Reports, King's Bench (Ireland), 1 vol., 1825—1826 ...	Ir.
Beat.	Beatty's Reports, Chancery (Ireland), 1 vol., 1813—1830 ...	Ir.
Beav.	Beavan's Reports, Rolls Court, 36 vols., 1838—1866	Eng.
Beav. & Wal.	Beavan and Walford's Railway Parliamentary Cases, 1 vol., 1846	Eng
Beaw.	Beawes's Lex Mercatoria	Eng.
Bell, C. C.	T. Bell's Crown Cases Reserved, 1 vol., 1858—1860	Eng.
Bell, Ct. of Sess. ...	R. Bell's Decisions, Court of Session (Scotland), 1 vol., 1790—1792	Scot.
Bell, Ct. of Sess. fol. ...	R. Bell's Decisions, Court of Session (Scotland), fol., 1 vol., 1794—1795	Scot.
Bell, Dict. Dec. ...	S. S. Bell's Dictionary of Decisions, Court of Session (Scotland), 2 vols., 1808—1833	Scot.
Bell, Sc. App.	S. S. Bell's Scotch Appeals, House of Lords, 7 vols., 1842—1850	Scot.
Bellewe...	Bellewe's Cases *temp.* Richard II., King's Bench, 1 vol. ...	Eng.
Belt's Sup.	Belt's Supplement to Vesey Sen., Chancery , 1 vol., 1746—1756	Eng.
Ben. & D.	Benloe and Dalison's Reports, Common Pleas, fol., 1 vol., 1357—1579	Eng.
Benl.	Benloe's (or Bendloe's) Reports, King's Bench and Common Pleas, fol., 1 vol., 1515—1627	Eng.
Ber.	New Brunswick Reports (Berton)	Can.
Bing.	Bingham's Reports, Common Pleas, 10 vols., 1822—1834 ...	Eng.
Bing. N. C.	Bingham's New Cases, Common Pleas, 6 vols., 1834—1840 ...	Eng.
Biss. & Sm.	Bissett and Smith's Digest	S. Af.
Bitt. Prac. Cas. ...	Bittleston's Practice Cases in Chambers under the Judicature Acts, 1873 and 1875, 1 vol., 1875—1876	Eng.
Bitt. Rep. in Ch. ...	Bittleston's Reports in Chambers (Queen's Bench Division), 1 vol., 1883—1884...	Eng.
Bl. Com.	Blackstone's Commentaries...	Eng.
Bl. D. & Osb. (or Bl. D. & O.).	Blackham, Dundas, and Osborne's Reports, Practice and Nisi Prius (Ireland), 1 vol., 1846—1848	Ir.
Bli.	Bligh's Reports, House of Lords, 4 vols., 1819—1821	Eng.
Bli. N. S.	Bligh's Reports, House of Lords, New Series, 11 vols., 1827—1837	Eng.
Bom.	Bombay High Court Reports	Ind.
Bom. A. C.	Bombay Reports, Appeal Cases	Ind.
Bom. O. C.	Bombay Reports, Oudh Cases	Ind.
Bos. & P.	Bosanquet and Puller's Reports, Common Pleas, 3 vols., 1796—1804	Eng.
Bos. & P. N. R. ...	Bosanquet and Puller's New Reports, Common Pleas, 2 vols., 1804—1807	Eng.
Bourke	Bourke's Reports	Ind.
Bract.	Bracton De Legibus et Consuetudinibus Angliæ	Eng.
Bro. Abr.	Sir J. Brooke's Abridgment...	Eng.
Bro. C. C.	W. Brown's Chancery Reports, 4 vols., 1778—1794	Eng.
Bro. Ecc. Rep.... ...	W. G. Brooke's Ecclesiastical Reports, Privy Council, 1 vol., 1850—1872	Eng.
Bro. N. C.	Sir R. Brooke's New Cases, 1 vol., 1515—1558	Eng.
Bro. Parl. Cas.... ...	J. Brown's Cases in Parliament, 8 vols., 1702—1800	Eng.
Bro. Supp. to Mor. ...	M. P. Brown's Supplement to Morison's Dictionary of Decisions, Court of Session (Scotland), 5 vols.	Scot.
Bro. Synop.	M. P. Brown's Synopsis of Decisions, Court of Session (Scotland), 4 vols., 1532—1827	Scot.
Brod. & Bing.	Broderip and Bingham's Reports, Common Pleas, 3 vols., 1819—1822	Eng.
Brod. & F.	Broderick and Fremantle's Ecclesiastical Reports, Privy Council, 1 vol., 1705—1864	Eng.
Broun	Broun's Justiciary Reports (Scotland), 2 vols., 1842—1845 ...	Scot.
Brown. & Lush. ...	Browning and Lushington's Reports, Admiralty, 1 vol., 1863—1866...	Eng.
Brownl....	Brownlow and Goldesborough's Reports, Common Pleas, 2 parts, 1569—1624...	Eng.
Bruce	Bruce's Decisions, Court of Session (Scotland), 1714—1715 ...	Scot.
Buch.	Buchanan's Reports of the Supreme Court of the Cape of Good Hope, 1868—1879...	S. Af.
Buch. A. C.	Buchanan's Reports of Appeal Court (Cape)	S. Af.

Buchan.	Buchanan's Reports, Court of Session and Justiciary (Scotland), 1806—1813	Scot.
Buck	Buck's Cases in Bankruptcy, 1 vol., 1816—1820	Eng.
Bulst.	Bulstrode's Reports, King's Bench, fol., 3 parts in 1 vol., 1610—1626	Eng.
Bunb.	Bunbury's Reports, Exchequer, fol., 1 vol., 1713—1741 ...	Eng.
Burr.	Burrow's Reports, King's Bench, 5 vols., 1756—1772	Eng.
Burr. S. C.	Burrow's Settlement Cases, King's Bench, 1 vol., 1733—1776 ...	Eng.
Burrell	Burrell's Reports, Admiralty, ed. by Marsden, 1 vol., 1648—1840	Eng.
C. & P....	Carrington and Payne's Reports, Nisi Prius, 9 vols., 1823—1841	Eng.
C. B.	Common Bench Reports, 18 vols., 1845—1856	Eng.
C. B. N. S.	Common Bench Reports, New Series, 20 vols., 1856—1865 ...	Eng.
C. C. Ct. Cas.	Central Criminal Court Cases (Sessions Papers), 1834—(current)	Eng.
C. L.	Irish Common Law Reports, 17 vols., 1849—1866	Ir.
C. L. Ch.	Common Law Chambers	Can.
C. L. J....	Cape Law Journal	S. Af.
C. L. J. N. S.	Canada Law Journal, New Series	Can.
C. L. J. O. S.	Canada Law Journal, Old Series	Can.
C. L. R.	Common Law Reports, 3 vols., 1853—1855	Eng.
C. L. R.	Commonwealth Law Reports	Aus.
C. L. R.	Calcutta Law Reporter	Ind.
C. L. R.	Cape Law Reports	S. Af.
C. L. T....	Canadian Law Times	Can.
C. L. T. Occ. N. (or Dec. N.).	Canadian Law Times, Occasional Notes	Can.
C. P.	Upper Canada Common Pleas	Can.
C. P. D.	Law Reports, Common Pleas Division, 5 vols., 1875—1880 ...	Eng.
C. P. D.	Cape Provincial Division Reports	S. Af.
C. R. [date] A. C. (or C. R. A. C.).	Canadian Reports, Appeal Cases	Can.
C. S.	Quebec Reports, Supreme Court	Can
C. T. R.	Cape Times Reports of the Supreme Court of the Cape of Good Hope	S. Af.
C. W. N.	Calcutta Weekly Notes	Ind.
Cab. & El.	Cababé and Ellis's Reports, Queen's Bench Division, 1 vol., 1882—1885	Eng.
Calc. W. N.	Calcutta Weekly Notes	Ind.
Cald. Mag. Cas. ...	Caldecott's Magistrates Cases, 1 vol., 1776—1785	Eng.
Calth.	Calthrop's City of London Cases, King's Bench, 1 vol., 1609—1618	Eng.
Cam. Cas.	Cameron's Supreme Court Cases	Can.
Camp.	Campell's Reports, Nisi Prius, 4 vols., 1807—1816	Eng.
Can. Com. Cas. ...	Commercial Law Reports of Canada	Can.
Can. Crim. Cas. (or Can. Cr. Ca.).	Canadian Criminal Cases, Annotated	Can.
Can. Ry. Cas.	Canadian Railway Cases	Can.
Cape P. Div.	Cape Provincial Division Reports	S. Af.
Car. & Kir.	Carrington and Kirwan's Reports, Nisi Prius, 3 vols., 1843—1853	Eng.
Car. & M.	Carrington and Marshman's Reports, Nisi Prius, 1 vol., 1841—1842...	Eng.
Carp. Pat. Cas. ...	Carpmael's Patent Cases, 2 vols., 1602—1842	Eng.
Cart.	Carter's Reports, Common Pleas, fol., 1 vol., 1664—1673 ...	Eng.
Cart.	Cases on British North America Act	Can.
Carth.	Carthew's Reports, King's Bench, fol., 1 vol., 1687—1700 ...	Eng.
Cary	Cary's Reports, Chancery, 1 vol.	Eng.
Cas. in Ch.	Cases in Chancery, fol., 3 parts, 1660—1697	Eng.
Cas. Pract. K. B. ...	Cases of Practice, King's Bench, 1 vol., 1655—1775	Eng.
Cas. Sett.	Cases of Settlements and Removals, 1 vol., 1685—1727 ...	Eng.
Cas. *temp.* Finch ...	Cases *temp.* Finch, Chancery, fol., 1 vol., 1673—1680	Eng.
Cas. *temp.* King ...	Select Cases *temp.* King, Chancery, fol., 1 vol., 1724—1733 ...	Eng.
Cas. *temp.* Talb. ...	Cases in Equity *temp.* Talbot, fol., 1 vol., 1730—1737	Eng.
Cass. Dig.	Cassells' Digest	Can.
Ch. (preceded by date).	Law Reports, Chancery Division, since 1890 (*e.g.*, [1891] 1 Ch.)	Eng.
Ch. App.	Law Reports, Chancery Appeals, 10 vols., 1865—1875	Eng.
Ch. Cas. in Ch. ...	Choyce Cases in Chancery, 1557—1606	Eng.
Ch. Ch.	Upper Canada Chancery Chambers	Can.
Ch. D.	Law Reports, Chancery Division, 45 vols., 1875—1890	Eng.
Ch. R.	Upper Canada, Chancery Chambers Reports	Can.
Ch. Rob.	Christopher Robinson's Reports, Admiralty, 6 vols., 1798—1808	Eng.
Ch. T.	Canadian Law Times	Can.
Char. Cham. Cas. ...	Charley's Chamber Cases, 1 vol., 1875—1876	Eng.
Char. Pr. Cas.	Charley's New Practice Reports, 3 vols., 1875—1876	Eng.
Chit.	Chitty's Practice Reports, King's Bench, 2 vols., 1770—1822 ...	Eng.
Cl. & Fin.	Clark and Finnelly's Reports, House of Lords, 12 vols., 1831—1846...	Eng.
Cl. & Sc. Dr. Cas. ...	Clark and Scully's Drainage Cases...	Can.
Clay.	Clayton's Reports and Pleas of Assises at Yorke, 1 vol., 1631—1650	Eng.
Clif. & Rick.	Clifford and Rickards' Locus Standi Reports, 3 vols., 1873—1884	Eng.

Clif. & Steph.	Clifford and Stephens' Locus Standi Reports, 2 vols., 1867—1872	Eng.
Co. A.	Cook's Lower Canada Admiralty Court Cases	Can.
Co. Ct. I. L. T.	Irish Law Times, County Courts	Ir.
Co. Ent.	Coke's Entries	Eng.
Co. Inst.	Coke's Institutes	Eng.
Co. L. J.	Colonial Law Journal	N.Z.
Co. Litt.	Coke on Littleton (1 Inst.)	Eng.
Co. Rep.	Coke's Reports, 13 parts, 1572—1616	Eng.
Cockb. & Rowe	Cockburn and Rowe's Election Cases, 1 vol., 1833	Eng.
Coll.	Collyer's Reports, Chancery, 2 vols., 1844—1846	Eng.
Coll. Jurid.	Collectanea Juridica, 2 vols.	Eng.
Colles	Colles' Cases in Parliament, 1 vol., 1697—1713	Eng.
Colt.	Coltman's Registration Cases, 1 vol., 1879—1885	Eng.
Com.	Comyns' Reports, King's Bench, Common Pleas, and Exchequer, fol., 2 vols., 1695—1740	Eng.
Com. Cas.	Commercial Cases, 1895—(current)	Eng.
Com. Dig.	Comyns' Digest	Eng.
Comb.	Comberbach's Reports, King's Bench, fol., 1 vol., 1685—1698	Eng.
Con. & Law. (or Con. & L.).	Connor and Lawson's Reports, Chancery (Ireland), 2 vols., 1841—1843	Ir.
Cooke & Al.	Cooke and Alcock's Reports, King's Bench (Ireland), 1 vol., 1833—1834	Ir.
Cooke, Pr. Cas.	Cooke's Practice Reports, Common Pleas, 1 vol., 1706—1747	Eng.
Cooke, Pr. Reg.	Cooke's Practical Register of the Common Pleas, 1 vol., 1702—1742	Eng.
Coop. G.	G. Cooper's Reports, Chancery, 1 vol., 1792—1815	Eng.
Coop. Pr. Cas.	C. P. Cooper's Reports, Chancery Practice, 1 vol., 1837—1838	Eng.
Coop. *temp.* Brough.	C. P. Cooper's Cases *temp.* Brougham, Chancery, 1 vol., 1833—1834	Eng.
Coop. *temp.* Cott.	C. P. Cooper's Cases *temp.* Cottenham, Chancery, 2 vols., 1846—1848 (and miscellaneous earlier cases)	Eng.
Cor.	Coryton's Reports	Ind.
Corb. & D.	Corbett and Daniell's Election Cases, 1 vol., 1819	Eng.
Correspondence Jud.	Correspondence Judiciaries	Can.
Couper	Couper's Justiciary Reports (Scotland), 5 vols., 1868—1885	Scot.
Cout.	Coutlees' Unreported Cases	Can.
Cout. Dig.	Coutlees' Digest	Can.
Cowp.	Cowper's Reports, King's Bench, 2 vols., 1774—1778	Eng.
Cox & Atk.	Cox and Atkinson's Registration Appeal Cases, 1 vol., 1843—1846	Eng.
Cox, C. C.	E. W. Cox's Criminal Law Cases, 1843—(current)	Eng.
Cox, Eq. Cas.	S. C. Cox's Equity Cases, 2 vols., 1745—1797	Eng.
Cox, M. & H.	Cox, Macrae, and Hertslet's County Courts Cases and Appeals, Vol. I., 1846—1852	Eng.
Cr. & J.	Crompton and Jervis's Reports, Exchequer, 2 vols., 1830—1832	Eng.
Cr. & M.	Crompton and Meeson's Reports, Exchequer, 2 vols., 1832—1834	Eng.
Cr. & Ph.	Craig and Phillips' Reports, Chancery, 1 vol., 1840—1841	Eng.
Cr. App. Rep.	Cohen's Criminal Appeal Reports, 1908—(current)	Eng.
Cr. M. & R.	Crompton, Meeson, and Roscoe's Reports, Exchequer, 2 vols., 1834—1835	Eng.
Craw. & D.	Crawford and Dix's Circuit Cases (Ireland), 3 vols., 1838—1846	Ir.
Craw. & D. Abr. C.	Crawford and Dix's Abridged Cases (Ireland), 1 vol., 1837—1838	Ir.
Cress. Insolv. Cas.	Cresswell's Insolvency Cases, 1 vol., 1827—1829	Eng.
Cripps' Church Cas.	Cripps' Church and Clergy Cases, 2 parts, 1847—1850	Eng.
Cro. Car.	Croke's Reports *temp.* Charles I., King's Bench and Common Pleas, 1 vol., 1625—1641	Eng.
Cro. Eliz.	Croke's Reports *temp.* Elizabeth, King's Bench and Common Pleas, 1 vol., 1582—1603	Eng.
Cro. Jac.	Croke's Reports *temp.* James I., King's Bench and Common Pleas, 1 vol., 1603—1625	Eng.
Cru. Dig.	Cruise's Digest of the Law of Real Property, 7 vols.	Eng.
Cunn.	Cunningham's Reports, King's Bench, fol., 1 vol., 1734—1735	Eng.
Curt.	Curteis' Ecclesiastical Reports, 3 vols., 1834—1844	Eng.
D.	Dunlop, Court of Session Cases (Scotland), 2nd series, 24 vols., 1838—1862	Scot.
D.	Duxbury's Reports of the High Court of the South African Republic	S. Af.
D. C. A.	Dorion's Queen's Bench Reports	Can.
D. L. R.	Dominion Law Reports	Can.
Dalr.	Dalrymple's Decisions, Court of Session (Scotland), fol., 1 vol., 1698—1720	Scot.
Dan.	Daniell's Reports, Exchequer in Equity, 1 vol., 1817—1823	Eng.
Dan. & Ll.	Danson and Lloyd's Mercantile Cases, 1 vol., 1828—1829	Eng.
Dav. & Mer.	Davison and Merivale's Reports, Queen's Bench, 1 vol., 1843—1844	Eng.

Dav. Ir.	Davys' (or Davies' or Davy's) Reports (Ireland), 1 vol., 1604—1611	Ir.
Dav. Pat. Cas.	Davies' Patent Cases, 1 vol., 1785—1816	Eng.
Dav. Rep.	Davies' (Sir John) Reports	Ir.
Day	Day's Election Cases, 1 vol., 1892—1893	Eng.
Dea. & Sw.	Deane and Swabey's Ecclesiastical Reports, 1 vol., 1855—1857	Eng.
Deac.	Deacon's Reports, Bankruptcy, 4 vols., 1834—1840	Eng.
Deac. & Ch.	Deacon and Chitty's Reports, Bankruptcy, 4 vols., 1832—1835	Eng.
Dears. & B.	Dearsly and Bell's Crown Cases Reserved, 1 vol., 1856—1858	Eng.
Dears. C. C.	Dearsly's Crown Cases Reserved, 1 vol., 1852—1856	Eng.
Deas & And.	Deas and Anderson's Decisions (Scotland), 5 vols., 1829—1832	Scot.
De G.	De Gex's Reports, Bankruptcy, 1 vol., 1844—1848	Eng.
De G. & J.	De Gex and Jones's Reports, Chancery, 4 vols., 1857—1859	Eng.
De G. & Sm.	De Gex and Smale's Reports, Chancery, 5 vols., 1846—1852	Eng.
De G. F. & J.	De Gex, Fisher and Jones's Reports, Chancery, 4 vols., 1859—1862	Eng.
De G. J. & Sm.	De Gex, Jones, and Smith's Reports, Chancery, 4 vols., 1862—1865	Eng.
De G. M. & G.	De Gex, Macnaghten and Gordon's Reports, Chancery, 8 vols., 1851—1857	Eng.
Delane	Delane's Decisions, Revision Courts, 1 vol., 1832—1835	Eng.
Den.	Denison's Crown Cases Reserved, 2 vols., 1844—1852	Eng.
Dick.	Dickens' Reports, Chancery, 2 vols., 1559—1798	Eng.
Dig.	Justinian's Digest or Pandects	Eng.
Dirl.	Dirleton's Decisions, Court of Session (Scotland), fol., 1 vol., 1665—1677	Scot.
Dods.	Dodson's Reports, Admiralty, 2 vols., 1811—1822	Eng.
Donnelly	Donnelly's Reports, Chancery, 1 vol., 1836—1837	Eng.
Doug. El. Cas.	Douglas' Election Cases, 4 vols., 1774—1776	Eng.
Doug. K. B.	Douglas' Reports, King's Bench, 4 vols., 1778—1785	Eng.
Dow	Dow's Reports, House of Lords, 6 vols., 1812—1818	Eng.
Dow & Cl.	Dow and Clark's Reports, House of Lords, 2 vols., 1827—1832	Eng.
Dow. & L.	Dowling and Lowndes' Practice Reports, 7 vols., 1843—1849	Eng.
Dow. & Ry. K. B.	Dowling and Ryland's Reports, King's Bench, 9 vols., 1822—1827	Eng.
Dow. & Ry. M. C.	Dowling and Ryland's Magistrates' Cases, 4 vols., 1822—1827	Eng.
Dow. & Ry. N. P.	Dowling and Ryland's Reports, Nisi Prius, 1 part, 1822—1823	Eng.
Dowl.	Dowling's Practice Reports, 9 vols., 1830—1841	Eng.
Dowl. N. S.	Dowling's Practice Reports, New Series, 2 vols., 1841—1843	Eng.
Dr. & Wal. (or Dru. & W.).	Drury and Walsh's Reports, Chancery (Ireland), 2 vols., 1837—1841	Ir.
Dr. & War.	Drury and Warren's Reports, Chancery (Ireland), 1841—1843	Ir.
Dra.	Draper's King's Bench Reports	Can.
Drew.	Drewry's Reports, Chancery, 4 vols., 1852—1859	Eng.
Drew. & Sm.	Drewry and Smale's Reports, Chancery, 2 vols., 1859—1865	Eng.
Drinkwater	Drinkwater's Reports, Common Pleas, 1 vol., 1840—1841	Eng.
Drury *temp.* Nap.	Drury's Reports *temp.* Napier, Chancery (Ireland), 1 vol., 1858—1859	Ir.
Drury *temp.* Sug.	Drury's Reports *temp.* Sugden, Chancery (Ireland), 1 vol., 1841—1844	Ir.
Dugd. Orig.	Dugdale's Origines Juridiciales	Eng.
Dunl. (Ct. of Sess.)	Dunlop, Court of Session Cases (Scotland), 2nd Series, 24 vols., 1838—1862	Scot.
Dunning	Dunning's Reports, King's Bench, 1 vol., 1753—1754	Eng.
Durie	Durie's Decisions, Court of Session (Scotland), fol., 1 vol., 1621—1642	Scot.
Dyer	Dyer's Reports, King's Bench, 3 vols., 1513—1581	Eng.
E. & A.	Upper Canada Error and Appeal	Can.
E. & B.	Ellis and Blackburn's Reports, Queen's Bench, 8 vols., 1852—1858	Eng.
E. & E.	Ellis and Ellis's Reports, Queen's Bench, 3 vols., 1858—1861	Eng.
E. B. & E.	Ellis, Blackburn, and Ellis's Reports, Queen's Bench, 1 vol., 1858—1860	Eng.
E. D. C.	Reports of the Eastern Districts Court (Cape) from 1880	S. Af.
E. D. L.	South African Law Reports, Eastern Districts Local Division	S. Af.
E. L. R.	Eastern Law Reporter	Can.
E. R. (or Eng. Rep.)	English Reports	Eng.
E. R.	Ontario Election Reports	Can.
Eag. & Y.	Eagle and Younge's Tithe Cases, 4 vols., 1204—1825	Eng.
East	East's Reports, King's Bench, 16 vols., 1800—1812	Eng.
East, P. C.	East's Pleas of the Crown	Eng.
Ecc. & Ad.	Spinks' Ecclesiastical and Admiralty Reports, 2 vols., 1853—1855	Eng.
Eden	Eden's Reports, Chancery, 2 vols., 1757—1766	Eng.

Edgar	Edgar's Decisions, Court of Session (Scotland), fol., 1724—1725...	Scot.
Edw.	Edwards' Reports, Admiralty, 1 vol., 1808—1812	Eng.
Elchies	Elchies' Decisions, Court of Session (Scotland), 2 vols., 1733—1754...	Scot.
Eng. Pr. Cas.	Roscoe's English Prize Cases, 2 vols., 1745—1858	Eng.
Eq. Cas. Abr.	Abridgment of Cases in Equity, fol., 2 vols., 1667—1744 ...	Eng.
Eq. Rep.	Equity Reports, 3 vols., 1853—1855	Eng.
Esp.	Espinasse's Reports, Nisi Prius, 6 vols., 1793—1810	Eng.
Ex. C. R. or Exch. C. R.	Exchequer Court Reports	Can.
Ex. D.	Law Reports, Exchequer Division, 5 vols., 1875—1880... ...	Eng.
Exch.	Exchequer Reports (Welsby, Hurlstone, and Gordon), 11 vols., 1847—1856...	Eng.
F. (or F. (Ct. of Sess.))	Fraser, Court of Session Cases (Scotland), 5th series, 1898—1906	Scot.
F.	Foord's Reports of the Supreme Court of the Cape of Good Hope, 1879—1880...	S. Af.
F. & F....	Foster and Finlason's Reports, Nisi Prius, 4 vols., 1856—1867...	Eng.
F. C.	Faculty of Advocates, Collection of Decisions, Court of Session (Scotland)	Scot.
F. N. D.	Finnemore's Notes and Digest of Natal Cases, 1863—1867 ...	S. Af.
Fac.	Faculty of Advocates, Collection of Decisions, Court of Session (Scotland)	Scot.
Fac. Coll. (with date)...	Faculty of Advocates, Collection of Decisions, Court of Session (Scotland), fol., 1st and 2nd series, 21 vols., 1752—1825 ...	Scot.
Fac. Coll. N. S. (with date).	Faculty of Advocates, Collection of Decisions, Court of Session (Scotland), New Series, 16 vols., 1825—1841	Scot.
Falc.	Falconer's Decisions, Court of Session (Scotland), 2 vols., fol., 1744—1751	Scot.
Falc. & Fitz.	Falconer and Fitzherbert's Election Cases, 1 vol., 1835—1838...	Eng.
Fenton	Fenton, Important Judgments	N.Z.
Ferg.	Ferguson's Consistorial Decisions (Scotland), 1 vol., 1811—1817	Scot.
Fitz. Nat. Brev. ...	Fitzherbert's Natura Brevium	Eng.
Fitz.-G....	Fitz-Gibbons' Reports, King's Bench, fol., 1 vol., 1727—1731...	Eng.
Fl. & K.	Flanagan and Kelly's Reports, Rolls Court (Ireland), 1 vol., 1840—1842...	Ir.
Fonbl.	Fonblanque's Reports, Bankruptcy, 2 parts, 1849—1852 ...	Eng.
For.	Forrest's Reports, Exchequer, 1 vol., 1800—1801	Eng.
Forb.	Forbes' Decisions, Court of Session (Scotland), fol., 1 vol., 1705—1713...	Scot.
Fort. De Laud. ...	Fortesque, De Laudibus Legum Angliæ	Eng.
Fortes. Rep.	Fortescue's Reports, fol., 1 vol., 1692—1736	Eng.
Fost.	Foster's Crown Cases, 1 vol., 1708—1760...	Eng.
Fount.	Fountainhall's Decisions, Court of Session (Scotland), fol., 2 vols., 1678—1712...	Scot.
Fox & S. Ir.	M. C. Fox and T. B. C. Smith's Reports, King's Bench (Ireland), 2 vols., 1822—1825	Ir.
Fox & S. Reg.... ...	J. S. Fox and C. L. Smith's Registration Cases, 1 vol., 1886—1895...	Eng.
Fras.	Fraser (Simon), Election Cases, 2 vols., 1793	Eng.
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G.	Gregorowski's Reports of the High Court of the Orange Free State from 1883	S. Af.
G. I. Dig.	General Index Digest	Can.
Gal. & Dav.	Gale and Davison's Reports, Queen's Bench, 3 vols., 1841—1843...	Eng.
Gale	Gale's Reports, Exchequer, 2 vols., 1835—1836	Eng.
Gaz. L. R.	New Zealand Gazette Law Reports	N.Z.
Gib. Cod.	Gibson's Codex Juris Ecclesiastici Anglicani	Eng.
Giff.	Giffard's Reports, Chancery, 5 vols., 1857—1865	Eng.
Gilb.	Gilbert's Cases in Law and Equity, 1 vol., 1713—1714	Eng.
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Gilb. C. P.	Gilbert's History and Practice of the Court of Common Pleas ...	Eng.
Gilm. & F.	Gilmour and Falconer's Decisions, Court of Session (Scotland), 2 parts, Part I. (Gilmour) 1661—1666, Part II. (Falconer) 1681—1686...	Scot.
Gl. & J.	Glyn and Jameson's Reports, Bankruptcy, 2 vols., 1819—1828...	Eng.
Glanv.	Glanville, De Legibus et Consuetudinibus Regni Angliæ ...	Eng.
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Glascock	Glascock's Reports (Ireland), 1 vol., 1831—1832	Ir.
Godb.	Godbolt's Reports, King's Bench, Common Pleas, and Exchequer, 1 vol., 1574—1637	Eng.

Gouldsb.	Gouldsborough's Reports, Queen's Bench and King's Bench, 1 vol., 1586—1601	Eng.
Gow	Gow's Reports, Nisi Prius, 1 vol., 1818—1820	Eng.
Gr.	Upper Canada Chancery (Grant)	Can.
Griffin's Patent Cases	Griffin's, Patent Cases, 1884—1886	Eng.
Gwill.	Gwillim's Tithe Cases, 4 vols., 1224—1824	Eng.
H.	Hertzog's Reports of the High Court of the South African Republic, 1893	S. Af.
H. & C.	Hurlstone and Coltman's Reports, Exchequer, 4 vols., 1862—1866	Eng.
H. & N.	Hurlstone and Norman's Reports, Exchequer, 7 vols., 1856—1862	Eng.
H. & Tw.	Hall and Twells' Reports, Chancery, 2 vols., 1848—1850	Eng.
H. & W.	Hurlstone and Walmsley's Reports, Exchequer, 1 vol., 1840—1841	Eng.
H. C.	Reports of the High Court of Griqualand West	S. Af.
H. E. C.	Hodgin's Election Reports	Can.
H. H. L.	Court of Session Cases, House of Lords	Scot.
H. L. Cas.	Clark's Reports, House of Lords, 11 vols., 1847—1866	Eng.
Hag. Adm.	Haggard's Reports, Admiralty, 3 vols., 1822—1838	Eng.
Hag. Con.	Haggard's Consistorial Reports, 2 vols., 1789—1821	Eng.
Hag. Ecc.	Haggard's Ecclesiastical Reports, 4 vols., 1827—1833	Eng.
Hailes	Hailes's Decisions, Court of Session (Scotland), 2 vols., 1766—1791	Scot.
Hale, C. L.	Hale's Common Law	Eng.
Hale, P. C.	Hale's Pleas of the Crown, 2 vols.	Eng.
Han.	New Brunswick Reports (Hannay)	Can.
Har. & Ruth.	Harrison and Rutherfurd's Reports, Common Pleas, 1 vol., 1865—1866	Eng.
Har. & W.	Harrison and Wollaston's Reports, King's Bench and Bail Court, 2 vols., 1835—1836	Eng.
Harc.	Harcarse's Decisions, Court of Session (Scotland), fol., 1 vol., 1681—1691	Scot.
Hard.	Hardres' Reports, Exchequer, fol., 1 vol., 1655—1669	Eng.
Hare	Hare's Reports, Chancery, 11 vols., 1841—1853	Eng.
Hawk. P. C.	Hawkins's Pleas of the Crown, 2 vols.	Eng.
Hay	Hay's Reports	Ind.
Hayes	Hayes's Reports, Exchequer (Ireland), 1 vol., 1830—1832	Ir.
Hayes & Jo.	Hayes and Jones's Reports, Exchequer (Ireland), 1 vol., 1832—1834	Ir.
Hem. & M.	Hemming and Miller's Reports, Chancery, 2 vols., 1862—1865	Eng.
Het.	Hetley's Reports, Common Pleas, fol., 1 vol., 1627—1631	Eng.
Hob.	Hobart's Reports, Common Pleas, fol., 1 vol., 1613—1625	Eng.
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Hog.	Hogan's Reports, Rolls Court (Ireland), 2 vols., 1816—1834	Ir.
Holt, Adm.	W. Holt's Rule of the Road Cases, Admiralty, 1 vol., 1863—1867	Eng.
Holt, Eq.	W. Holt's Equity Reports, 2 vols., 1845	Eng.
Holt, K. B.	Sir John Holt's Reports, King's Bench, fol., 1 vol., 1688—1710	Eng.
Holt, N. P.	F. Holt's Reports, Nisi Prius, 1 vol., 1815—1817	Eng.
Home, Ct. of Sess.	Home's Decisions, Court of Session (Scotland), fol., 1 vol., 1735—1744	Scot.
Hong Kong L. R.	Hong Kong Reports	Hong Kong.
Hop. & Colt.	Hopwood and Coltman's Registration Cases, 2 vols., 1868—1878	Eng.
Hop. & Ph.	Hopwood and Philbrick's Registration Cases, 1 vol., 1863—1867	Eng.
Horn & H.	Horn and Hurlstone's Reports, Exchequer, 2 vols., 1838—1839	Eng.
Hov. Supp.	Hovenden's Supplement to Vesey Jun.'s Reports, Chancery, 2 vols., 1753—1817	Eng.
Hud. & B.	Hudson and Brooke's Reports, King's Bench and Exchequer (Ireland), 2 vols., 1827—1831	Ir.
Hume	Hume's Decisions, Court of Session (Scotland), 1 vol., 1781—1822	Scot.
Hut.	Hutton's Reports, Common Pleas, fol., 1 vol., 1617—1638	Eng.
Hy. Bl.	Henry Blackstone's Reports, Common Pleas, 2 vols., 1788—1796	Eng.
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I. C. L. R.	Irish Common Law Reports, 17 vols., 1849—1866	Ir.
I. Ch. R. (or I. C. R.)	Irish Chancery Reports, 17 vols., 1850—1867	Ir.
I. Eq. R. (or I. Ed. R.)	Irish Equity Reports, 13 vols., 1838—1851	Ir.
I. L. R.	Irish Law Reports, 13 vols., 1838—1851	Ir.
I. L. R. All.	Indian Law Reports, Allahabad	Ind.
I. L. R. Bom.	Indian Law Reports, Bombay	Ind.

I. L. R. Calc.	Indian Law Reports, Calcutta	Ind.
I. L. R. Mad.	Indian Law Reports, Madras	Ind.
I. L. T. (or I. L. T. R.)	Irish Law Times, 1867—(current)	Ir.
I. L. T. Jo.	Irish Law Times Journal, 1867 (current)	Ir.
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Ir. L. Rec. 1st ser.	Law Recorder (Ireland), 1st series, 4 vols., 1827—1831	Ir.
Ir. L. Rec. N. S.	Law Recorder (Ireland), New Series, 6 vols., 1833—1838	Ir.
Ir. Law Rep.	Irish Law Reports, 13 vols., 1838—1851	Ir.
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Irv.	Irvine's Justiciary Reports (Scotland), 5 vols., 1852—1867	Scot.
J.	Justiciary Cases	Scot.
J. Bridg.	Sir John Bridgman's Reports, Common Pleas, fol., 1 vol., 1613—1621	Eng.
J. D. R.	Juta's Daily Reporter, Reporting Cases in the Cape Provincial Division	S. Af.
J. P.	Justice of the Peace, 1837—(current)	Eng.
J. P. Jo.	Justice of the Peace (Weekly Notes of Cases)	Eng.
J. R.	Jurist Reports	N.Z.
J. R. N. S.	Jurist Reports, New Series	N.Z.
J. Shaw, Just.	J. Shaw's Justiciary Reports (Scotland), 1 vol., 1848—1852	Scot.
Jac.	Jacob's Reports, Chancery, 1 vol., 1821—1823	Eng.
Jac. & W.	Jacob and Walker's Reports, Chancery, 2 vols., 1819—1821	Eng.
James	Novia Scotia Law Reports (James)	Can.
Jebb & B.	Jebb and Bourke's Reports, Queen's Bench (Ireland), 1 vol., 1841—1842	Ir.
Jebb & S.	Jebb and Symes' Reports, Queen's Bench (Ireland), 2 vols., 1838—1841	Ir.
Jebb, C. C.	Jebb's Crown Cases Reserved (Ireland), 1 vol., 1822—1840	Ir.
Jebb Cr. & Pr. Cas.	Jebb's Crown and Presentment Cases	Ir.
Jenk.	Jenkins' Reports, 1 vol., 1220—1623	Eng.
Jo. & Car.	Jones and Carey's Reports, Exchequer (Ireland), 1 vol., 1838—1839	Ir.
Jo. & Lat.	Jones and La Touche's Reports, Chancery (Ireland), 3 vols., 1844—1846	Ir.
Jo. Ex. Ir.	T. Jones' Reports, Exchequer (Ireland), 2 vols., 1834—1838	Ir.
John.	Johnson's Reports, Chancery, 1 vol., 1858—1860	Eng.
John. & H.	Johnson and Hemming's Reports, Chancery, 2 vols., 1859—1862	Eng.
Jones	Jones' Report	Ir.
Jur.	Jurist Reports, 18 vols., 1837—1854	Eng.
Jur. N. S.	Jurist Reports, New Series, 12 vols., 1855—1867	Eng.
Just. Inst.	Justinian's Institutes	Eng.
K.	Kotze's Reports of the High Court of the Transvaal Province, 1877—1881	S. Af.
K. & G.	Keane and Grant's Registration Cases, 1 vol., 1854—1862	Eng.
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K. B. (preceded by date)	Law Reports, King's Bench Division since 1900 (*e.g.*, [1901] 2 K. B.)	Eng.
Kames, Dict. Dec.	Kames, Dictionary of Decisions, Court of Session (Scotland), fol., 2 vols., 1540—1741	Scot.
Kames, Rem. Dec.	Kames, Remarkable Decisions, Court of Session (Scotland), 2 vols., 1716—1752	Scot.
Kames, Sel. Dec.	Kames, Select Decisions, Court of Session (Scotland), 1 vol., 1752—1768	Scot.
Kay	Kay's Reports, Chancery, 1 vol., 1853—1854	Eng.
Keb.	Keble's Reports, fol., 3 vols., 1661—1677	Eng.
Keen	Keen's Reports, Rolls Court, 2 vols., 1836—1838	Eng.
Keil.	Keilwey's Reports, King's Bench, fol., 1 vol., 1327—1578	Eng.
Kel.	Sir John Kelyng's Reports, Crown Cases, fol., 1 vol., 1662—1707	Eng.
Kel. W.	W. Kelynge's Reports, fol., 1 vol., Chancery, 1730—1732; King's Bench, fol., 1731—1734	Eng.
Keny.	Kenyon's Notes of Cases, King's Bench, 2 vols., 1753—1759	Eng.
Keny. Ch.	Chancery Cases in Vol. II. of Kenyon's Notes of Cases, 1753—1754	Eng.
Kerr	New Brunswick Reports (Kerr)	Can.

Kilkerran	Kilkerran's Decisions, Court of Session (Scotland), fol., 1 vol., 1738—1752...	Scot.
Kn. & Omb.	Knapp and Ombler's Election Cases, 1 vol., 1834—1835 ...	Eng.
Knapp	Knapp's Reports, Privy Council, 3 vols., 1829—1836	Eng.
Knox	Knox's Reports	Aus.
L. & G. *temp.* Plunk. ...	Lloyd and Goold's Reports *temp.* Plunkett, Chancery (Ireland), 1 vol., 1834—1839	Ir.
L. & G. *temp.* Sugd. ...	Lloyd and Goold's Reports *temp.* Sugden, Chancery (Ireland), 1 vol., 1835	Ir.
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L. C. & M. Gaz. ...	Local Courts and Municipal Gazette	Can.
L. C. J. (or L. C. Jur.)...	Lower Canada Jurist...	Can.
L. C. L. J.	Lower Canada Law Journal	Can.
L. C. R.	Lower Canada Reports	Can.
L. G. R.	Local Government Reports, 1902—(current)	Eng.
L. J. Adm.	Law Journal, Admiralty, 1865—1875	Eng.
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L. J. C. C.	Law Journal (County Courts Reporter), 1912—(current) ...	Eng.
L. J. C. P.	Law Journal, Common Pleas, 1822—1875	Eng.
L. J. Ch.	Law Journal, Chancery, 1822—(current)	Eng.
L. J. Eccl.	Law Journal, Ecclesiastical Cases, 1866—1875	Eng.
L. J. Ex.	Law Journal, Exchequer, 1830—1875	Eng.
L. J. Ex. Eq.	Law Journal, Exchequer in Equity, 1835—1841...	Eng.
L. J. K. B. or Q. B. ...	Law Journal, King's Bench or Queen's Bench, 1822—(current).	Eng.
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L. J. P. M. & A. ...	Law Journal, Probate, Matrimonial and Admiralty, 1860—1865	Eng.
L. Jo.	Law Journal Newspaper, 1866—(current)	Eng.
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L. M. & P.	Lowndes, Maxwell, and Pollock's Reports, Bail Court and Practice, 2 vols., 1850—1851	Eng.
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L. R.	Law Reports	Eng.
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L. T. O. S.	Law Times Reports, Old Series, 34 vols., 1843—1860	Eng.
L. Th.	La Themis	Can.
Lane	Lane's Reports, Exchequer, fol., 1 vol., 1605—1611	Eng.
Lat.	Latch's Reports, King's Bench, fol., 1 vol., 1625—1628 ...	Eng.
Laws. Reg. Cas. ...	Lawson's Registration Cases, 1895—(current)	Eng.
Ld. Raym.	Lord Raymond's Reports, King's Bench and Common Pleas, 3 vols., 1694—1732	Eng.
Le. & Ca.	Leigh and Cave's Crown Cases Reserved, 1 vol., 1861—1865 ...	Eng.

Leach	Leach's Crown Cases, 2 vols., 1730—1814	Eng.
Lee	Sir G. Lee's Ecclesiastical Judgments, 2 vols., 1752—1758 ...	Eng.
Lee *temp.* Hard. ...	T. Lee's Cases *temp.* Hardwicke, King's Bench, 1 vol., 1733—1738	Eng.
Leg. Rep.	Legal Reporter	Ir.
Legge	Legge's Reports	Aus.
Leon.	Leonard's Reports, King's Bench, Common Pleas and Exchequer, fol., 4 parts, 1552—1615	Eng.
Lev.	Levinz's Reports, King's Bench and Common Pleas, fol., 3 vols., 1660—1696	Eng.
Lew. C. C.	Lewin's Crown Cases on the Northern Circuit, 2 vols., 1822—1838	Eng.
Ley	Ley's Reports, King's Bench, fol., 1 vol., 1608—1629	Eng.
Lib. Ass.	Liber Assisarum, Year Books, 1—51 Edw. III.	Eng.
Lilly	Lilly's Reports and Pleadings of Cases in Assize, fol., 1 vol. ...	Eng.
Litt.	Littleton's Reports, Common Pleas, fol., 1 vol., 1627—1631 ...	Eng.
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Lumley, P. L. C. ...	Lumley's Poor Law Cases, 2 vols., 1834—1842	Eng.
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Smith, Reg. Cas.	C. L. Smith's Registration Cases, 1895—(current)	Eng.
Smythe	Smythe's Reports, Common Pleas (Ireland), 1 vol., 1839—1840	Ir.
Sol. Jo.	Solicitors' Journal, 1856—(current)	Eng.
Spence	Spence's Equitable Jurisdiction of the Court of Chancery	Eng.
Spinks	Spinks' Prize Court Cases, 2 parts, 1854—1856	Eng.
Stair Rep.	Stair's Decisions, Court of Session (Scotland), fol., 2 vols., 1661—1681	Scot.
Stark.	Starkie's Reports, Nisi Prius, 3 vols., 1814—1823	Eng.
State Tr.	State Trials, 34 vols., 1163—1820	Eng.
State Tr. N. S.	State Trials, New Series, 8 vols., 1820—1858	Eng.
Stewart	Stewart's Vice-Admiralty Reports	Can.
Stockton	Stockton's Vice-Admiralty Report and Digest	Can.
Story	Story's Commentaries on Equity Jurisprudence	Eng.
Stra.	Strange's Reports, 2 vols., 1716—1747	Eng.
Stu. M. & P.	Stuart, Milne, and Peddie's Reports (Scotland), 2 vols., 1851—1853	Scot.
Stuart	Sessions Cases (Stuart)	Scot.
Stuart	Stuart's Vice-Admiralty Reports	Can,
Sty.	Style's Reports, King's Bench, fol., 1 vol., 1646—1655	Eng.
Sw.	Swabey's Reports, Admiralty, 1 vol., 1855—1859	Eng.
Sw. & Tr.	Swabey and Tristram's Reports, Probate and Divorce, 4 vols., 1858—1865	Eng.
Swan.	Swanston's Reports, Chancery, 3 vols., 1818—1821	Eng.
Swin.	Swinton's Justiciary Reports (Scotland), 2 vols., 1835—1841	Scot.
Syme	Syme's Justiciary Reports (Scotland), 1 vol., 1826—1829	Scot.
T. & M.	Temple and Mew's Criminal Appeal Cases, 1 vol., 1848—1851	Eng.
T. H.	Reports of the Witwatersrand High Court (Transvaal Colony)	S. Af.
T. Jo.	Sir T. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1667—1685	Eng.
T. L. R.	The Times Law Reports, 1884—(current)	Eng.
T. P. D.	South African Law Reports, Transvaal Provincial Division	S. Af.
T. Raym.	Sir T. Raymond's Reports, King's Bench, fol., 1 vol., 1660—1683	Eng.
T. S.	Reports of the Supreme Court of the Transvaal Colony	S. Af.
Taml.	Tamlyn's Reports, Rolls Court, 1 vol., 1829—1830	Eng.
Tas. L. R.	Tasmanian Law Reports	Tasmania
Taunt.	Taunton's Reports, Common Pleas, 8 vols., 1807—1819	Eng.
Tax Cas.	Tax Cases, 1875—(current)	Eng.
Tay.	Taylor's King's Bench Reports	Can.
Temp. Wood	Manitoba Reports *temp.* Wood	Can.
Term Rep.	Term Reports (Durnford and East), fol., 8 vols., 1785—1800	Eng.
Terr. L. R.	Territories Law Reports	Can.
Thom.	Nova Scotia Reports (Thomson)	Can.
Toth.	Tothill's Transactions in Chancery, 1 vol., 1559—1646	Eng.
Town. St. Tr.	Townsend Modern State Trials	Eng.
Trist.	Tristram's Consistory Judgments, 1 vol., 1872—1890	Eng.
Tudor, L. C. Merc. Law.	Tudor's Leading Cases on Mercantile and Maritime Law	Eng.
Tudor, L. C. Real Prop.	Tudor's Leading Cases on Real Property	Eng.
Turn. & R.	Turner and Russell's Reports, Chancery, 1 vol., 1822—1825	Eng.
Tyr.	Tyrwhitt's Reports, Exchequer, 5 vols., 1830—1835	Eng.
Tyr. & Gr.	Tyrwhitt and Granger's Reports, Exchequer, 1 vol., 1835—1836	Eng.
U. C. Jur.	Upper Canada Jurist	Can.
U. C. R.	Upper Canada Reports, Queen's Bench	Can.
Udal	Fiji Law Reports (Udal)	Fiji
V. L. R. (or V. L. R. L.)	Victorian Law Reports	Aus.
V. R.	Victorian Reports	Aus.
V. R. (Adm.)	Victorian Reports (Admiralty)	Aus.
V. R. L.	Victorian Law Reports	Aus.
Vaugh.	Vaughan's Reports, Common Pleas, fol., 1 vol., 1666—1673	Eng.
Vent.	Ventris' Reports (Vol. I., King's Bench; Vol. II., Common Pleas), fol., 2 vols., 1668—1691	Eng.
Vern.	Vernon's Reports, Chancery, 2 vols., 1680—1719	Eng.
Vern. & Scr.	Vernon and Scriven's Reports, King's Bench (Ireland), 1 vol., 1786—1788	Ir.
Ves.	Vesey Jun.'s Reports, Chancery, 19 vols., 1789—1817	Eng.

Ves. & B.	Vesey and Beames's Reports, Chancery, 3 vols., 1812—1814	Eng.
Ves. Sen.	Vesey Sen.'s Reports, 2 vols., 1747—1756	Eng.
Vin. Abr.	Viner's Abridgment of Law and Equity, fol., 22 vols.	Eng.
Vin. Supp.	Supplement to Viner's Abridgment of Law and Equity, 6 vols.	Eng.
W.	Watermeyer's Reports of the Supreme Court of the Cape of Good Hope, 1857	S. Af.
W. A. L. R.	West Australian Law Reports	Aus.
W. A. R.	West Australian Reports	Aus.
W. A'B. & W.	Webb, A'Beckett and Williams' Victorian Reports	Aus.
W. & S.	Wilson & Shaw's Scotch Appeals, House of Lords, 7 vols., 1825—1835	Scot.
W. & W. (or W. & W. L.)	Wyatt and Webb	Aus.
W. C. C.	Workmen's Compensation Cases (Minton-Senhouse), 9 vols., 1898—1907	Eng.
W. Jo.	Sir W. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1620—1640	Eng.
W. L. D.	South African Law Reports, Witwatersrand Local Division	S. Af.
W. L. R.	Western Law Reporter	Can.
W. L. T.	Western Law Times	Can.
W. N. (preceded by date)	Law Reports, Weekly Notes, 1866—(current (*e.g.*, [1866] W. N.)	Eng.
W. N.	Calcutta Weekly Notes	Ind.
W. R.	Weekly Reporter, 54 vols., 1852—1906	Eng.
W. R.	Sutherland's Weekly Reporter	Ind.
W. R.	Weekly Reporter, reporting cases in the Cape Provincial Division	S. Af.
W. R.	Sutherland's Weekly Reporter	Ind.
W. W. & A'B. (or W. W. & A'B. L.)	Wyatt, Webb and A'Beckett	Aus.
W. W. R.	Western Weekly Reports	Can.
Wallis	Wallis' Reports, Chancery (Ireland), 1 vol., 1766—1791	Ir.
Web. Pat. Cas.	Webster's Patent Cases, 2 vols., 1602—1855	Eng.
Welsh, Reg. Cas.	Welsh's Registry Cases (Ireland), 1 vol., 1832—1840	Ir.
Went. Off. Ex.	Wentworth's Office and Duty of Executors	Eng.
West	West's Reports, House of Lords, 1 vol., 1839—1841	Eng.
West *temp.* Hard.	West's Reports *temp.* Hardwicke, Chancery, 1 vol., 1736—1740	Eng.
West. Tithe Cas.	Western's London Tithe Cases, 1 vol., 1592—1822	Eng.
White	White's Justiciary Reports (Scotland), 3 vols., 1886—1893	Scot.
White & Tud. L. C.	White and Tudor's Leading Cases in Equity, 2 vols.	Eng.
Wight.	Wightwick's Reports, Exchequer, 1 vol., 1810—1811	Eng.
Will. Woll. & Dav.	Willmore, Wollaston, and Davison's Reports, Queen's Bench and Bail Court, 1 vol., 1837	Eng.
Will. Woll. & H.	Willmore, Wollaston, and Hodges' Reports, Queen's Bench and Bail Court, 2 vols., 1838—1839	Eng.
Willes	Willes' Reports, Common Pleas, 1 vol., 1737—1758	Eng.
Wilm.	Wilmot's Notes of Opinions and Judgments, 1 vol., 1757—1770	Eng.
Wils.	G. Wilson's Reports, King's Bench and Common Pleas, fol., 3 vols., 1742—1774	Eng.
Wils. Ch.	J. Wilson's Reports, Chancery, 2 vols., 1818—1819	Eng.
Wils. Ex.	J. Wilson's Reports, Exchequer in Equity, 1 part, 1817	Eng.
Wils. & S.	Wilson and Shaw's Scotch Appeals, House of Lords, 7 vols., 1825—1835	Scot.
Win.	Winch's Reports, Common Pleas, fol., 1 vol., 1621—1625	Eng.
Wm. Bl.	William Blackstone's Reports, King's Bench and Common Pleas, fol., 2 vols., 1746—1779	Eng.
Wm. Rob.	William Robinson's Reports, Admiralty, 3 vols., 1838—1850	Eng.
Wms. Saund.	Williams' Notes to Saunders' Reports, 2 vols.	Eng.
Wolf. & B.	Wolferstan and Bristowe's Election Cases, 1 vol., 1859—1864	Eng.
Wolf. & D.	Wolferstan and Dew's Election Cases, 1 vol., 1857—1858	Eng.
Woll.	Wollaston's Reports, Bail Court and Practice, 1 vol., 1840—1841	Eng.
Wood	Wood's Tithe Cases, Exchequer, 4 vols., 1650—1798	Eng.
Y. A. D.	Young's Vice-Admiralty Reports	Can.
Y. & C. Ex.	Younge and Collyer's Reports, Exchequer in Equity, 4 vols., 1833—1841	Eng.
Y. & C. Ch. Cas.	Younge and Collyer's Reports, Chancery Cases, 2 vols., 1841—1843	Eng.
Y. & J.	Younge and Jervis' Reports, Exchequer, 3 vols., 1826—1830	Eng.
Y. B.	Year Books	Eng.
Yelv.	Yelverton's Reports, King's Bench, fol., 1 vol., 1602—1613	Eng.
You.	Younge's Reports, Exchequer in Equity, 1 vol., 1830—1832	Eng.

ABBREVIATIONS

USED IN THIS WORK.

(For Abbreviations used in citing Reports, *see* pp. xxvii—xlii, *ante*.)

Act.	for Actiengesellschaft.
Admlty.	,, Admiralty.
Affd.	,, Affirmed.
Affg.	,, Affirming.
Akt.	,, Aktiengesellschaft; Aktiebolaget; Aktieselskabet.
Anon.	,, Anonymous.
Apld.	,, Applied.
Appct.	,, Applicant.
Appln.	,, Application.
Appln.	,, Application to Register a Trade Mark.
Applt.	,, Appellant.
Apprvd.	,, Approved.
Arbn.	,, Arbitration.
Archbp.	,, Archbishop.
Art.	,, Article.
Assce.	,, Assurance.
Assocn.	,, Association.
A.-G.	,, Attorney-General.
B. C.	,, Borough Council.
Bkpcy.	,, Bankruptcy.
Bkpt.	,, Bankrupt.
Bldg. Soc.	,, Building Society.
Bp.	,, Bishop.
C. A.	,, Court of Appeal.
C. & S. L. Ry. Co.	,, City & South London Railway Co.
C. C. A.	,, Court of Criminal Appeal.
C. C. R.	,, County Court Rules.
C. C. R.	,, Court of Crown Cases Reserved.
C. L. P. Act.	,, Common Law Procedure Act.
C. L. Ry. Co.	,, Central London Railway Co.
Ct. of Eq.	,, Court of Equity.
C. of R.	,, Court of Review.
Cale. Ry. Co.	,, Caledonian Railway Co.
Co.	,, Company.
Co-op. Assocn.	,, Co-operative Supply Association.
Comrs.	,, Commissioners.
Consd.	,, Considered.
Corpn.	,, Corporation.
Ct.	,, Court.
D. C.	,, Divisional Court.
Deft.	,, Defendant.
Distd.	,, Distinguished.
Dbtd.	,, Doubted.
Eccl. Comrs.	,, Ecclesiastical Commissioners.
Eccl. Ct.	,, Ecclesiastical Court.
Ex. Ch.	,, Exchequer Chamber.
Ex p.	,, *Ex parte*.
Exch.	,, Exchequer.
Exor.	,, Executor.

Exorship.	for Executorship.
Expld.	,, Explained.
Extd.	,, Extended.
Extrix.	,, Executrix.
Folld.	,, Followed.
G. & S. W. Ry. Co.	,, Glasgow & South Western Railway Co.
G. C. Ry. Co.	,, Great Central Railway Co.
G. E. Ry. Co.	,, Great Eastern Railway Co.
G. N. of Scotland Ry. Co.	,, Great North of Scotland Railway Co.
G. N. Picc. & Brompton Ry. Co.	,, Great Northern, Piccadilly & Brompton Railway Co.
G. N. Ry. Co.	,, Great Northern Railway Co.
G. S. & W. Ry. Co. of Ireland.	,, Great Southern & Western Railway Co. of Ireland.
G. W. Ry. Co.	,, Great Western Railway Co.
Govt.	,, Government.
Grdns.	,, Guardians or Guardians of the Poor.
H. C. of A.	,, High Court of Australia.
H. L.	,, House of Lords.
Hil. T.	,, Hilary Term.
I. R. Comrs.	,, Inland Revenue Commissioners.
Insce.	,, Insurance.
JJ.	,, Justices.
Jud. Act	,, Judicature Act.
L. & B. Ry. Co.	,, London & Brighton Railway Co.
L. & N. W. Ry. Co.	,, London & North Western Railway Co.
L. & S. W. Ry. Co.	,, London & South Western Railway Co.
L. & Y. Ry. Co.	,, Lancashire & Yorkshire Railway Co.
L. B.	,, Local Board.
L. B. & S. C. Ry. Co.	,, London, Brighton & South Coast Railway Co.
L. C.	,, Lord Chancellor.
L. C. & D. Ry. Co.	,, London, Chatham & Dover Railway Co.
L. C. C.	,, London County Council.
L. Elec. Ry. Co.	,, London Electric Railway Co.
L. G. Board	,, Local Government Board.
L.J.	,, Lord Justice.
L.JJ.	,, Lords Justices.
L. T. & S. Ry. Co.	,, London, Tilbury & Southend Railway Co.
M. S. Act	,, Merchant Shipping Act.
M. S. & L. Ry. Co.	,, Manchester, Sheffield & Lincolnshire Railway Co.
Mags.	,, Magistrates.
Mentd.	,, Mentioned.
Met. Dist. Ry. Co.	,, Metropolitan District Railway Co.
Met. Ry. Co.	,, Metropolitan Railway Co.
Mid. G. W. Ry. Co.	,, Midland Great Western Railway Co.
Mid. Ry. Co.	,, Midland Railway Co.
Mtge.	,, Mortgage.
Mtgee.	,, Mortgagee.
Mtgor.	,, Mortgagor.
N. B. Ry. Co.	,, North British Railway Co.
N. E. Ry. Co.	,, North Eastern Railway Co.
N. F.	,, Not Followed.
N. P.	,, Nisi Prius.
O.	,, Order.
O. H.	,, Outer House.
Overd.	,, Overruled.
P. C.	,, Privy Council.
Petn.	,, Petition or Election Petition.
Pltf.	,, Plaintiff.
R. C.	,, Rural Council.
R. D. C.	,, Rural District Council.
R. S. A.	,, Rural Sanitary Authority.
R. S. C.	,, Rules of the Supreme Court, 1883.
Refd.	,, Referred.
Regn. of Trade Mk.	,, Registration of Trade Mark.
Regr. of Trade Mks.	,, Registrar of Trade Marks.
Resp.	,, Respondent.
Restg.	,, Restoring.
Revsd.	,, Reversed.
Revsg.	,, Reversing.
Ry. Co.	,, Rail. Co. or Railway Co.

S. C.	for Same Case.
S. C. (name of colony following)	,, Supreme Court of a Colony.
S. E.	,, Settled Estates.
S. E. & C. Ry. Co.	,, South Eastern & Chatham Railway Co.
S. E. Ry. Co.	,, South Eastern Railway Co.
S. P.	,, Same Point.
S.S. Co.	,, Steamship Co.
Sect.	,, Section.
Set. Land Act	,, Settled Land Act.
Settlmt.	,, Settlement.
Soc.	,, Society.
Soc. Anon.	,, Société Anonyme, etc.
Solr.	,, Solicitor.
Trade Mk.	,, Trade Mark.
Tram. Co.	,, Tramways Company.
U. C.	,, Urban Council.
U. D. C.	,, Urban District Council.
U. S. A.	,, United States of America.
Union Assmt. Com.	,, Union Assessment Committee.
Urban S. A.	,, Urban Sanitary Authority.
V.-C.	,, Vice-Chancellor.
V. A. C.	,, Vice-Admiralty Court.

MEANING OF TERMS

USED IN CLASSIFYING ANNOTATING CASES.

THE different expressions used to describe the effect of the annotating cases have the following meanings, and the classification of the annotating cases has been done strictly in accordance with these meanings. The annotating cases are listed chronologically except such as are classified as "Referred to" or "Mentioned." These come at the end and are arranged *inter se* in chronological order. The terms used in classifying the annotating cases are as follows:—

"APPLIED" (Apld.).—This expression is used to denote the fact that the principle of law enunciated in the annotated case has been applied to a new set of facts and circumstances in the annotating case.

"APPROVED" (Apprvd.).—This expression is used to denote the fact that the annotated case has been considered to be good law in the annotating case where the latter is in a higher court than the former.

"CONSIDERED" (Consd.).—This expression is used where the remarks in the annotating case are devoid of adverse criticism and merely denote the giving of more or less careful consideration to the annotated case.

"DISTINGUISHED" (Distd.).—This expression is used where the earlier case is not necessarily doubted, but where some essential difference (either on the facts or in law) between it and the annotated case is pointed out.

"DOUBTED" (Dbtd.).—This expression is used where the court in the annotating case, without definitely going to the length of saying that the annotated case is wrong, adduces reasons which seem to show that it is not accurate.

"EXPLAINED" (Expld.).—This expression is used where the earlier case is not necessarily doubted, but the decision arrived at is justified or accounted for by calling attention to some point of fact or of law which is usually, but not necessarily, one not obvious on the face of the report.

"EXTENDED" (Extd.).—Compare "APPLIED," *supra.*

"FOLLOWED" (Folld.).—This expression is used to denote that the same principles of law are applied in the two cases. It does not necessarily imply that the facts are substantially identical in the two cases.

"NOT FOLLOWED" (N.F.).—Compare "FOLLOWED," *supra*, to which it is the adverse.

"OVERRULED" (Overd.).—This expression is used where the annotating case is on substantially identical facts with the annotated case and in a higher court and the rule in the latter case is held to be wrong.

"REFERRED" (Refd.).—This expression is used only where the annotating case deals with the point of the Digest paragraph and is without comment of any definite character on the case annotated, and where there is no delicate shade of approval or disapproval which would justify the use of any of the foregoing words.

"MENTIONED" (Mentd.).—This expression is used only where none of the foregoing terms apply. In other words, it is used only where the case annotated is cited on a point having nothing to do with the point in the Digest paragraph.

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INTRODUCTION.

Of the two great systems of law which together control the lives of nearly all the civilised and most of the uncivilised populations of the world, the one looks for its origin to a city on the Tiber and the other to Westminster Hall and the Assizes. The history of the Roman law and its developments cover about twenty-five centuries, whereas the growth of English law from the reign of Edward I. is but about 600 years. Lord Bryce in 1901 estimated that there were probably 130 millions of civilised persons (without counting the natives of India) who lived under the English common law, while the number living under some modern form of the Roman law was still larger. Geographically the English common law is in force in the United Kingdom with the exception of Scotland; throughout the British Empire, with the chief exceptions of South Africa, British Guiana, Quebec, Mauritius and Ceylon; and in the slightly modified form of American common law, throughout the United States with the exception of Louisiana. The Roman law on the other hand, modified by local laws and legislation, extends over the Continent of Europe and elsewhere. In some cases, as in France, the actual system of law is of Roman descent; in others, *e.g.*, the States of Germany, the system, though not descended from the Roman, has been closely assimilated to the Roman law by large importations; while in other countries, such as Russia, Norway, Sweden and Denmark, which have borrowed much of their law from other European countries, the leading principles of Roman jurisprudence prevail.

On comparison of these two great systems of law—which may be generally described as the Continental system and the system of the English-speaking nations—one of the most striking differences is the

reliance upon and binding character of judicial decisions in our own system, and the absence of their binding character and their comparatively slight importance in the other system. On the Continent, the Codes of Prussia and Austria provide that judgments shall not have the force of law, and though the Codes in France, Italy, and Belgium do not touch the point, the rule in all these countries is substantially the same, namely, that previous decisions are not authoritative, with certain very limited exceptions.

Among us, on the other hand, it has long been established that our courts are arranged in ranks, and those of each rank are, generally speaking, bound by the decisions of courts of the same or a higher rank, and that the House of Lords is bound by its own decisions. The decisions of the Judicial Committee of the Privy Council are in general binding on the courts in the British Dominions and Colonies overseas. The binding character of a decision of course only exists in cases where the principle of the former decision applies, and it is a recognised function of the court, when not following a decision which on its face may appear to be applicable to the case in hand, to state the grounds on which it is distinguished.

Thus the judgments of our judges not merely decide the case in hand, but declare the law. It is a fundamental theory of our law that the judges "are the depositaries of the laws, the living oracles who must decide in all cases of doubt."

It is from this privilege of making a binding rule of law, which is attached in certain circumstances to the decisions of our Superior Courts, that the common law of England, the foundation of our system of law, has for the most part arisen. Out of this privilege have sprung our various instances of judge-made law, which declare what in novel circumstances is most consonant with well-known legal principles, for instance, in cases *primae impressionis*, or where a question of public policy arises, and to some extent in cases involving modern rules of equity.

The fact that the decisions of our courts were the main source of the common law led to great importance necessarily being attached to accurate records of them.

Hence, from the first Year-books of Edward I. onwards, the study and

practice of law reporting has gradually increased and developed in this country from an original jejune paragraph to the arrays of elaborate and learned reports which now exist; and by the experience of many generations, the practice as regards the principles of selection of cases for report out of the large number of judgments delivered has become well established; but even so the mass of reported cases during the last 600 years has been so great that special means of dealing with them became long ago necessary.

In this way abridgments and digests of cases originated and grew up in this country. They are the special and essential fruit of our system of law and our tradition of *stare decisis*, and have gradually extended from abridgments of small size, or digests of cases on some special branch of law, to large works endeavouring more and more to deal with the whole body of the law.

A digest of cases provides the practitioner with the main basis of his argument before the court, since legal arguments, like judgments, are in almost all instances founded on reported cases. A digest collects all the reported cases on each subject, and gives their history with a completeness not usually possible in a text-book or treatise. Further, a digest of cases not only prepares the way for an orderly statement of principles in a certain branch of the law (as by a codifying statute, such as the Sale of Goods Act), but also in itself has certain advantages over a Code, since a Code gives only the general principles, whereas a digest gives not only the principles, but copious instances of their application.

The importance of the decisions of the Supreme Court of the United States has been so often dwelt upon in our highest Appellate Courts that it is unnecessary to do more than allude to it. But it is perhaps not so clearly remembered in this country what a vast importance our reported decisions exert in the courts of the United States. As regards also the Superior Courts in the British Overseas Dominions and Colonies, their decisions, though not binding in our courts, are recognised often to be monuments of learning and to be most useful in elucidating difficult questions of law.

The reputation of British law and British justice stands supreme throughout the world, as the unquestioned acceptance by the Overseas

Dominions of the decisions of the Judicial Committee of the Privy Council and the suits by subjects of foreign States in the courts of this country, instead of in those of their own country, testify. A work which through the English cases collected in its pages traces the source and growth of that law, and which shows through the cases decided in the courts of the Overseas Dominions and Colonies its application to and development under the different and various conditions of life in the British Empire, and which illustrates how old principles of law have been applied and will have to be applied to the new combinations of circumstances which have arisen overseas and are now likely to arise in this country under the new conditions of commerce born of the War, will, it is believed, not only stimulate the study of the science and art of our law amongst ourselves, the subjects of India, the Overseas Dominions and the Colonies, the United States of America and those foreign States which already regard with favour British law and British justice, but will also help to forge yet another link in the chain of affection and esteem which holds this Empire together.

For as has been observed: "Doubtless the most significant and momentous fact of modern history is the wide diffusion of the English race, the sweep of its commerce, and dominance of its institutions, its imperial control of the destinies of half of the globe." And whilst in many respects it is true that the Overseas Dominions and Colonies have modified various characteristics of our institutions to meet the requirements of their national life, yet they have generally retained the outstanding features of our legal system, an institution which is in truth one of the cornerstones of the Empire and stands for freedom and purity of justice wherever the British flag flies. It was in order to uphold that freedom and all the principles of right which are so dear to the Empire, that her sons came together from all quarters of the world and fought and learned to appreciate more fully the sterling qualities of each other during the great War that has ravaged the world for the last four years.

Now, when the dawn of Peace has arisen and the bonds of friendship between the English-speaking races are daily becoming more secure, when this country is confronted with the problems of reconstruction and the reorganisation of its commerce and industry, is a fitting moment to produce a work that side by side will trace the source and growth of

the law of England and of the Empire, so that the Overseas Dominions will see the development not only of our own law, but also its influence on the growth of their law, and we in this country shall learn how they have approached and decided problems which they in the infancy of their national life have had to overcome, and which we from our close contact with them during the War and in our new strength are bound to meet in the era of Peace we hope is now opening out before us.

T. WILLES CHITTY.

ABSTRACT OF TITLE.

See SALE OF LAND.

ACCIDENT.

See NEGLIGENCE.

ACCORD AND SATISFACTION.

See CONTRACT.

ACCOUNTS AND INQUIRIES.

See PRACTICE AND PROCEDURE.

ACTION.

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Part I.—Definitions.

SECT. 1.—ACTION AND OTHER LIKE TERMS.

SUB-SECT. 1.—ACTION.

A. Under Judicature Act, 1873 (*c.* 66).

1. Essential features—Plaintiff & defendant.]—The words "rules of ct." in s. 100 of the above Act are not confined to rules of the High Ct., & the term "action" includes any civil proceeding in which there is a pltf. who sues & a deft. who is sued in respect of some cause of action as contrasted with proceedings such as statutory proceedings which are embraced in the word "matter" (BUCKLEY, L.J.). —JOHNSON *v.* REFUGE ASSURANCE CO., LTD., [1913] 1 K. B. 259; 82 L. J. K. B. 411; 108 L. T. 242; 29 T. L. R. 127; 57 Sol. Jo. 128, C. A. S. C. No. 8, *post*.

2. —— —— Judgment against defendant possible.]—ROBERTS *v.* BATTERSEA METROPOLITAN BOROUGH, Nos. 5, 15, 27, 28, 70, *post*.

3. Award—Application to enforce.]—An application for a rule calling on a party to show cause against his paying money according to an award which has been made a rule of ct. is not made in an "action" within R. S. C. (1875), O. 53, r. 2 (*see, now*, R. S. C. (1883), O. 52, r. 2).—*Re* PHILLIPS & GILL (1875), 1 Q. B. D. 78; 45 L. J. Q. B. 136; 24 W. R. 158.

4. Administration bond—Application to enforce.]—An application for the assignment of an administration bond with a view to its being enforced against the sureties is not a proceeding in any "action" within R. S. C. (1875), O. 53, r. 2 (*see, now*, R. S. C. (1883), O. 52, r. 2).—*In the Goods of* CARTWRIGHT (1876), 1 P. D. 422; 34 L. T. 72; 40 J. P. 104; 24 W. R. 214; 3 Char. Pr. Cas. 399.

5. Certiorari.]—ROBERTS *v.* BATTERSEA METROPOLITAN BOROUGH, No. 2, *ante;* Nos. 15, 27, 28, 70, *post*.

6. Counterclaim.]—A counterclaim cannot be deemed an "action," it not being commenced by writ of summons.—MCGOWAN *v.* MIDDLETON (1883), 11 Q. B. D. 464; 52 L. J. Q. B. 355; 31 W. R. 835.

For full anns., *see* SET-OFF & COUNTERCLAIM.

7. —— For purposes of transfer.]—A deft. to an action in the Ch. Div. counterclaimed for libel & slander:—*Held:* the word "action" in R. S. C., O. 36, r. 2, did not apply to a counterclaim so as to entitle deft. to have the action & counterclaim transferred to the K. B. Div. for a trial by a judge with a jury; though the ct. might exercise its discretion & send the issues raised by the counterclaim to be tried by a judge with a jury.—KINNAIRD (LORD) *v.* FIELD, [1905] 2 Ch. 361; 74 L. J. Ch. 692; 93 L. T. 190; 54 W. R. 85; 21 T. L. R. 682; 49 Sol. Jo. 670, C. A.

Annotation:—**Refd.** R. *v.* Westminster Assmt. Com., R. *v.* Islington Assmt. Com., [1917] 2 K. B. 215, C. A.

See, further, SET-OFF & COUNTERCLAIM.

8. County court action.]—The word "action" in s. 100 includes a cty. ct. action, since such an action is a civil proceeding commenced in manner prescribed by rules of ct.; & therefore an order of the Div. Ct. dismissing an appeal from a judgment in a cty. ct. action commenced by plaint is a final order in an action, & not "in a matter not being an action," within R. S. C., O. 58, r. 15.—JOHNSON *v.* REFUGE ASSCE., No. 1, *ante*.

9. Information.]—The term "action" in R. S. C., O. 1, r. 1, includes an action (formerly known as an information) by the A.-G. at the relation of a pltf., for which proceeding the title "information" should no longer be used.—A.-G. *v.* SHREWSBURY BRIDGE CO. (1880), 42 L. T. 79.

10. Interpleader proceedings.]—An interpleader issue was ordered to be tried by jury. The case was tried & verdict passed for defts. A new trial was granted on the ground of misdirection. Pltf. gave notice of trial to be by a judge alone without a jury under R. S. C., O. 36, r. 2:—*Held:* he was not entitled to do this, because interpleader proceedings were not an "action" within s. 100.—HAMLYN *v.* BETTELEY (1880), 6 Q. B. D. 63; 50 L. J. Q. B. 1; 43 L. T. 790; 29 W. R. 275, C. A.

Annotations:—**Distd.** Hartmont *v.* Foster (1881), 8 Q. B. D. 82, C. A.; James *v.* Ricknell (1887), 20 Q. B. D. 164. **Refd.** R. *v.* Westminster Assmt. Com., R. *v.* Islington Assmt. Com., [1917] 2 K. B. 215, C. A.

11. Mandamus.]—An application for a prerogative writ of mandamus is a civil proceeding commenced otherwise than by writ in manner prescribed by rules of ct. & is an "action" within s. 100 of the above Act.—R. *v.* WESTMINSTER ASSESSMENT COMMITTEE, *Ex p.* LONDON & PROVINCIAL VICTUALLERS, LTD., R. *v.* ISLINGTON ASSESSMENT COMMITTEE, *Ex p.* ROYAL AGRICULTURAL HALL CO., [1917] 2 K. B. 215; 86 L. J. K. B. 1161; 116 L. T. 641; 81 J. P. 221; 61 Sol. Jo. 299; 15 L. G. R. 362, C. A.

12. Originating summons—When action.]—An originating summons was taken out for administration of real & personal estate. The summons was dismissed. On appeal to the C. A. a preliminary objection was taken that the appeal was out of time because notice of appeal had not been given in due time:—*Held:* (1) an originating summons taken out under R. S. C., O. 55, r. 3, was a civil proceeding commenced otherwise than by writ in manner prescribed by rules of ct., & was an "action" within s. 100; (2) it was not "a matter not being an action" within R. S. C., O. 58, r. 15, & the preliminary objection failed.—*Re* FAWSITT, GALLAND *v.* BURTON (1885), 30 Ch. D. 231; 55 L. J. Ch. 568; 53 L. T. 271; 34 W. R. 26, C. A.

Annotations:—**Distd.** *Re* Busfield, Whaley *v.* Busfield (1886), 32 Ch. D. 123. **Folld.** Gee *v.* Bell (1887), 35 Ch. D. 160. **Refd.** *Re* Robinson, Pickard *v.* Wheater (1885), 31 Ch. D. 247; *Re* Binstead, *Ex p.* Dale, [1893] 1 Q. B. 199, C. A.; Johnson *v.* Refuge Assce., [1913] 1 K. B. 259, C. A.; R. *v.* Westminster Assmt. Com., R. *v.* Islington Assmt. Com., [1917] 2 K. B. 215, C. A.

13. —— ——.]—An originating summons under R. S. C., O. 55, r. 3, is an "action" within s. 100, & is not "a matter not being an action" within R. S. C., O. 58, r. 15.—*Re* VARDON'S TRUST (1885), 55 L. J. Ch. 259, C. A.

For full anns., *see* EQUITY.

14. —— ——.]—*Semble:* there is no general rule that pltfs. are justified in proceeding by action instead of by originating summons because they desire to have a receiver appointed. An originating summons under R. S. C., O. 55, r. 3, is an "action." —GEE *v.* BELL (1887), 35 Ch. D. 160; 56 L. J. Ch. 718; 56 L. T. 305; 35 W. R. 805.

For full anns., *see* MORTGAGE.

15. —— When not action.]—An originating summons is not an "action" in the sense that it is a proceeding commenced against a person as deft., or a proceeding in which there is all the possibility of counterclaim, &c., as in an action (BUCKLEY, L.J.).—ROBERTS *v.* BATTERSEA METROPOLITAN BOROUGH (1914), 110 L. T. 566; as reptd. 78 J. P. 265; 12 L. G. R. 898, C. A. S. C. Nos. 2, 5, *ante;* Nos. 27, 28, 70, *post*.

16. —— ——.]—An originating summons at the instance of the A.-G. was served on W., who in turn served a notice under R. S. C., O. 16, r. 55, claiming contribution from E.'s exors.:—*Held:* (1) third party procedure was only applicable to an

Sect. 1.—*Action & other like terms: Sub-sect.* 1, *A. B. C. & D.*]

action; (2) an originating summons was not an "action" for this purpose.—*Re* WILSON, A.-G. *v.* WOODALL (1890), 45 Ch. D. 266; 60 L. J. Ch. 101; 63 L. T. 100; 39 W. R. 58, C. A.

Annotations:—**Refd.** Roberts *v.* Battersea Metropolitan Borough (1914), 110 L. T. 566, C. A. **Mentd.** R. *v.* Westminster Assmt. Com., R. *v.* Islington Assmt. Com., [1917] 2 K. B. 215, C. A.

17. Suit in equity.—A suit commenced before Nov. 1, 1875, is not an "action" as defined by s. 100.—DARCY *v.* WHITTAKER (1876), 33 L. T. 778; 24 W. R. 244.

18. ——.]—Under the above Act all proceedings by a mtgee., whether to enforce the personal covenant for payment against mtgor., or to enforce the security by proceedings formerly known as suits in equity, are called "actions."—SUTTON *v.* SUTTON, Nos. 43, 65, 82, *post.*

Annotation:—**Expld.** *Re* Turner's Estate, Turner *v.* Spencer (1894), 13 R. 132.
For full anns., *see* S. C. No. 82, *post.*

B. Under County Courts Act, 1888 (*c.* 43).

19. Admiralty action.]—In an Admlty. action for collision, where pltfs. demanded a jury & defts. demanded two nautical assessors:—*Held:* (1) the word "action" in s 101 did not include an Admlty. action for collision. *Qu.:* whether it included Admlty. actions at all.—THE TYNWALD, [1895] P. 142; 64 L. J. P. 1; 71 L. T. 731; 43 W. R. 509; 11 T. L. R. 94; 7 Asp. M. L. C. 539; 11 R. 690, D. C.

Annotation:—**Extd.** The Theodora, [1897] P. 279.

20. ——.]—In a proceeding *in rem* in a cty. ct. under Cty. Cts. Admlty. Jurisdiction Amendment Act, 1869 (c. 51), s. 2 (1), by a shipowner against cargo owners for balance of freight, defts. counterclaimed, under the same sub-sect., for £100 damages for wrongful arrest of the cargo, &, under Cty. Cts. Act, 1888 (c. 43), s. 101, required a jury to be summoned for the trial of the action:—*Held:* this being an Admlty. cause defts. were not entitled as of right to a jury, for the word "action" in s. 101 did not include Admlty. actions.—THE THEODORA, [1897] P. 279; 66 L. J. P. 50; 76 L. T. 627; 46 W. R. 157; 13 T. L. R. 350; 8 Asp. M. L. C. 259, D. C.

21. Bankruptcy motion.]—The high bailiff of a cty. ct. levied two executions against the goods of a debtor. He then received an intimation that a petition was about to be filed, & a motion was made by the trustee in bkpcy. under Bkpcy. Act, 1883 (c. 52), s. 45. At the hearing a preliminary objection was taken that the formalities prescribed by Cty. Cts. Act, 1888 (c. 43), ss. 52, 53, 54, were not complied with:—*Held:* the motion was not an "action" within those sects. & the objection must be disallowed.—*Re* LOCKE (LOCK), *Ex p.* POPPLETON (1890), 63 L. T. 320; 39 W. R. 15; 6 T. L. R. 384; 7 Morr. 184.

22. Counterclaim.]—An action was brought in the High Ct. & deft. counterclaimed for slander. Pltf. having become bkpt., the trustee in bkpcy. obtained a stay as to the claim in the action:—*Held:* the counterclaim, although the issue raised by it was the only issue left for trial in the action, could not be treated as an "action" for the purpose of remitting to the cty. ct. under s. 66.—DELOBBEL-FLIPO (DALOBBEL-FLIPO) *v.* VARTY, [1893] 1 Q. B. 663; 62 L. J. Q. B. 398; 68 L. T. 797; 42 W. R. 48; 37 Sol. Jo. 426; 5 R. 347.

Annotation:—**Folld.** Guilford *v.* Lambeth, [1894] 2 Q. B. 832.

23. Garnishee order.]—There is no appeal from a garnishee order under C. C. R., 1875, for it is not a decision in an "action or cause" within the above Act.—MASON *v.* WIRRAL HIGHWAY BOARD (1879), 4 Q. B. D. 459; 48 L. J. Q. B. 679; 27 W. R. 676. S. C. No. 93, *post.*

24. Interpleader.]—Interpleader proceedings were not "actions" within Cty. Cts. Act, 1867 (c. 142), s. 13; an appeal did not lie, even by leave of the judge, from the decision of a cty. ct. in proceedings in interpleader, where neither the money claimed nor the value of the goods or chattels claimed, or of the proceeds thereof, exceeded £20.—COLLIS *v.* LEWIS (1887), 20 Q. B. D. 202; 57 L. J. Q. B. 167; 57 L. T. 716; 36 W. R. 472.

But *see, now*, Cty. Cts. Act, 1888 (c. 43), s. 120.

25. Warrant of execution.]—A warrant of execution issued out of the Palace Ct. was not an "action or suit" within Cty. Cts. Act, 1849 (c. 101), s. 13, & was valid although issued after the passing of that Act.—BRAHAM *v.* JOYCE (1849), 4 Exch. 487; 19 L. J. Ex. 1; 14 J. P. 39. S. C. No. 69, *post.*

Annotation:—**Distd.** Henderson *v.* Preston (1888), 21 Q. B. D. 362, C. A.

C. Under Public Authorities Protection Act, 1893 (*c.* 61).

See, generally, PUBLIC AUTHORITIES & PUBLIC OFFICERS.

26. Admiralty action.]—An Admlty. action *in rem* is not an "action" within s. 1 (*a*).—THE BURNS, [1907] P. 137; 76 L. J. P. 41; 71 J. P. 193; 23 T. L. R. 323; 51 Sol. Jo. 276; 10 Asp. M. L. C. 424; 5 L. G. R. 676, C. A.

27. Certiorari.]—Proceedings in the K. B. Div. for a writ of *certiorari* to quash surcharges made by the auditor of the Local Govt. Board are not an "action" within s. 1 entitling the auditor to solr. & client costs.—ROBERTS *v.* BATTERSEA METROPOLITAN BOROUGH, Nos. 2, 5, 15, *ante;* Nos. 28, 70, *post.*

28. ——.]—The "action," prosecution, or other proceeding spoken of must be one commenced against a "person" as a deft. & it must be one in which a judgment can be obtained against deft. against whom it is brought (BUCKLEY, L.J.).—ROBERTS *v.* BATTERSEA METROPOLITAN BOROUGH, Nos. 2, 5, 15, 27, *ante;* No. 70, *post.*

29. Declaration, action for.]—Pltfs., being about to erect certain buildings upon land within defts.' district, were served by defts. with notice that if they did so legal proceedings would be taken against them for infringing Public Health (Buildings in Streets) Act, 1888 (c. 52). Pltfs. thereupon brought an action against defts. for a declaration that they were entitled to erect the contemplated buildings without defts.' consent. The action having been dismissed with costs:—*Held:* it was an "action" within s. 1 of the Act of 1893, & defts. were entitled to their costs as between solr. & client.—GRAND JUNCTION WATERWORKS CO. *v.* HAMPTON URBAN DISTRICT COUNCIL (1899), 63 J. P. 503; 15 T. L. R. 412; 43 Sol. Jo. 570.

30. Injunction.]—F. brought an action against a corpn. for an injunction to prevent it from using a weir in such fashion as to allow the water in storm time to injure his land. The action was dismissed & pltf. ordered to pay costs as between solr. & client under s. 1:—*Held:* the word "action" in the above sect. included an action for an injunction in the Ch. Div. & the order as to costs was right.—FIELDEN (FIELDING) *v.* MORLEY CORPN., [1899] 1 Ch. 1; 67 L. J. Ch. 611; 79 L. T. 231; 47 W. R. 295, C. A.; *affd.*, [1900] A. C. 133, H. L.

Annotations:—**Distd.** Bradford Corpn. *v.* Myers, [1916] 1 A. C. 242, H. L. **Refd.** Smith *v.* Northleach R. C. (1901), 71 L. J. Ch. 3; Sharpington *v.* Fulham Grdns., [1904] 2 Ch. 449. **Apld.** Gilbert *v.* Gosport & Alverstoke U. C., [1916] 2 Ch. 587. **Mentd.** Southwark & Vauxhall Water Co. *v.* Wandsworth District Board of Works (1898), 67 L. J. Ch. 657, C. A.; Roberts *v.* Gwyrfai R. C. (1899), 68 L. J. Ch. 233; The Ydun, [1899] P. 236, C. A.; A.-G. *v.* Margate Pier & Harbour, [1900] 1 Ch. 749; R. *v.* Cockerton, [1901] 1 K. B. 726, C. A.; Ambler *v.* Bradford Corpn., [1902] 2 Ch. 585, C. A.; Parker *v.* L. C. C., [1904] 2 K. B. 501; Tilling *v.* Dick, [1905] 1 K. B. 562; Lyles *v.* Southend Corpn., [1905] 2 K. B. 1, C. A.; Jones *v.* Shervington, [1908] 2 K. B. 539; L. C. C. *v.* Bermondsey Bioscope Co., [1911] 1 K. B. 445.

31. ——.]—The word "action," as used in s. 1, includes all actions in the Ch. Div., whether for an injunction, or partly for an injunction & partly for damages. In any such action against a public authority judgment for defts. carries the right to an order for costs to be taxed as between solr. & client, & the ct. has no discretion in the matter.—HARROP *v.* OSSETT CORPN., [1898] 1 Ch. 525; 67 L. J. Ch. 347; 78 L. T. 387; 62 J. P. 297; 46 W. R. 391; 14 T. L. R. 308; 42 Sol. Jo. 365.

Annotations:—**Folld.** Fielden *v.* Morley Corpn., [1899] 1 Ch. 1, C. A.; The Ydun, [1899] P. 236, C. A. **Distd.** Bradford Corpn. *v.* Myers, [1916] 1 A. C. 242, H. L. **Refd.** Toms *v.* Clacton U. D. C. (1898), 42 Sol. Jo. 572; Parker *v.* L. C. C., [1904] 2. K. B. 501.

D. Under other English Statutes.

32. **Admiralty action—6 & 7 Will. 4, c. 100, s. 8.**]—By the above sect. no action was to be brought against a certain steamship co. without notice of action:—*Held:* this did not apply to an action *in rem*, since Admlty. actions were at the date of the Act called suits or causes.—THE LONGFORD (1889), 14 P. D. 34; 58 L. J. P. 33; 60 L. T. 373; 37 W. R. 372; 5 T. L. R. 256; 6 Asp. M. L. C. 371, C. A.

Annotation:—**Folld.** The Burns, [1907] P. 137, C. A.

33. **Arbitration—Sale of Goods Act, 1893 (c. 71), s. 4.**]—If there is no sufficient memorandum of a contract to satisfy the above sect., a claim on such a contract cannot succeed in an arbn., for an arbn. is an "action" within the above sect.—*Re* COX, MCEWEN & CO. & HOARE, MARR & CO. (1907), 96 L. T. 719, C. A., *affg. S. C. sub nom.* COX *v.* HOARE (1906), 95 L. T. 121

34. **Audita querela—4 Anne, c. 16, s. 4.**]—An *audita querela* was held to be an "action or suit" within the above sect., & a deft. was held entitled to plead several matters thereto.—GILES *v.* HUTT (1848), 1 Exch. 701; 5 Dow. & L. 387; 17 L. J. Ex. 121; 10 L. T. O. S. 376; 154 E. R. 298. S. C. No. 63, *post*.

35. —— **Civil Procedure Act, 1833 (c. 42), s. 34.**]—An *audita querela* was an "action" within the above sect., & as costs might become payable by pltf., he was compellable, when resident abroad, to give security for costs.—HOLMES *v.* PEMBERTON, PEMBERTON *v.* HOLMES (1859), 1 E. & E. 369; 28 L. J. Q. B. 172; 32 L. T. O. S. 242; 5 Jur. N. S. 727; 7 W. R. 160; 120 E. R. 948.

36. **Divorce Court proceedings—Bankruptcy Act, 1883 (c. 52).**]—Causes or suits in the Divorce Ct. are not called "actions," & its decisions are not called judgments, but decrees.

In a suit by a husband against his wife for dissolution of marriage on the ground of adultery a decree *nisi* for dissolution was made, the decree containing an order for payment of petitioner's costs by co-resp. The decree was afterwards made absolute; the costs were taxed at £204, & an order was made that co-resp. should pay the amount within a specified time. He failed to comply with the order:—*Held:* (1) there had not been a "final judgment" for the amount within s. 4 (1) (*g*) of the above Act; (2) petitioner could not issue a bkpcy. notice against co-resp. in respect of it.—*Re* BINSTEAD, *Ex p.* DALE, [1893] 1 Q. B. 199, 208; 62 L. J. Q. B. 207; 68 L. T. 31; 41 W. R. 452; 9 T. L. R. 114; 37 Sol. Jo. 117; 9 Morr. 319; 4 R. 146, C. A.

Annotations:—**Refd.** *Re* Bkpcy. Notice, *Ex p.* Official Receiver, [1895] 1 Q. B. 609, C. A.; *Re* Owen, *Ex p.* Peters (1900), 70 L. J. Q. B. 92; Ivimey *v.* Ivimey, [1908] 2 K. B. 260, C. A.; *Re* Hallman, *Ex p.* Ellis, [1909] 2 K. B. 430. **Mentd.** *Re* Lynes, *Ex p.* Lester (1893), 68 L. T. 739, C. A.; Rayment *v.* Rayment, [1910] P. 271.

But *see, now*, Bkpcy. Act, 1914 (c. 58), s. 1.

37. **Information—Parliamentary Oaths Act, 1866 (c. 19).**]—Although in some cases "actions" include indictments or even criminal informations, the word "action" in the above Act, penalties under which are "to be recovered by action," must be construed according to its ordinary meaning; it means action in one of the superior cts.

An information laid by the A.-G. under the above Act is a civil action with all the consequences, including a right of appeal (BRETT, M.R.).—A.-G. *v.* BRADLAUGH (1885), 14 Q. B. D. 667; 54 L. J. Q. B. 205; 52 L. T. 589; 33 W. R. 673, C. A.

For full anns., *see* CONSTITUTIONAL LAW.

38. —— ——.]—An action was brought to recover a penalty under the above Act:—*Held:* the word "action" as used in the Act was a generic term & might be used as a general term so as to include informations & other proceedings by the Crown.—BRADLAUGH *v.* CLARKE (1883), 8 App. Cas. 354; 52 L. J. Q. B. 505; 48 L. T. 681; 47 J. P. 405; 31 W. R. 677, H. L.

Annotations:—**Refd.** A.-G. *v.* Bradlaugh (1885), 14 Q. B. D. 667, C. A.; Charrington *v.* Midland Ry. Co. (1901), 11 Ry. & Can. Tr. Cas. 222. **Mentd.** Bradlaugh *v.* Newdegate (1883), 31 W. R. 792; Bradlaugh *v.* Gossett (1884), 12 Q. B. D. 271; Dixon *v.* Farrer (1886), 17 Q. B. D. 658.

39. **Mandamus—43 Geo. 3, c. 46.**]—Where, on a mandamus to admit a freeman, the party pleaded, & damages & costs were given to prosecutor:—*Held:* (1) this was an "action" within 43 Geo. 3, c. 46, since it partook so much of the nature of an action that deft. was to pay one shilling damages & costs to the party prosecuting; (2) the sheriff must levy for the poundage.—R. *v.* GLAMORGAN CORPN. (1804), 2 Smith, K. B. 8.

40. **Mayor's Court action—Bankruptcy Act, 1849 (c. 106), s. 79.**]—The word "action" in the above sect. means an action in the superior cts. only, not an action in the Lord Mayor's Ct., or in cts. of inferior jurisdiction.—*Re* A TRADER-DEBTOR SUMMONS (1859), 33 L. T. O. S. 384.

41. **Originating summons—Conveyancing Act, 1881 (c. 41), s. 14.**]—An action for ejectment was being brought by a lessor in a cty. ct. Deft. desired relief under the above sect., & sought to obtain such relief by an originating summons in the High Ct.:—*Held:* it was not competent for him to do so, because for the purpose of the sect. an originating summons was not an "action."—LOCK *v.* PEARCE, [1893] 2 Ch. 271; 62 L. J. Ch. 582; 68 L. T. 569; 41 W. R. 369; 9 T. L. R. 363; 37 Sol. Jo. 372; 2 R. 403, C. A.

Annotations:—**Refd.** Roberts *v.* Battersea Metropolitan Borough (1914), 110 L. T. 566, C. A. **Mentd.** Pannel *v.* City of London Brewery, [1900] 1 Ch. 496; Guillemard *v.* Silverthorne (1908), 99 L. T. 584; Fox *v.* Jolly, [1916] 1 A. C. 1, H. L.

42. **Petition—Lands Clauses Consolidation Act, 1845 (c. 18).**]—Money was paid into ct. under the above Act for the purchase of land subject to an equitable mtge. by deposit, with an immediate undertaking to give a legal mtge.; on petition by mtgee. for payment out:—*Held:* the petition was neither a distress, nor "action," nor strictly a suit, but was analogous to a suit for recovery of land, & the principal & six years' interest alone could be recovered.—*Re* STEAD'S MORTGAGED ESTATES (1876), 2 Ch. D. 713; 45 L. J. Ch. 634; 35 L. T. 465; 24 W. R. 698.

Annotations:—**Distd.** *Re* Lloyd, [1903] 1 Ch. 385, C. A. **Refd.** *Re* Marshfield, Marshfield *v.* Hutchings (1887), 34 Ch. D. 721.

43. **Real Property Limitation Act, 1874 (c. 57), s. 8.**]—SUTTON *v.* SUTTON, No. 18, *ante;* Nos. 65, 82, *post*.

For full anns., see S. C. No. 82, *post*.

44. **Set-off—Limitation Act, 1623 (c. 16).**]—The above Act may be replied to a set-off which is an "action" for this purpose.—REMINGTON *v.* STEVENS (1747), 2 Stra. 1271; 93 E. R. 1175.

Annotations:—**Folld.** Chapple *v.* Durston (1830), 1 Cr. & J. 1. **Mentd.** Rawley *v.* Rawley (1876), 1 Q. B. D. 460, C. A.

Sect. 1.—*Action & other like terms: Sub-sect.* 1, *D. E. F.; sub-sect.* 2.]

45. —— Statute of Frauds Amendment Act, 1828 (c. 14), s. 5.]—*Held:* a set-off was an "action" within the above sect., so that no set-off could be maintained for a debt contracted by pltf. during infancy & not ratified by him in writing after full age.—RAWLEY *v.* RAWLEY (1876), 1 Q. B. D. 460; 45 L. J. Q. B. 675; 35 L. T. 191, C. A.

46. —— Solicitors Act, 1843 (c. 73).]—To *assumpsit* on an attorney's bill of costs deft. pleaded a set-off, &, in support of that plea, put in an account furnished to him by pltf. Pltf.'s credit side of the account contained his claim for costs, but of this no signed bill had been delivered, & deft. contended that the debit side only of pltf.'s account could be looked to:—*Held:* the whole account was evidence for the jury, as the non-delivery of a signed bill did not bar the debt, but merely (if insisted on) prevented its recovery by action.—HARRISON *v.* TURNER (1847), 10 Q. B. 482; 16 L. J. Q. B. 295; 11 Jur. 817; 116 E. R. 184.

Annotation:—**Follo.** Brown *v.* Tibbits (1862), 11 C. B. N. S. 855.

47. —— ——.]—An attorney may set off a claim for costs notwithstanding that no signed bill has been delivered. Such set-off is not commencing or maintaining an "action" within s. 37 of the above Act.—BROWN *v.* TIBBITS (TIBBETTS) (1862), 11 C. B. N. S. 855; 31 L. J. C. P. 206; 6 L. T. 385; 10 W. R. 465; 142 E. R. 1031.

Annotation:—**Expld.** Rawley *v.* Rawley (1876), 1 Q. B. D. 460, C. A.

See, further, SOLICITORS.

48. Suit in equity—53 Geo. 3, c. 141, s. 6.]—In a suit to set aside a deed securing an annuity as void for return of consideration under the above sect.:—*Held:* the word "action" in this sect. included a suit in equity.—PENNELL *v.* SMITH (1855), 5 De G. M. & G. 167; 24 L. J. Ch. 750; 25 L. T. O. S. 291; 1 Jur. N. S. 1213; 3 W. R. 619; 43 E. R. 834, C. A.

49. Workmen's compensation proceedings.]—Proceedings under Workmen's Comp. Act, 1897 (c. 37) (*see, now,* Workmen's Comp. Act, 1906 (c. 58)) are not in the nature of an "action."—DARLINGTON *v.* ROSCOE & SONS, [1907] 1 K. B. 219; 76 L. J. K. B. 371; 96 L. T. 179; 23 T. L. R. 167; 51 Sol. Jo. 130; 9 W. C. C. 1, C. A.

Annotations:—**Expld.** Hendry *v.* United Collieries (1908), 1 B. W. C. C. 289, Ct. of Sess. **Apprvd.** United Collieries *v.* Simpson, [1909] A. C. 383, H. L. Sc. **Mentd.** Tomalin *v.* Pearson, [1909] 2 K. B. 61, C. A.

E. In Releases.

50. All actions.]—A testator seised in fee of lands in G. & lands in W. devised his lands in G. to Z. for life. He died leaving a widow, T. N., his son & heir, & Z., an infant son. The widow entered into the lands in G. as guardian to Z., & whilst in possession released to T. N. "all & all manner of actions, as well real as personal, suits, quarrels, & demands whatsoever, as also all her dower, title, & action of dower in the lands in W., what or which she ever had or has, etc., against T. N." Z. died without any heir of his body; T. N. died leaving M. his daughter & heir. The widow & her second husband brought a writ of dower to be endowed of the lands in G. against M. & her husband:—*Held:* demandants were entitled to dower, since the words of the release were confined to the lands in W. *Semble:* (1) the release of "all actions real" to T. N., having but a reversion expectant on a freehold, did not extinguish the dower; but if the release had been of "all her right" the dower would have been extinct. (2) Where a man has several means of coming to his right, he may release one of them specially, & yet take benefit of the other; but when he can only come to his right by way of action, a release of "all actions" destroys his right. (3) A release of "all actions" is not a release of executions; but it is a release of a *scire facias* & of all actions depending & causes of action. In some cases a debt or duty is barred although no action at the time of the release given lies for the debt. By a release of "all actions real & personal" such actions only are released as those in which pltf. would recover anything in the realty or personalty which is due to him. (4) The word "quarrels" extends to actions real & personal, & to causes of actions & suits. (5) A release of all demands is the most advantageous to the releasee. If the deed of release had not gone farther the dower of the widow would have been barred.—ALTHAM'S CASE (1610), 8 Co. Rep. 150 b; 1 Brownl. 62; 77 E. R. 701. S. C. No. 66, *post.*

Annotations:—**Refd.** Lampet's Case (1612), 10 Co. Rep. 46 b; Witton *v.* Bye (1618), Cro. Jac. 486; Williams *v.* Fry (1672), 2 Keb. 756, 787, 814, 867. **Mentd.** Trenchard *v.* Hoskins (1624), Win. 91; Beck's Case (1630), Litt. 253, 285, 315, 344; Wiseman *v.* Cotton (1663), 1 Keb. 372, 492, 505; Austin *v.* Lippencott (1673), 1 Mod. Rep. 99; Green *v.* Horne (1693), 1 Salk. 197; Brice *v.* Smith (1737), Willes, 1; Goodridge *v.* Goodridge (1742), 7 Mod. Rep. 453; Walpole *v.* Cholmondeley (1797), 7 Term Rep. 138; Doe *d.* Ellis *v.* Ellis (1808), 7 East, 382; Doe *d.* Jersey *v.* Smith (1819), 1 Brod. & Bing. 97; Miller *v.* Travers (1832), 8 Bing. 244; Doe *d.* Gord *v.* Needs (1836), 2 Gale, 245; Bradlaugh *v.* Clarke (1883), 8 App. Cas. 354.

51. —— Causes of action not yet complete.]—In an action for slander by which pltf. lost a marriage:—*Held:* if after the speaking pltf. released all actions, although she lost her marriage afterwards, she should not have action (WINDHAM, J.).—LITTLEBERY *v.* WRIGHT (1662), 1 Keb. 328; 1 Sid. 85; 83 E. R. 975.

52. —— Co-defendant.]—A release to one deft. of "all actions, etc.," will discharge a co-deft. in trover.—KIFFIN *v.* WILLIS (1695), 4 Mod. Rep. 379; 87 E. R. 455.

53. —— General words controlled by recital—Joint debt.]—By a release reciting that deft. stood indebted to his creditors in the several sums set to their respective names, & that they had agreed to take of deft. 15*s.* in the £ on the whole of their respective debts, the creditors, in consideration of said 15*s.* in the £ paid to them before executing the release, each & every of them released deft. from all manner of actions, &c., which they or any of them had against him or thereafter could, should, or might have, by reason of anything from the beginning of the world to the date of release:—*Held:* (1) the general words of release had reference to the particular recital & were governed by it; (2) the release released nothing but the respective debts; (3) the release was no bar to an action on a bond given by deft. with others as security for the repayment of bills drawn upon pltfs. by deft., & for moneys advanced to him, the release being intended only to apply to moneys due from deft. on his own account.—PAYLER *v.* HOMERSHAM (1815), 4 M. & S. 423; 105 E. R. 890.

Annotations:—**Consd.** Solly *v.* Forbes (1820), 2 Brod. & Bing. 38. **N.F.** Britten *v.* Hughes (1829), 5 Bing. 460. **Follo.** Simons *v.* Johnson (1832), 3 B. & Ad. 175; Upton *v.* Upton (1832), 1 Dowl. 400; Read *v.* Wrout (1839), 9 L. J. Q. B. 4. **Consd.** Squire *v.* Ford (1851), 9 Hare, 47. **Apld.** Price *v.* Barker (1855), 4 E. & B. 760. **Distd.** Teede *v.* Johnson (1856), 11 Exch. 840. **Consd.** Moore *v.* Rawlins (1859), 6 C. B. N. S. 289; Lyall *v.* Edwards (1861), 30 L. J. Ex. 193; Jenner *v.* Jenner (1866), L. R. 1 Eq. 361. **Distd.** Wigens *v.* Pickwick (1866), 14 L. T. 521. **Apld.** Danby *v.* Coutts (1885), 29 Ch. D. 500; *Re* Perkins, Poyser *v.* Beyfus, [1898] 2 Ch. 182, C. A.; Crouch *v.* Crouch, [1912] 1 K. B. 378. **Refd.** Cocks *v.* Nash (1832), 2 Moo. & S. 431; Charlton *v.* Spencer (1842), 3 Q. B. 693; Warwick *v.* Richardson (1844), 14 Sim. 281; Blackstone *v.* Wilson (1857), 26 L. J. Ex. 220; Harrison *v.* Blackburn (1864), 17 C. B. N. S. 678; Hasegrove *v.* House (1865), 6 B. & S. 975; Gunnestad *v.* Price, Fullmore *v.* Wait (1875), L. R. 10 Exch. 65.

54. —— —— Co-defendant—Parol evidence.]—A release recited that various disputes were sub-

sisting between S. & J., & actions had been brought by them against each other which were still depending, & that it had been agreed between them that in order to put an end thereto, J. should pay S. £150, & that each of them should execute a release to the other of all actions, causes of action, & claims brought by him, or which he had against the other, & then proceeded in the usual general words to release all actions, &c., whatsoever:—*Held:* (1) the effect of the general words was confined by the recital to actions then commenced, & in which S. was the party on one side & J. on the other; (2) it could not be pleaded in bar to an action brought by S. against J. & others jointly; (3) parol evidence was admissible to show that at the time of executing the release, there were mutual actions depending between S. & J. for other causes than that of the present suit, & for such causes only.—SIMONS *v.* JOHNSON & MOORE (1832), 3 B. & Ad. 175; 1 L. J. K. B. 98; 110 E. R. 65.

Annotation:—**Refd.** Gunnestad *v.* Price, Fullmore *v.* Wait (1875), L. R. 10 Exch. 65.

See, further, CONTRACT; DEEDS & OTHER INSTRUMENTS.

F. Commencement of Action.

55. When writ issued.]—The writ is now the commencement of the action for all purposes.—THOMPSON *v.* DICAS (1833), 1 Cr. & M. 768; 2 Dowl. 93; 3 Tyr. 873; 2 L. J. Ex. 294; 149 E. R. 609.

56. ——.]—A plea of tender before action is supported by proof of tender after pltf.'s attorney had applied for a writ of *latitat*, but before the issue thereof.—BRIGGS *v.* CALVERLEY (1800), 8 Term Rep. 629; 101 E. R. 1585.

57. ——.]—In *assumpsit* for goods sold & delivered, the question being whether deft. had not paid for them before action brought, it appeared that deft. paid pltf. after the issue, but before service of an *alias pluries* writ:—*Held:* the issue of the writ was the commencement of the action.—TOMS *v.* POWELL (1806), 7 East, 536; 3 Smith, K. B. 534; 103 E. R. 207.

58. ——.]—In an action against an attorney for goods sold & delivered, deft. pleaded payment. Payment was made on the day pltf. filed his bill, & there was no evidence as to whether the payment was made before or after notice of the bill being filed was served on deft.:—*Held:* the filing of a bill was the commencement of an action against an attorney without notice being served upon him (LORD ELLENBOROUGH, C.J.).—GODARD *v.* BENJAMIN (1813), 3 Camp. 331.

59. ——.]—Where payment was made after pltf. had issued a writ of *latitat*:—*Held:* a plea of payment was bad.—FRANCIS *v.* CRYWELL (1822), 5 B. & Ald. 886; 1 Dow. & Ry. K. B. 546; 106 E. R. 1415.

Annotations:—**Refd.** Worswick *v.* Beswick (1830), 8 L. J. O. S. K. B. 305. **Mentd.** Cook *v.* Hopewell (1856), 11 Exch. 555.

60. ——.]—Deft. was arrested on Apr. 1 & owing to Easter Monday & Tuesday falling on the 8th & 9th had the 10th to put in bail. Pltf. on the 10th took an assignment of the bail bond, & issued a writ of summons against the bail. The ct. set aside the proceedings on the bail bond:—*Held:* since Uniformity of Process Act, 1832 (c. 39), suing out the writ of summons was the commencement of the action for all purposes, & the cause of action was not complete until after the 10th.—ALSTON *v.* UNDERHILL (1833), 1 Cr. & M. 492; 2 Dowl. 26; 3 Tyr. 427; 2 L. J. Ex. 238; 149 E. R. 494. S. C. No. 163, *post.*

Annotations:—**Apprvd.** Grant *v.* Gibbs (1835), 1 Scott, 390. **Apld.** Hughes *v.* Griffiths (1862), 13 C. B. N. S. 324.

61. —— **Actual time of issue.**]—To issue a writ of summons is not a judicial act, & the ct. may inquire at what period of the day it was issued.

It appeared from the statement of claim that the writ of summons in the action was issued on July 2, & that the cause of action arose on the same day, but before issue of the writ. The statement of claim was demurred to on the ground that the issuing of the writ was a judicial act, and must be presumed to have taken place at the earliest moment of the day, before the cause of action accrued:—*Held:* the ct. could inquire whether or not the writ was in fact issued after the cause of action accrued.—CLARKE *v.* BRADLAUGH (1881), 8 Q. B. D. 63; 51 L. J. Q. B. 1; 46 L. T. 49; 46 J. P. 278; 30 W. R. 53, C. A.

For full anns., *see* PARLIAMENT.

62. —— ——.]—The issue of a writ in an action for the infringement of a copyright on the same day, but subsequently to the registration of such copyright under Copyright Act, 1842 (c. 45), sufficiently complies with s. 24 of that Act, so as to enable the person making the registration to sue in respect of the infringement.—WARNE *v.* LAWRENCE (1886), 54 L. T. 371; 34 W. R. 452; 2 T. L. R. 427.

Effect of writ as election to forfeit & as re-entry.]—*See* LANDLORD & TENANT.

SUB-SECT. 2.—SUIT.

63. Audita querela.]—GILES *v.* HUTT, No. 34, *ante.*

64. Petition—Real Property Limitation Act, 1833 (c. 27).]—The proceeds of sale of mtged. premises, sold under the power of sale in a mtge. deed by the trustees of the mtgee., were paid into ct. in a suit for administration of mtgee.'s estate, & there being nearly 20 years' arrears of interest due on the mtge. exceeding in amount the fund in ct., the trustees petitioned for payment out of the fund to satisfy such arrears, & the assignee of mtgor. was served with the petition:—*Held:* (1) this petition was not a "suit" to recover arrears of interest within s. 42 of the above Act; (2) the claim of mtgee.'s trustees in respect of interest was not limited to 6 years' arrears.—EDMUNDS (EDMUND) *v.* WAUGH (1866), L. R. 1 Eq. 418; 35 L. J. Ch. 234; 13 L. T. 739; 12 Jur. N. S. 326; 14 W. R. 257.

Annotations:—**Distd:** *Re* Stead's Mortgaged Estates (1876), 2 Ch. D. 713. **Folld.** *Re* Marshfield, Marshfield *v.* Hutchings (1887), 34 Ch. D. 721; Dingle *v.* Coppen, [1899] 1 Ch. 726; *Re* Lloyd, [1903] 1 Ch. 385, C. A.

65. Real Property Limitation Act, 1874 (c. 57), s. 8.]—SUTTON *v.* SUTTON, Nos. 18, 43, *ante;* No. 82, *post.*

For full anns., *see* S. C. No. 82, *post.*

66. Release of suits.]—A release of "all suits" is a release of executions, & is larger & more beneficial than a release of "quarrels" or of "actions,"—ALTHAM'S CASE, No. 50, *ante.*

Annotations:—**Refd.** Lampet's Case (1612), 10 Co. Rep. 46 b; Witton *v.* Bye (1618), Cro. Jac. 486; Williams *v.* Fry (1672), 2 Keb. 756, 787, 814, 867.

For full anns., *see* S. C. No. 50, *ante.*

67. —— **Writ of error.**]—A writ of error was a "suit"; by a release of all suits the writ was destroyed.—COLE'S CASE (1622), Lat. 110; 82 E. R. 299.

68. Covenant not to sue.]—A suit in Ch. comes within a covenant the condition of which reads as

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PART I. SECT. 1, SUB-SECT. 1.—F.

55 i. *When writ issued.*]—The day of issue of a summary writ, & not the day of the teste, is considered the commencement of the action: a process sued out on a demand accruing subsequent to the teste but before the issuing, is sufficient.—STEPHENSON *v.* MCLELLAN (1848), 6 N. B. R. (1 All.) 19.—**CAN.**

55 ii. ——.]—The issue of writ, & not the filing of the declaration, is the commencement of an action.—STILES *v.* BREWSTER (1859), 9 N. B. R. (4 All.) 414.—**CAN.**

55 iii. ——.]—In a suit brought in a justice's ct., the filing of the particulars of pltf.'s claim with the justice is not the commencement of the action.—MCPHERSON *v.* MCKINNON (1879), 19 N. B. R. (3 P. & B.) 3.—**CAN.**

Sect. 1.—*Action & other like terms: Sub-sects.* 2, 3 & 4.]

follows: "If deft. or others sued or troubled, charged or vexed pltf. as administrator."—ASHTON *v.* MARTYN (1667), 2 Keb. 288; 84 E. R. 179.

69. Warrant of execution.]—BRAHAM *v.* JOYCE, No. 25, *ante*.

For full anns., *see* S. C. No. 25, *ante*.

SUB-SECT. 3.—PROCEEDING, ETC.

70. Scope of term.]—A "proceeding" need not be an action; it may be no more than an act which may or may not terminate in an action.—ROBERTS *v.* BATTERSEA METROPOLITAN BOROUGH, Nos. 2, 5, 15, 27, 28, *ante*.

71. Companies Act, 1862 (c. 89), s. 85—Quasi-criminal proceedings.]—"Proceedings" within this sect. included not only the legal proceedings referred to in ss. 65 *et seq.*, but also *quasi*-criminal proceedings for the recovery of penalties under ss. 26, 27 of the Act, & under Life Assurance Cos. Act, 1870 (c. 61), ss. 8, 10.—*Re* BRITON MEDICAL & GENERAL LIFE ASSURANCE ASSOCN. (1886), 32 Ch. D. 503; 55 L. J. Ch. 416; 54 L. T. 152; 34 W. R. 390; 2 T. L. R. 344.

Annotations:—**Consd.** *Re* Vexatious Actions Act, 1896, *Re* Boaler, [1914] 1 K. B. 122. **Refd.** *Re* Vexatious Actions Act, 1896, *Re* Boaler, [1915] 1 K. B. 21, C. A.

72. —— Execution.]—The word "proceeding" in ss. 85, 87, included execution under a judgment in an action (JESSEL, M.R.).—*Re* ARTISTIC COLOUR PRINTING CO. (1880), 14 Ch. D. 502; 49 L. J. Ch. 526; 42 L. T. 802; 28 W. R. 943.

For full anns., *see* COMPANIES.

73. Evidence Act, 1851 (c. 99), s. 13—Action.]—An action in a superior ct. is a "proceeding" in which a certified copy of a record is admissible as evidence of the record under the above sect.—RICHARDSON *v.* WILLIS (1872), L. R. 8 Ex. 69; 42 L. J. Ex. 15; 27 L. T. 828; 12 Cox, C. C. 298.

74. Judicature Act, 1873 (c. 66)—Not step in action.]—In s. 89, "proceeding" is used for "action," not for any step in an action.—PRYOR *v.* CITY OFFICES CO. (1883), 10 Q. B. D. 504; 52 L. J. Q. B. 362; 48 L. T. 698; 31 W. R. 777, C. A.

Annotations:—**Refd.** Speers *v.* Daggers (1885), Cab. & El. 503; R. *v.* Selfe, [1908] 2 K. B. 121. **Mentd.** Darlow *v.* Shuttleworth, [1902] 1 K. B. 721.

75. —— Not order of reference.]—An order of reference to a master made under C. L. P. Act, 1854 (c. 125), by consent is not a "proceeding in the High Ct." within Jud. Act, 1875, O. 55.—WIMSHURST, HOLLICK & CO. *v.* BARROW SHIPBUILDING CO. (1877), 2 Q. B. D. 335; 46 L. J. Q. B. 477; 25 W. R. 557.

Annotations:—**Distd.** Hyde *v.* Beardsley (1886), 35 W. R. 140. **Refd.** Penrice *v.* Williams (1883), 31 W. R. 496.

76. —— Not voluntary arbitration.]—Where parties agree to refer their disputes to arbn., no action having been brought in respect of those disputes, the ct. or a judge has no power under R. S. C., O. 37, r. 5, to order the issue of a commission for examination of witnesses in the matter referred to arbn., since the arbn. is not a "proceeding" in the High Ct. within Jud. Act, 1873 (c. 66), s. 100.—*Re* SHAW & RONALDSON, [1892] 1 Q. B. 91; 61 L. J. Q. B. 141; 8 T. L. R. 85. S. C. No. 99, *post*.

Annotation:—**Refd.** *Re* Colman & Watson (1907), 97 L. T. 857, C. A.

77. —— R. S. C., O. 64, r. 13—Not proceeding after judgment.]—"Proceeding" in this rule means a proceeding towards & not after judgment.—HOULSTON *v.* WOODALL (1884), 78 L. T. Jo. 113, C. A.

Annotation:—**Extd.** Taylor *v.* Roe (1893), 62 L. J. Ch. 391.

78. Public Authorities Protection Act, 1893 (c. 61), s. 2—Not action for penalties.]—In an action under Municipal Corpns. Act, 1882 (c. 50), s. 224, to recover penalties:—*Held*: the action was not a "proceeding" to which the Act of 1893 applied.—HUMPHRISS *v.* WORWOOD (1894), 64 L. J. Q. B. 437.

79. Public Health Act, 1875 (c. 55), s. 107.]—"Proceedings" within the above sect. mean the ordinary proceedings known to the law, &, in the absence of special damage, a local authority cannot sue in respect of a public nuisance except with the sanction of the A.-G. by action in the nature of an information.—TOTTENHAM URBAN DISTRICT COUNCIL *v.* WILLIAMSON & SONS, LTD., [1896] 2 Q. B. 353; 65 L. J. Q. B. 591; 75 L. T. 238; 60 J. P. 725; 44 W. R. 676, C. A.

Annotations:—**Folld.** Stoke Parish Council *v.* Price, [1899] 2 Ch. 277. **Distd.** Sheringham U. D. C. *v.* Holsey (1904), 91 L. T. 225.

80. Railway & Canal Traffic Act, 1854 (c. 31), s. 6—Action, set-off & counterclaim.]—"Proceeding" in the above sect. includes "action," "set-off," & "counterclaim," none of which can be maintained for a breach of s. 2.—MANCHESTER, SHEFFIELD, & LINCOLNSHIRE RY. CO. *v.* DENABY MAIN COLLIERY CO. (1884), 14 Q. B. D. 209; 54 L. J. Q. B. 103; 52 L. T. 598; 49 J. P. 181; 33 W. R. 491; 1 T. L. R. 106; 4 Ry. & Can. Tr. Cas. 437; varied without reference to this point, 11 App. Cas. 97, H. L.

Annotations:—**Folld.** Rhymney Ry. Co. *v.* Rhymney Iron Co. (1890), 25 Q. B. D. 146, C. A. **Refd.** Liverpool Corn Trade Assocn. *v.* L. & N. W. Ry. Co. (1890), 63 L. T. 564. **Mentd.** Bannatyne *v.* G. S. & W. Ry. Co. of Ireland (1904), 12 Ry. & Can. Tr. Cas. 105, Ir.; A.-G. *v.* Long Eaton U. D. C., [1914] 2 Ch. 251; Chance *v.* G. W. Ry. Co. (1914), 15 Ry. & Can. Tr. Cas. 241.

81. Railway Act—Taxation of costs.]—Taxation of costs in an action previously pending is a "proceeding" within 30 & 31 Vict. c. ccix., s. 4, which cannot under that Act be continued until leave of the Ct. of Ch. for that purpose has been obtained.—R. *v.* LONDON, CHATHAM, & DOVER RY. CO., *Ex p.* LONDON, BRIGHTON, & SOUTH COAST RY. CO. (1868), L. R. 3 Q. B. 170; 37 L. J. Q. B. 75; 17 L. T. 581; 16 W. R. 487.

82. Real Property Limitation Act, 1874 (c. 57), s. 8—Actions & suits.]—In an action to enforce personal liability on the covenant for payment in a mtge. deed:—*Held*: the words "action, suit, or other proceeding" within the above sect. included proceedings at law (which are called actions) & in equity (which are called suits), & that sect. applied so as to bar the remedy in 12 years.—SUTTON *v.* SUTTON (1882), 22 Ch. D. 511; 52 L. J. Ch. 333; 48 L. T. 95; 31 W. R. 369, C. A. S. C. Nos. 18, 43, 65, *ante*.

Annotations:—**Folld.** Fearnside *v.* Flint (1883), 22 Ch. D. 579. **Distd.** *Re* Powers, Lindsell *v.* Phillips (1885), 30 Ch. D. 291. **Consd.** *Re* Frisby, Allison *v.* Frisby (1889), 43 Ch. D. 106, C. A. **Expld.** *Re* Turner's Estate, Turner *v.* Spencer (1894), 13 R. 132. **Explд. & Apld.** *Re* England, Steward *v.* England, [1895] 2 Ch. 820, C. A. **Distd.** Barnes *v.* Glenton, [1899] 1 Q. B. 885, C. A. **Folld.** Kirkland *v.* Peatfield, [1903] 1 K. B. 756. **Apld.** Shaw *v.* Crompton, [1910] 2 K. B. 370; *Re* Turner, Klaftenberger *v* Groombridge, [1917] 1 Ch. 422. **Refd.** Firth *v.* Slingsby (1888), 58 L. T. 481; Kibble *v.* Fairthorne, [1895] 1 Ch. 219; London & Midland Bank *v.* Mitchell, [1899] 2 Ch. 161; Hervey *v.* Wynn (1905), 22 T. L. R. 93; *Re* Lacey, Howard *v.* Lightfoot, [1907] 1 Ch. 330, C. A. **Mentd.** Powell *v.* Kempton Park Racecourse, [1897] 2 Q. B. 242, C. A.; De Beauvais *v.* Green (1906), 22 T. L. R. 816.

83. "Civil proceeding"—Bankruptcy Act, 1890 (c. 71), s. 1.]—Upon an application by originating summons under R. S. C., O. 54, an order under

PART I. SECT. 1, SUB-SECT. 3.

a. *Real Property Limitation Act*, 1833 (c. 27)—*Mortgagee exercising power of sale*.]—The effect of s. 40 of the above Act, which deals with the personal remedy of a mtgee., is not to extinguish absolutely the mtge. debt, but to bar any remedy by action, suit, or other proceeding to recover it:—*Qu.* whether the exercise by a mtgee. of his power of sale is a "proceeding" within the above sect., that not being a proceeding *ejusdem generis* with "action" or "suit."—CAMPBELL *v.* DISTRICT LAND REGISTRAR, AUCKLAND (1909), 28 N. Z. L. R. 816.—**NZ.**

Arbn. Act, 1889 (c. 49), s. 12, was obtained to enforce an award in the same manner as a judgment or order to the same effect; & the goods of the debtor were seized & sold by the sheriff under a writ of *fi. fa.*:—*Held:* (1) the summons was a "civil proceeding" in the High Ct.; (2) the issue of the writ of *fi. fa.* was a "process in a civil proceeding"; (3) as debtor's goods had been seized & sold thereunder by the sheriff, debtor had committed an act of bkpcy. under Bkpcy. Act, 1890, s. 1.—*Re* A BANKRUPTCY PETITION, *Ex p.* CAUCASIAN TRADING CORPN., LTD., [1896] 1 Q. B. 368; 74 L. T. 47; 12 T. L. R. 226; *sub nom. Re* B., *Ex p.* CAUCASIAN TRADING CORPN., LTD., 65 L. J. Q. B. 346; *sub nom. Re* BIRCH, *Ex p.* CAUCASIAN TRADING CORPN., LTD., 44 W. R. 439; 3 Mans. 1, C. A.

Annotations:—**Refd.** China Steam Navigation Co. *v.* Van Laun (1905), 22 T. L. R. 26; *Re* A Debtor (1906), 96 L. T. 131, C. A.; *Re* A Bkpcy. Notice, [1907] 1 K. B. 478, C. A.; *Re* Colman, [1908] 1 K. B. 47, C. A.

84. "Judicial proceedings"—Commissioners for Oaths Act, 1889 (c. 10), s. 7.]—C. was charged with suborning P. to commit perjury in an affidavit sworn in an action brought by C. against a fictitious deft., & P. was charged with perjury in the same connection. The defence suggested was that such an action was not a judicial proceeding & that there could be no perjury in law:—*Held:* the action had been regularly commenced by a writ & followed by a judgment, & was a "judicial proceeding."—R. *v.* CASTIGLIONE & PORTEOUS (1912), 106 L. T. 1023; 76 J. P. 351; 28 T. L. R. 403; 23 Cox, C. C. 46; 7 Cr. App. Rep. 233, C. C. A.

85. "Legal proceedings"—Commencement of—Counterclaim—Arbitration Act, 1889 (c. 49), s. 4.]—*Semble:* the delivery of a counterclaim is the commencement of "legal proceedings" within the above sect.—CHAPPELL *v.* NORTH, [1891] 2 Q. B. 252; 60 L. J. Q. B. 554; 65 L. T. 23; 40 W. R. 16; 7 T. L. R. 563.

Annotations:—**Consd.** Brighton Marine Palace & Pier, Ltd. *v.* Woodhouse, [1893] 2 Ch. 486; Ives & Barker *v.* William, [1894] 1 Ch. 68; Bartlett *v.* Ford's Hotel Co., [1895] 1 Q. B. 850, C. A. **Folld.** County Theatres & Hotels, Ltd. *v.* Knowles, [1902] 1 K. B. 480, C. A.

86. —— —— ——.]—Where there is an agreement to refer the subject-matter of a counterclaim, the counterclaim will be stayed, on the application of pltf.—SPARTALI & CO. *v.* VAN HOORN (1884), Bitt. Rep. in Ch. 218.

87. —— Vexatious Actions Act, 1896 (c. 51), s. 1.]—The Act applies to the institution of civil proceedings only, & criminal offences are not within the words "legal proceedings"; an order made against a person in the terms of the Act prohibiting him from instituting any "legal proceedings" in the High Ct. or any other ct. should be limited to civil proceedings.—*Re* VEXATIOUS ACTIONS ACT, 1896, *Re* BOALER, [1915] 1 K. B. 21; 83 L. J. K. B. 1629; 111 L. T. 497; 30 T. L. R. 580; 58 Sol. Jo. 634; 24 Cox, C. C. 335; 78 J. P. Jo. 280, C. A.

88. "Proceedings commenced by a writ"—R. S. C., O. 5, rr. 13, 14.]—An originating summons was taken out in the L. District Registry asking for an account & the appointment of a new trustee:—*Held:* deft. was not entitled as of right to have the proceedings removed to London, as they were not "proceedings commenced by a writ."—*Re* THWAITES, YERBURGH *v.* ASTON (1890), 63 L. T. 747.

89. Taking proceedings—What amounts to.]—W. having refused to pay calls on certain shares, the co. commenced an action to enforce payment, & on July 12 applied for final judgment under R. S. C., O. 14. W. filed an affidavit in opposition to the application, alleging that he had been induced to take the shares by misrepresentation, & stating that he intended to counterclaim for rescission on that ground. Leave to defend was given. A petition for winding up the co. was presented on July 22, & W. delivered his defence & counterclaim on Aug. 2. A winding up order was made on the petition on Aug. 3. W. applied to have his name removed from the list of contributories:—*Held:* W. having asserted his right to repudiate the shares in the affidavit on which he obtained leave to defend the application under R. S. C., O. 14, he had in substance taken legal steps before commencement of the winding up to have his name removed from the register.—*Re* GENERAL RAILWAY SYNDICATE, WHITELEY'S CASE, [1900] 1 Ch. 365; 69 L. J. Ch. 250; 82 L. T. 134; 48 W. R. 443; 16 T. L. R. 176; 44 Sol. Jo. 228; 8 Mans. 74, C. A.

90. Instituting proceedings—What amounts to.]—Deft., a married woman, entered a caveat against the will under which pltf. was extrix.; pltf. gave warning to deft. to enter an appearance to the caveat, & deft entered such appearance. Pltf. then issued a writ in an action, & established the will. On motion by pltf. that the costs might under the above sect. be paid out of property to which deft. was entitled for her separate use without power of anticipation:—*Held:* neither by the entry of the caveat nor by the appearance of the caveator to the caveat warning was the proceeding "instituted" within that sect.—MORAN *v.* PLACE, [1896] P. 214; 65 L. J. P. 83; 74 L. T. 661; 44 W. R. 593; 12 T. L. R. 407; 40 Sol. Jo. 514, C. A.

Annotations:—**Distd.** Nunn *v.* Tyson, [1901] 2 K. B. 487. **Expld.** Crickett *v.* Crickett, [1902] P. 177, C. A. **Refd.** Salter *v.* Salter (1896), 65 L. J. P. 117, C. A.

SUB-SECT. 4.—CAUSE OR MATTER.

91. "Cause."]—The word "cause" in Eccles. Cts. Act, 1812 (c. 127), s. 1, is not a technical word, but means *causa jurisdictionis*, any suit, action, matter, or other similar proceeding competently brought before & litigated in a particular ct. (LORD SELBORNE, C.).—GREEN *v.* PENZANCE (LORD) (1881), 6 App. Cas. 657, 671; 45 L. T. 353; 46 J. P. 115; 30 W. R. 218; *sub nom. Re* GREEN, 51 L. J. Q. B. 25, H. L. S. C. No. 308, *post*.

Annotations:—**Refd.** The Tynwald, [1895] P. 142. **Mentd.** Enraght *v.* Penzance (1882), 7 App. Cas. 240; Sweet *v.* Ely (1902), 86 L. T. 679.

92. —— Interpleader suit.]—An interpleader suit was not a "cause" within Cty. Cts. Act, 1880 (c. 61), s. 14, which enabled "either party in any cause" to appeal.—BESWICK *v.* BOFFEY (1854), 9 Exch. 315; 23 L. J. Ex. 89; 22 L. T. O. S. 214; 18 J. P. 151; 2 W. R. 156; 2 C. L. R. 503; 156 E. R. 134.

Annotations:—**Apld.** Mason *v.* Wirral H. B. (1879), 4 Q. B. D. 459. **Refd.** Fraser *v.* Fothergill (1854), 23 L. J. C. P. 53.

93. —— Garnishee order.]—MASON *v.* WIRRAL HIGHWAY BOARD, No. 23, *ante*.

94. "Cause or matter"—Application for rule nisi—Order as to Supreme Court Fees, 1884.]—An application for a rule ordering a metropolitan police magistrate to hear an application for a summons for libel:—*Held:* "a cause or matter for trial" within fee 52 in the above Order, the words not being confined to cases where the matter for hearing arises in an action, but extending to any matter entered for hearing.—*Ex p.* HASKER (1884), 14 Q. B. D. 82; 54 L. J. M. C. 94.

Annotation:—**Distd.** *Re* A Solr., *Ex p.* Dudley (1885), 33 W. R. 750.

95. —— Action for recovery of rents & profits of real estate.]—An action by an infant heir-at-law against the widow & administratrix of an intestate, claiming an account of the personal estate & an account of the rents & profits of the real estate, is not a "cause or matter relating to any real estate" within R. S. C., O. 51, r. 1.—*Re* STAINES, STAINES *v.* STAINES (1886), 33 Ch. D. 172; 55 L. J. Ch. 913; 35 W. R. 75.

96. —— Order of reference under Arbitration Act, 1889 (c. 49), s. 14.]—An order of reference under the above sect. is not an order in any "cause or matter" within s. 15 of the Act.—DARLINGTON WAGON CO. *v.* HARDING & TROUVILLE PIER &

Sect. 1.—*Action & other like terms: Sub-sects.* 4 *& 5. Sect.* 2.—*Cause of Action: Sub-sects.* 1 *&* 2, *A.*]

STEAMBOAT CO., LTD., [1891] 1 Q. B. 245; 60 L. J. Q. B. 110; 64 L. T. 409; 39 W. R. 167; 7 T. L. R. 106, C. A.

Annotation:—**Refd.** M'Alpine *v.* Calder (1893), 9 T. L. R. 219.

97. "Matter"—Originating summons.]—An originating summons, though not a "cause," is a "matter." Where proceedings for the appointment of new trustees & the vesting of the trust estate have been commenced by originating summons under R. S. C., O. 55, r. 13a, a vesting order made on motion in the proceedings is made "on motion in a matter" within Trustee Act, 1850 (c. 60), s. 43.—*Re* JONES (1889), 59 L. J. Ch. 157; 61 L. T. 554; 38 W. R. 203; 6 T. L. R. 49.

98. —— Compulsory arbitration.]—A co. whose property consisted of gold mines in India, having passed resolutions for voluntary liquidation & reconstruction, a dissentient member of the liquidating co., in an arbn. under Cos. Act, 1862 (c. 89), ss. 161, 162, claimed to have his interest valued at the price at which the shares in the new co. were issued under the scheme of reconstruction; but the liquidators claimed that such interest should be valued on the footing of a realisation of the assets, & took out a summons entitled "*In the Matter of Cos. Acts*, 1862 *&* 1867," for a commission to India to examine witnesses as to the value of the property:—*Held:* (1) the application was made in a "matter" within Jud. Act, 1873 (c. 66), s. 100, & R. S. C., O. 37, r. 5; (2) in the circumstances the ct. would make the order, as being necessary for the purposes of justice within the above rule.—*Re* MYSORE WEST GOLD MINING CO., LTD. (1889), 42 Ch. D. 535; 58 L. J. Ch. 731; 61 L. T. 453; 37 W. R. 794; 5 T. L. R. 695; 1 Meg. 347.

For full anns., *see* COMPANIES.

99. —— Voluntary arbitration.]—There is no jurisdiction under R. S. C., O. 37, r. 5, to order the issue of a commission for examination of witnesses in a reference to arbn. by consent out of ct., since the arbn. is not a "matter" within the above rule. —*Re* SHAW & RONALDSON, No. 76, *ante*.

Annotation:—**Refd.** *Re* Colman & Watson (1907), 97 L. T. 857, C. A.

100. —— Summons for assaulting county court officer—County Courts Act, 1888 (c. 43), ss. 48, 120.]—The word "matter" in s. 120 of the above Act only applies to civil actions and matters, & does not extend to an order of a cty. ct. judge imposing a fine under s. 48 for an assault upon an officer of the ct. in execution of his duty, & no appeal lies from such an order.—LEWIS *v.* OWEN, [1894] 1 Q. B. 102; 63 L. J. Q. B. 233; 69 L. T. 861; 58 J. P. 263; 42 W. R. 254; 10 T. L. R. 39; 38 Sol. Jo. 27; 10 R. 59, C. A.

101. —— Misfeasance summons.]—A misfeasance summons under Cos. Winding-up Act, 1890 (c. 63), s. 10 (*see, now*, Cos. (Consolidation) Act, 1908 (c. 69), s. 215), is a "matter" within R. S. C., O. 65, r. 27 (48), which provides for allowance of refresher fees.—*Re* ANGLO-AUSTRIAN PRINTING & PUBLISHING UNION, [1894] 2 Ch. 622; 63 L. J. Ch. 632; 71 L. T. 331; 38 Sol. Jo. 513; 42 W. R. 648; 1 Mans. 361; 8 R. 510.

102. —— Motion to set aside award.]—A motion to set aside an award is a "matter" within R. S. C., O. 31, r. 15, which provides that every party to a "cause or matter" shall be entitled to give notice to produce documents referred to in pleadings or affidavits.—*Re* FENNER & LORD, [1897] 1 Q. B. 667; 66 L. J. Q. B. 498; 76 L. T. 376; 45 W. R. 486, C. A.

103. —— Order for taxation.]—An order for taxation obtained by a client is a "matter" within Attorneys & Solicitors Act, 1874 (c. 68), s. 12, which enacts that no costs &c. of any act done by a person, who acts as solr. without being duly qualified so to act, shall be recoverable in any "action, suit, or matter."—*Re* SWEETING, [1898] 1 Ch. 268; 67 L. J. Ch. 159; 78 L. T. 6; 14 T. L. R. 171; 46 W. R. 242.

Annotation:—**Folld.** Browne *v.* Barber, [1913] 2 K. B. 553, C. A.

SUB-SECT. 5.—UNDER COLONIAL STATUTES AND RULES.

See cases *infra*.

PART I. SECT. 1, SUB-SECT. 5.

b. *Action—Appeal causes in county court.*]—Popularly speaking, suits brought into the cty. ct. by appeal are spoken of as appeal causes only, & not as "actions." Cty. Cts. Consolidation Act (Nova Scotia), 1889 (c. 9), s. 64, providing for appeals in all "actions" does not extend to appeals by a garnishee, appeals relating to removal of paupers, bastardy proceedings, etc.—HALIFAX PILOT COMMRS. *v.* FARQUHAR (1894), 26 N. S. R. 333.—**CAN.**

c. —— *Counterclaim.*]—A counterclaiming deft. is not a plff. in an action; nor is a counterclaim an "action."—IRWIN *v.* BROWN (1888), 12 P. R. 639.—**CAN.**

d. —— ——.]—An answer to a counterclaim is termed a defence in the Practice Rules (Ontario).—IRWIN *v.* TURNER (1895), 16 P. R. 349.—**CAN.**

e. —— *Execution.*]—Limitations Act (Ontario), 1910 (c. 34), Part III., of which s. 49 is the first sect., is headed "Personal Actions," a well-understood term which clearly does not include the issue or renewal of a writ of execution.—POUCHER *v.* WILKINS (1915), 33 O. L. R. 125; 7 O. W. N. 670.—**CAN.**

f. —— *Garnishee proceeding.*]—For some purposes of Division Cts. Act, R. S. O. 1887 (c. 51), a distinction is made between an "action" or "cause" and a garnishee proceeding, but not for purposes of transfer.—*Re* MCCABE *v.* MIDDLETON (1896), 27 O. R. 170.—**CAN.**

g. —— *Habeas corpus.*]—A prisoner can obtain relief in the cty. ct. under the Act "Of the Liberty of the Subject." As regards that Act the cty. ct. has concurrent jurisdiction with the S. C., but the proceeding is not an "action," & there is no provision for an appeal. —*Re* HARRIS (1894), 26 N. S. R. 508.—**CAN.**

But *see* Cty. Ct Act (Nova Scotia), R. S., 1900 (c. 156), s. 35.

h. —— *Information.*]—O. 1, r. 1, provides that all actions & suits which previous to Oct. 1, 1884, were commenced by writ, bill, or information in the S. C., shall be instituted in the ct. by a proceeding to be called "an action":—*Held:* the word "information" in the rule must be read in the same sense as the corresponding word in the English rule (O. 1, r. 1), as referring exclusively to informations in Chancery, & would not cover an information in the nature of a *quo warranto*. —A.-G. *v.* BERGEN (1896), 29 N. S. R. 135.—**CAN.**

i. —— —— *Limitations Act (Ontario).*]—The word "action" in Limitations Act (c. 34), s. 49, is used in its ordinary sense & only applies to an action or proceeding in the nature of an action. The interpretation section (s. 2 (*a*)), which reads "'action' shall include an information on behalf of the Crown, and any civil proceeding," does not extend the ordinary meaning of the word.—POUCHER *v.* WILKINS (1915), 7 O. W. N. 670; 33 O. L. R. 125.—**CAN.**

j. —— *Interpleader.*] — An interpleader issue is within the meaning of the words "action at law" in Administration of Justice Act, 1873, s. 24, & an order to examine deft. may be made. — CANADA PERMANENT BUILDING SOCIETY *v.* FOREST (1874), 6 P. R. 254.—**CAN.**

k. —— ——.]—R. 641 (c) (Ontario) does not apply to interpleader issues at all. It is confined to actions, & an interpleader proceeding is not an "action" (citing *Hamlyn* v. *Betteley* (1880), 6 Q. B. D. 63).—HOGABOOM *v.* GILLIES (1895), 16 P. R. 402.—**CAN.**

l. —— *Matrimonial suit.*]—The term "civil action," in Jury Act, 1862, s. 44, & Jury Act Further Amendment Act, 1907, s. 2, does not include a matrimonial suit.—RAMSAY *v.* RAMSAY & LETT, [1914] S. A. R. 246.—**AUS.**

m. —— *Petition for payment out under Trustee Relief Act, 1847 (c. 96).*]—In the matter of a petition for payment out of ct. of moneys paid in under the above Act, it was sought under R. S. C. (Ir.), O. 15, r. 13, to have a person appointed to represent the estate of a deceased person. The rule provided for this course to be taken "in any action or suit":—*Held:* "action" for this purpose did not, but "suit" did, include a petition for payment out of ct.—*Re* WALLIS' TRUSTS, *Ex p.* WALLIS (1888), 23 L. R. Ir. 7.—**IR.**

n. —— *Petty sessions order — Enforcement of.*]—A proceeding to en-

SECT. 2.—CAUSE OF ACTION.

SUB-SECT. 1.—DEFINITION.

104. Cause of complaint.]—In its popular meaning, the term "cause of action" means the act on the part of deft. which gives pltf. his cause of complaint. —JACKSON *v.* SPITTALL (1870), L. R. 5 C. P. 542; 39 L. J. C. P. 321; 22 L. T. 755; 18 W. R. 1162.

Annotations :—**N.F.** Cherry *v.* Thompson (1872), L. R. 7 Q. B. 573. **Distd.** Payne *v.* Hogg, [1900] 2 Q. B. 43, C. A. **Refd.** Northey Stone Co. *v.* Gidney, [1894] 1 Q. B. 99, C. A. **Mentd.** Durham *v.* Spence (1870), L. R. 6 Exch. 46; MacMahon *v.* Irish N. W. Ry. Co. (1870), 19 W. R. 212, C. A.; Cooke *v.* Gill (1873), 42 L. J. C. P. 98; Vaughan *v.* Weldon (1874), L. R. 10 C. P. 47; Rayment *v.* Rayment, [1910] 1 P. 271.

105. ——.]—In C. L. P. Act, 1852 (c. 76), ss. 18, 19, the words "cause of action" mean the act on the part of deft. which gives pltf. his cause of complaint; & a pltf. who has issued a writ under either of these sects. is not bound to prove that every circumstance necessary to sustain his case occurred within the jurisdiction.—VAUGHAN *v.* WELDON (1874), L. R. 10 C. P. 47; 44 L. J. C. P. 64; 31 L. T. 683; 23 W. R. 138.

106. Material facts.]—"Cause of action" has been held from the earliest times to mean every fact which is material to be proved to entitle pltf. to succeed—every fact which deft. would have a right to traverse.—COOKE (COOK) *v.* GILL (1873), L. R. 8 C. P. 107; 42 L. J. C. P. 98; 28 L. T. 32; 21 W. R. 334.

Annotations :—**Folld.** Whinney *v.* Schmidt (1873), L. R. 8 C. P. 118; Read *v.* Brown (1888), 22 Q. B. D. 128, C. A.; Whitehead *v.* Butt (1891), 7 T. L. R. 609. **Refd.** Northey Stone Co. *v.* Gidney, [1894] 1 Q. B. 99, C. A.; Payne *v.* Hogg, [1900] 2 Q. B. 43, C. A.; Isaacs *v.* Salbstein, [1916] 2 K. B. 139, C. A. **Mentd.** Quartley *v.* Timmins (1874), L. R. 9 C. P. 416; Jacobs *v.* Brett (1875), L. R. 20 Eq. 1; Johnstone *v.* Benham (1888), 4 T. L. R. 313; Cowan *v.* O'Connor (1888), 57 L. J. Q. B. 401; Broad *v.* Perkins (1888), 4 T. L. R. 545, C. A.; Coburn *v.* Colledge (1896), 66 L. J. Q. B. 213.

107. ——.]—A "cause of action" means every fact which it would be necessary for pltf. to prove, if traversed, in order to support his right to the judgment of the ct. It does not comprise every piece of evidence necessary to prove each fact, but every fact necessary to be proved.—READ *v.* BROWN (1888), 22 Q. B. D. 128; 58 L. J. Q. B. 120; 60 L. T. 250; 37 W. R. 131; 5 T. L. R. 97, C. A.

Annotations :—**Folld.** Whitehead *v.* Butt (1891), 7 T. L. R. 609. **Distd.** Northey Stone Co. *v.* Gidney, [1894] 1 Q. B. 99, C. A. **Expld. & Folld.** Coburn *v.* Colledge, [1897] 1 Q. B. 702, C. A. **Mentd.** Bennett *v.* White, [1910] 2 K. B. 643, C. A.

108. Definition for statutory purposes.]—In Frivolous Arrests Act, 1725 (c. 29), & 5 Geo. 2, c. 27, the words "cause of action" meant the damages laid in the declaration, not those found by the verdict. —GILMORE *v.* HORTON (1733), 7 Mod. Rep. 190; Ridg. *temp.* H. 29; 87 E. R. 1182.

SUB-SECT. 2.—WHERE IT ARISES.

A. In General.

109. Partnership—Place of business.]—A. resided & carried on business at M., & B., who had various places of business elsewhere, agreed with A. to carry on a partnership business in certain transactions at M., where the books were kept & advances made by A. At the close of the partnership affairs, which were attended with loss, a balance was struck showing a debt due by B. to A. :—*Held* : the cause of action accrued at M.—LUCHMEECHUND *v.* MULL (1860), 3 L. T. 603.

110. Policy of insurance—Not place of payment.] —A declaration upon a policy of insurance from Baltimore to Liverpool alleged a total loss by perils of the seas. The ct. refused to allow the venue to be changed from Lancashire to London, upon the usual affidavit that the cause of action arose in London & not elsewhere, the declaration showing that such statement could not be correct, although the policy was effected & the loss was payable in London.—BUTLER *v.* FOX (1849), 7 C. B. 970; 18 L. J. C. P. 304; 13 L. T. O. S. 258; 137 E. R. 384.

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force an order, made by a ct. of petty sessions under Imprisonment of Fraudulent Debtors Act, 1915, is not an "action" within s. 79 (i) (*c*) (vi) of Supreme Court Act, 1915; s. 213 of Justices Act, 1915, does not apply.—COOPER & SONS *v.* DAWSON (1916), V. L. R. 381.—**AUS.**

o. —— *Amendment of style of cause.*] —An order was made directing proceedings to be continued in another name, owing to a devolution of interest, & directing an amendment of style of cause :—*Held* : the judge had jurisdiction to make *ex p.* an order for carrying on the proceedings by another person, but the amendment to the style of cause could not be so made, that being a "proceeding" within r. 973 & requiring a month's notice as prescribed by that rule.—GOLDSTEIN *v.* VANCOUVER TIMBER & TRADING CO. (1912), 21 W. L. R. 561; 2 W. W. R. 722; 4 D. L. R. 172, B. C. R.—**CAN.**

p. *Suit—Petition for payment out under Trustee Relief Act*, 1847 (c. 96).] —*Re* WALLIS' TRUSTS, *Ex p.* WALLIS, p. 12, m, *ante*.

q. *Cause—Garnishee proceeding.*]—*Re* MCCABE *v.* MIDDLETON, p. 12, f, *ante*.

PART I. SECT. 2, SUB-SECT. 1.

104 i. *Cause of complaint.*]—"Cause of action" means the act or omission constituting the violation of the duty complained of.—MACKEN *v.* ELLIS (1874), I. R. 8 C. L. 151.—**IR.**

106 i. *Material facts.*]—"Cause of action" means that bundle of essential facts which it is necessary for a pltf. to prove before he can succeed.—MUSA YAKUB *v.* MANILAL (1905), I. L. R. 29 Bom. 368.—**IND.**

106 ii. ——.]—"Cause of action" is a well-understood phrase & comprises "every fact which it would be necessary for pltf. to prove, if traversed, to support his right to the judgment of the ct." (*Read* v. *Brown* (1888), 22 Q. B. D. 128 refd. to). "A cause of action arises" (within the meaning of Limitations Act (Ontario) at the time when the debt could first have been recovered by action (citing *Reeves* v. *Butcher*, [1891] 2 Q. B. 509).—POUCHER *v.* WILKINS (1915), 33 O. L. R. 125; 7 O. W. N. 670.—**CAN.**

108 i. *Definition for statutory purposes—Civil Bill Courts (Ireland) Act*, 1851 (*c.* 57), *s.* 40.]—Pltf. had been arrested in the county of Kerry, under a judge's *fiat*, founded upon an affidavit made in that county, but obtained in Dublin. In an action for malicious arrest :—*Held* : (1) the cause of action consisted not merely of the arrest & the swearing of the affidavit upon which the *fiat* was founded, but also included the presenting of that affidavit to the judge, & obtaining his *fiat* thereon; (2) the words "cause of action" in the above sect. meant the whole cause of action.—HURLY *v.* LAWLOR (1854), 6 Ir. Jur. O. S. 344 (E.).—**IR.**

108 ii. —— *Civil Procedure Code (India) (VIII. of* 1859), *s.* 5.]—*Semble* : the words "cause of action" in the above sect. do not mean the whole cause of action.—HILLS *v.* CLARK (1874), 14 B. L. R. 367; 23 W. R. 63.—**IND.**

108 iii. —— *Civil Procedure Code (India)*, 1882, *s.* 43.]—The whole of the claim pltf. is entitled to make in respect of the cause of action in the above sect. means the entire claim which pltf. has against deft. at the time the action is brought in respect of any failure to accept & pay for goods purchased under one contract, & the whole of such claim must be included in one action. The expression "cause of action" is to be construed with reference to the substance rather than the form of the action.—DUNCAN BROTHERS & Co. *v.* JEETMULL GREEDHAREE LALL (1892), I. L. R. 19 Calc. 372.—**IND.**

108 iv. —— *Code of Civil Procedure (India) Act* (*X. of* 1877).]—The illustrations to s. 17 of the above Act afford no safe guide as to what is meant in the code by the term "cause of action." —LALJEE LALL *v.* HARDEV NARAIN (1882), I. L. R. 9 Calc. 105; 11 C. L. R. 12.—**IND.**

108 v. —— ——.] — The term "cause of action" as used in ss. 31 & 45 of the above Act is there used in the same sense as it is used in English law.— SALIMA BIBI *v.* MUHAMMAD (1895), I. L. R. 18 All. 131.—**IND.**

108 vi. ——. *Letters Patent (India)*, 1865, *s.* 12.]—In the case of an action on a contract, "cause of action" in the above sect. means the whole cause of action, & consists of the making of the contract & of its breach in the place where it ought to be performed.— DHUNJISHA NUSSERWANJI *v.* FFORDE (1887), I. L. R. 11 Bom. 649.—**IND.**

r. *Cause of action compared with title.*]—A pltf.'s cause of action is a very different thing from his title; the one being something done contrary to his interest, obliging him to seek the aid of a ct. of justice, the other being the proof that that something affords him a valid ground for relief.—DUDSAR BIBEE *v.* SHAKIR BURKUNDAZ (1871), 15 W. R. 168.—**IND.**

s. *Counts of declaration.*]—Counts of declaration are considered as distinct causes of action.—CRAVLEY *v.* WILSON (1850), 6 N. B. R. (1 All.) 704.—**CAN.**

Sect. 2.—Cause of Action: Sub-sects. 2, 3 & 4, A. & B.]

111. *S. P.* CAILLAND *v.* CHAMPION (1797), 7 Term Rep. 205; 101 E. R. 933.

Annotations:—**Folld.** Collins *v.* Jacobs (1803), 3 Bos. & P. 579. **Distd.** Wood *v.* Perkes (1819), 2 B. & Ald. 618. **Folld.** Butler *v.* Fox (1849), 7 C. B. 970. **Refd.** Cundell *v.* Harrison (1846), 16 L. J. Q. B. 81.

112. Sale of goods—Place of delivery.]—A vendee at Aberystwith gave an order for goods to the traveller of pltf., a deale in London, nothing being said about the mode of carriage:—*Held:* (1) it was to be presumed the goods were to be sent in the most usual & convenient way; (2) upon delivery of the goods to a carrier in London, a cause of action arose in London.—COPELAND *v.* LEWIS (1817), 2 Stark. 33.

113. Seamen's wages—Voyage.]—A., captain of an India country trader, contracted in India with B. for a crew according to the custom of the country; A. arrived in England with the crew, & made a voyage with them to the West Indies & back. An action was brought by part of the crew for wages due on the West India voyage. On a motion for a mandamus to examine witnesses in India:—*Held:* the cause of action did not arise in India within East India Co. Act, 1772 (c. 63), s. 44.—FRANCISCO *v.* GILMORE (1797), 1 Bos. & P. 177; 126 E. R. 845.

Cause of action arising abroad.]—*See* CONFLICT OF LAWS.

B. Within Jurisdiction of Mayor's Court, London: see MAYOR'S COURT, LONDON.

C. Within Jurisdiction of Salford Hundred Court: see COURTS.

D. Within Jurisdiction of County Courts: see COUNTY COURTS.

E. For the Purpose of Service out of the Jurisdiction: see PRACTICE & PROCEDURE.

SUB-SECT. 3.—WHEN IT ARISES.

A. For the Purposes of the Statutes of Limitation: see LIMITATION OF ACTIONS.

B. Continuing Causes of Action.

(*a*) *Obstruction, etc., of Watercourses: see* WATERS & WATERCOURSES.

(*b*) *Subsidence of Land caused by Mining: see* EASEMENTS & PROFITS À PRENDRE; MINES, MINERALS, & QUARRIES.

(*c*) *Obstruction to Light: see* EASEMENTS & PROFITS À PRENDRE.

(*d*) *Continuing Nuisances generally: see* NUISANCE.

(*e*) *Continuing Trespass: see* TRESPASS.

SUB-SECT. 4.—SEPARATION OF CAUSES OF ACTION AND SPLITTING DEMANDS.

A. In General.

114. General principle.]—It is a rule that when a thing directly wrongful in itself is done to a man, in itself a cause of action, he must, if he sues in respect of it, do so once & for all. As, if he is beaten or wounded, if he sues he must sue for all his damage, past, present, & future, certain & contingent. He cannot maintain an action for a broken arm, & subsequently for a broken rib, though he did not know of it when he commenced his first action. If he sustained two injuries from a blow, one to his person, another to his property, as, for instance, damage to his watch, there is no doubt that he could maintain two actions in respect of his one blow. The same would be true of an action for consequential damages. A man slandered by words actionable in themselves must sue, if at all, for all his damage in one action. Probably, if he sustained special damage, as that he lost a contract through being charged with theft, he might maintain one action for the actionable slander, another for the personal loss (LORD BRAMWELL).—DARLEY MAIN COLLIERY CO. *v.* MITCHELL, Nos. 118, 224, *post.*

For full anns., *see* S. C. No. 118, *post.*

115. ——.]—There is no positive law (except so far as the Cty. Cts. Acts have from a very early date dealt with the matter) against splitting demands which are essentially separable, although the High Ct. has inherent power to prevent vexation or oppression, & by staying proceedings or by apportioning the costs, would have always ample means of preventing any injustice arising out of the reckless use of legal procedure (BOWEN, L.J.).—BRUNSDEN *v.* HUMPHREY, No. 122, *post.*

For full anns., *see* S. C. No. 122, *post.*

116. —— **Dilapidation of rectory—Non-repair of chancel.**]—In an action against the exor. of a deceased rector for dilapidations to the chancel & pew, defts. pleaded that pltfs. had recovered in a previous action for want of reparation of the rectory house & other buildings belonging to the rectory, that the chancel & pew were in the same state as at the commencement of the former action, & that the compensation then claimed might have been recovered in the former action:—*Held:* the injury from dilapidation of the rectory could not be identified with non-repair of the chancel, & there was no entirety in the cause of action.—YOUNG *v.* MUNBY (1815), 4 M. & S. 183; 105 E. R. 802.

Annotations:—**Apld.** Warren *v.* Lugger (1849), 3 Exch. 579. **Refd.** Ross *v.* Adcock (1868), L. R. 3 C. P. 655.

117. Separate cause of action in respect of new subsidence.]—Where there is a claim against an administrator for money had & received by the intestate, for coal tortiously taken by him from pltf.'s land, & sold by him, & part has been raised

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PART I. SECT. 2, SUB-SECT. 4.—A.

t. *Fresh action for same cause—Special damage not identical.*]—A. sued B. by civil bill process, for having sold pltf. a cow, warranted sound, but which was unsound. The civil bill assigned as special damage that four other cows of pltf. became infected by her, & died. B. having been decreed in this suit, appealed, relying upon a decree against himself at a former sessions at the suit of A. immediately after the death of the particular cow, for breach of the above warranty. By that decree, deft. had been ordered to pay the value of the deceased cow:—*Held:* as both actions were in contract, & for substantially the same cause of action, although the special damage was not identical, pltf. was not entitled to recover. *Semble:* the result would have been the same had the second action been framed expressly in tort for the consequential damage.—GARDINER *v.* MATHEWSON (1853), 6 Ir. Jur. 147.—**IR.**

u. *Fresh action for integral part of original suit.*]—In Sept., 1883, pltfs., a firm of millers, delivered to defts. a quantity of flour to be carried on their ry., nine sacks being consigned to D., who had purchased same from pltfs., and the remainder being consigned to pltfs. themselves. Some of the flour received by pltfs., & the greater portion of that delivered to D., was damaged in the course of carriage. D. had used two & a half sacks before he discovered that it was contaminated, whereupon he returned five sacks to pltfs. & claimed from them damages for the sacks he had used. Pltfs. notified defts. of the damage & issued a civil bill process without, however, claiming in respect of the sacks used by D., & obtained a decree. D. then issued a civil bill against pltfs. for the two & a half sacks, & obtained a decree, & the amount was paid by pltfs. to D. Defts. were served with notice of D.'s civil bill. Pltfs. afterwards sued defts. to recover the amount they had been obliged to pay to D.:—*Held:* the injury to the two & a half sacks being an integral part of the cause of action arising from defts.' negligence in the carriage of the flour & for which pltfs. sued in the first civil bill process, the second civil bill action was not maintainable.—RUSSELL & SONS *v.* WATERFORD & LIMERICK RY. CO. (1885), 16 L. R. Ir. 314.—**IR.**

more than 6 months before intestate's death, & part within 6 months, pltf. may bring trespass, under Civil Procedure Act, 1833 (c. 42), s. 2, for so much as was raised within the 6 months, and also money had & received for so much as was raised before, the acts being distinct, and the two actions not incompatible.—POWELL *v.* REES (1837), 7 A. & E. 426; 2 Nev. & P. K. B. 571; Will. Woll. & Dav. 680; 8 L. J. Q. B. 47; 112 E. R. 530.

For full anns., *see* CONTRACT.

118. ——.]—When damage is caused to land by removal of the minerals under it & the consequent subsidence of the surface, the owner has a cause of action as often as such damage takes place.

Resp. was the owner of land, & in 1867 & 1868 applts. worked out the coal under the land without leaving proper support, in consequence of which the surface subsided, & some cottages belonging to resp. were injured. Applts. made compensation for the injury, & did not work the minerals after 1868. In 1882 a further subsidence occurred from the combined effect of the previous workings of applts. & workings under the adjoining land. Resp. brought an action to recover compensation for the injury he had sustained:—*Held:* (1) a new cause of action arose in respect of the second subsidence; (2) resp.'s right to maintain an action for the injury he had sustained was not barred by Stat. Limitations.—DARLEY MAIN COLLIERY CO. *v.* MITCHELL (1886), 11 App. Cas. 127; 55 L. J. Q. B. 529; 54 L. T. 882; 51 J. P. 148; 2 T. L. R. 301, H. L. S. C. No. 114, *ante*; No. 224, *post*.

Annotations:—**Folld.** Crumbie *v.* Wallsend L. B., [1891] 1 Q. B. 503, C. A. **Consd.** A.-G. *v.* Conduit Colliery Co., [1895] 1 Q. B. 301; Greenwell *v.* Low Beechburn Coal Co., [1897] 2 Q. B. 165. **Apld.** Jordeson *v.* Sutton Southcoates & Drypool Gas Co., [1898] 2 Ch. 614; Harrington *v.* Derby Corpn., [1905] 1 Ch. 205; Tunnicliffe & Hampson *v.* West Leigh Colliery Co., [1905] 2 Ch. 390; West Leigh Colliery Co. *v.* Tunnicliffe & Hampson, [1908] A. C. 27. **Distd.** Manley *v.* Burn, [1916] 2 K. B. 121, C. A. **Refd.** Brundsen *v.* Humphrey (1884), 14 Q. B. D. 141, C. A.; Markey *v.* Tolworth Joint Hospital District Board (1900), 69 L. J. Q. B. 738; Hall *v.* Norfolk, [1900] 2 Ch. 493; Tunnicliffe & Hampson *v.* West Leigh Colliery Co., [1906] 2 Ch. 22, C. A. **Mentd.** Serrao *v.* Noel (1885), 15 Q. B. D. 549, C. A.; Carey *v.* Bermondsey B. C. (1903), 2 L. G. R. 219, C. A.; Nash *v.* Rochford R. D. C., [1917] 1 K. B. 384, C. A.

See, further, EASEMENTS & PROFITS À PRENDRE; MINES, MINERALS, & QUARRIES.

119. Creditor's debt secured by mortgage—Action to recover residue of debt.]—A creditor whose debt is secured by pledge or mtge. necessarily resorts to legal proceedings to make his security available, &, if he realises only a portion of his debt, there is no reason why he should not have recourse to a common law ct. for the recovery of the residue (BYLES, J.).—NELSON *v.* COUCH (1863), 15 C. B. N. S. 99; 2 New Rep. 395; 33 L. J. C. P. 46; 8 L. T. 577; 10 Jur. N. S. 366; 11 W. R. 964; 1 Mar. L. C. 348; 143 E. R. 721.

For full anns., *see* ESTOPPEL.

120. —— ——.]—Deft. charged her property with repayment of £100 & interest to pltf., & gave him four supplementary charges to secure further advances. She then gave him another supplementary charge to secure a further advance & his professional costs. Pltf. brought an action on the first five charges, omitting the sixth, which was mislaid, & obtained an order for foreclosure *nisi*. He afterwards found the sixth charge, & applied for an order extending the relief to that charge, but his application was dismissed with costs. He then brought a fresh action for foreclosure on all six charges. Deft. took out a summons asking that the proceedings might be stayed on the ground that pltf. was estopped by the foreclosure order:—*Held:* (1) the subject-matter of the fresh action was not the same as that in the first action; (2) in the circumstances pltf. was not estopped from setting up his present case; (3) deft.'s application must be dismissed with costs.—BAKE *v.* FRENCH, [1907] 1 Ch. 428; 76 L. J. Ch. 299; 97 L. T. 131.

For full anns., *see* ESTOPPEL.

121. Sheriff's negligence—Money had & received.]—After the sheriff's death & before the appointment of his successor, the under-sheriff sold goods taken in execution before the death of the sheriff, & paid part of the proceeds to the execution creditors, but died before paying over the balance. The execution creditors, more than 6 months after the death of the under-sheriff, on entering upon the administration sued his exors. for negligence & extortion in the under-sheriff, & also for money had & received:—*Held:* (1) an action for money had & received would lie against exors. of the under-sheriff; (2) the action for money had & received, not requiring the same evidence to support it as the action for tort, might be brought although the tort had not been waived.—GLOUCESTERSHIRE BANKING CO. *v.* EDWARDS (1887), 19 Q. B. D. 575; 56 L. J. Q. B. 514; 35 W. R. 842; *affd.* 20 Q. B. D. 107, C. A.

B. Claims in Tort.

122. Same wrongful act—Two distinct torts—Injury to person—Damage to property.]—Damage to goods & injury to the person, although they have been occasioned by one & the same wrongful act, are infringements of different rights, & give rise to distinct causes of action; & the recovery in an action of compensation for the damage to the goods is no bar to an action subsequently commenced for the injury to the person.

Pltf. brought an action in a cty. ct. for damage to his cab occasioned by negligence of deft.'s servant, & having recovered the amount claimed, afterwards brought an action in the High Ct. against deft., claiming damages for personal injury sustained by pltf. through the same negligence:—*Held:* the action was maintainable & was not barred by the previous proceedings in the cty. ct.—BRUNSDEN *v.* HUMPHREY (1884), 14 Q. B. D. 141; 53 L. J. Q. B. 476; 51 L. T. 529; 49 J. P. 4; 32 W. R. 944, C. A. S. C. No. 115, *ante*.

Annotations:—**Expld.** Macdougall *v.* Knight (No. 2) (1890) 25 Q. B. D. 1, C. A. **Refd.** Edmonds *v.* Robinson (1885) 29 Ch. D. 170; Serrao *v.* Noel (1885), 15 Q. B. D. 549 C. A.; Darley Main Colliery Co. *v.* Mitchell (1886), 11 App. Cas. 127, H. L.; Lendon *v.* London Road Car Co. (1888), 4 T. L. R. 448; Midland Ry. Co. *v.* Martin, [1893] 2 Q. B. 172; James *v.* Evans (1897), 77 L. T. 78; Rose *v.* Buckett, [1901] 2 K. B. 449, C. A.; Furness, Withy *v.* Hall (1909), 25 T. L. R. 233; Isaacs *v.* Salbstein, [1916] 2 K. B. 139, C. A. **Mentd.** National Co. for Distribution of Electricity *v.* Gibbs (1901), 18 R. P. C. 393.

123. —— —— **Trespass to goods—Trover.**]—A recovery in trespass for taking & driving away a

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PART I. SECT. 2, SUB-SECT. 4.—B.

122 i. *Same wrongful act—Two distinct torts—Injury to person—Damage to property.*]—A judgment recovered by a widow, as administratrix of her husband, under Fatal Accidents Act, 1846 (c. 93), amended by Fatal Accidents Act, 1864 (c. 95), for damages for the death of her husband through negligence or breach of duty of defts. is no bar to a subsequent action brought by her, as administratrix of her husband, to recover damages for injuries, arising from the same cause, to his personal property.—BARNETT *v.* LUCAS (1872), I. R. 5 C. L. 140; 6 C. L. 247.—**IR.**

122 ii. *S. P.* DALY *v.* DUBLIN, WICKLOW & WEXFORD RY. CO. (1892), 30 L. R. Ir. 514.—**IR.**

v. —— *Different defendants.*]—Pltf. brought an action against a sheriff for taking his goods on an execution against A., & recovered judgment, but not to the full extent of his claim, the jury having found that part of the goods did not belong to pltf. Pltf. afterwards brought trespass against deft., who had indemnified the sheriff for seizing the goods:—*Held:* (1) a party cannot split up his claim for damages & proceed for a part of the trespass at one time, & part at another; (2) the judgment against the sheriff was a satisfaction for the wrong done to pltf., and he could not recover.—LAWTON *v.* ADAMS (1862), 10 N. B. R. (5 All.) 274.—**CAN.**

Sect. 2.—Cause of Action: Sub-sect. 4, B. & C.]

flock of sheep, & small damages given, is no bar to trover for the same sheep, if pltf. reply that the recovery was only for the taking & not for the value. —LACON *v.* BARNARD (1627), Cro. Car. 35; 79 E. R. 635.

Annotations:—**Dbtd.** Putt *v.* Royston (1682), 2 Show. 211. **Refd.** Buckland *v.* Johnson (1854), 15 C. B. 145.

124. —— —— —— Damage to credit.]—Deft., a comr. in bkpcy., wrongfully seized the goods of pltf., who was no bkpt. In an action on the case for damage to his credit:—*Held:* it was no defence that pltf. had already recovered damages in trespass for the goods taken from him. The same thing may give several causes of action.—WATSON *v.* NORBURY (1649), Sty. 201; 82 E. R. 645.

125. —— —— —— Trespass to land.]—Certain premises were let to pltf. by P., who had previously mtged. them to defts., trustees of a benefit building society, to secure payment of subscriptions, etc., which might become due from him to the society. The mtge. deed gave power to defts. to distrain the goods of P., on the premises for arrears of subscriptions due to the society, as for rent due on a demise. Defts. distrained on the premises for subscriptions due from P., & seized pltf.'s goods. Pltf. replevied the goods, & recovered in the action of replevin, in the cty. ct., as damages, the amount of the expenses of the replevin bond. Having sustained further consequential damages by reason of the seizure of his goods, he brought an action of trespass in the High Ct., to recover these damages, & also in respect of the trespass to the land:—*Held:* (1) the judgment in replevin was a bar to the action in respect of trespass to the goods, as the special damage was recoverable in the action of replevin; (2) the judgment in replevin was no bar to the action in respect of trespass to the land, as it was not in respect of the same cause of action.—GIBBS *v.* CRUIKSHANK (1873), L. R. 8 C. P. 454; 42 L. J. C. P. 273; 28 L. T. 735; 37 J. P. 244; 21 W. R. 734.

Annotations:—**Distd.** Dover *v.* Child (1876), 34 L. T. 737. **Mentd.** Smith *v.* Earight (1893), 63 L. J. Q. B. 220.

126. —— —— Malicious prosecution—False imprisonment.]—To an action for falsely, maliciously, & without any reasonable or probable cause, charging pltf. with larceny, before JJ. indicting pltf., & causing him to be tried on such charge, on which he was afterwards acquitted, deft. pleaded that before commencement of the suit pltf. brought an action of trespass against deft. for assaulting & imprisoning him on a false & unreasonable assertion that he had committed felony; that to that action deft. pleaded the general issue & a justification of the assertion, & imprisonment in consequence, & on a trial of which action the judge directed the jury to take into their consideration the question whether deft. had charged & accused pltf. with having stolen the goods mentioned in the declaration, & falsely & maliciously, & without any reasonable or probable cause, committed the grievances complained of in the present action; that the jury found for pltf. & assessed damages, & that pltf. recovered judgment for same, with costs; averring the identity of the imprisonments in the two actions, & that the grievances complained of were the same in respect of which damages had been given on the former occasion:—*Held:* (1) this plea was no answer to the action, as the causes of action were different; (2) the judge had misdirected the jury on the trial of the former action. *Qu.:* whether it would have been a defence that on the trial of the former action damages in respect of the cause of action complained of in the present had been assessed by the jury with the consent of the parties.—GUEST *v.* WARREN (1854), 9 Exch. 379; 23 L. J. Ex. 121; 18 Jur. 133; 2 W. R. 159; 2 C. L. R. 979; 156 E. R. 161.

127. —— Defamation—Different innuendoes.]—In an action for slander deft. pleaded that pltf. had unsuccessfully brought a previous action against him on the same words, except that no innuendo had been attached to them. On demurrer:—*Held:* pltf. could not entitle himself to a new action by a new interpretation of the same words.—GARDNER *v.* HELVIS (1684), 3 Lev. 248; 83 E. R. 673.

128. —— —— Different defendants.]—If A. & B., having recovered in separate actions for libels against different persons engaged in the management & publication of the same newspaper, commence fresh actions against the same parties, each suing the party against whom the other has recovered, the ct. will not interfere in a summary way to set aside the latter proceedings.—MARTIN *v.* KENNEDY, BANNING *v.* PERRY (1800), 2 Bos. & P. 69; 126 E. R. 1161.

Annotation:—**Refd.** Brunsden *v.* Humphrey (1884), 14 Q. B. D. 141, C. A.

129. —— —— Different passages in same publication.]—Deft. published in pamphlet form a report of the judgment delivered in a former action which pltf. had brought against him. The pamphlet contained no report of the evidence given at the trial, & there were passages in the judgment reflecting on pltf.'s conduct. Pltf. brought an action for libel in respect of such publication, & the jury found the pamphlet was a fair, accurate & honest report of the judgment & was published without malice, & returned a verdict for deft. Pltf. brought another action for libel in respect of the same publication; but he relied on defamatory statements in the pamphlet other than those set out in the statement of claim in the former action for libel. On an application to dismiss this action as frivolous & vexatious:—*Held:* (1) the questions for the jury in the second action for libel being identical with those decided in the first, a plea of *res judicata* must succeed; (2) the action ought to be stayed as frivolous & vexatious; (3) even if pltf. could rely in one action on one part of the pamphlet, & in another action on another part, such a course was an abuse of the process of the ct., & the second action should be stayed.—MACDOUGALL *v.* KNIGHT (1890), 25 Q. B. D. 1; 59 L. J. Q. B. 517; 63 L. T. 43; 54 J. P. 788; 38 W. R. 553; 6 T. L. R. 276, C. A.

Annotation:—**Apld.** Stephenson *v.* Garnett, [1898] 1 Q. B. 677, C. A.

130. —— Assault.]—After a recovery in an action for an injurious act, no action can be maintained on account of consequences occasioned by that act. A recovery in an action for assault & battery is a bar to an action for subsequent loss in consequence of the battery of part of the skull.—FETTER *v.* BEALE (1701), Holt, K. B. 12; 1 Ld. Raym. 339; 1 Salk. 11; 90 E. R. 905.

Annotations:—**Apld.** Howell *v.* Young (1825), 2 C. & P. 238. **Folld.** Bonomi *v.* Backhouse (1856), 32 L. T. O. S. 156. **Distd.** Whitehouse *v.* Fellowes (1861), 10 C. B. N. S. 765; Brunsden *v.* Humphrey (1884), 14 Q. B. D. 141, C. A. **Refd.** Rosewell *v.* Prior (1701), 1 Ld. Raym. 713; Blyth *v.* Fladgate, Morgan *v.* Blyth, Smith *v.* Blyth, [1891] 1 Ch. 337.

Bankruptcy of plaintiff — Dividing cause of action between bankrupt & trustee in bankruptcy.] —*See* BANKRUPTCY & INSOLVENCY.

C. Claims in Contract.

131. Splitting demand—Items in account.]—A. contracted with B. for the purchase of certain parcels of malt, the money paid for each being under 40*s.* B. took out separate plaints in an inferior ct. with respect to them:—*Held:* (1) B. should have joined them all in one action, & not put A. to unnecessary vexation by splitting an entire

cause of action.—GIRLING *v.* ALDERS (1670), 1 Vent. 73; 2 Keb. 617; 86 E. R. 51.

Annotations:—**Apprvd.** *Re* Aykroyd (1847), 1 Exch. 479. **Folld.** Jones *v.* Pritchard (1849), 18 L. J. Q. B. 104.

132. —— ——.]—Where a suit is for an account & the matter is proper for one entire account, the suit is not maintainable for part of the matter only, for pltf. may not split cause & make a multiplicity of suits.—PUREFOY *v.* PUREFOY (1681), 1 Vern. 28; 23 E. R. 283.

Annotation:—**Refd.** Jones *v.* Smith (1794), 2 Ves. 372.

133. —— ——.]—Small Debts Act, 1846 (c. 95), s. 63, enacted that it should not be lawful for any pltf. to divide any "cause of action" for the purpose of bringing two or more suits in any of the cts.:—*Held:* (1) the term "cause of action" meant cause of one action & was not limited to an action on one separate contract; (2) the definition did not embrace all contracts executed, however unconnected & dissimilar in character, which could be included in one *indebitatus* count, but applied to tradesmen's bills, in which one item was connected with another, in the sense that the dealing was not intended to terminate with one contract, but to be continuous, so that one item, if not paid, should be united with another, & form an entire demand. *Qu.:* whether the sect. applied to all debts which could be comprised in one description in one count, *e.g.*, for "goods sold."

Certain alleged agents of deft. had given to several persons tickets for goods, which goods were to be supplied by pltf., & the latter had brought 228 actions in the cty. ct. against deft., in respect thereof, upon claims none of which exceeded £5, & many fell short of 20s., the whole amounting to £303 19*s.* The ct. granted a prohibition. *Qu.:* whether a prohibition would have been granted if the whole of the claims had amounted to £20 only, & the items had been separated & sued for in the cty. ct. by separate plaints.—*Re* AYKROYD, GRIMBLY *v.* AYKROYD (1847), 1 Exch. 479; 5 Dow. & L. 701; Cox, M. & H. 79; 17 L. J. Ex. 157; 11 L. T. O. S. 105; 12 J. P. 411; 12 Jur. 357; 154 E. R. 204.

Annotations:—**Distd.** Wickham *v.* Lee (1848), 18 L. J. Q. B. 21. **Folld.** Wood *v.* Perry (1849), 3 Exch. 442. **Distd.** Kimpton *v.* Willey (1850), 9 C. B. 719; Brunskill *v.* Powell (1850), 19 L. J. Ex. 362. **Folld.** Bonsey *v.* Wordsworth (1856), 18 C. B. 325. **Refd.** Jones *v.* Pritchard (1849), 18 L. J. Q. B. 104; Isaac *v.* Wyld (1851), 7 Exch. 163; Copeman *v.* Hart (1863), 14 C. B. N. S. 731; London Corpn. *v.* Cox (1867), L. R. 2 H. L. 239; James *v.* Evans, [1897] 2 Q. B. 180. **Mentd.** Boddington *v.* Castelli (1853), 17 Jur. 781, Ex. Ch.; Jackson *v.* Grimley (1864), 12 W. R. 686.

134. —— ——.]—A tradesman's bill for a series of articles delivered continuously cannot be split into different causes of action.—BONSEY *v.* WORDSWORTH (1856), 18 C. B. 325; 25 L. J. C. P. 205; 20 J. P. 406; 2 Jur. N. S. 494; 4 W. R. 566; 139 E. R. 1395.

Annotation:—**Apld.** Copeman *v.* Hart (1863), 14 C. B. N. S. 731.

See, further, COUNTY COURTS.

135. —— **Promissory note to secure instalments —Judgment on note.**]—A promissory note for £100, on the face of it payable on demand, was given to the trustee of a building society, to secure certain instalments, fines, & interest. The payee having sued upon the note, took a *cognovit* for instalments then due, & costs, which were afterwards paid; & he gave a receipt as for debt & costs in the action:—*Held:* he could not maintain another action on the note for instalments which subsequently became due.—SIDDALL *v.* RAWCLIFFE (1803), 1 Cr. & M. 487; 3 Tyr. 441; 1 Mood. & R. 263; 2 L. J. Ex. 237; 149 E. R. 491.

136. Distinct claims—Separate actions.]—Pltf. in a former action declared on a promissory note, & for goods sold, but upon executing a writ of inquiry after judgment by default gave no evidence on the count for goods sold, & took his damages for the amount of his promissory note only:—*Held:* the judgment thereupon was no bar to his recovering in a subsequent action for the goods sold.—SEDDON *v.* TUTOP (1796), 6 Term Rep. 607; 1 Esp. 401; 101 E. R. 729.

Annotations:—**Apld.** Godson *v.* Smith (1818), 2 Moore, C. P. 157. **Consd.** Stafford *v.* Clark (1824), 9 Moore, C. P. 724. The true distinction is that if a pltf. offer no evidence in the first action on part of his claim, a new action may be brought for such part; but if he offers evidence and fails, he cannot bring a fresh action (BEST, C.J.). **Distd.** Bagot *v.* Williams (1824), 3 B. & C. 235. **Apld.** Thorpe *v.* Cooper (1828), 5 Bing. 116. **Folld.** Hadley *v.* Green (1832), 2 Cr. & J. 374. **Consd.** Brunsden *v.* Humphrey (1884), 14 Q. B. D. 141, C. A. The real test is not whether pltf. had the opportunity of recovering in the first action what he claims to recover in the second (BOWEN, L.J.). **Refd.** Eastmure *v.* Laws (1839), 5 Bing. N. C. 444; Holland *v.* Clark (1841–2), 1 Y. & C. Ch. Cas. 151; Stewart *v.* Todd (1846), 9 Q. B. 767; Odaya Taver *v.* Katama Natchiar (1866), 11 Moo. Ind. App. 50; Stevens *v.* Tillett (1870), L. R. 6 C. P. 147; Jones *v.* Brassey (1871), 24 L. T. 947.

137. —— ——.]—Pltf. declared in debt for double rent, for use & occupation, with a count for money had & received; & obtained a general verdict for the amount of rent only. Two days before trial of the action, he delivered a declaration in

PART I. SECT. 2, SUB-SECT. 4.—C.

w. *Splitting demand—Second action for sum due at institution of first.*]—Where pltf. arrested deft. for $63,000 for money had & received & proceeded to judgment, & subsequently arrested deft. for $20,000, which was due at the time of commencement of the first action but was not included in it:—*Held:* deft. entitled to be discharged from custody.—NATIONAL PARK BANK OF NEW YORK *v.* ELLIS (1879), 18 N. B. R. 547.—**CAN.**

x. *Items disallowed in former suit—No fresh action for.*]—Where, in *assumpsit* for goods sold & delivered, pltf. has recovered the value of part of the goods in his particulars, but not the whole, some items being disallowed by the jury, under the judge's direction, as not proved, no new action can be maintained for such items. *Qu.:* Whether pltf. could in such case expressly withdraw part of his demand from the jury, in order to bring a new action therefor.—RAMSAY *v.* HAMILTON (1844), 4 N. B. R. (2 Kerr), 511.—**CAN.**

y. *Distinct claims under one agreement—Wages & wrongful dismissal.*]—Pltfs. sued deft. in a district ct. in two actions for wages & wrongful dismissal, under one agreement. By consent, the actions were heard together, & judgment given for pltf. on both. On an application for a prohibition:—*Held:* (1) the causes of action were separate & distinct; (2) rule must be refused.—HAWKES *v.* CORFIELD (1870), 2 Q. S. C. R. 65.—**AUS.**

z. —— *Price of goods sold & damages for non-acceptance.*]—A claim for the price of goods sold is a cause of action different from a claim for damages for non-acceptance of goods pursuant to contract. Such claims, although arising under the same contract, may be sued upon separately. But where a purchaser takes some goods, and breaks his contract in part by not paying for the goods he takes, & in part by not taking & paying for the remainder, the claim arises out of one cause of action; & the whole must be included in one suit.—ANDERSON WRIGHT & Co. *v.* KALACARLA SURJINARAIN (1885), I. L. R. 12 Calc. 339.—**IND.**

a. —— *Mortgage—Suits for possession & recovery of principal.*]—A mtge. was executed in 1879, but the mtgee. never obtained possession as stipulated for; & in 1882 he brought a suit against the mtgor. to recover unpaid interest & obtained a decree, which was satisfied by the sale of property belonging to the judgment-debtor. In 1886 he brought another suit to recover the principal & residue of interest:—*Held:* (1) the cause of action in the suit of 1882 was mtgor.'s non-delivery of possession of the property, by reason of which mtgee. had been unable to realise his interest from the usufruct; (2) the cause of action to recover the principal accrued at the same time & was the same cause of action, & pltf. was bound in the suit of 1882 to sue for the principal, & the present suit was barred by Civil Procedure Code (India), s. 43.—HIKMATULLA KHAN *v.* IMAM ALI (1890), I. L. R. 12 All. 203.—**IND.**

b. —— —— *Action for interest separable from claim for principal.*]—The breach of covenant in a mtge. bond to pay interest, which covenant is not confined to the fixed period of the mtge. & is distinct from & independent of the claim of the mtgee. to recover the principal sum, gives rise to a distinct cause of action, & a decree obtained on such bond for overdue interest does not, under Civil Procedure Code (Act XIV. of 1882) (India), s. 43, bar a subsequent suit to recover the principal & interest by sale of the mtged. property.—YASHVANT NARAYAN KAMAT *v.* VITHAL DIVAKAR PARULEKAR (1895), I. L. R. 21 Bom. 267.—**IND.**

Sect. 2.—*Cause of Action: Sub-sect.* 4, *C; sub-sects.* 5 *& 6, A.*]

case, with a count for digging quarries & carrying away stone; & in trover for stone, with a bill of particulars for stone converted, corresponding precisely with the bill of particulars on the count for money had & received in the former action:—*Held:* the judgment in the first action was no bar to a recovery on the count in trover on the second.—HADLEY *v.* GREEN (1832), 2 Cr. & J. 374; 2 Tyr. 390; 1 L. J. Ex. 137; 149 E. R. 159.

138. —— ——.]—Pltf. entered two plaints in the cty. ct., one for £19 19*s.* for goods sold & delivered, work & labour, & money paid; the other for £19 for money lent. The particulars annexed to the first consisted of items from Nov., 1845, to July 12, 1849. The particulars of the second plaint consisted of three items, from April, 1846, to July 14, 1849. The pltf. recovered judgment in the first cause for £17, in the second for £19:—*Held:* the items in the two plaints were not so connected as to form one cause of action, although they might have been recovered under one count.—KIMPTON *v.* WILLEY (1850), 9 C. B. 719; 1 L. M. & P. 280; 19 L. J. C. P. 269; 15 L. T. O. S. 160; 14 J. P. 386; 14 Jur. 762; Rob. L. & W. 319; Cox, M. & H. 350; 137 E. R. 1075.

Annotations:—**Consd.** Avards *v.* Rhodes (1853), 8 Exch. 312. **Folld.** Richards *v.* Marten (1874), 23 W. R. 93. **Consd.** Adkin *v.* Friend (1878), 38 L. T. 393. **Mentd.** Heyworth *v.* London Corpn. (1884), Cab. & El. 312.

139. —— ——.]—Deft. was indebted to pltf. for liquors supplied & money lent at different times. Pltf. had been in the habit of marking down the separate items, & afterwards entering them in his book as one account, & sent deft. an account including the whole, amounting to £36 10*s.* 4*d.* Pltf. levied a plaint in the cty. ct. for £20 for goods sold, the particulars of demand comprising no items for money lent. Having recovered judgment & obtained payment of this amount, he levied another plaint for £5 1*s.* 6*d.* for money lent, being the amount of the loans included in the account of £36 10*s.* 4*d.* At the hearing of the first plaint there was no abandonment:—*Held:* (1) these were distinct demands; (2) there was no ground for prohibition.—BRUNSKILL *v.* POWELL (1850), 1 L. M. & P. 550; 19 L. J. Ex. 362.

Annotations:—**Folld.** Richards *v.* Marten (1874), 23 W. R. 93. **Refd.** Isaac *v.* Wyld (1851), 7 Exch. 163.

140. —— ——.]—In consideration of pltf.'s discounting a bill, deft., jointly & severally with D., undertook if the same was not paid at maturity to pay, as interest thereon, £20 for each month afterwards. The bill was not paid at maturity, & pltf. issued a writ against deft., & by the indorsement thereon claimed the amount of the bill & interest at £20 per month as per agreement; but the declaration in the action was on the bill only, & contained no count upon the agreement or for interest, & pltf. recovered judgment by default for the amount of the bill only. Pltf. having brought a second action against deft. upon the agreement for interest:—*Held:* the action was maintainable for interest due before the judgment was recovered, but not for interest due subsequently to it.—FLORENCE *v.* JENINGS (1857), 2 C. B. N. S. 454; 26 L. J. C. P. 274; 30 L. T. O. S. 53; 3 Jur. N. S. 772; 140 E. R. 494.

Annotations:—**Consd. & Apld.** *Re* Sneyd, *Ex p.* Fewings (1883), 25 Ch. D. 338, C. A. **Apld.** Faber *v.* Latham (1897), 77 L. T. 168. **Refd.** *Re* King, *Ex p.* King, [1895] 1 Q. B. 189. **Mentd.** Gilding *v.* Eyre (1861), 10 C. B. N. S. 592.

SUB-SECT. 5.—ELECTION OF REMEDY.

A. In General.

Lis alibi pendens—Stay of proceedings where.]—*See* CONFLICT OF LAWS; PRACTICE & PROCEDURE.

Remedies against different defendants—Husband & wife.]—*See* HUSBAND & WIFE.

—— **Joint contractors.**]—*See* CONTRACT; ESTOPPEL.

—— **Joint tortfeasors.**]—*See* TORT.

—— **Master & servant.**]—*See* MASTER & SERVANT.

—— **Principal & agent.**]—*See* AGENCY.

Res judicata & transit in rem judicatam.]—*See* ESTOPPEL.

B. Civil and Criminal Proceedings.

141. Assault.]—If a party proceed against deft. by action & indictment for the same assault, the ct. will not compel him to make his election.—JONES *v.* CLAY (1798), 1 Bos. & P. 191; 126 E. R. 853.

142. —— **Nominal damages after conviction.**]—A person who has preferred an indictment for an assault, from which he did not suffer any personal injury, & has succeeded, & received from the Treasury a portion of the fine imposed upon deft., is not entitled, in an action against same deft., to recover more than nominal damages. It is the duty of an attorney when applied to to bring such action to dissuade the party from persevering in his intention.—JACKS *v.* BELL (1828), 3 C. & P. 316.

Annotation:—**Refd.** Gill *v.* Lougher (1830), 1 Tyr. 121.

143. Libel.]—Where a rule *nisi* obtained for a criminal information for a libel, in the Q. B., is discharged on showing cause, appct. may bring an action in another ct. for publication of the same libel.—WAKLEY *v.* COOKE (1847), 16 M. & W. 822; 4 Dow. & L. 702; 16 L. J. Ex. 225; 11 J. P. 506; 11 Jur. 377; 153 E. R. 1424.

144. Misappropriation of money.]—Deft., an officer of a friendly society, was charged under Friendly Societies Act, 1875 (c. 60), s. 16 (9), with misappropriation of certain money. He was convicted & ordered to pay a penalty & to repay the money, &, in default of compliance with this order, was imprisoned for 2 months with hard labour. An action having afterwards been instituted against him to recover the misappropriated money:—*Held:* his conviction & punishment under the above Act were a bar to remedy by action.

If the operation of the stat. had been confined to criminal proceedings I should have entertained no doubt that imprisonment for the criminal offence afforded no answer to a civil claim for the debt. The old principle of law, founded upon public policy & expediency,—that where a claim is founded on a matter which might be the subject of criminal proceedings, the person seeking to enforce it must prosecute for the criminal offence before he can sue in a civil action—is not in question here (LORD HALSBURY, C.).—VERNON *v.* WATSON, [1891] 2 Q. B. 288; 60 L. J. Q. B. 472; 64 L. T. 728; 56 J. P. 85; 39 W. R. 519; 7 T. L. R. 534, C. A.

See, now, Friendly Societies Act, 1896, s. 87 (3).

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141 i. *Assault—Waiver of right to bring civil action.*]—A. filed a criminal information by leave of the ct. against C., for a provocation to fight a duel: C. was found guilty, & sentenced. A. afterwards commenced an action to recover damages for an assault connected with same transaction, which assault the ct. had taken into consideration in measuring the punishment:—*Held:* a party applying for a criminal information waives all right to bring a civil action for same transaction.—R. *v.* O'BRIEN, (1824) Sm. & Bat. 79.—**IR.**

c. *Criminal prosecution—Concurrent action for tort.*]—Notwithstanding s. 866 of the Criminal Code (Nova Scotia), a pltf. has the right to prosecute deft. criminally, & at the same time to sue him for damages for same illegal act. Application to stay proceedings in civil action will be refused.—HAMILTON *v.* CROWE (1897), 40 N. S. R. 217.—**CAN.**

145. Detention of goods.]—A person who obtains an order from a police magistrate under Metropolitan Police Act, 1839 (c. 71), s. 40, for delivery up of goods improperly detained, is not thereby precluded from bringing an action for special damage arising out of the same detention.—MIDLAND RY. CO. *v.* MARTIN & CO., [1893] 2 Q. B. 172; 62 L. J. Q. B. 517; 69 L. T. 353; 58 J. P. 39; 9 T. L. R. 514; 17 Cox, C. C. 687; 5 R. 489.

Annotation:—**Consd.** Leicester *v.* Cherryman (1907), 76 L. J. K. B. 678.

C. Actions of Contract and of Tort.

See, also, COUNTY COURTS.

146. Breach of duty—Employment for hire.]—In an action against three, wherein pltf. declared that they had the loading of a hogshead of pltf. for a certain reward to be paid to one of them, & a certain other reward to the other two, & that defts. so negligently conducted themselves in the loading, etc., that the hogshead was damaged:—*Held:* (1) the gist of the action was the tort, not the contract out of which it arose; (2) on plea of not guilty, the two being acquitted, judgment might be had against the third, who was found guilty.

What inconvenience is there in suffering the party to allege his gravamen, if he please, as consisting in a breach of duty arising out of an employment for hire, & to consider that breach of duty as tortious negligence, instead of considering the same circumstances as forming a breach of promise implied from the same consideration of hire? (LORD ELLENBOROUGH, C.J.).—GOVETT *v.* RADNIDGE, PULMAN & GIMBLETT (1802), 3 East, 62; 102 E. R. 520.

Annotations:—**N.F.** Powell *v.* Layton (1806), 2 Bos. & P. N. R. 365. **Distd.** Bretherton *v.* Wood (1821), 3 Brod. & Bing. 54; Leslie *v.* Wilson (1821), 3 Brod. & Bing. 171. **Folld.** Marshall *v.* York, Newcastle & Berwick Ry. Co. (1851), 11 C. B. 655. **Refd.** Samuel *v.* Judin (1805), 6 East, 333; Max *v.* Roberts (1810), 12 East, 89; Ansell *v.* Waterhouse (1817), 6 M. & S. 365; Pozzi *v.* Shipton (1838), 8 Ad. & El. 963; Foulks *v.* Metropolitan District Ry. Co. (1879), 4 C. P. D. 267.

147. —— Broker.]—Wherever there is a contract, & something is to be done in the course of the employment which is the subject of that contract, if there is a breach of duty in the course of that employment, the party injured may recover either in tort or in contract.

In case the declaration alleged that A. employed B. as broker, to sell & deliver oil, on the terms contained in such contracts of sale as should be made with persons who should become purchasers thereof, for reasonable commission to B.; that B. accepted the employment, & sold oil to C. on the terms of payment on delivery; that it thereupon became the duty of B. not to deliver the oil without payment; that B. delivered the oil to C., but did not obtain payment, whereby pltf. was damnified:—*Held:* (1) this declaration set forth a good cause of action; (2) the duty of B. arose out of the contract.—BROWN *v.* BOORMAN, BOORMAN & WILD (1844), 11 Cl. & Fin. 1; 8 E. R. 1003, H. L.

Annotations:—**Folld.** Hyman *v.* Nye (1881), 6 Q. B. D. 685. **Refd.** Howard *v.* Shepherd (1850), 9 C. B. 297; Midland Ry. Co. *v.* Withington L. B. (1883), 11 Q. B. D. 788, C. A.

148. —— Duty independent of contract.]—Where the liability to do a certain act arises merely from an agreement to do it upon a good consideration, & there is no such relation between the contracting parties as would involve a common law duty in the performance, the non-performance of the act is not such a breach of duty as can be made the subject of an action of tort.

The third & fourth counts of a declaration set forth certain promises of deft. for a good consideration, & not connected with any common law duty arising from the relation between pltf. & deft., & then alleged a breach of duty in deft. consisting solely in the neglect to do the acts which he had by such promises agreed to do, pltf. having performed his part of the agreement. The last count was in trover. On general demurrer:—*Held:* the declaration was bad for misjoinder.—COURTENAY *v.* EARLE (1850), 10 C. B. 73; 1 L. M. & P. 764; 20 L. J. C. P. 7; 15 Jur. 15; 138 E. R. 30.

Annotation:—**Apld.** Woods *v.* Finnis (1852), 7 Exch. 363.

—— Effect of distinction between actions of contract & of tort on costs under County Courts Acts.]—*See* COUNTY COURTS.

149. False warranty.]—Upon a declaration in case alleging a deceit to have been effected upon pltf. by means of a warranty made by two defts. upon a joint sale to him by both of sheep, their joint property, pltf. cannot recover upon proof of a contract of sale & warranty by one only as of his separate property; the action, though laid in tort, being founded on the joint contract alleged.—WEALL *v.* KING (1810), 12 East, 452; 104 E. R. 176.

Annotations:—**Folld.** Green *v.* Greenbank (1816), 2 Marsh. 485. **Distd.** Leslie *v.* Wilson (1821), 3 Brod. & Bing. 171. **Expld.** Rawlings *v.* Bell (1845), 1 C. B. 951; Legge *v.* Tucker (1856), 26 L. J. Ex. 71. **Refd.** Lopes *v.* De Tastet (1820), 1 Brod. & Bing. 538. **Mentd.** Collen *v.* Wright (1857), 4 Jur. N. S. 357, Ex. Ch.

150. Waiver of rights under contract.]—A person against whom a commission of bkpcy. had been maliciously obtained, & to whom, after superseding the commission, the Lord Chancellor had assigned petitioning creditor's bond, having afterwards brought an action against petitioning creditor, & a rule of ct. having been made by consent referring the matters in dispute, except the bond assigned, to the award of an arbitrator, & an award having been made with an exception of the bond, an action cannot be maintained on the bond. An action on the case is a waiver of the right of action on the bond; to restore that right the agreement of the parties must be unequivocal.—HOLMES *v.* WAINEWRIGHT (1818), 1 Swan. 20; 36 E. R. 281.

Waiver of tort.]—*See* CONTRACT.

SUB-SECT. 6.—AS NECESSARY PRELIMINARY TO WRIT.

A. In General.

151. No action before cause of action arises.]—A promise was made for payment of a sum of money on Mar. 19; the action was brought on Mar. 16:—*Held:* judgment must be reversed, since the action was brought before there was any cause of action.—EGLES *v.* VALE (1605), Cro. Jac. 69; 79 E. R. 59. S. C. No. 173, *post.*

PART I. SECT. 2, SUB-SECT. 6.—A.

151 i. *No action before cause of action arises.*]—Several creditors of deft. entered into a composition agreement with him, whereby they engaged to accept payment at certain stated periods, & among the rest, pltf. agreed to grant 3 years for payment of his debt:—*Held:* pltf. could not, before expiration of that period, maintain an action on a promissory note, which he had afterwards induced deft. to give him for the amount of his debt, payable by annual instalments, in fraud of the other creditors.—WILLARD *v.* KILMAN (1840), 3 N. B. R. (1 Kerr) 105.—**CAN.**

151 ii. ——.]—An agreement between pltf. & deft. & T. recited that T., in the hope of obtaining a vacate on the enrolment of certain recognisances, had accepted bills, the amount of one of which he had applied to pltf. to advance until such vacate was had, & that T. bargained that pltf. should be repaid the advance by deft. out of proceeds of the loan, deft. & W. having a certain amount in consols to their credit as trustees for T. In an action of debt:—*Held:* (1) the liability of deft. was only to arise on default of T.; (2) a declaration omitting to state that T. had not paid, by reason whereof a right against deft. accrued to pltf., was defective.—PORTER *v.* GRAHAM, [1894] 13 L. R. 49 (Q. B.).—**IR.**

151 iii. ——.]—In a suit to recover principal and interest alleged to be due on a bond, deft. pleaded that subsequent to execution of the bond pltf. had taken from the obligor an ijara & a dur-ijara & executed ijara kabuliats, agreeing to accept payment of the bond by setting

Sect. 2.—Cause of Action: Sub-sect. 6, A. & B.]

152. ——.]—Upon oyer of administration craved after imparlance, deft. pleaded in abatement that the *scire facias* was tested since action brought:—*Held:* no action lay but in the term subsequent, unless by judicial writ which might be tested at any time of vacation.—HARKER *v.* MORELAND (1678), 2 Lev. 197; 83 E. R. 516.

153. —— **Premature action set aside.**] — If an action be prematurely brought before the cause of action accrued the ct. will on a summary application set aside the proceeding.—KERR *v.* DICK, No. 168, *post.*

For full anns., *see* S. C. No. 168, *post.*

154. No relief in equity till title accrued.]—Pltf. was bound to establish a title to relief at the time of the filing of his bill in the old Ct. of Ch.; if he then had no title to relief his bill was improperly filed. General convenience has since relaxed the above rules in matters of account.

K., after bill filed, published a book by N. which B. alleged to be a piracy. It was only by pltf.'s bill that K. had notice of N.'s covenant making him responsible to pltf.:—*Held:* there was no case on which an injunction against K. could be continued.—BARFIELD *v.* KELLY (1828), 4 Russ. 355; 38 E. R. 839. S. C. No. 177, *post.*

For full anns., *see* EQUITY.

155. Defect not cured by amendment.]—A judgment having been obtained in an action commenced before the debt became due, on a writ of error to reverse the judgment:—*Held:* the ct. would not allow the proceedings to be amended.—RUSH *v.* TORY (1694), 4 Mod. Rep. 367; 87 E. R. 447.

156. ——.]—Where there was no title to sue at the time of filing an original bill or information, a decree in the Ct. of Ch. could not be founded upon a right of suit subsequently acquired & brought forward by a supplemental bill or under the new practice by way of amendment. This rule applied not only in cases where the title to sue in respect of the whole matter of the suit had been acquired subsequently to the filing of the original bill, but also in cases where the title to sue in respect of any of the matters of the suit had been so acquired. The principle was that there must be a right of suit when the suit was commenced, & a supplemental bill was not commencement but continuance of the suit.—A.-G. *v.* AVON CORPN. (1863), 3 De G. J. & Sm. 637; 33 L. J. Ch. 172; 2 New Rep. 564; 9 L. T. 187; 11 W. R. 1050; 46 E. R. 783, C. A.

Annotation:—**Folld.** Evans *v.* Bagshaw (1870), 39 L. J. Ch. 145.

157. ——.]—Pltfs. brought an action to restrain defts. from stopping the outlet of effluents of sewage into the river. An application was made to defts. after action brought for their sanction to new works:—*Held:* an amendment to the statement of claim relating to these new works, & claiming an injunction to restrain defts. from interfering with the effluent till it should be ascertained whether the new works were efficient, must be refused.

The amendment could not have been allowed inasmuch as it related to a cause of action which did not exist at the time when the writ was issued (BOWEN, L.J.).—TOTTENHAM LOCAL BOARD OF HEALTH *v.* LEA CONSERVANCY BOARD (1886), 2 T. L. R. 410, C. A. S. C. No. 178, *post.*

158. Effect of judgment.] — Case for words spoken on Nov. 5. The declaration was generally, as of Michaelmas term, after verdict for pltf. with damages. Upon motion in arrest of judgment judgment was arrested because it appeared by the general memorandum that the action was commenced before the cause of it arose.—VENABLES (VENABLE) *v.* DAFFE (DAFT, DAST) (1689), Carth. 113; Holt, K. B. 38; 1 Show. K. B. 147; 90 E. R. 670.

159. ——.]—In *indebitatus assumpsit* for money lent it appeared on the record after verdict that the promise was alleged to be made at a time after the writ issued. Upon motion in arrest of judgment:

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off the rents due under the kabuliats. The kabuliats stipulated that neither party should put an end to the lease prior to settlement of accounts:—*Held:* till the termination of the lease pltf. could not sue on the bond, his right of suit having been suspended during continuance of the ijara & dur-ijara.—DYA CHAND OSWAL *v.* MOOKTEEDA DABEE (1870), 13 W. R. 24.—**IND.**

151 iv. ——.]—A lease dated May 29, 1911, gave the lessee an option to purchase for cash the leased premises for one year ending June 3, 1912. On May 9, 1912, the lessee's solrs. wrote to the lessor stating that their client intended to exercise the option. This was followed by a request for preparation of a deed & some requisitions upon the title and the statement that their client would be ready to close "as soon as the papers were in shape." No reply was made to this letter, & on May 23 the solrs. wrote to lessor that failing to hear on the following Monday they would issue a writ for specific performance. They so did on May 31. On June 1 lessee made a tender of the cash:—*Held:* there had been no acceptance of the offer embodied in the option; the option stipulated for cash which was not tendered until after issue of the writ.—MILLER *v.* ALLEN (1912), 7 D. L. R. 438; 4 O. W. N. 346; 23 O. W. R. 527.—**CAN.**

d. *Premature action—Defect not cured by subsequent events.*]—A cause of action imperfect at the date of issue of the writ is not perfected, either at law or equity, by subsequent events.—PECK *v.* SUN LIFE ASSURANCE CO. (1905), 11 B. C. R. 215.—**CAN.**

e. —— *Judicial notice of.*]—Pltf. purchased a business under an agreement providing that if he was not satisfied with the business & found it not as represented the vendor would refund the purchase money within a period of three months from Oct. 25, 1915. The purchaser was dissatisfied & commenced an action for the return of the money on Nov. 24, 1915. No objection on that ground was taken by the defence, nor was there any application to stay the proceedings; but the ct. considered it an objection on the face of the agreement that ought to be taken notice of by the ct., & the action was dismissed.—WATSON *v.* MORGAN (1916), 27 O. W. R. 523.—**CAN.**

158 i. *Effect of judgment.*]—It is not ground for arrest of judgment that the declaration is entitled generally of a term, & the cause of action appears to have arisen on a subsequent day in the term.—WILLISTON *v.* PIERCE (1851), 7 N. B. R. (2 All.) 162.—**CAN.**

158 ii. ——.]—K. sued N. (his uncle) for partition of the estate of V. (the father of N.) in the lifetime of V., who was alleged to be of unsound mind. N. objected that V. was alive. Before issues were settled, V. died, & the suit was tried, & K. obtained a decree. On appeal by N. on the ground that, when the plaint was filed, K. had no cause of action:—*Held:* the decree would not on this ground be set aside, seeing that the relief sought was justified by the facts on the record.—NARAYANA *v.* KRISHNA (1884) I. L. R. 8 Mad. 214; 1 B. Dig. 617 (136).—**IND.**

g. *Building contract.*]—Pltf. sued for amount due under a building contract. Defts. had dismissed pltf. for defective work. The contract provided that after giving pltf. notice to remedy defects, defts. might make good such defects at pltf.'s expense:—*Held:* pltf. could not recover; his right was to recover the difference between the contract price and what it cost defts. to complete the work. Such difference was not ascertained until Sept., but pltf. instituted proceedings in the June preceding & before the work was completed.—BERESFORD *v.* HALLORAN CONSTRUCTION CO. (1914), 28 W. L. R. 208.—**CAN.**

h. *Commission on sale.*]—Deft. appointed pltf. sole agent to sell lands, & to pay him out of first instalment a certain percentage of gross selling price for commission. In Feb., 1912, deft. arranged with C. that a co. be formed & registered before March 30, 1912, to acquire property, including that covered by the agreement between pltf. & deft. Deft. sold the land to C. as "on & from Feb. 1st, 1912," payment to be made partly in shares and partly in cash. The agreement for sale provided for conveyance on or before May 30, 1912, or later, if agreed upon. The co. was formed & registered on March 12, 1912, and on March 25, 1912, bought the land from C. Pltf. commenced an action on April 22, 1912, alleging the sale of the land and claiming commission. At date of the writ, no shares had been allotted to deft., nor had any cash payment been received by him, although this was ultimately received before trial:—*Held:* if rights of parties were to be decided as on date of writ, pltf. could not succeed because deft. had not received purchase price or any part of it.

I know of no law giving a person a right to sue for money before it is due.—KENNERLEY *v.* HEXTALL (1913), 23 W. L. R. 205; 5 Alta. L. R. 192; 10 D. L. R. 501; 3 W. W. R. 699.—**CAN.**

—*Held:* the date of the promise was immaterial, & it must be presumed that a cause of action which accrued before the issuing of the writ was proved at the trial.

If it be once assumed that the day is immaterial, it can only then be supposed that a cause of action, which accrued before the date of the issuing of the writ, was proved at the trial. In the case of an action on a promissory note, that could not be done, because there the date is material.—ARNOLD *v.* ARNOLD (1836), 3 Bing. N. C. 81; 2 Hodg. 189; 5 L. J. C. P. 338; 132 E. R. 340.

Annotation:—**Follď.** *Re* Richardson, [1915] 1 Ch. 353.

160. ——.]—Pltfs., a firm of money-lenders, sued deft. on three promissory notes for certain sums, which—owing to default of instalments—became due respectively on Oct. 17, Dec. 17, & Dec. 25 (all in 1912). The writ was issued on Dec. 13. Pltfs. took out a summons under R. S. C., O. 14. Deft. by his solr. appeared in answer to such summons before the master. He did not take the point that the cause of action was incomplete when the action was commenced. The master gave judgment for a part of the sum claimed & gave leave to defend as to the balance:—*Held:* the judgment obtained cured the defect in the writ.—STIRLING & CO. *v.* NORTH (1913), 29 T. L. R. 216.

B. Cases where Principle Applied.

161. Debt falling due after action brought.]—In debt on a bond, conditioned for performance of covenants in a lease, deft. pleaded performance, & pltf. in his replication assigned a breach in non-payment of rent, due after commencement of the suit:—*Held:* bad.—CHAMPION *v.* SKIPWETH (1666), 1 Sid. 307; 82 E. R. 1123.

162. ——.]—In an action on a fidelity bond, assuring payment by a rent collector of rents received by him within a month after he received them, pltfs. sued for money he had received before issue of the writ, but did not allege that he had received it more than a month before issue of the writ. On demurrer:—*Held:* pltfs. could not recover on this pleading.—BALL *v.* RICHARDS (1688), 1 Lut. 470; 125 E. R. 247.

163. ——.]—ALSTON *v.* UNDERHILL, No. 60, *ante*.

For full anns., *see* S. C. No. 60, *ante*.

164. Goods sold.]—A sale of goods took place on terms of "7½ per cent. discount, bill at 3 months, 10 per cent. discount, cash in 14 days." The sellers considering they had been induced by fraud to sell the goods to deft., held him to bail for the whole amount within the 14 days, & declared in *indebitatus assumpsit* for goods sold. The jury found that deft. did not intend to avail himself of the discount, but intended to take the longer credit:—*Held:* the action being in form *ex contractu*, was prematurely brought within the 14 days, though trover might have been brought within that period on rescinding the contract for fraud.—STRUTT *v.* SMITH (1834), 1 Cr. M. & R. 312; 4 Tyr. 1019; 3 L. J. Ex. 357; 149 E. R. 1099.

165. ——.]—In *indebitatus assumpsit* or debt for goods sold & delivered, deft. may prove, under the general issue, that the goods were sold on a credit which had not expired at the time of action brought.—BROOMFIELD *v.* SMITH (1836), 1 M. & W. 542; 2 Gale, 114; Tyr. & Gr. 929; 5 L. J. Ex. 155; 150 E. R. 550.

166. ——.]—Goods were sold on Oct. 5, to be paid for in 2 months:—*Held:* an action for the price could not be commenced until after expiration of Dec. 5.—WEBB *v.* FAIRMANER (1838), 6 Dowl. 549; 3 M. & W. 473; 7 L. J. Ex. 140; 2 Jur. 397; 150 E. R. 1231.

Annotations:—**Apld.** Blunt *v.* Hislop (1838), 2 Jur. 542. **Follď.** Young *v.* Higgon (1840), 6 M. & W. 49. **Distd.** Simpson *v.* Margitson (1847), 11 Q. B. 23. **Refd.** Russell *v.* Ledsam (1845), 14 M. & W. 574; Spartali *v.* Benecke (1850), 10 C. B. 212; Williams *v.* Nash (1859), 28 L. J. Ch. 886; Isaacs *v.* Royal Insce. (1870), L. R. 5 Exch. 296; *Re* Railway Sleepers Supply (1885), 29 Ch. D. 204; Goldsmiths' Co. *v.* West Metropolitan Ry. Co. [1904] 1 K. B. 1, C. A.; English *v.* Cliff, [1914] 2 Ch. 376.

167. Money paid.]—Deft. employed B. to convey timber for him. Pltfs. were afterwards required to get the timber from where B. had placed it & remove it to London. B. declined to permit its removal until his charges for the cartage were paid, whereupon pltfs.' agent agreed to become personally responsible for their payment, & the timber was conveyed to London. Deft. paid pltfs. their charges, but refused to pay the amount their agent had agreed to pay B. Pltfs. brought an action on July 12 for money paid by pltfs. to recover from deft. this latter sum:—*Held:* as pltfs.' agent did not pay the amount to B. until July 17, the action could not be maintained.—THOMPSON *v.* ACOCKS (1850), 15 L. T. O. S. 69, 303.

168. Negotiable instrument.]—Deft. was sued on a bill of exchange before it became due & was arrested on mesne process:—*Held:* the ct. would set aside the proceedings entirely.—KERR *v.* DICK (1820), 2 Chit. 11. S. C. No. 153, *ante*.

Annotation:—**Distd.** Potter *v.* Macdonel (1835), 3 Dowl. 583.

169. —— **Days of grace not expired.**] — The holder of a bill of exchange presented the bill at the bank during business hours on the third day of grace, & payment was refused. On the same day the writ in the action was issued:—*Held:* (1) the cause of action was not complete until after expiration of

PART I. SECT. 2, SUB-SECT. 6.—B.

161 i. *Debt falling due after action brought.*]—Where one of several notes was not due until near the end of the term in which process had been issued & returnable, but was due before filing the declaration, which was intituled generally of the term:—*Held:* such note could not be recovered on in the action.—KERR *v.* JENNINGS (1840).—**CAN.**

164 i. *Goods sold.*]—Pltf. sold deft. certain timber. Deft. agreed to pay by giving a note at 3 months. Without giving a note, deft. took possession of the timber. Before expiration of 3 months pltf. brought an action, having first called for the note, with no result:—*Held:* when a person sells goods upon a certain credit to be paid for by a bill he cannot maintain an action for goods sold until expiration of the period for which such bill would become due, because the goods are not agreed to be paid for until that time. If the bill be not given, pltf. can bring an action on the specific agreement because he is deprived of the security agreed upon.—MAGRATH *v.* TINNING (1842), 6 O. S. 484.—**CAN.**

164 ii. ——.]—Applts. in Oct., 1899, offered hay to resps., subject to acceptance in 5 days; delivery in 6 months. Resps. wrote: "We will accept . . . etc.," but owing to postal delay the letter reached applts. on the day following the time allowed for acceptance. Applts. refused to treat this as an acceptance, and the hay was not sent to resps. Resps. owed applts. money for hay previously shipped, for which applts. brought action. Resps. counterclaimed for breach of the Oct., 1899, contract, before expiration of the 6 months mentioned for delivery of the hay:—*Held:* applts. had 6 months for delivery of the hay, & resps.' counterclaim within that period was premature.—OPPENHEIMER *v.* BRACKMAN & KER MILLING CO. (1902), 32 S. C. R. 699.—**CAN.**

169 i. *Negotiable instrument—Days of grace not expired.*]—A note read: "On or before Nov. 1, 1904, I promise to pay . . . etc." Suit thereon was commenced on Nov. 1, 1910:—*Held:* deft. had the whole of Nov. 1 in which to make payment, & pltf. had no right to sue until Nov. 2. *Kennedy* v. *Thomas*, [1894] 2 Q. B. 759, settled the law on the point. Where a bill is refused payment at any time on the last day of grace, although the holder can immediately give notice of dishonour, he has no cause of action until the expiration of that day, & an action commenced on the last day of grace must be dismissed as premature.—WILLOUGHBY *v.* WAINWRIGHT (1913), 24 W. L. R. 504; 4 W. W. R. 875.—**CAN.**

i. *Debt not matured—Bankruptcy of debtor.*]—A creditor whose debt has not matured may take proceedings to subject the estate of his debtor to compulsory liquidation under Insolvent Act, 1869, s. 20.—*Re* PERKS (1870), 13 N. B. R. (2 Han.) 121.—**CAN.**

Sect. 2.—*Cause of Action: Sub-sect.* 6, *B. & C.*]

the third day of grace ; (2) the writ was premature. — KENNEDY *v.* THOMAS, [1894] 2 Q. B. 759 ; 63 L. J. Q. B. 761 ; 71 L. T. 144 ; 42 W. R. 641 ; 10 T. L. R. 572 ; 38 Sol. Jo. 616 ; 9 R. 564, C. A.

170. —— Notice of dishonour not received.]—In an action against the indorser of a bill of exchange issue was joined as to notice of dishonour. It appeared that a letter containing the notice was put into the post on the day on which the action was commenced, &, by the routine of the post office, would reach deft. between four & five in the afternoon of that day. No further evidence was given as to the time of notice. The offices of the ct. were open only till five in the afternoon of the day in question :—*Held :* pltf. must fail, it lying on him to show the right of action was complete before the suit was commenced.—CASTRIQUE *v.* BERNABO (1844), 6 Q. B. 498 ; 1 New Pract. Cas. 94 ; 14 L. J. Q. B. 3 ; 9 Jur. 130 ; 115 E. R. 186.

Annotation :—**Refd.** Hinton *v.* Duff (1862), 1 C. B. N. S. 724.

See, further, BILLS OF EXCHANGE, PROMISSORY NOTES & NEGOTIABLE INSTRUMENTS.

171. Policy-holder.]—Pltf. effected with deft. co. a policy on 20 years' continuance of his own life. The policy provided that the capital stock of the co. should alone be liable to answer claims under the policy & that no director should be personally liable. The deed of settlement entitled policy-holders to participate in profits, & also contained provisions enabling the directors in certain events to dissolve the co. The directors—but not in accordance with their powers to dissolve the co.—transferred its funds & property to another co., who were to take their liabilities. Pltf., before the maturing of his policy, brought an action against the co., his assurers, charging them with having wrongfully aliened & transferred their property & ceased to carry on business, whereby he lost the moneys & profits he would otherwise have made from continuance of the contract :—*Held :* (1) pltf. had no claim on the co. until his policy became payable ; (2) until that event happened the action was an action *quia timet*, & pltf. must be nonsuited.—KING *v.* ACCUMULATIVE LIFE FUND & GENERAL ASSURANCE CO. (1857), 3 C. B. N. S. 151 ; 27 L. J. C. P. 57 ; 30 L. T. O. S. 119 ; 3 Jur. N. S. 1264 ; 6 W. R. 12 ; 140 E. R. 696

Annotations :—**Refd.** Aldebert *v.* Leaf (1864), 3 New Rep. 455 ; *Re* Sovereign Life Assce., [1892] 3 Ch. 279, C. A.

172. ——.]—P. insured his life with defts. & assigned the policy to pltf. After two premiums had been paid defts. refused to receive any further premium, & repudiated liability on the policy. Pltf. in P.'s lifetime brought an action claiming a declaration that the policy was valid, & an injunction to restrain defts. from repudiating it :—*Held :* (1) the action was premature ; (2) on defts. undertaking that if an action was hereafter brought on the policy they would not rely as a defence on non-payment of premiums it would be dismissed.

There is no enforceable claim in respect of the policy, &, so long as he is not prejudiced by non-payment of his premium, he has no right at present to ask for a declaration in his favour that the policy is valid before any claim against the society has arisen (BUCKLEY, J.). — HONOUR *v.* EQUITABLE LIFE ASSURANCE SOCIETY OF THE U.S., [1900] 1 Ch. 852 ; 69 L. J. Ch. 420 ; 82 L. T. 144 ; 48 W. R. 347 ; 44 Sol. Jo. 313.

See, further, JUDGMENTS & ORDERS.

173. Promise to pay.]—EGLES *v.* VALE, No. 151, *ante.*

174. Rent—Re-entry for non-payment.]—For the purposes of the Moratorium Proclamation under Postponement of Payments Act, 1914 (c. 11), s. 1 (1), rent due & payable before the date of the Proclamation could not be recovered in an action in which the writ was issued after the Proclamation & before the specified date because not due & payable at the date of the writ ; & as the right given by the agreement of tenancy to re-enter for non-payment of rent is only a security for the rent it follows that the cause of action to enforce that right also did not exist at the date of the writ & could not be enforced in the action.—DURELL *v.* GREAD (1914), 84 L. J. K. B. 130, 132 ; 112 L. T. 126 ; 31 T. L. R. 22 ; 59 Sol. Jo. 7.

175. Stockbroker's account.]—On default of his client pltf., a stockbroker, closed his account. He was not liable to pay his jobber till May 27, but brought his action on May 17 :—*Held :* the action was premature.—HALSTEAD *v.* FREELAND (1904), *Times*, 25th July.

176. Tort—Detinue.]—Deft., a jeweller, sold to pltf.'s wife a valuable antique gold watch which she presented to pltf. Some years afterwards it was stolen from pltf. abroad, deft. being informed by the wife of the theft shortly after its occurrence. The watch, which had been pawned, was sent to certain auction rooms in London, where it was sold as an unredeemed pledge, the purchaser selling it to B. The latter sent the watch to deft., of whom he was an old customer, for his opinion as to its genuineness, & deft., recognising it as the watch originally sold to pltf.'s wife, wrote to B. informing him of the circumstances, & asking him what he would take for it if deft. could buy it from him. B. replied that he would return it to the original owner if he paid the price it cost him. Deft. thereupon wrote to pltf.'s wife informing her of the watch being in his possession & of B.'s offer & asking her wishes. No reply was sent to this letter, but pltf.'s solrs., having issued a writ for wrongful detention of the watch, sent their clerk with it to deft.'s premises, who, after inspecting the watch & demanding it should be given over to him, immediately served deft. with the writ :—*Held :* there had been in the circumstances no such demand by pltf. & refusal by deft. as would give pltf. a cause of action in detinue before the date of issue of the writ. —CLAYTON *v.* LE ROY, [1911] 2 K. B. 1031 ; 81 L. J. K. B. 49 ; 105 L. T. 430 ; 75 J. P. 521 ; 27 T. L. R. 479, C. A. S. C. Nos. 469, 480, *post.*

Annotation :—**Refd.** Eastern Construction Co. *v.* National Trust Co. (1913), 83 L. J. P. C. 122, P. C.

177. —— Infringement of copyright.] — BARFIELD *v.* KELLY, No. 154, *ante.*

178. —— Nuisance.]—TOTTENHAM L. B. OF HEALTH *v.* LEA CONSERVANCY BOARD, No. 157, *ante.*

C. Exceptional Cases.

179. Counterclaim—Rule applicable to.]—Pltfs. sued to restrain deft. obstructing navigation in a river so as to prevent their ships from coming to their wharf. Deft. counterclaimed to restrain pltfs. from mooring their ships so as to obstruct access to his own wharf, & at the hearing claimed to be entitled to damages up to the date of his counterclaim :—*Held :* under R. S. C., O. 19, r. 3, deft. could not claim damages in respect of obstruction after the date of the writ in the original action.—ORIGINAL HARTLEPOOL COLLIERIES CO. *v.* GIBB (1877), 5 Ch. D. 713 ; 46 L. J. Ch. 311 ; 36 L. T. 433 ; 3 Asp. M. L. C. 411.

Annotations :—**N.F.** Beddall *v.* Maitland (1881), 17 Ch. D. 174. **Refd.** Fritz *v.* Hobson (1880), 14 Ch. D. 542 ; Toke *v.* Andrews (1882), 8 Q. B. D. 428 ; Jones *v.* Simes (1890), 59 L. J. Ch. 351. **Mentd.** Barber *v.* Penley, [1893] 2 Ch. 447 ; A.-G. *v.* Brighton & Hove Co.-op. Assocn. (1900), 81 L. T. 762, C. A. ; Land Securities Co. *v.* Commercial Gas Co. (1902), 18 T. L. R. 405 ; Lowdens *v.* Keaveney (1902), 67 J. P. 378, Ir.

180. —— Rule not applicable to.]—Relief can be given on a counterclaim in respect of a cause of

action which accrued to deft. subsequently to issue of the writ in the original action.

Pltfs. sued to restrain deft. from holding himself out as partner in or selling the effects of pltf.'s business, which was carried on on premises in the occupation of deft. as manager: the writ was issued in Dec., 1879. Deft. counterclaimed for forcible entry by pltfs. in Jan., 1880, after issue of the writ, & for damage to his effects occasioned thereby:—*Held:* the counterclaim was properly made, by reason of Jud. Act, 1873 (c. 66), s. 24 (3).—BEDDALL *v.* MAITLAND (1881), 17 Ch. D. 174; 50 L. J. Ch. 401; 44 L. T. 248; 29 W. R. 484.

Annotations:—**Follds.** Andrew *v.* Aitken (1882), 51 L. J. Ch. 784. **Mentd.** Toke *v.* Andrews (1882), 8 Q. B. D. 428; Gray *v.* Webb (1882), 21 Ch. D. 802; McGowan *v.* Middleton (1883), 11 Q. B. D. 464, C. A.; Fraser *v.* Cooper (1883), 31 W. R. 714; Scott *v.* Brown (1884), 51 L. T. 746; Jones *v.* Foley, [1891] 1 Q. B. 730.

181. —— ——.]—By R. S. C., O. 24, r. 3, whenever deft. in his defence, or in any further defence as mentioned in r. 1, alleges any ground of defence which has arisen after commencement of the action, pltf. may deliver a confession of such defence & sign judgment for his costs up to the time of the pleading of such defence:—*Held:* a counterclaim & set-off is a defence within this rule.—WOOD *v.* GOODWIN (1884), Bitt. Rep. in Ch. 167.

182. —— —— **Facts arising since action must be pleaded.**]—A counterclaim founded on facts which have arisen since action brought must be pleaded as so arising, so that pltf. may be able to confess the plea; & if it is not so pleaded pltf. should take out a summons to strike it out, unless it be amended.—ELLIS *v.* MUNSON (1876), 35 L. T. 585, C. A.

Annotation:—**Refd.** McGowan *v.* Middleton (1883), 11 Q. B. D. 464, C. A.

183. —— —— **Nor to counterclaim in reply.**]—T. brought an action to recover arrears of rent of a farm down to Midsummer, 1881. Deft. by his counterclaim, delivered after Sept. 29, claimed the amount due to him on a valuation as outgoing tenant. Pltf. in reply "by way of set-off & counterclaim" claimed the quarter's rent due on Sept. 29, & also a sum paid by him for the rent-charge left unpaid by deft. On application by deft. to strike out this reply:—*Held:* pltf. was entitled to set up such counterclaim in reply.—TOKE *v.* ANDREWS (1882), 8 Q. B. D. 428; 51 L. J. Q. B. 281; 30 W. R. 659.

Annotations:—**Distd.** Alcoy & Gandia Ry. & Harbour Co. *v.* Greenhill, [1896] 1 Ch. 19, C. A. **Apprvd.** Renton Gibbs *v.* Neville, [1900] 2 Q. B. 181, C. A.

184. —— —— —— **Except in respect of existing claim.**]—In an action for money had & received deft. pleaded that he had expended all money received to pltf.'s use on her property as her agent, & counterclaimed for a sum of money expended on pltf.'s property as her agent in excess of the sum received to her use. Pltf. in her reply denied that deft. acted as her agent & counterclaimed if he had so acted for damages for negligence:—*Held:* the statement of claim must be amended, if a ground of claim was omitted which existed before the writ.—JAMES *v.* PAGE (1888), 85 L. T. Jo. 157.

Annotation:—**Distd.** Renton Gibbs *v.* Neville, [1900] 2 Q. B. 181, C. A.

185. —— —— —— **In respect of existing claim—When merely protection against counterclaim.**]—In an action for the price of goods supplied, defts. counterclaimed for damages for breach of contract by pltfs. Pltfs. denied that the contract was binding on them, & further alleged that, if it was binding, defts. had committed breaches of it which caused them loss, & they counterclaimed to set off the loss so sustained against defts.' counterclaim. Upon an application to strike out the counterclaim in the reply:—*Held:* as pltfs. did not rely upon the counterclaim in the reply as an independent claim, but merely as a protection against defts.' counterclaim, the counterclaim was properly raised in the reply & ought not to be struck out.—RENTON GIBBS & CO., LTD. *v.* NEVILLE & CO., [1900] 2 Q. B. 181; 69 L. J. Q. B. 514; 82 L. T. 446; 48 W. R. 532. C. A.

See, further, SET-OFF & COUNTERCLAIM.

186. **Debenture.**]—The holder of a debenture creating a floating charge is entitled to issue a writ for protection of his interest before the principal money secured by the debenture has become payable. If when the case comes on for hearing the money has become due or the security has crystallised, the ct. has jurisdiction to make an order for realisation of the security, &, so far as necessary, for foreclosure.—*Re* CARSHALTON PARK ESTATE, LTD., GRAHAM *v.* CARSHALTON PARK ESTATE, LTD., TURNELL *v.* CARSHALTON PARK ESTATE, LTD., [1908] 2 Ch 62; 77 L. J. Ch. 550; 99 L. T. 12; 24 T. L. R. 547; 15 Mans. 228.

See, further, COMPANIES.

Part II.—In respect of what Acts and Omissions an Action will Lie.

SECT. 1.—UBI JUS, IBI REMEDIUM.

SUB-SECT. 1.—IN GENERAL.

187. **No right without a remedy.**]—If pltf. has a right he must of necessity have a means to vindicate & maintain it, & a remedy if he is injured in the exercise & enjoyment of it; indeed, it is a vain thing to imagine a right without a remedy, for want of right & remedy are reciprocal. Every injury imports a damage though it does not cost the party one farthing; if men will multiply injuries actions must be multiplied too, for every man that is injured ought to have his recompense (HOLT, C.J.).—ASHBY *v.* WHITE (1703), 1 Bro. Parl. Cas. 62; Holt, K. B. 524; 2 Ld. Raym. 938; 6 Mod. Rep. 45; 1 Salk. 19; 3 Salk. 17; 14 State Tr. 695; 1 Smith, L. C., 12th ed., 266; 1 E. R. 417. S. C. Nos. 208, 216, 304, *post*.

Annotations:—**Follds.** Myddelton *v.* Wynn (1745–6), Willes, 597; R. *v.* Midhurst (1750), 1 Willes, 283; Milward *v.* Serjeant (1786), 14 East, 60. **Expld.** Harman *v.* Tappenden (1801), 1 East, 555. **Distd.** Williams *v.* Mostyn (1838), 4 M. & W. 145; Pryce *v.* Belcher (1847), 4 C. B. 866. **Apld.** Embrey *v.* Owen (1851), 6 Exch. 353. **Follds.** King *v.* Rochdale Canal Co. (1851), 14 Q. B. 136; Nicklin *v.* Williams (1854), 10 Exch. 259. **Expld. & Distd.** Tozer *v.* Child (1856), 6 E. & B. 289. **Distd.** Smith *v.* Thackerah (1866), L. R. 1 C. P. 564. **Apld.** Fotherby *v.* Metropolitan Ry. Co. (1866), L. R. 2 C. P. 188. **Distd.** Wood *v.* Wood (1874), L. R. 9 Exch. 190. **Expld.** Bowen *v.* Hall (1881), 6 Q. B. D.

PART II. SECT. 1, SUB-SECT. 1.

187 i. *No right without a remedy.*]—To a count alleging that deft. took pltf.'s property in a certain vessel, & negligently launched & managed the vessel so that she was damaged, deft. pleaded in answer joint ownership of pltf. & himself:—*Held:* the plea was no answer to the action; as long as tenancy in common exists, one tenant in common cannot maintain trover against the other; but when negligence of an active nature amounting to misfeasance is shown, one tenant in common is liable for misuse of the property, as it is a wrong for which there should be a remedy.—DOMVILLE *v.* O'BRIEN (1879), 18 N. B. R. (2 P. & B.) 656.—**CAN.**

Sect. 1.—*Ubi jus, ibi remedium: Sub-sects.* 1, 2 & 3.]

333, C. A. **Apprvd.** Ratcliffe *v.* Evans, [1892] 2 Q. B. 524, C. A. **Distd.** Chaffers *v.* Goldsmid, [1894] 1 Q. B. 186. **Expld.** Allen *v.* Flood, [1898] A. C. 1. **Consd.** Hammerton *v.* Dysart, [1916] 1 A. C. 57, H. L. **Refd.** Kendall *v.* John (1708), Fortes. Rep. 104; Drewe *v.* Coulton (1787), 1 East. 563, n.; Schinotti *v.* Bumsted (1796), 6 Term Rep. 646; Tewkesbury Corpn. *v.* Diston (1805), 6 East, 438; Cullen *v.* Morris (1819), 2 Stark. 577; Harnett *v.* Maitland (1847), 16 M. & W. 257; *Ex p.* Mawley (1854), 18 Jur. 906; McCormac *v.* Queen's University (1867), 15 W. R. 733, Ir.; Morgan *v.* Metropolitan Ry. Co. (1868), 37 L. J. C. P. 265; Metropolitan Board of Works *v.* McCarthy (1874), L. R. 7 H. L. 243; Humphreys *v.* Cousins (1877), 46 L. J. Q. B. 438, C. A.; Clark *v.* London General Omnibus Co., [1906] 2 K. B. 648, C. A.; I. R. Comrs. *v.* Joicey (No. 1), [1913] 1 K. B. 445, C. A. **Mentd.** R. *v.* Paty (1704), 2 Ld. Raym. 1105; R. *v.* Loggon & Froome (1718), 2 Stea. 73; Selwyn *v.* Honeywood (1744), 9 Mod. Rep. 419; Chapman *v.* Pickersgill (1762), 2 Willes, 145; R. *v.* Pasmore (1789), 3 Term Rep. 199; Burdett *v.* Abbot (1811), 14 East, 1; Stockdale *v.* Hansard (1839), 9 Ad. & El. 1; Ferguson *v.* Kinnoull (1842), 9 Cl. & Fin. 251; Hampden *v.* Macmullen (1843), 3 Notes of Cases, Supp. 1; Partridge *v.* Bank of England (1846), 8 L. T. O. S. 195; Chamberlain *v.* West End of London & Crystal Palace Ry. Co. (1863), 2 B. & S. 617; Spaight *v.* Tedcastle (1881), 44 L. T. 589, H. L. Ir.; Dalton *v.* Angus; Works & Public Buildings Comrs. *v.* Angus (1881), 6 App. Cas. 740; Bradlaugh *v.* Erskine (1883), 47 L. T. 618; The Bernina (1887), 12 P. D. 58, C. A.; Mills *v.* Armstrong, The Bernina (1888), 13 App. Cas. 1.

188. ——.]—A sheriff having a writ of *ca. sa.* delivered to him, unnecessarily delayed putting it in force:—*Held:* an action lay against him at the suit of the execution creditor, though no actual pecuniary damage had arisen from the default.

When the clear right of a party is invaded in consequence of another's breach of duty, he must be entitled to an action against the other for some amount (LORD DENMAN, C.J.).—CLIFTON *v.* HOOPER (1844), 6 Q. B. 468; 14 L. J. Q. B. 1; 4 L. T. O. S. 92; 8 Jur. 958; 115 E. R. 175. S. C. Nos. 213, 219, *post.*

Annotations:—**Distd.** Pryce *v.* Belcher (1847), 4 C. B. 866. **Expld. & Distd.** Hobson *v.* Thellusson (1867), 8 B. & S. 476.

189. Damnum & injuria.]—Wherever there is *damnum & injuria*, an action lies at common law. A person who has been excommunicated by a spiritual ct. for contumacy in failing to appear has a right of action against the officer of the ct. who failed to summon him.—POLE *v.* GODFREY (1614), 2 Bulst. 264; 80 E. R. 1110.

Annotation:—**Refd.** Ashby *v.* White (1703), 2 Ld. Raym. 938.

190. —— **Injury defined.**]—On a submission of all debts, trespasses, & injuries, the award directed releases of all actions, debts, duties, trespasses, & demands:—*Held:* the award was valid.

The award here does not exceed the submission, for the word "injury" is a general & large word, & comprehends in itself all manner of wrongs: *injuria & damnum* are the two grounds for the having all actions, & without these no action lies: if there be *damnum absque injuria*, or *injuria absque damno*, no action lies, but where there is injury, *injuria & damnum*, & so both of them do run together, there an action well lies (DODDERIDGE, J.).—CABLE *v.* ROGERS (1625), 3 Bulst. 311; 81 E. R. 259.

191. —— ——.]—The law will never suffer an injury & a damage without a remedy. There must be *damnum cum injuria*. By *injuria* is meant a tortious act; it need not be wilful & malicious. Though accidental, an action will lie (WILLES, C.J.). —WINSMORE *v.* GREENBANK (1745), Willes, 577; 125 E. R. 1330.

Annotations:—**Refd.** Lumley *v.* Gye (1853), 2 E. & B. 216; Allen *v.* Flood, [1898] A. C. 1. **Mentd.** Lynch *v.* Knight (1861), 5 L. T. 291, H. L.; Evans *v.* Walton (1867), L. R. 2 C. P. 615; Mogul S.S. Co. *v.* McGregor, Gow (1888), 21 Q. B. D. 544.

192. —— —— **"Wrongful."**]—An intent to "injure" connotes an intent to do wrongful harm. The term "wrongful" imports in its turn the infringement of some right (BOWEN, L.J.).—MOGUL S.S. Co. *v.* MCGREGOR, GOW, No. 249, *post.*

For full anns., *see* S. C. No. 249, *post.*

193. Lack of precedent—In general immaterial.] —Case for falsely & maliciously suing out a commission of bkpcy. afterwards superseded was a proper action at law, though the Chancellor had power to give £200 damages by statute.

This is an action of tort; torts are infinitely various, not limited or confined, for there is nothing in nature but may be an instrument of mischief (PRATT, C.J.).—CHAPMAN *v.* PICKERSGILL (1762), 2 Wils. 145; 95 E. R. 734. S. C. No. 200, *post.*

194. —— ——.]—A false affirmation made by deft. with the intent to defraud pltf., whereby pltf. received damage, is the ground of an action upon the case in the nature of deceit. In such an action it is not necessary that deft. should be benefited by the deceit, or that he should collude with the person who was.

Where cases are new in their principle, it is necessary to have recourse to legislative interposition to remedy the grievance; but where the case is only new in the instance, & the only question is upon the application of a principle recognised in the law to such new case, it is as competent to cts. of justice to apply the principle to any case which may arise two centuries hence as it was two centuries ago (ASHURST, J.).—PASLEY *v.* FREEMAN (1789), 3 Term Rep. 51; 2 Smith, L. C., 12th ed., 71; 100 E. R. 450. S. C. No. 201, *post.*

Annotations:—**Folld.** Eyre *v.* Durnsford (1801), 1 East, 318. **Expld.** Evans *v.* Bicknell (1801), 6 Ves. 174. **Distd.** Haycraft *v.* Creasy (1801), 2 East, 92. **Apprvd.** Taylor *v.* Ashton (1843), 11 M. & D. 401. **Apld.** Collins *v.* Evans (1844), 5 Q. B. 820. **Distd.** Childers *v.* Wooler (1859), 2 E. & E. 287. **Expld. & Distd.** Wilkinson *v.* Downton, [1897] 2 Q. B. 57. **Apprvd.** Allen *v.* Flood, [1898] A. C. 1. **Refd.** Hamar *v.* Alexander (1806), 2 Bos. & P. 241; Clifford *v.* Brooke (1806), 13 Ves. 131; Ames *v.* Millward (1818), 2 Moore, C. P. 713; Lyde *v.* Barnard (1836), 1 M. & W. 101; Langridge *v.* Levy (1837), 2 M. & W. 519; Shrewsbury *v.* Blount (1841), 2 Scott. N. R. 588; Pontefex *v.* Bignold (1841), 3 Man. & G. 63; Wilde *v.* Gibson (1848), 1 H. L. Cas. 605; Money *v.* Jorden (1852), 15 Beav. 372; Bushby *v.* Ellis (1853), 17 Beav. 279; Clelland *v.* Leech (1856), 27 L. T. O. S. 59, Ir.; Randall *v.* Trimen (1856), 18 C. B. 786; Robson *v.* Devon (1857), 29 L. T. O. S. 300; Wright *v.* Leonard (1861), 11 C. B. N. S. 258; *Re* Ward, Simmons *v.* Rose, Weeks *v.* Ward (1862), 31 Beav. 1; *Re* Dangar's Trusts (1889), 58 L. J. Ch. 315; Derry *v.* Peek (1889), 14 App. Cas. 337; Tallerman *v.* Dowsing Radiant Heat Co., [1900] 1 Ch. 1, C. A.; Cackett *v.* Keswick, [1902] 2 Ch. 456, C. A.; Nash *v.* Calthorpe, [1905] 2 Ch. 237, C. A.; Cavalier *v.* Pope (1905), 74 L. J. K. B. 857, C. A.; Nocton *v.* Ashburton, [1914] A. C. 932, H. L.; Banbury *v.* Bank of Montreal, [1917] 1 K. B. 409, C. A.; Hulton *v.* Hulton, [1917] 1 K. B. 813, C. A. **Mentd.** Burrows *v.* Lock (1805), 10 Ves. 470; Bromage *v.* Prosser (1825), 4 B. & C. 247; Morley *v.* Attenborough (1849), 3 Exch. 500; Shortridge *v.* Bosanquet (1852), 16 Jur. 919; Slim *v.* Croucher (1860), 1 De G. F. & J. 518; Bentley *v.* Mackay (1862), 31 Beav. 143; Eichholtz *v.* Bannister (1864), 17 C. B. N. S. 708; *Re* Overend, Gurney, *Ex p.* Oakes & Peck (1867), L. R. 3 Eq. 576; Hyde *v.* Bulmer (1868), 18 L. T. 293; Ramshire *v.* Bolton (1869), L. R. 8 Eq. 294; Schroeder *v.* Mendl (1877), 37 L. T. 452, C. A.; Joliffe *v.* Baker (1883), 11 Q. B. D. 255; Smith *v.* Chadwick (1884), 9 App. Cas. 187, H. L.; *Re* London & Leeds Bank, *Ex p.* Carling (1887), 56 L. J. Ch. 331; De Lassalle *v.* Guildford, [1901] 2 K. B. 215, C. A.; Heilbut, Symons *v.* Buckleton, [1913] A. C. 30.

195. —— ——.]—A bond recited that the patron of a rectory had by an instrument of the same date presented an incumbent, & that he had agreed to resign upon the request of the patron, or the owners of the advowson for the time being, for the purpose of enabling him or them to present one of the two younger brothers of the patron when capable of holding:—*Held:* such a bond was simoniacal & void.

If the House had been called on to establish a new & uncertain principle which had never been known or acted upon before, in that case legislation

alone ought to administer the remedy required for the existing evil: but where a principle is precisely the same the case no more requires legislative interference than one half the cases every day occurring in ct., where the old principle is applied to new combinations of circumstances, in order to circumvent the machinations of those who ingeniously are endeavouring by slight alterations to defeat or evade the decisions of the cts. (PARK, J.).—FLETCHER *v.* SONDES (1827), 3 Bing. 501; 1 Bli. N. S. 144; 130 E. R. 606, H. L.

Annotations:—**Refd.** Doe *d.* Watson *v.* Fletcher (1828), 2 Man. & Ry. K. B. 206. **Mentd.** R. *v.* Smith O'Brien (1848), 7 State Tr. N. S. 1; O'Brien *v.* R., Meagher *v.* R., MacManus *v.* R., O'Donnohue *v.* R. (1849), 3 Cox, C. C. 360, Ir.; Egerton *v.* Brownlow (1853), 4 H. L. Cas. 1.

196. —— When taken into consideration.]—COWLEY *v.* COWLEY, No. 270, *post.*

For full anns., *see* S. C. No. 270, *post.*

197. Remedy by mandamus.]—The Ct. of K. B. will grant a writ of mandamus as the suppletory means of substantial justice in every case where there is no other specific legal remedy for a legal right (LORD ELLENBOROUGH, C.J.).—R. *v.* CANTERBURY (ARCHBP.) (1812), 15 East, 117, 136; 104 E. R. 789.

Annotations:—**Apld.** R. *v.* Leicester Grdns., [1899] 2 Q. B. 632. **Refd.** R. *v.* Canterbury (1902), 71 L. J. K. B. 894. **Mentd.** A.-G. *v.* York (1831), 2 Russ. & M. 461; A.-G. *v.* Atherstone Free School Governors (1834), 3 My. & K. 544; Ferguson *v.* Kinnoull (1842), 9 Cl. & Fin. 251; R. *v.* Exeter (1850), 14 J. P. Jo. 351; *Re* Wilke's Charity (1851), 3 Mac. & G. 440; Marshall *v.* Exeter (1860), 7 C. B. N. S. 653; Exeter *v.* Marshall (1868), L. R. 3 H. L. 17; Hayman *v.* Rugby School Governors (1874), L. R. 18 Eq. 28; R. *v.* Liverpool (1904), 20 T. L. R. 485; Cassel *v.* Inglis, [1916] 2 Ch. 211.

See, further, CROWN PRACTICE.

198. How right may be ascertained.] — The nature of a right may often be ascertained by analysing the remedy for its breach. The appropriate remedy for disturbing a franchise ferry is an action in the nature of nuisance in which substantial damage has to be proved.—HAMMERTON *v.* DYSART, Nos. 238, 246, *post.*

Infringement of public right—No action without particular damage.]—*See* HIGHWAYS, STREETS & BRIDGES; NUISANCE; PRACTICE & PROCEDURE.

Quia timet actions.]—*See* EQUITY.

Statutory remedy alone available.]—*See* INJUNCTION; NEGLIGENCE; STATUTES; TORT.

SUB-SECT. 2.—ACTIONABLE ACTS.

199. Invasion of right.]—Pltfs., claiming a customary right with other inhabitants to have water from a spout in a highway, sued deft. for preventing sufficient water from reaching the spout. They had never suffered any damage or inconvenience: —*Held:* the action was maintainable.

Where there is a right in one man, & acts have been done by another which, if continued, would be evidence of a right in derogation of the right claimed, such acts are the subject of an action by the person entitled to the right in question (KELLY, C.B.).—HARROP *v.* HIRST (1868), L. R. 4 Exch. 43; 38 L. J. Ex. 1; 19 L. T. 426; 33 J. P. 103; 17 W. R. 164.

Annotations:—**Apld.** Goodhart *v.* Hyett (1883), 25 Ch. D. 182. **Folld.** Bower *v.* Sandford (1889), 5 T. L. R. 570. **Refd.** Wilts & Berks Canal Navigation *v.* Swindon Waterworks (1873), 29 L. T. 722; George *v.* Lysaght (1883), 49 L. T. 49; Brocklebank *v.* Thompson, [1903] 2 Ch. 344; McCartney *v.* Londonderry & Lough Swilly Ry. Co., [1904] A. C. 301; Hammerton *v.* Dysart, [1916] 1 A. C. 57, H. L.

200. Acts involving malice.] — CHAPMAN *v.* PICKERSGILL, No. 193, *ante.*

See, further, MALICIOUS PROSECUTION & PROCEDURE.

201. Acts involving falsehood—Deceit.]—PASLEY *v.* FREEMAN, No. 194, *ante.*

For full anns., *see* S. C. No. 194, *ante.*

202. —— Personating juryman.]—Where a stranger who is not one of the jury is sworn in the name of one of the jury the verdict of the jury is good, but the stranger may be indicted for a misdemeanor, or, *semble*, the parties may have an action against him.—ANON. (1640), March, 81, pl. 132; 82 E. R. 421.

See, further, JURIES.

203. —— False oath.]—An action lies against one who makes a false oath against pltf. whereby he is turned out of his office.—COXE *v.* SMITHE (1663), 1 Lev. 119; 83 E. R. 327.

204. —— Wife falsely claimed.]—An action lies for falsely & maliciously writing a letter claiming a woman as the writer's wife whereby she lost a marriage with another.—SHEPHERD (SHEPERD, SHEPPARD) *v.* WAKEMAN (1662), 1 Keb. 255, 269, 308, 326, 459; 1 Lev. 53; 1 Sid. 79; 83 E. R. 931, 939, 963, 974, 1052.

Annotations:—**Refd.** Lumley *v.* Gye (1853), 2 E. & B. 216; Haddon *v.* Lott (1854), 15 C. B. 411; Allen *v.* Flood, [1898] A. C. 1. **Mentd.** Barnardiston *v.* Soame (1674), 6 State Tr. 1063.

205. Mental shock caused by practical joke.]—A false statement made wilfully, the direct effect of which is to cause a mental shock resulting in the illness of the person to whom it is made, is an infringement of the right to personal safety, & actionable. It is wilful *injuria*, although no malicious purpose to cause the harm nor motive of spite be imputed, & its effect—illness from mental shock—may be, & in this case is, not too remote to be in law regarded as a consequence for which the speaker is answerable in damages.—WILKINSON *v.* DOWNTON, [1897] 2 Q. B. 57; 66 L. J. Q. B. 493; 76 L. T. 493; 45 W. R. 525; 13 T. L. R. 388; 41 Sol. Jo. 493.

Annotation:—**Refd.** Dulieu *v.* White, [1901] 2 K. B. 669.

SUB-SECT. 3.—ACTIONABLE REFUSALS & OMISSIONS.

206. Duty imposed by law—Refusal to perform.] —An action lies against a smith for refusing to shoe a horse or an innkeeper for refusing to feed it.—ANON. (1502), Keil. 50; 72 E. R. 208.

Annotation:—**Apprvd.** Clarke *v.* West Ham Corpn. (1909), 101 L. T. 481, C. A.

207. —— —— Clergyman refusing to perform marriage ceremony.]—*Qu.:* whether in any circumstances an action lies against a clergyman for refusing to perform the marriage ceremony. This depends on whether there is such a duty as to give rise to a remedy in law.

Such a neglect of the duty of a clergyman may be actionable if it be malicious & without probable cause (LORD DENMAN, C.J.).—DAVIS *v.* BLACK (1841), 1 Q. B. 900; 113 E. R. 1376.

Annotations:—**Refd.** Titchmarsh *v.* Chapman (1844), 3 Notes of Cases, 370. **Mentd.** Holford *v.* Hankinson (1844), 5 Q. B. 584.

208. —— —— Returning officer.] — A person who has a right to vote for the election of members to serve in Parliament may maintain an action against the officer who takes the poll for maliciously refusing to admit his vote, although the right of

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PART II. SECT. 1, SUB-SECT. 2.

199 i. *Invasion of right.*]—A pltf. whose right has been invaded is entitled to some remedy, whether damage has accrued to him or not.—RAMPHUL SAHOO *v.* MISREE LALL (1875), 24 W. R. 97.—**IND.**

199 ii. —— *Exclusion from office.*]—Deft. had been illegally elected for the office of surgeon of a county infirmary, but entered into office, &, though cautioned, kept out pltf., who had been legally elected:—*Held:* pltf. was entitled to recover damages from deft. for so excluding him.—LAWLOR *v.* ALTON (1873), I. R. 8 C. L. 160.—**IR.**

PART II. SECT. 1, SUB-SECT. 3.

206 i. *Duty imposed by law—Refusal to perform.*]—An action at the suit of a party aggrieved by the non-performance of a duty prescribed by an Act of Parliament, is an action at common law.—WARD *v.* FREEMAN (1852), 2 I. C. L. R. 460, 517.—**IR.**

208 i. —— —— *Returning officer.*]—Deft., chairman of a meeting under the Fishery Acts for the election of Fishery

Sect. 1.—*Ubi jus, ibi remedium: Sub-sects.* 3 & 4.]

such elector to vote was never determined in Parliament, & although the candidate for whom he tendered his vote was returned duly elected.—ASHBY *v.* WHITE, No. 187, *ante;* Nos. 216, 304, *post.*

For full anns., *see* S. C. No. 187, *ante.*

209. —— —— ——.]—An action lies against one who refuses a poll to one of two competitors for an office for which by custom a poll may be demanded.—STERLING *v.* TURNER (1672), 1 Vent. 206; 86 E. R. 139; *affg. S. C. sub nom.* TURNER *v.* STERLING (1671), 2 Vent. 25.

Annotations:—**Distd.** Ashby *v.* White (1703), 2 Ld. Raym. 938. **Foll.** Hampden *v.* Macmullen (1843), 3 Notes of Cases, Supp. 1 (revsd. on appeal). **Refd.** Lewis *v.* Lewis (1729), Fitz-G. 43, 98, 173. **Mentd.** Philips *v.* Smith (1717), 1 Com. 279.

210. —— —— ——.]—Pltf., a freeman, had a voice in the election of mayors; deft., the present mayor, refused to receive his vote. Upon issue & trial pltf. was nonsuited, but it did not appear whether pltf. was nonsuited for want of proof that deft. was the present mayor:—*Held:* deft. should not have double costs in such a case as this.—HERRING *v.* FINCH (1679), 2 Lev. 250; 83 E. R. 542.

Annotations:—**Distd.** Ashby *v.* White (1703), 2 Ld. Raym. 938. **Foll.** Hampden *v.* Macmullen (1843), 3 Notes of Cases, Supp. 1 (revsd. on appeal).

211. —— —— **Overseer.**]—The declaration stated that pltf. was an occupier of a house within the parish of G., rateable & entitled to be assessed for the relief of the poor of that parish; yet that deft., being overseer of the poor, wrongfully & maliciously omitted to insert her name in the rate, whereby she was prevented from applying for & obtaining a licence to sell beer, etc., on her premises. The plea traversed the facts firstly above stated in the declaration:—*Held:* deft. ought to have denied the special damage if, as was admitted, special damage went to the foundation of pltf.'s right of action.—PERRING *v.* HARRIS (1836), 2 Mood. & R. 5.

Annotation:—**Expld.** Wilby *v.* Elston (1849), 18 L. J. C. P. 320.

212. —— —— ——.]—*Semble:* a party sustaining inconvenience & loss for want of due publication of the list of borough voters under Parliamentary Voters Registration Act, 1843 (c. 18), s. 13, has an action against the overseers who have omitted to sign the list.—MORGAN *v.* PARRY (1856), 17 C. B. 334; K. & G. 53; 25 L. J. C. P. 141; 26 L. T. O. S. 292; 20 J. P. 149; 2 Jur. N. S. 285; 4 W. R. 286; 139 E. R. 1101.

213. —— —— **Sheriff.**]—CLIFTON *v.* HOOPER, No. 188, *ante;* No. 219, *post*

214. —— —— **Officer of inferior court—Refusal to allow attorney to appear.**]—Case by an attorney lies against a public notary of an inferior ct. who refuses to permit the attorney to appear there for his client.—HASTING'S CASE (1669), 2 Keb. 580; 1 Mod. Rep. 23; 1 Sid. 410; 84 E. R. 365.

See, further, SOLICITORS.

215. Duty arising out of contract—Banker refusing payment of customer's cheque.]—There is an implied contract between a banker & each of his customers that the former will pay the cheques of the latter upon presentment provided the money be paid into his office in such time that his clerks may reasonably be required to know the fact.

Where money was paid in a few minutes before eleven o'clock, & ten minutes before three a cheque was presented & was refused payment for want of sufficient assets, the clerk who refused not being aware of the payment that morning:—*Held:* the customer was entitled to maintain an action against the banker, & to have a verdict for nominal damages, although he did not prove that the refusal had caused him any actual damage.—MARZETTI *v.* WILLIAMS (1830), 1 B. & Ad. 415; 9 L. J. O. S. K. B. 42; 109 E. R. 842.

Annotations:—**Apld.** Godefroy *v.* Jay (1831), 7 Bing. 413; Bushell *v.* Beavan (1834), 1 Bing. N. C. 103. **Expld.** Boorman *v.* Brown (1842), 2 Gal. & Dav. 793, Ex. Ch. **Apld.** Clifton *v.* Hooper (1844), 6 Q. B. 468. **Distd.** Westaway *v.* Frost (1848), 17 L. J. Q. B. 286. **Apld.** Fray *v.* Voules (1859), 1 E. & E. 839. **Distd.** Bonomi *v.* Backhouse (1859), E. B. & E. 646, Ex. Ch. **Apld.** Dent *v.* Turpin, Tucker *v.* Turpin (1861), 2 John. & H. 139. **Distd.** Hyde *v.* Bulmer (1868), 18 L. T. 293; Cole *v.* Christie (1910), 26 T. L. R. 469. **Refd.** Wylie *v.* Birch (1843), 4 Q. B. 566; De Medina *v.* Grove (1847), 10 Q. B. 172; Bell *v.* Carey (1849), 8 C. B. 887; *Re* Gibson, *Re* St. Alban's Bank (1850), 15 L. T. O. S. 95; Robarts *v.* Tucker (1851), 20 L. J. Q. B. 270, Ex. Ch.; Woods *v.* Finnis (1852), 7 Exch. 363; Randall *v.* Moon (1852), 12 C. B. 261; Churchill *v.* Siggers (1854), 3 E. & B. 929; Rolin *v.* Steward (1854), 14 C. B. 595; Swinfen *v.* Chelmsford (1860), 2 L. T. 406; Emanuel *v.* Robarts (1868), 9 B. & S. 121; Prehn *v.* Royal Bank of Liverpool (1870), L. R. 5 Exch. 92; Larios *v.* Bonany (1873), L. R. 5 P. C. 346; *Re* General South American Co. (1877), 47 L. J. Ch. 67; Steljes *v.* Ingram (1903), 19 T. L. R. 534. **Mentd.** Gould *v.* Oliver (1840), 2 Man. & G. 205; *Re* Wise, *Ex p.* Atkins (1842), 3 Mont. D. & De G. 103; Beckham *v.* Drake (1849), H. L. Cas. 579.

See, further, BANKERS & BANKING.

SUB-SECT. 4.—NECESSITY OF ACTUAL DAMAGE.

216. Presumption of damage—Where right involved.]—ASHBY *v.* WHITE, Nos. 187, 208, *ante;* No. 304, *post.*

For full anns., *see* S. C. No. 187, *ante.*

Conservators, rejected the vote of pltf., duly tendered by proxy:—*Held:* an action for not receiving pltf.'s vote was sustainable without special damage, although the persons for whom pltf.'s vote was tendered were, before action brought, declared elected, upon proceedings in the Q. B.—BEECHER *v.* LUCAS (1877), I. R. 11 C. L. 517.—**IR.**

208 ii. —— —— *Presiding officer.*]—Pltf. was entitled to vote and select the form of oath. Deft., the presiding officer, refused to administer the selected oath, and did not permit pltf. to vote:—*Held:* the duties of presiding officers are ministerial, and for breach in respect thereto, action lies, by aggrieved party, without proof of malice or negligence.—WILSON *v.* MANES (1896), 28 O. R. 419; 26 A. R. 398.—**CAN.**

208 iii. —— —— ——.]—Pltf. resided in St. John, New Brunswick, & his name was on the voters' list in St. John, & also in Dalhousie, Nova Scotia. Pltf. presented himself at a Dalhousie booth, & demanded a ballot. Under the Nova Scotia Act, an elector could only vote once in the province at any election; he must vote in the county in which he resided; & a non-resident elector, having a right to vote in two or more polling districts, might vote in either. Pltf. was required to swear that "at the teste of the writ for this election I resided in the city of St. John, New Brunswick; that I am not qualified to vote in the city. . . ." He declined & was refused a ballot:—*Held:* pltf. had a right to vote in Dalhousie; & damages were assessed at $350.—ANDERSON *v.* HICKS (1902), 21 C. L. T. 507; 35 N. S. R. 161.—**CAN.**

208 iv. —— —— *City chamberlain.*]—Pltf.'s name was wrongfully struck off the voters' list, under the impression that his rates were not paid, & he lost his vote at an election. He had paid his rates & was entitled to vote:—*Held:* (1) the exercise of franchise is an important right; (2) a person having the right and denied its exercise, is injured, and a right of action exists.—CRAWFORD *v.* ST. JOHN CITY (1898), 34 N. B. R. 560.—**CAN.**

j. —— —— *Refusal to submit petition of right.*]—Under British Columbia Crown Procedure Act, s. 4, it is the duty of the Provincial Secretary to submit to the Lieutenant-Governor a petition left with him as therein directed. His definite refusal so to do gives petitioner a cause of action involving damages.—FULTON *v.* NORTON C. R., [1908] A. C. 451; 78 L. J. (P. C.) 29; 99 L. T. 455; 24 T. L. R. 794; 39 S. C. R. 202; 27 C. L. T. 887.—**CAN.**

215 i. *Duty arising out of contract—Agreement to pay court fee.*]—Deft. having agreed with pltf., as one of the terms of a compromise of a suit *in formâ pauperis*, to pay part of the ct. fee, if subsequently levied, & having failed so to do, in consequence of which pltf.'s properties were attached:—*Held:* on deft.'s failure to pay pltf. according to his contract, pltf. was entitled to sue at once & recover substantial damages.—RAMALINGATHUDAYAR *v.* UNNAMALAI ACHI, [1914] 1 L. R. 38 Mad. 791.—**IND.**

PART II. SECT. 1, SUB-SECT. 4.

216 i. *Presumption of damage—Where right involved.*]—Defts. unlawfully interfered with pltfs.' rights in a river. It was contended that pltfs., not having shown a pecuniary loss, were not entitled to recover:—*Held:* the contention was not an answer to the claim. Where there is an invasion of a right the law infers damage. Actual perceptible damage is not indispensable as a

217. —— ——.]—Actual perceptible damage is not indispensable as the foundation of an action; it is sufficient to show the violation of a right, in which case the law will presume damage (PARKE, B.). —EMBREY *v.* OWEN (1851), 6 Exch. 353; 20 L. J. Ex. 212; 17 L. T. O. S. 79; 15 Jur. 633; 155 E. R. 579.

Annotations:—**Refd.** Nicklin *v.* Williams (1854), 10 Exch. 259; Brunsden *v.* Humphrey (1884), 14 Q. B. D. 141, C. A. **Mentd.** Dickinson *v.* Grand Junction Canal Co. (1852), 7 Exch. 282; Northam *v.* Hurley (1853), 1 E. & B. 665; Chasemore *v.* Richards (1857), 2 H. & N. 168, Ex. Ch.; Sampson *v.* Hoddinott (1857), 1 C. B. N. S. 590; Stockport Waterworks Co. *v.* Potter (1864), 3 H. & C. 300; Nuttall *v.* Bracewell (1866), 36 L. J. Ex. 1; Grand Junction Canal *v.* Shugar (1871), 24 L. T. 402, C. A.; Pennington *v.* Brinsop Hall Coal Co. (1877), 5 Ch. D. 769; Orr Ewing *v.* Colquhoun (1877), 2 App. Cas. 839, H. L. Sc.; Sandwich *v.* G. N. Ry. Co. (1878), 10 Ch. D. 707; Angus *v.* Dalton (1878), 4 Q. B. D. 162, C. A.; Ormerod *v.* Todmorden Joint Stock Mill Co. (1883), 11 Q. B. D. 155, C. A.; Kensit *v.* G. E. Ry. Co. (1883), 23 Ch. D. 566; Withers *v.* Purchase (1889), 60 L. T. 819; Bradford Corpn. *v.* Ferrand, [1902] 2 Ch. 655; McCartney *v.* Londonderry & Lough Swilly Ry. Co., [1904] A. C. 301; Sharp *v.* Wilson, Rotheray (1905), 93 L. T. 155.

218. —— —— **Nuisance.**]—A declaration in case stated that deft., possessing a messuage adjoining pltf.'s garden, erected a cornice upon his messuage, projecting over the garden, & damaged same, & pltf. had been incommoded in the possession & enjoyment of his garden:—*Held:* (1) the erection of the cornice was a nuisance from which the law would infer injury to pltf.; (2) he was entitled to maintain an action in respect thereof without proof that rain had fallen between the period of the erection of the cornice & commencement of the action.—FAY *v.* PRENTICE (1845), 1 C. B. 828; 14 L. J. C. P. 298; 5 L. T. O. S. 216; 9 Jur. 876; 135 E. R. 769.

Annotations:—**Consd.** Lemmon *v.* Webb, [1894] 3 Ch. 1, C. A. **Refd.** Brunsden *v.* Humphrey (1884), 14 Q. B. D. 141, C. A.

219. —— —— **Sheriff.**]—If the sheriff, having a writ of execution delivered to him, unnecessarily delays putting it in force, an action on the case lies against him at the suit of the execution creditor though no actual pecuniary damage has arisen from the default. The measure of damages for such default is not necessarily the whole debt, but such sum as the jury think equivalent to the real loss. If there has been no actual loss, still, in the case of final process, pltf. must have nominal damages.—CLIFTON *v.* HOOPER, Nos. 188, 213, *ante.*

Annotations:—**Consd.** Pryce *v.* Belcher (1847), 4 C. B. 866. **Refd.** Hobson *v.* Thellusson (1867), 8 B. & S. 476.

Cf. p. 29, *post.*

220. —— —— **Pound breach.**]—An action for treble damages for pound breach or rescous of goods distrained for rent, under 2 Will. & M., c. 5, s. 4, is maintainable by the landlord without proof of any special damage suffered by him.—KEMP *v.* CHRISTMAS (1898), 79 L. T. 233; 14 T. L. R. 572, C. A.

Annotation:—**Refd.** Jones *v.* Bierstein, [1899] 1 Q. B. 470.

221. —— —— **Riparian owner.**]—Pltf. had immemorially enjoyed the benefit of irrigating certain meadows with the water of the Y., subject to the right of the occupier of a mill to detain the water for the use of his mill; & although the natural flow of the river was prevented by the exercise of the miller's right, the water came down at such times that pltf. was enabled to irrigate his meadows effectually. Of late deft. had, for the purpose of irrigating his own adjacent land, from time to time diverted the water after it had passed the mill & before it reached pltf.'s meadows; &, although it did not appear that the quantity of water which ultimately reached pltf.'s meadows was thereby sensibly diminished, yet the effect was that the water was detained by the process of irrigation & did not arrive until so late in the day that pltf. was deprived of the power to use it fully:—*Held:* (1) this detention of the water by deft. was a use of it which was necessarily injurious to the natural rights of pltf. as a riparian proprietor, & a ground of action; (2) in such a case it is not necessary to show actual damage to pltf.'s reversionary interest; it is enough to show an obstruction of his right, &, such obstruction being shown, the law will infer damage.—SAMPSON *v.* HODDINOTT (1857), 1 C. B. N. S. 590; *affd.* 3 C. B. N. S. 596; 26 L. J. C. P. 148; 20 L. T. O. S. 304; 21 J. P. 375; 3 Jur. N. S. 243; 5 W. R. 230; 140 E. R. 242, 875.

Annotations:—**Consd.** Stockport Waterworks Co. *v.* Potter (1864), 3 H. & C. 300; Crossley *v.* Lightowler (1866), L. R. 3 Eq. 279. **Distd.** Kensit *v.* G. E. Ry. Co. (1883), 23 Ch. D. 566. **Apprvd.** McCartney *v.* Londonderry & Lough Swilly Ry. Co., [1904] A. C. 301. **Apld.** Sharp *v.* Wilson, Rotheray (1905), 93 L. T. 155. **Refd.** Roberts *v.* Richards (1881), 50 L. J. Ch. 297; Simpson *v.* Godmanchester Corpn., [1896] 1 Ch. 214, C. A.

See, further, EASEMENTS & PROFITS À PRENDRE; NUISANCE.

222. —— —— **Trade.**]—A declaration stated that pltf., being the inventor & manufacturer of metallic hones, used certain envelopes for same denoting them to be his; & that defts. wrongfully made other hones, wrapped in envelopes resembling pltf.'s, & sold them as his, whereby pltf. was prevented from selling many of his hones, & they were depreciated in value & reputation, those of defts.

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foundation for an action. The violation of a right is sufficient.—RAINY RIVER NAV. CO. *v.* WATROUS ISLAND BOOM CO. (1914), 26 O. W. R. 456; 6 O. W. N. 537.—**CAN.**

216 ii. —— ——.]—In a cause of trespass, deft. justified cutting a ditch under an award of fence viewers, &c. The jury found for deft. on this issue, & on the general issue that there was no damage:—*Held:* as a right was involved, pltf. was entitled on the general issue to nominal damages.—WARREN *v.* DESLIPPES (1872), 33 U. C. R. 59.—**CAN.**

k. —— —— *Obstruction of right of way.*]—O., on Dec. 15, 1848, conveyed to P. part of lot 33, & by the same deed, "as appurtenant to the land, a full, free, & unrestricted right of way over a strip of land adjoining the westerly side of the parcel of land, extending from the highway to the water's edge." In an action for obstructing this right of way:—*Held:* (1) the way was a private, not a public way; (2) the obstruction, without actual damage, gave the grantee a cause of action, for it was an interference with his easement, which, if submitted to, would become a right.—PLUMB *v.* MCGANNON (1871), 32 U. C. R. 8.—**CAN.**

221 i. —— —— *Riparian owner.*]—H. had erected a mill in 1815, & about 10 years before the action, L. built a mill higher up on the same stream. The natural flow of water at many seasons of the year would not keep up a head of water sufficient to drive the mills, & deft. was in the daily habit of shutting his dam & stopping the water for considerable portions of time, when it was prevented from flowing to pltf.'s mill. The jury found for pltf., damages one shilling, pltf. not having sustained actual loss. A new trial was moved for, on the grounds (1) every riparian owner has a right to erect a dam, & detain water to fill it; (2) this was at most a mere injury to a right without actual damage:—*Held:* an action would lie without actual damage, & the rule for a new trial must be discharged.—HOWATT *v.* LAIRD & CREW (1850), 1 P. E. I. 7.—**CAN.**

221 ii. —— —— ——.]—Pltf., owner of a water wheel mill, &c., was entitled to the benefit of a watercourse and fall of water. Deft. possessed a sawmill higher up stream. He deposited sawdust, &c., in the stream, & pltf. was hindered from working his mill, &c., & fall. The damage was not appreciable, & the jury found for deft. generally. On a rule *nisi* for a new trial:—*Held:* (1) if denial of pltf.'s right to use the stream was sustained, deft. could continue to deposit sawdust, etc., therein; the injury would in time become serious, & 20 years' uninterrupted enjoyment would evidence an easement; (2) a new trial must be ordered.—MITCHELL *v.* BARRY (1867), 26 U. C. R. 416.—**CAN.**

221 iii. —— —— ——.]—In an action for wrongfully obstructing the flow of a certain river by increasing the height of a weir, whereby pltf.'s lands, abutting on the river, were flooded, the judge instructed the jury that, if the acts complained of raised the water as it flowed past pltf.'s land above the height it ought of right to have flowed, such raising would be an actionable wrong, & would entitle pltf. to nominal damages; & declined to direct the jury that actual damage was essential to the action.—*Held:* the direction was right.—M'GLONE *v.* SMITH (1888), 22 L. R. Ir. 559.—**IR.**

Sect. 1.—*Ubi jus, ibi remedium: Sub-sect.* 4. *Sects.* 2 & 3: *Sub-sect.* 1.]

being inferior:—*Held:* pltf. was entitled to some damages for the invasion of his right by defts.' fraud, though he did not prove that their hones were inferior, or that he had sustained any specific damage.—BLOFELD (BLOFIELD) *v.* PAYNE (1833), 4 B. & Ad. 410; 1 Nev. & M. K. B. 353; 2 L. J. K. B. 68; 110 E. R. 509.

Annotations:—**Apld.** Dent *v.* Turpin, Tucker *v.* Turpin (1861), 2 J. & H. 139. **Apprvd.** Singer *v.* Loog (1882), 8 App. Cas. 15; Reddaway *v.* Bentham, [1892] 2 Q. B. 639, C. A. **Consd.** Spalding *v.* Gamage (1915), 84 L. J. Ch. 449, H. L. **Refd.** Seeley *v.* Fisher (1841), 10 L. J. Ch. 274; Crawshay *v.* Thompson (1842), 4 Man. & G. 357; Pryce *v.* Belcher (1846), 3 C. B. 58; Rodgers *v.* Nowill (1847), 5 C. B. 109; Leather Cloth Co. *v.* Hirschfield (1865), L. R. 1 Eq. 299.

223. —— —— —— **Inducing breach of contract.**]—In order to support an action for maliciously inducing persons to break their business contracts with pltf. proof of specific damage need not be given; it is sufficient to prove facts from which it may properly be inferred that some damage must result to pltf. from deft.'s wrongful acts.

Under a contract made between pltfs. & the Stock Exchange Committee valuable information of prices of stocks & shares during the day was collected on the Stock Exchange, & supplied to pltfs., & printed on tapes & sheets of letterpress in their office. Deft. having surreptitiously obtained such information, published it in the same form before its publication by pltfs.:—*Held:* pltfs. had a right of property at common law in the information, & were entitled to restrain deft. from infringing that right by continuing to publish it.

The action is founded upon three main causes of action: (1) an attack made upon the proprietary right of persons in unpublished matter; (2) an attack upon the proprietary right of persons in matter which they have published; (3) an attack made upon the right or interest of persons in the business which they carry on. As to the first of such rights, no registration & no proof of damage is necessary to support the action; as to the second, registration is necessary, but not any proof of damage; as to the third, unless damage be shown to have been actually sustained, there is no right of action, the fact of damage being the only thing which brings deft. into any relation with pltfs. (RIGBY, L.J.).—EXCHANGE TELEGRAPH CO., LTD. *v.* GREGORY & CO., [1896] 1 Q. B. 147; 65 L. J. Q. B. 262; 74 L. T. 83; 60 J. P. 52; 12 T. L. R. 18, C. A.

Annotations:—**Consd.** Exchange Telegraph Co. *v.* Central News, [1897] 2 Ch. 48. **Folld.** Summers *v.* Boyce & Kimmond (1907), 97 L. T. 505. **Expld. & Distd.** National Phonograph Co. *v.* Edison-Bell Consolidated Phonograph Co., [1908] 1 Ch. 335, C. A. **Apld.** Fenning Film Service *v.* Wolverhampton, Walsall & District Cinemas, [1914] 3 K. B. 1171; Goldsoll *v.* Goldman, [1914] 2 Ch. 603. **Distd.** Sports & General Press Agency *v.* "Our Dogs" Publishing Co., [1916] 2 K. B. 880.

224. Cases where special damage necessary.]—There are certain acts which, though improper, give no cause of action unless & until a damage is occasioned thereby. Thus, if a servant is unjustifiably beaten, no action arises to the master until there is damage by the loss of the service. The same principle applies to slander by words not actionable *per se* & to negligence. Further, an act, though neither improper nor unlawful, may, by causing avoidable damage, constitute an invasion of the rights of another & thus give a cause of action. Thus, it is not unlawful for a person to make an excavation upon his own land, but if it causes a subsidence in the adjoining owner's land, a right of action arises, & there is a fresh cause of action in respect of every subsidence.—DARLEY MAIN COLLIERY CO. *v.* MITCHELL, Nos. 114, 118, *ante*.

Annotations:—**Folld.** Crumbie *v.* Wallsend L. B., [1891] 1 Q. B. 503, C. A. **Apld.** Jordeson *v.* Sutton Southcoates & Drypool Gas Co. (1898), 67 L. J. Ch. 666. **Apld.** Harrington *v.* Derby Corpn., [1905] 1 Ch. 205; Tunnicliffe *v.* West Leigh Colliery Co., [1905] 2 Ch. 390; West Leigh Colliery Co. *v.* Tunnicliffe, [1908] A. C. 27. **Refd.** Brunsden *v.* Humphrey (1884), 14 Q. B. D. 141, C. A.; Markey *v.* Tolworth Joint Hospital District Board (1900), 69 L. J. Q. B. 738; Tunnicliffe *v.* West Leigh Colliery Co., [1906] 2 Ch. 22, C. A.; Nash *v.* Rochford R. D. C., [1917] 1 K. B. 384, C. A.

For full anns., *see* S. C. No. 118, *ante*.

225. —— Nature of special damage.]—The special damage necessary to support an action for defamation, when the words spoken are not actionable in themselves, must be the loss of some material temporal advantage.

Where words were spoken imputing unchastity to a woman, & by reason thereof she was excluded from a private society & congregation of a sect of Protestant Dissenters, of which she had been a member, & was prevented from obtaining a certificate without which she could not become a member of any other society of the same nature:—*Held:* such a result was not such special damage as would render the words actionable.—ROBERTS *v.* ROBERTS (1864), 5 B. & S. 384; 4 New Rep. 271; 33 L. J. Q. B. 249; 10 L. T. 602; 10 Jur. N. S. 1027; 12 W. R. 909; 122 E. R. 874.

Annotation:—**Distd.** Davies *v.* Solomon (1871), L. R. 7 Q. B. 112.

See, further, LIBEL & SLANDER.

226. —— Aerial trespass.]—Where deft. nailed to his own wall a board which overhung pltf.'s close:—*Semble:* the remedy was case & not trespass.

I do not think it is a trespass to interfere with the column of air superincumbent on the close. I once had occasion to rule upon the circuit, that a man who, from the outside of a field, discharged a gun into it, so that the shot must have struck the soil, was guilty of breaking & entering it. I am by no means prepared to say that firing across a field *in vacuo*, no part of the contents touching it, amounts to a *clausum fregit*. Nay, if this board overhanging pltf.'s garden be a trespass, it would follow that an aeronaut is liable to an action of trespass *quare clausum fregit* at the suit of the occupier of every field over which his balloon passes in the course of his voyage. Whether the action may be maintained cannot depend upon the length of time for which the superincumbent air is invaded. If any damage arises from the object which overhangs the close, the remedy is by an action on the case (LORD ELLENBOROUGH, C.J.).—PICKERING *v.* RUDD (1815), 4 Camp. 219; 1 Stark. 56. S. C. No. 287, *post*.

Annotations:—**Consd.** Wells *v.* Ody (1836), 1 M. & W. 452; Foulkes *v.* Scarfe (1842), 4 Man. & G. 126; Harvey *v.* Walters (1872-3), L. R. 8 C. P. 162; Lemmon *v.* Webb, [1894] 3 Ch. 1, C. A. **Refd.** Kenyon *v.* Hart (1865), 6 B. & S. 249; Clifton *v.* Bury (1887), 4 T. L. R. 8; Lemmon *v.* Webb, [1895] A. C. 1.

227. —— ——.]—SAUNDERS *v.* SMITH, Nos. 286, 289, *post*.

For full anns., *see* S. C. No. 289, *post*.

228. —— Distress by landlord—Excessive claim.]—No action lies against a landlord who, in distraining for rent, claims or pretends that more is due than is really so unless the goods taken & sold under the distress are unreasonable in respect of the rent

228 i. *Cases where special damage necessary—Distress by landlord—Excessive claim.*]—The declaration in an action for excessive distress alleged that pltf. held land as tenant to deft. at a certain rent; that deft. wrongfully seized goods as a distress for arrears of rent alleged to be due, & sold same for the alleged arrears, whereas a small part only of the alleged rent was in arrear. There was no allegation that more goods were taken or sold than were necessary to produce the rent actually due:—*Held:* the declaration disclosed no cause of action, as, some rent being due, the distress itself was not a wrong, & the mere distraining & selling on a claim of more than was due was not actionable.—PRESTON *v.* SIMONDS (1867), 12 N. B. R. (1 Han.) 44.—**CAN.**

actually due, or unless the tenant otherwise suffers special damage.—TANCRED & ARMITAGE *v.* LEYLAND (1851), 16 Q. B. 669 ; 20 L. J. Q. B. 316 ; 17 L. T. O. S. 53 ; 15 J. P. 815 ; 15 Jur. 394 ; 117 E. R. 1036, Ex. Ch.

Annotations:—**Foll.** Stevenson *v.* Newnham (1853), 13 C. B. 285. **Apprvd.** Glynn *v.* Thomas (1856), 11 Exch. 870. **Foll.** French *v.* Phillips (1856), 1 H. & N. 564, Ex. Ch. **Distd.** Fell *v.* Whittaker (1871), L. R. 7 Q. B. 120. **Foll.** Thwaites *v.* Wilding (1883), 52 L. J. Q. B. 734. **Refd.** Churchill *v.* Siggers (1854), 3 E. & B. 929.

229. —— Sheriff.]—No action can be maintained against the sheriff for the escape of a prisoner in custody on mesne process, unless pltf. has sustained actual damage or delay of his suit thereby. —WILLIAMS *v.* MOSTYN (1838), 4 M. & W. 145 ; 1 Horn. & H. 217 ; 17 L. J. Ex. 289 ; 2 J. P. 440 ; 2 Jur. 643 ; 150 E. R. 1379, Ex. Ch.

Annotations:—**Apld.** Wylie *v.* Birch (1843), 4 Q. B. 566. **Expld.** Clifton *v.* Hooper (1844), 6 Q. B. 468. **Refd.** Wintle *v.* Freeman (1841), 10 Ad. & El. 539 ; Rogers *v.* Parker (1856), 25 L. J. C. P. 220 ; Lloyd *v.* Harrison (1865), 6 B. & S. 36.

230. —— ——.]—An action against a sheriff for a false return will not lie unless actual damage has been caused to pltf.

A sheriff returned to a writ of *fi. fa.* that he had seized the goods of the execution debtor, & kept them safe in his possession until he received an order from creditor's attorney to withdraw, whereupon he withdrew. In defence to an action for a false return by the execution creditor, the sheriff proved that the only goods which debtor appeared to have had been assigned by a valid bill of sale, & no damage had occurred to pltf. in consequence of the return :—*Held :* the circumstance of deft. being a public officer to whose services pltf. was entitled did not constitute the case an exception to the rule that, in an action for tort, actual damage must be proved or a presumption of law implying damage established.—STIMSON *v.* FARNHAM (1871), L. R. 7 Q. B. 175 ; 41 L. J. Q. B. 52 ; 25 L. T. 747 ; as reptd. 20 W. R. 183.

SECT. 2.—INJURIA ABSQUE DAMNO.

231. Damage too remote.]—Pltfs.' tug was engaged in towing a ship from Antwerp to Port Talbot, under a contract which contained the clause "Sea towage interrupted by accident to be paid *pro rata* of distance towed." During the towage deft.'s vessel, by the negligence of those on board, collided with & sank the tow. The tug was uninjured. Pltfs. sued deft. to recover the amount of towage remuneration so lost :—*Held :* the damage sustained by pltfs. by reason of the towage contract being no longer performable in consequence of the sinking of the tow gave pltfs. no cause of action against deft.

Pltfs. have no cause of action. The obligation of deft. which was broken was the general one of navigating the seas with reasonable care. In order to give pltfs. a cause of action arising out of that breach they must show not only an *injuria*—viz., breach of deft.'s obligation—but also a *damnum* to themselves—that is, a *damnum* in a sense recognised by law. This they have failed to do (HAMILTON, J.).—SOCIETE ANONYME DE REMORQUAGE A HELICE *v.* BENNETTS, [1911] 1 K. B. 243 ; 80 L. J. K. B. 228 ; 27 T. L. R. 77 ; 16 Com. Cas. 24.

See, generally, DAMAGES ; NEGLIGENCE.

232. No damage—Ostensible violation of right—Void act.]—Pltf. was a member of a mutual marine insurance assocn., of which defts. were the committee. According to the rules of the assocn. defts. might expel any member whose conduct they deemed to be suspicious. Ptf. alleged that defts. had improperly & collusively expelled him under the rules, & without an opportunity of being heard to explain his conduct, whereby he lost the benefit of an insurance of a vessel insured by him with the assocn., & damaged at sea :—*Held :* the action was not maintainable on the grounds (1) the expulsion was void, & pltf. ought to sue in Ch. on the insurance (KELLY, C.B. & AMPHLETT, B.) ; (2) the declaration showed no expulsion which was not legally justified by the rules (CLEASBY & POLLOCK, BB.).

An action is not in general maintainable on a void act (KELLY, C.B., POLLOCK & AMPHLETT, BB.). —WOOD *v.* WOAD (1874), L. R. 9 Ex. 190 ; 43 L. J. Ex. 153 ; 30 L. T. 815 ; 22 W. R. 709 ; 2 Asp. M. L. C. 289.

Annotations:—**Distd.** Russell *v.* Russell (1880), 14 Ch. D. 471 ; James *v.* Chartered Accountants' Institute (1907), 98 L. T. 225, C. A. **Consd.** Cassel *v.* Inglis, [1916] 2 Ch. 211. **Refd.** Cooper *v.* Page (1876), 34 L. T. 90 ; Steuart *v.* Gladstone (1879), 10 Ch. D. 626, C. A. ; Lapointe *v.* L'Association de Bienfaisance et de Retraite de la Police de Montreal, [1906] A. C. 535, P. C. ; Green *v.* Howell, [1910] 1 Ch. 495, C. A. ; D'Arcy *v.* Adamson (1913), 29 T. L. R. 367.

SECT. 3.—DAMNUM ABSQUE INJURIA.

SUB-SECT. 1.—IN GENERAL.

233. Absence of legal right.]—In an action by a registered voter, who by non-residence had lost the right to vote, against a returning officer for refusing his vote, & making an unauthorised scrutiny as to his right to vote :—*Held :*—the foundation of pltf.'s action was the injury to his right ; he had no right, & suffered no injury.—PRYCE *v.* BELCHER (1847), 4 C. B. 866 ; 16 L. J. C. P. 264 ; 11 Jur. 675 ; 136 E. R. 749.

For full anns., *see* ELECTIONS.

234. ——.]—It is essential to an action in tort that the act complained of should, under the circumstances, affect the party complaining in some legal right. It is not sufficient that it merely does harm to his interests.

A Govt. officer, without malice, prohibited pilots under his orders from employing a particular vessel :—*Held :* this was not actionable.—ROGERS *v.* DUTT (1860), 13 Moo. P. C. C. 209 ; 8 Moo. Ind. App. 103 ; 3 L. T. 160 ; 25 J. P. 3 ; 9 W. R. 149 ; 15 E. R. 78, P. C.

Annotations:—**Apprvd.** Mogul S.S. Co. *v.* McGregor, Gow (1889), 23 Q. B. D. 598, C. A. **Mentd.** Tobin *v.* R. (1864), 16 C. B. N. S. 310 ; Palmer *v.* Hutchinson (1881), 6 App. Cas. 619, P. C. ; Allen *v.* Flood, [1898] A. C. 1.

235. ——.]—Boilermakers in common employment with resps., shipwrights working on wood, objected to work with the latter on the ground that in a previous employment they had been engaged on iron work. Applt., an official of the Boiler-

1. —— —— *Distress damage feasant.*] —In an action brought, not to establish a right nor in respect of an *injuria* involving *contumelia* or insult, but merely for the purpose of recovering damages for an *injuria*, pltf. must prove the actual damage sustained, & in the absence of such proof he will fail in his action, & will not be granted nominal damages. Deft. detained pltf.'s pigs, which had strayed on to his ground, until certain expenses should be paid, & eventually sent them to the pound. Pltf. sued deft. for the unlawful detention, but failed to prove actual damage ; —*Held :* deft. entitled to absolution from the instance with costs.—EDWARDS *v.* HYDE (1903), T. S. 381.—S. AF.

229 i. —— *Sheriff.*]—An attachment for non-payment of costs is in the nature of mesne process, & a sheriff is not liable to an action for the escape of a person so imprisoned unless pltf. in the suit has sustained actual damage in consequence.—ATKINSON *v.* MITCHELL (1866), 11 N. B. R. (6 All.) 345.—CAN.

PART II. SECT. 3, SUB-SECT. 1.

233 i. *Absence of legal right.*]—Pltf. sought to recover damages against deft. for obstructing the use of a way adjoining pltf.'s property, which he claimed to enjoy by virtue of user for upwards of 40 years. No such user was proved, but it appeared that pltf. had no legal right to use the way :—*Held :* the mere user by pltf. of the way in common with other parties, in the absence of any legal right, would not enable him to recover damages against deft. for obstructing the way.—ELLS *v.* BLACK (1886), 19 N. S. R. (7 R. & G.) 222 ; 7 C. L. T. 326 ; *affd.* (1887), 14 S. C. R. 740 ; 7 C. L. T. 390.—CAN.

Sect. 3.—*Damnum absque injuria: Sub-sects.* 1 & 2, *A.*]

makers' Union, was sent for by the boilermakers & informed that they intended to leave off working. He dissuaded them from doing so, & then informed the employers that unless resps. were discharged the boilermakers would leave their work or be called out. Resps., who were engaged from day to day, were thereupon discharged, & the employers refused to employ them again. In the ordinary course their employment would have continued. There was evidence that these acts on the part of the boilermakers were done to punish resps. for what they had done in the past:—*Held:* applt. had violated no legal right of resps.—ALLEN *v.* FLOOD, Nos. 253, 257, *post.*

Annotation:—**Refd.** Boots *v.* Grundy (1900), 82 L. T. 769.
For full anns., *see* S. C. No. 253, *post.*

236. ——.]—The promoters of a dog show purported to assign the sole photographic rights in connection with the show. The assignee purported to assign to pltfs. the sole Press photographic rights at the show. Defts., by an agent, took photographs of the show although previously informed that the promoters had assigned the exclusive right to do so. The promoters of the show did not cause any notice to be placed on the tickets of admission nor otherwise forbid the taking of photographs at the show. Defts. having published in an illustrated journal the photographs they had taken, pltfs. brought an action for an injunction to restrain them from continuing to do so:—*Held:* the action would not lie, inasmuch as (1) an exclusive right to take photographs does not, in law, exist as property, & the promoters of the dog show had, in law, no exclusive right of photographing anything there, & could not assign that right as property; (2) their possession of the land on which the show was held would have entitled them to make their purported assignment effective by making conditions as to admission & stipulating that no one should enter unless he agreed not to take photographs, but they had not done so, & pltfs. had failed to make out any cause of action.—SPORTS (SPORT) & GENERAL PRESS AGENCY, LTD. *v.* "OUR DOGS" PUBLISHING CO., LTD., [1917] 2 K. B. 125; 86 L. J. K. B. 702; 116 L. T. 626; 33 T. L. R. 204; 61 Sol. Jo. 299, C. A.

237. Mere damage insufficient.]—Pltfs. alleged in their statement of claim that their house had been called "Ashford Lodge" for 60 years, & the adjoining house, belonging to deft., had been called "Ashford Villa" for 40 years, & that deft. had recently altered the name of his house to that of pltfs.' house. Pltfs. alleged that this act of deft. had caused them great inconvenience & annoyance, & had materially diminished the value of their property; & they claimed an injunction to restrain deft. from continuing to use the name of their house:—*Held:* the alleged act of deft. in calling his house by the name of pltfs.' house was not a violation of any legal right of pltfs., & there being no allegation of malicious intention, a demurrer to the statement of claim was allowed.

An allegation of damage alone will not do. You must have in our law injury as well as damage. . . . The mere fact of causing damage to pltf. does not give him a right of action (JESSEL, M.R.).—DAY *v.* BROWNRIGG (1878), 10 Ch. D. 294; 48 L. J. Ch. 173; 39 L. T. 553; 27 W. R. 217, C. A. S. C. No. 271, *post.*

Annotations:—**Folld.** Street *v.* Union Bank of Spain & England (1885), 30 Ch. D. 156. **Refd.** Ewing *v.* Buttercup Margarine Co., [1917] 2 Ch. 1, C. A. **Mentd.** Quartz Hill Consolidated Gold Mining Co. *v.* Beall (1882), 20 Ch. D. 501, C. A.; N. London Ry. Co. *v.* G. N. Ry. Co. (1883), 11 Q. B. D. 30, C. A.; Bonnard *v.* Perryman, [1891] 2 Ch. 269, C. A.; Nicholson *v.* Buchanan (1900), 44 Sol. Jo. 408.

238. ——.]—Damage alone is not sufficient to give rise to a right of action. There must be some right in the person damaged to immunity from the damage complained of (LORD PARKER).—HAMMERTON *v.* DYSART (EARL), [1916] 1 A. C. 57; 85 L. J. Ch. 33; 113 L. T. 1032; 80 J. P. 97; 31 T. L. R. 592; 59 Sol. Jo. 665; 13 L. G. R. 1255, H. L.; *revsg. S. C. sub nom.* DYSART (EARL) *v.* HAMMERTON, [1914] 1 Ch. 822, C. A.; *restg.* (1913), 29 T. L. R. 464. S. C. No. 198, *ante*; No. 246, *post.*

239. Motive immaterial.]—Upon an election of a knight of the shire for Parliament the sheriff returned both candidates as elected. Deft., by advice of counsel & others, made this double return, to prevent an action for a false return in case it should appear that some freeholders who voted for pltf. had insufficient freehold. Pltf., who had received the majority of votes, then sued the sheriff for damages for making a false & malicious return. Upon examination in Parliament, the election of pltf. was adjudged good & deft. committed for making the double return:—*Held:* the action could not be brought after Parliament had determined the election, for to that determination the sheriff was no party. A double return was a lawful means for a sheriff to perform his duty in doubtful cases. Where there is *damnum absque injuria* no action will accrue, though the malice were never so great.—BARNARDISTON *v.* SOAME (1689), 6 State Tr. 1063, at p. 1119, H. L., *affg. S. C. sub nom.* SOAMES *v.* BARNARDISTON (1676), 1 Freem. K. B. 430.

Annotations:—**Refd.** Stockdale *v.* Hansard (1839), 9 Ad. & El. 1. **Mentd.** Bradlaugh *v.* Gossett (1884), 50 L. T. 620.

240. ——.]—In all civil actions the law does not so much regard the intent of the actor as the loss & damage to the party suffering.—LAMBERT & OLLIOT *v.* BESSEY (1680), T. Raym. 421, 467; 83 E. R. 220, 244.

Annotations:—**Distd.** Fletcher *v.* Rylands (1866), L. R. 1 Exch. 265. **Apprvd.** Rylands *v.* Fletcher (1868), L. R. 3 H. L. 330. **Refd.** Scott *v.* Shepherd (1773), 3 Wills, 403; Humphries *v.* Cousins (1877), 2 C. P. D. 239; Crowhurst *v.* Amersham Burial Board (1878), 4 Exch. D. 5.

241. ——.]—A count in case for distraining for more rent than was due is bad though it alleges it to have been done maliciously, for an act which does not amount to a legal injury cannot be actionable because it is done with a bad intent.—STEVENSON *v.* NEWNHAM (1853), 13 C. B. 285, 297; 22 L. J. C. P. 110; 20 L. T. O. S. 279; 17 Jur. 600; 138 E. R. 1208, Ex. Ch.

Annotations:—**Apprvd.** Allen *v.* Flood, [1898] A. C. 1; Quinn *v.* Leathem, [1901] A. C. 495. **Refd.** Fitzroy *v.* Cave, [1905] 2 K. B. 364, C. A. **Mentd.** Jeffries *v.* G. W. Ry. Co. (1856), 25 L. J. Q. B. 107; Billiter *v.* Young (1856), 6 E. & B. 1; Monk *v.* Sharp (1857), 2 H. & N. 540; Young *v.* Billiter (1860), 8 H. L. Cas. 682; Hardman *v.* Booth (1863), 32 L. J. Ex. 105; Paull *v.* Best (1863), 3 B. & S. 537; *Re* Willmett, *Ex p.* Goss (1864), 9 L. T. 734; Topping *v.* Keysell (1864), 16 C. B. N. S. 258; Marks *v.* Feldham (1869), 10 B. & S. 371, Ex. Ch.; Clough *v.* L. & N. W. Ry. Co. (1871), L. R. 7 Exch. 26; *Re* Johnson, *Ex p.* Rayner (1872), 41 L. J. Bcy. 26; *Re* Meldrum, *Ex p.* Butcher (1874), 9 Ch. App. 595; London & County Banking Co. *v.* London & River Plate Bank (1887), 4 T. L. R. 179; *Re* O'Sullivan, *Ex p.* Baller (1892), 61 L. J. Q. B. 228; *Re* Clarke, *Ex p.* Dickenson (1894), 1 Mans. 47; *Re* Clark, *Ex p.* Beardmore, [1894] 2 Q. B. 393, C. A.

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237. i. *Mere damage insufficient.*]—Pltf. was possessed of a messuage which he had been accustomed to let to soldiers of the garrison, as a dance hall. He alleged that defts. unlawfully & unjustly induced the General commanding, by order, to prevent the soldiers from assembling in the hall. Defts. pleaded that pltf. kept a disorderly house, & that the General, on that account, placed the hall out of bounds for the military, etc.:—*Held:* the declaration did not disclose any cause of action, as although the city could be held liable for intentional acts of misfeasance it did not appear that there was any binding agreement conferring rights or interests upon pltf. which had been violated.—LAWSON *v.* HALIFAX CITY (1878), 12 N. S. R. (3 R. & C.) 168.—**CAN.**

237 ii. ——.]—Damages & injury must both concur to give a right of action.—ST. JOHN YOUNG MEN'S CHRISTIAN ASSOCN. *v.* HUTCHISON (1878), 18 N. B. R. 523.—**CAN.**

242. ——.]—If an act, apart from motive, gives rise merely to damage without legal injury, the motive, however reprehensible it may be, will not supply that element (LORD MACNAGHTEN).—BRADFORD CORPN. *v.* PICKLES, [1895] A. C. 587; 64 L. J. Ch. 759; 73 L. T. 353; 60 J. P. 3; 44 W. R. 190; 11 R. 286, H. L.

Annotations:—**Refd.** Cochrane *v.* Smith (1895), 12 T. L. R. 78; Allen *v.* Flood, [1898] A. C. 1; Quinn *v.* Leathem, [1901] A. C. 495; Husey *v.* London Electric Supply Corpn., [1902] 1 Ch. 411, C. A.; Salt Union *v.* Brunner, Mond, [1906] 2 K. B. 822. **Mentd.** Pitts *v.* George (1896), 66 L. J. Ch. 1; Murray *v.* Epsom L. B. (1896), 45 W. R. 185; Jordeson *v.* Sutton, Southcoates & Drypool Gas Co., [1899] 2 Ch. 217, C. A.; Fitzroy *v.* Cave, [1905] 2 K. B. 364, C. A.; English *v.* Metropolitan Water Board, [1907] 1 K. B. 588.

Defence against common peril.]—*See* NEGLIGENCE; NUISANCE; TORT; TRESPASS.

Acts of State.]—*See* CONSTITUTIONAL LAW; PUBLIC AUTHORITIES & PUBLIC OFFICERS.

SUB-SECT. 2.—EXAMPLES.

A. Interference with Trade or Business.

243. Competition in business—New business—Mill.]—A. granted a mill with multure thereon to a church & its canons, & covenanted that neither he nor his heirs would construct any other mill within T. without the abbot's licence. The covenant was not found for removal of a mill constructed without licence, but with negative words not binding in law. A.'s heir broke the covenant & attracted to the mill built without licence the townspeople of T. to grind their oats there & pay him multure instead of at the church's mill. Pltf. claimed that the mill should be removed for the time of oats:—*Held:* pltf. might recover damages for the whole time of the breach, but the mill might be erected without committing a tort, there being *damnum sine injuria*. ——(1333), Y. B. 7 Edw. 3, p. 65, pl. 67.

Annotation:—**Refd.** Mitchel *v.* Reynolds (1711), 1 P. Wms. 181

244. —— —— School.] — The collation of a grammar school belonged to a prior, who had collated pltfs. Defts. set up a school in the same town, whereby pltfs. could not obtain such large fees:—*Held:* pltfs. had no action.

Pltfs. have no estate in the schoolmastership except for an uncertain time; & it would be contrary to reason that a master should be hindered in keeping a school where he pleases, except in the case of a university corporate or school of ancient foundation (*per Cur.*).—GLOUCESTER GRAMMAR SCHOOL (1410), Y. B. 11 Hen. 4, p. 47, pl. 21.

Annotations:—**Refd.** Keble *v.* Hickeringell (1707), Kel. W. 273; Allen *v.* Flood, [1898] A. C. 1. **Mentd.** R. *v.* Patrick (1667), 2 Keb. 65, 165.

245. —— —— Ferry.]—The owner of a ferry cannot maintain an action for loss of traffic caused by a new highway by bridge or ferry made to provide for a new traffic.

A ry. co., under the authority of its Act, constructed across a river, half a mile above an ancient ferry, a ry. bridge & a foot-bridge, the latter being used by persons going to the ry. station & other places. The traffic across the ferry fell off, & the ferry was given up. The owners claimed compensation under Lands Clauses Consolidation Act, 1845 (c. 18), & Ry. Clauses Consolidation Act, 1845 (c. 20):—*Held:* no compensation could be recovered, on the grounds (1) an action could not have been maintained for disturbance of the ferry in respect of the traffic either by the ry. or by the foot-bridge, if they had been erected without the authority of an Act; (2) the injury to the ferry being occasioned not by the construction but by the working of the ry., the ferry had not been injuriously affected within the above Acts.—HOPKINS *v.* GREAT NORTHERN RY. CO. (1877), 2 Q. B. D. 224; 46 L. J. Q. B. 265; 36 L. T. 898; 42 J. P. 229, C. A.

Annotations:—**Expld.** G. W. Ry. Co. *v.* Swindon & Cheltenham Extension Ry. Co. (1884), 9 App. Cas. 787, H. L. **Apld.** A.-G. *v.* Metropolitan Ry. Co., [1894] 1 Q. B. 384, C. A.; Cowes U. C. *v.* Southampton, Isle of Wight & South of England Royal Mail Steam Packet Co., [1905] 2 K. B. 287. **Folld.** Dibden *v.* Skirrow, [1908] 1 Ch. 41, C. A. **Consd.** Dysart *v.* Hammerton, [1914] 1 Ch. 822, C. A. **Apprvd.** Hammerton *v.* Dysart, [1916] 1 A. C. 57, H. L. **Refd.** Parkdale Corpn. *v.* West (1887), 12 App. Cas. 602, P. C.; North Shore Ry. Co. *v.* Pion (1889), 61 L. T. 525, P. C.; General Estates Co. *v.* Beaver, [1914] 3 K. B. 918, C. A.

246. —— —— ——.]—Applt. set up a new ferry in proximity to resp.'s old ferry to accommodate new traffic requiring new facilities & such as would not naturally use the highways served by the old ferry:—*Held:* resp. had no cause of action for disturbance of the old ferry.—HAMMERTON *v.* DYSART, Nos. 198, 238, *ante*.

247. —— —— Under same name—Father & son.]—Where a person is selling an article in his own name fraud must be shown to constitute a case for restraining him from so doing on the ground that the name is one in which another has long been selling a similar article.

Where a father had for many years exclusively sold an article under the title of "B.'s Essence of Anchovies," the ct. would not restrain his son from selling a similar article under that name, no fraud being proved.—BURGESS *v.* BURGESS (1853), 3 De G. M. & G. 896; 22 L. J. Ch. 675; 21 L. T. O. S. 53; 17 Jur. 292; 43 E. R. 351. S. C. No. 273, *post*.

Annotations:—**Apld.** Edelsten *v.* Vick (1853), 1 Eq. Rep. 413. **Distd.** Taylor *v.* Taylor (1854), 2 Eq. Rep. 290; Schweitzer *v.* Atkins (1868), 37 L. J. Ch. 847. **Expld.** Massam *v.* Thorley's Cattle Food Co. (1880), 14 Ch. D. 748, C. A. **Apld.** Nicholls *v.* Kimpton (1887), 3 T. L. R. 674. **Folld.** Warner *v.* Warner (1889), 5 T. L. R. 327; Turton *v.* Turton (1889), 42 Ch. D. 128, C. A. **Consd.** Tussaud *v.* Tussaud (1890), 44 Ch. D. 678. **Folld.** Otard, Dupuy *v.* Otard de Montebello Cognac Co. (1893), 9 T. L. R. 295. **Consd.** Saunders *v.* Sun Life Assce. of Canada, [1894] 1 Ch. 537. **Apld.** Reddaway *v.* Banham, [1895] 1 Q. B. 286, C. A. **Expld.** [1896] A. C. 199. **Apprvd.** Birmingham Vinegar Brewery Co. *v.* Powell, [1897] A. C. 710. **Folld.** Jamieson *v.* Jamieson (1898), 14 T. L. R. 160, C. A. **Apprvd.** Cellular Clothing Co. *v.* Maxton, [1899] A. C. 326. **Folld.** Brinsmead *v.* Brinsmead (1913), 29 T. L. R. 237; Teofani *v.* Teofani, *Re* Teofani's Trade Mk., [1913] 2 Ch. 545. **Refd.** Lawson *v.* Bank of London (1856), 4 W. R. 481; Thorley's Cattle Food Co. *v.* Massam (1880), 14 Ch. D. 763, C. A.; Free Fishers & Dredgers of Whitstable *v.* Elliott (1888), 4 T. L. R. 273; Starey *v.* Chilworth Gunpowder Co. (1889), 24 Q. B. D. 90; Powell *v.* Birmingham Brewery Co., [1896] 2 Ch. 54, C. A.; Valentine's Meat Juice Co. *v.* Valentine Extract Co. (1899), 48 W. R. 127; Cash *v.* Cash (1900), 82 L. T. 655; Magnolia Metal Co. *v.* Tandem Smelting Syndicate (1900), 17 R. P. C. 477, H. L.; Weingarten *v.* Bayer (1903), 88 L. T. 168; Warsop *v.* Warsop (1904), 21 R. P. C. 481; Electromobile Co. *v.* British Electromobile Co. (1907), 98 L. T. 258, C. A.; Ouvah Ceylon Estates *v.* Uva Ceylon Rubber Estates (1910), 103 L. T. 16; Ash *v.* Invicta Manufacturing Co. (1911), 55 Sol. Jo. 348; Spalding *v.* Gamage (1915), 84 L. J. Ch. 449, H. L.; Waring & Gillow *v.* Gillow & Gillow (1916), 32 T. L. R. 389.

248. —— Anticipating catch of fish.]—In an ordinary case of fishing at sea, apart from stat. there can be no action by one fisherman against another for anticipating him in a capture of fish which has not been appropriated.—STEVENS *v.* JEACOCKE (1848), 11 Q. B. 731; 17 L. J. Q. B. 163; 11 L. T. O. S. 101; 12 Jur. 477; 116 E. R. 647.

Annotations:—**Apld.** Marshall *v.* Nicholls (1852), 18 Q. B. 882. **Distd.** Couch *v.* Steel (1854), 3 E. & B. 402; Atkinson *v.* Newcastle & Gateshead Water Co. (1871), 20 W. R. 35; Great Northern S.S. Fishing Co. *v.* Edgehill (1883), 11 Q. B. D. 225. **Apld.** Clegg, Parkinson *v.* Earby, [1896] 1 Q. B. 592. **Refd.** Cleeve *v.* Harwar (1857), 1 H. & N.

PART II. SECT. 3, SUB-SECT. 2.—A.

245 i. *Competition in business—New business—Ferry.*]—A., owner of a ferry granted under a Govt. settlement, brought a suit to restrain B. from running another ferry over the same spot. It appeared B. levied no tolls on his ferry, but it was not shown that it was used only for the conveyance of his own servants & raiyats:—*Held:* such suit was maintainable.—LUCHMESSUR SINGH *v.* LEELANUND SINGH (1878), I. L. R. 4 Calc. 599; 3 C. L. R. 427.—**IND.**

Sect. 3.—Damnum absque injuria: Sub-sect. 2, A. B. & C.]

873; Wilde *v.* Stanner (1857), 1 H. & N. 875; St. Pancras Vestry *v.* Batterbury (1857), 2 C. B. N. S. 477; Midland Ry. Co. *v.* Edmonton Union (1894), 72 L. T. 206, C. A.; Peebles *v.* Oswaldtwistle U. D. C., [1897] 1 Q. B. 625, C. A. **Mentd.** Baxendale *v.* Eastern Counties Ry. Co. (1858), 4 C. B. N. S. 63; Gorris *v.* Scott (1874), L. R. 9 Exch. 125; Melliss *v.* Shirley & Freemantle L. B. (1885), 54 L. J. Q. B. 408.

249. Trade boycott—With lawful object—Unlawful means not used.]—Owners of ships, in order to secure a carrying trade exclusively for themselves & at profitable rates, formed an assocn. & agreed that the number of ships to be sent by members of the assocn. to the loading port, the division of cargoes & the freights to be demanded should be the subject of regulation; that a rebate of 5 per cent. on the freights should be allowed to all shippers who shipped only with members; & that agents of members should be prohibited on pain of dismissal from acting in the interest of competing shipowners; any member to be at liberty to withdraw on giving certain notices. Pltfs., shipowners excluded from the assocn., sent ships to the loading port to endeavour to obtain cargoes. The associated owners sent more ships to the port, underbid pltfs., & reduced freights so much that pltfs. were obliged to carry at unremunerative rates. They also threatened to dismiss certain agents if they loaded pltfs.' ships, & circulated a notice that the rebate of 5 per cent. would not be allowed to any person who shipped cargoes on pltfs.' vessels. Pltfs. having brought an action for damages against the associated owners, alleging a conspiracy to injure pltfs.: —*Held:* since the acts of defts. were done with the lawful object of protecting & extending their trade & increasing their profits, & since they had not employed any unlawful means, pltfs. had no cause of action.—MOGUL S.S. CO. *v.* MCGREGOR, GOW & CO., [1892] A. C. 25; 61 L. J. Q. B. 295; 66 L. T. 1; 56 J. P. 101; 40 W. R. 337; 8 T. L. R. 182; 7 Asp. M. L. C. 120, H. L. S. C. No. 192, *ante*.

Annotations:—**Follo.** Jenkinson *v.* Nield (1892), 8 T. L. R. 540. **Consd.** Temperton *v.* Russell (1893), 1 Q. B. 715, C. A.; Flood *v.* Jackson, [1895] 2 Q. B. 21, C. A.; Boots *v.* Grundy (1900), 82 L. T. 769; Quinn *v.* Leathem, [1901] A. C. 495; Giblan *v.* National Amalgamated Labourers' Union, [1903] 2 K. B. 600, C. A. **Distd.** Larkin *v.* Long, [1915] A. C. 814, H. L. **Reid.** *Re* Apollinaris Co.'s Trade Mks. (1890), 63 L. T. 162; Connor *v.* Kent, Gibson *v.* Lawson, Curran *v.* Treleaven, [1891] 2 Q. B. 545; Wright *v.* Hennessey (1894), 11 T. L. R. 14; Trollope *v.* London Building Trades Federation (1895), 72 L. T. 342, C. A.; Lyons *v.* Wilkins, [1896] 1 Ch. 811, C. A.; Huttley *v.* Simmons, [1898] 1 Q. B. 181; Azello *v.* Worsley, [1898] 1 Ch. 274; Allen *v.* Flood, [1898] A. C. 1; Elliman *v.* Carrington (1901), 84 L. T. 858; Glamorgan Coal Co. *v.* South Wales Miners' Federation, [1905] A. C. 239; Denaby & Cadeby Main Collieries *v.* Yorkshire Miners' Assocn., [1906] A. C. 384; National Phonograph Co. *v.* Edison-Bell Consolidated Phonograph Co., [1908] 1 Ch. 335, C. A.; United Shoe Machinery Co. of Canada *v.* Brunet, [1909] A. C. 330, P. C.; A.-G. of Australia *v.* Adelaide S.S. Co., [1913] A. C. 781, P. C. **Mentd.** Maxim-Nordenfelt Guns & Ammunition Co. *v.* Nordenfelt (1893), 41 W. R. 604, C. A.; Newton *v.* Amalgamated Musicians' Union (1896), 40 Sol. Jo. 716; Hyams *v.* Stuart King, [1908] 2 K. B. 696, C. A.; Conway *v.* Wade, [1908] 2 K. B. 844, C. A.; North Western Salt Co. *v.* Electrolytic Alkali Co., [1913] 3 K. B. 422, C. A.; *Re* Bowman, Secular Soc. *v.* Bowman, [1915] 2 Ch. 447, C. A.

250. ——.]—A combination of the parents of scholars at a meeting to withdraw their children from a school on account of dissatisfaction with the religious opinions of a teacher appointed to the school is not an unlawful act giving a cause of action to the teacher, though it may result in pecuniary loss to him.—SWEENEY *v.* COOTE, [1907] A. C. 221; 76 L. J. P. C. 49; 96 L. T. 748; 23 T. L. R. 448; 51 Sol. Jo. 444, H. L.

See, further, TRADE & TRADE UNIONS.

251. Advertising goods of plaintiff at undervalue.]—As a general rule a trader may sell at any price whatsoever any goods, including goods of another's manufacture, which he either has in stock or expects to acquire, & may offer the same for sale by advertisement, although he thereby damages the trade of the manufacturer; & his motives for so doing cannot be inquired into.

Deft., a retail dealer, advertised for sale in a newspaper a new piano of pltfs.' manufacture of a specified character at the price at which pltfs. supplied the same to the trade, & thereby caused other dealers to give up dealing with pltfs.; he continued the advertisement after he ceased to have in stock any pianos of pltfs.' manufacture, & after pltfs. had refused to supply him, in the expectation of being able to acquire pltfs.' pianos from other dealers:—*Held:* (1) apart from any question of misrepresentation, deft. had a legal right to issue the advertisement though it amounted to an implied representation that he had in his possession a piano of the advertised description; (2) such misrepresentation was not the cause of the damage to pltfs.' trade, & gave no right of action.—AJELLO *v.* WORSLEY, [1898] 1 Ch. 274; 67 L. J. Ch. 172; 77 L. T. 783; 46 W. R. 245; 14 T. L. R. 168; 42 Sol. Jo. 212.

Annotation:—**Distd.** Spalding *v.* Gamage (1914), 110 L. T. 530, C. A.

252. Telegraphic address appropriated.]—Pltfs., Messrs. Street & Jackson, were advertising agents, with an extensive foreign connection. Their correspondents abroad had for some time been in the habit of telegraphing to them in the name of "Street, London." Defts., a co. incorporated in 1881, adopted as a cypher to indicate their name & address for the purpose of foreign telegrams the name "Street, London." Since that time foreign telegrams intended for pltfs. had been delivered to defts., so that inconvenience & pecuniary loss were sustained by pltfs., & they brought an action to restrain defts. from using the address, "Street, London," for telegraphic purposes, & from opening telegrams so addressed:—*Held:* the matter was merely one of inconvenience, which the ct. had no jurisdiction to restrain.—STREET *v.* UNION BANK OF SPAIN & ENGLAND (1885), 30 Ch. D. 156; 55 L. J. Ch. 31; 53 L. T. 262; 33 W. R. 901; 1 T. L. R. 554. S. C. No. 272, *post*.

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249 i. *Trade boycott—With lawful object—Unlawful means not used.*]—The Coastal Retail Butchers' Assocn., of which defts. were the secretary & executive officers, entered into a combination with the Wholesale Butchers' Assocn. for the purpose of raising the price of meat, the latter agreeing not to supply retailers who sold below the Assocn. prices. Pltf., a butcher, refused to be bound by the Assocn. prices. Thereupon the wholesale butchers refused to supply him, apparently at the instigation of defts. Pltf. was compelled to close his business & brought an action against defts. for damages for conspiracy to injure him in his trade:—*Held:* defts. had not infringed any legal right of pltf. —REA *v.* BUCKLAND (1908), 11 W. A. R. 2.—**AUS.**

249 ii. —— —— ——.]—Pltf., a bookmaker, alleged that he was wrongfully expelled from race tracks by defts., officers & members of a racing assocn. He asked for a declaration that their action was without lawful excuse, also for an injunction and damages:—*Held:* (1) defts. were authorised by various jockey clubs to represent them at the racing assocn.; (2) their action in expelling pltf. was necessary to the good government of the course; (3) defts. merely discharged their duty.—SCULLY *v.* MADIGAN (1912), 23 O. W. R. 876; 4 O. W. N. 394.—**CAN.**

249 iii. —— —— ——.]—Pltf., formerly Protestant incumbent of a parish, brought an action against certain parishioners, alleging that defts. entered into a conspiracy to deprive him of his income & compel him to resign the incumbency by abstaining from giving contributions to the Sustentation Fund. The jury found *inter alia* that defts. combined to abstain themselves from contributing, but did not combine or induce other parishioners not to contribute:—*Held:* the acts of defts. did not constitute any legal injury to pltf., & the action was not maintainable.—KEARNEY *v.* LLOYD (1890), 26 L. R. Ir. 268.—**IR.**

B. Interference with Contracts.

253. Prevention of contract.]—If a pltf. is prevented from entering into a contract by deft., his loss is merely *damnum sine injuria* (MATHEW, J.).—ALLEN *v.* FLOOD, [1898] A. C. 1; 67 L. J. Q. B. 119; 77 L. T. 717; 62 J. P. 595; 46 W. R. 258; 14 T. L. R. 125; 42 Sol. Jo. 149, H. L. S. C. No. 235, *ante*. No. 257, *post*.

Annotations:—**Consd.** Huttley *v.* Simmons, [1898] 1 Q. B. 181. **Folld.** Taylor *v.* Cambridge Gazette (1898), 42 Sol. Jo. 832. **Distd.** Lyons *v.* Wilkins, [1899] 1 Ch. 255, C. A.; Quinn *v.* Leathem, [1901] A. C. 495; Read *v.* Friendly Soc. of Operative Stonemasons, [1902] 2 K. B. 732. **Consd.** National Phonograph Co. *v.* Edison-Bell Consolidated Phonograph Co., [1908] 1 Ch. 335, C. A. **Reld.** Ajello *v.* Worsley, [1898] 1 Ch. 274; Hubbuck *v.* Wilkinson, [1899] 1 Q. B. 86, C. A.; Boots *v.* Grundy (1900), 82 L. T. 769; Glamorgan Coal Co. *v.* South Wales Miners Federation, [1903] 2 K. B. 545, C. A.; Giblan *v.* National Amalgamated Labourers Union, [1903] 2 K. B. 600, C. A.; Denaby & Cadeby Main Collieries *v.* Yorkshire Miners Assocn., [1906] A. C. 384, H. L.; Wilford *v.* West Riding of Yorkshire County Council, [1908] 1 K. B. 685. **Mentd.** Charnock *v.* Court (1899), 68 L. J. Ch. 550; Brigg *v.* Thornton (1903), 73 L. J. Ch. 301, C. A.; South Wales Miners Federation *v.* Glamorgan Coal Co., [1905] A. C. 239, H. L.; Conway *v.* Wade (1908), 78 L. J. K. B. 14, C. A.; Santen *v.* Busnach (1913), 29 T. L. R. 214, C. A.; *Re* Ainsworth, Finch *v.* Smith, [1915] 2 Ch. 96; Stott *v.* Gamble, [1916] 2 K. B. 504.

254. ——.]—Pltf., a professional football player in the employment of defts., was offered employment by another football club, but the offer fell through owing to the transfer fee charged by defts. under the rules of the Football League. Pltf. claimed damages for loss of employment, alleging that defts. had maliciously charged an excessive transfer fee:—*Held:* (1) pltf. had no cause of action, even if the fee was excessive, as the course taken by defts. was justified by the terms of the employment; (2) there was no evidence of malice. *Qu.:* whether Trade Disputes Act, 1906 (c. 47), did not apply.

Where a man exercises an undoubted legal right, his motive in so doing is immaterial (LAWRENCE, J.).—KINGABY *v.* ASTON VILLA FOOTBALL CLUB (1912), *Times*, Mar. 28.

255. Loss of bargain.]—Pltf., who had been served by defts. with notice to treat for his land under Elementary Education Act, 1870 (c. 75), afterwards discovered that they had already agreed to exchange a portion of the land included in the notice for other land, thereby securing to defts. additional land & other advantages, instead of allowing him to reap those advantages, which he would have done had he remained in possession of his land, & he moved that defts. might be restrained from using the land otherwise than for educational purposes:—*Held:* although he might have lost the chance of making a profitable bargain, such loss was no cause of action, but only a *damnum absque injuria*.—ROLLS *v.* LONDON SCHOOL BOARD (1884), 27 Ch. D. 639; 51 L. T. 567; 33 W. R. 129.

256. Loss of profit.]—Defts., a waterworks co., under their Act laid down one of their mains along & under a turnpike road, made under an Act which declared the soil to be in the owners of the adjoining land, subject only to the right to use & maintain the road. K. was owner of land on both sides, at a spot where the road was carried across a valley on an embankment, & wanting to connect his land on either side, K. employed pltf., at an agreed sum, to make a tunnel under the road. In doing the work a leak was discovered in defts.' main higher up the road, & on pltf. digging out the earth, the water from the leak flowed down upon the work & delayed it, so as to cause pecuniary damage to pltf., for which he brought an action against defts.:—*Held:* assuming K. could have maintained an action against defts. for injury to his property (to which the ct. gave no opinion), the damage sustained by pltf. by reason of his contract with K. becoming less profitable, or a losing contract, in consequence of the injury to K.'s property, gave pltf. no right of action against defts.—CATTLE *v.* STOCKTON WATERWORKS CO. (1875), L. R. 10 Q. B. 453; 44 L. J. Q. B. 139; 33 L. T. 475; 39 J. P. 791. S. C. No. 334, *post*.

Annotations:—**Folld.** Soc. Anon de Remorquage à Helice *v.* Bennetts, [1911] 1 K. B. 243. **Mentd.** Allen *v.* Flood, [1898] A. C. 1; The Amerika, [1914] P. 167, C. A.

257. Procuring breach of contract.]—ALLEN *v.* FLOOD, Nos. 235, 253, *ante*.

For full anns., *see* S. C. No. 253, *ante*.

C. Interference with Land.

258. Adjacent owners—Seeding thistles.]—An occupier of land is under no duty towards his neighbour to cut periodically the thistles naturally growing on his land, so as to prevent them from seeding, & if, owing to his neglect to cut them, the seeds are blown on to his neighbour's land & do damage, he is not liable.—GILES *v.* WALKER (1890), 24 Q. B. D. 656; 59 L. J. Q. B. 416; 62 L. T. 933; 54 J. P. 599; 38 W. R. 782.

259. —— **Dangerous tree—Trespassing horse.**]—Pltf. & defts. occupied adjoining fields separated by a fence & ditch belonging to defts. The ditch was on the side of the fence next to pltf.'s field, his boundary being the edge of the ditch. On defts.' side of the fence grew a yew tree, the branches of which extended over the fence & partly over the ditch, but no part of the tree extended over or up to pltf.'s boundary. Defts. were under no liability to fence against their neighbour's cattle. Pltf.'s horse ate of the branches extending over the ditch, & died therefrom. In an action to recover as damages the value of the horse:—*Held:* defts. were not liable, because there was no duty on them to take means to prevent pltf.'s horses from having access to the branches of the tree.—PONTING *v.* NOAKES, [1894] 2 Q. B. 281; 63 L. J. Q. B. 549;

PART II. SECT. 3, SUB-SECT. 2.—B.

253 i. *Prevention of contract.*]—Pltf. was engaged from hour to hour in discharging cargo. He could be discharged at any time, but had a reasonable expectation of being continued in his employment until the "job" was completed. Deft., secretary of a trade union, represented to pltf.'s employer that the employment of pltf. was a breach of a contract made by the employer with the union & warned him against further employing pltf., & the employer did not further employ pltf. Deft. was not actuated by any malice or desire to injure pltf., but acted in the interests of his union & the employer:—*Held:* pltf. had no cause of action.—HOND *v.* MORRIS (1912), V. L. R. 351.—AUS.

256 i. *Loss of profit.*]—Pltf., an hotel keeper at Niagara Falls, furnished guides & dresses to persons going under the falls, & by consent of the Govt., had a stairway down the bank of the river; defts. also had a stairway for same purpose. Pltf.'s stairway was burned down, & while he was rebuilding it, defts., to injure him, as it was alleged, represented to the A.-G. that the land on which pltf.'s stairway was, was necessary for military purposes, & induced the A.-G. to permit the use of his name in filing an information to restrain pltf. Pltf. was delayed in completing his stairway until he obtained a licence from the Crown, & lost the profits of his business, etc. It was also alleged that defts. represented to the public wishing to go down the public stairway that they had a right to prevent them. On demurrer:—*Held:* no cause of action was shown; there was no violation of any right of pltf. nor malicious procuring of any breach of contract.—DAVIS *v.* BARNETT (1866), 26 U. C. R. 109.—CAN.

PART II. SECT. 3, SUB-SECT. 2—C.

258 i. *Adjacent owners—Right to drive off locusts.*]—A swarm of unwinged locusts came upon pltf.'s farm. Pltf. drove them out in a southerly direction. Deft. owned property to the south of pltf.'s farm & he & his neighbours drove the locusts in an easterly direction parallel with pltf.'s southern boundary. Some of the locusts were thus checked from leaving the pltf.'s farm, & damaged his lands:—*Held:* though defts. had no right to go on pltf.'s land, if pltf. had the right to turn the locusts out of his lands with the result of turning them into his neighbour's farm, the neighbour had an equal right to do his utmost to keep them from his farm, even though the result should be to turn them back to pltf.'s land.—GREYVENSTEIN *v.* HATTINGH (1909), 3 Buch. A. C. 462; 19 C. T. R. 314.—S. AF.

Sect. 3.—Damnum absque injuria : Sub-sect. 2, C. D. & E.]

70 L. T. 842 ; 58 J. P. 559 ; 42 W. R. 506 ; 10 T. L. R. 444 ; 88 Sol. Jo. 438 ; 10 R. 265.

Annotations :—**Apld.** Lowery *v.* Walker, [1909] 2 K. B. 433, C. A. **Consd.** Cheater *v.* Cater, [1917] 2 K. B. 516. **Refd.** Latham *v.* Johnson, R. *v.* Nephew, [1913] 1 K. B. 398, C. A.

See, further, AGRICULTURE.

260. Percolating water.]—The owner of land through which water flows in a subterraneous course has no right or interest in it which will enable him to maintain an action against a landowner, who, in carrying on mining operations in his own land in the usual manner, drains away the water from the land of the first-mentioned owner & lays his well dry. *Qu. :* if the well had been ancient, whether there would have been any difference.—ACTON *v.* BLUNDELL (1843), 12 M. & W. 324 ; 13 L. J. Ex. 289 ; 1 L. T. O. S. 207 ; 152 E. R. 1223.

Annotations :—**Folld.** South Shields Waterworks Co. *v.* Cookson (1845), 15 L. J. Ex. 315. **Apld.** Smith *v.* Kenrick (1849), 7 C. B. 515. **Distd.** Humphries *v.* Brogden (1850), 12 Q. B. 739. **Consd.** Dickinson *v.* Grand Junction Canal Co. (1852), 7 Exch. 282. **Expld. & Distd.** Chasemore *v.* Richards (1857), 2 H. & N. 168, Ex. Ch. **Apprvd.** (1859), 7 H. L. Cas. 349 ; New River Co. *v.* Johnson (1860), 2 E. & E. 435 ; Baird *v.* Williamson (1863), 15 C. B. N. S. 376. **Consd.** West Cumberland Iron & Steel Co. *v.* Kenyon (1877), 6 Ch. D. 773. **Apld.** Ballard *v.* Tomlinson (1884), 26 Ch. D. 194. **Expld. & Distd.** (1885), 29 Ch. D. 115, C. A. **Folld.** Bower *v.* Sandford (1889), 5 T. L. R. 570. **Consd.** Jordeson *v.* Sutton, Southcoates & Drypool Gas Co., [1899] 2 Ch. 217, C. A. **Refd.** Fay *v.* Prentice (1845), 1 C. B. 828 ; Wood *v.* Wand (1849), 3 Exch. 748 ; Broadbent *v.* Ramsbotham (1856), 25 L. J. Ex. 115 ; R. *v.* Metropolitan Board of Works (1863), 3 B. & S. 710 ; Grand Junction Canal Co. *v.* Shugar (1871), 6 Ch. App. 483 ; Ballacorkish Silver, Lead, & Copper Mining Co. *v.* Harrison (1873), L. R. 5 P. C. 49 ; Bradford Corpn. *v.* Pickles, [1895] 1 Ch. 145, C. A. ; Bradford Corpn. *v.* Ferrand, [1902] 2 Ch. 655 ; Salt Union *v.* Brunner, Mond, [1906] 2 K. B. 822. **Mentd.** *Re* Trufort, Trafford *v.* Blanc (1887), 36 Ch. D. 600.

261. ——.]—The principles which regulate the rights of owners of land in respect to water flowing in known & defined channels, whether upon or below the surface of the ground, do not apply to underground water which merely percolates through the strata in no known channels.

Where A., a landowner & a millowner, who had for above 60 years enjoyed the use of a stream chiefly supplied by such percolating underground water, lost the use of the stream after an adjoining landowner had dug, on his own ground, an extensive well for the purpose of supplying water to the inhabitants of the district, many of whom had no title as landowners to the use of the water :—*Held :* A. had no right of action.—CHASEMORE *v.* RICHARDS (1859), 7 H. L. Cas. 349 ; 29 L. J. Ex. 81 ; 33 L. T. O. S. 350 ; 23 J. P. 596 ; 5 Jur. N. S. 873 ; 7 W. R. 685 ; 11 E. R. 140.

Annotations :—**Apld.** New River Co. *v.* Johnson (1860), 2 E. & E. 435 ; R. *v.* Metropolitan Board of Works (1863), 3 B. & S. 710. **Distd.** Hodgkinson *v.* Ennor (1863), 4 B. & S. 229. **Consd.** Grand Junction Canal Co. *v.* Shugar (1871), 6 Ch. App. 483 ; Lyon *v.* Fishmonger's Co. (1876), 1 App. Cas. 662, H. L. **Apld.** Angus *v.* Dalton (1877), 3 Q. B. D. 85. **Consd.** (1878), 4 Q. B. D. 162, C. A. **Apld.** Bryant *v.* Lefever (1879), 4 C. P. D. 172, C. A. ; Brain *v.* Marfell (1879), 4 L. T. 455, C. A. **Folld.** Ballard *v.* Tomlinson (1884), 26 Ch. D. 194. **Expld. & Distd.** (1885), 29 Ch. D. 115, C. A. **Folld.** Bower *v.* Sandford (1889), 5 T. L. R. 570. **Extd.** Bradford Corpn. *v.* Pickles, [1895] A. C. 587. **Consd.** Jordeson *v.* Sutton Southcoates & Drypool Gas Co., [1899] 2 Ch. 217, C. A. ; Bradford Corpn. *v.* Ferrand, [1902] 2 Ch. 655 ; English *v.* Metropolitan Water Board, [1907] 1 K. B. 588. **Distd.** Schwann *v.* Cotton, [1916] 2 Ch. 120. **Refd.** Ennor *v.* Barwell (1860), 2 Giff. 410 ; Hunt *v.* Peake (1860), 25 J. P. 5 ; Gaved *v.* Martyn (1865), 19 C. B. N. S. 732 ; Ibbotson *v.* Peat (1865), 3 H. & C. 644 ; Jegon *v.* Vivian (1871), 40 L. J. Ch. 389 ; Ballacorkish Silver, Lead & Copper Mining Co. *v.* Harrison (1873), L. R. 5 P. C. 49 ; Dumbell *v.* Ballacorkish Silver, Lead & Copper Mining Co. (1873), 22 W. R. 277, P. C. ; West Cumberland Iron & Steel Co. *v.* Kenyon (1877), 6 Ch. D. 773 ; Sturges *v.* Bridgman (1879), 11 Ch. D. 852, C. A. ; A.-G. *v.* Tomline (1880), 14 Ch. D. 58, C. A. ; Dalton *v.* Angus, Works & Public Buildings Comrs. *v.* Angus (1881), 6 App. Cas. 740 ; Harris *v.* De Pinna (1886), 33 Ch. D. 238, C. A. ; Baso *v.* Gregory (1890), 25 Q. B. D. 481 ; Bradford Corpn. *v.* Pickles, [1894] 3 Ch. 53 ; Allen *v.* Flood, [1898] A. C. 1 ; Salt Union *v.* Brunner, Mond, [1906] 2 K. B. 822. **Mentd.** Scots Mines Co. *v.* Leadhills Mines (1859), 34 L. T. O. S. 34, H. L. ; Gumm *v.* Fowler (1860), 6 Jur. N. S. 1093 ; Webb *v.* Bird (1861), 10 C. B. N. S. 268 ; Webb *v.* Bird (1863), 13 C. B. N. S. 841 ; Mogul S.S. Co. *v.* McGregor, Gow (1889), 23 Q. B. D. 598, C. A. ; North Shore Ry. Co. *v.* Pion (1889), 14 App. Cas. 612, P. C. ; Aldin *v.* Latimer Clark, Muirhead, [1894] 2 Ch. 437 ; Mansell *v.* Valley Printing Co., [1908] 2 Ch. 441, C. A.

See, generally, EASEMENTS & PROFITS À PRENDRE ; MINES, MINERALS & QUARRIES ; WATERS & WATERCOURSES.

D. Acts causing Death.

262. Damage caused by third person's death—Husband & wife.]—In an action for negligence, whereby pltf.'s wife was killed, he is not entitled to any damages for the loss of her society, or for his mental sufferings on her account after the moment of her death.

In a civil ct. the death of a human being cannot be complained of as an injury (LORD ELLENBOROUGH, C. J.).—BAKER *v.* BOLTON (1808), 1 Camp. 493.

Annotations :—**Folld.** (BRAMWELL, B., *diss.*) Osborn *v.* Gillett (1873), L. R. 8 Exch. 88. The law has been so understood up to the present time, & if it is to be changed it rests with the legislature (PIGOTT, B.). **Consd.** Ward *v.* London & Blackwall Ry. Co. (1845), 6 L. T. O. S. 125. *Baker v. Bolton* seems to be against the position that the rule depends on some supposed connection with the principles of criminal law (LORD DENMAN, C. J.) ; Clark *v.* London General Omnibus Co., [1906] K. B. 648, C. A. **Distd.** Jackson *v.* Watson, [1909] 2 K. B. 193, C. A. The rule in *Baker v. Bolton* only applies to cases when death is an essential part of the cause of action, & does not apply where there is a cause of action independently of such wrong, *e.g.*, breach of contract of warranty (VAUGHAN WILLIAMS, L. J.). **Apld.** The Amerika, [1914] P. 167, C. A. The rule is binding upon the C. A. (BUCKLEY, L. J.). **Folld.** Admiralty Comrs. *v.* S.S. Amerika, [1917] A. C. 38, H. L. **Refd.** Berry *v.* Humm, [1915] 1 K. B. 627.

263. —— Master & servant—Parent & child.]—A master cannot maintain an action for injuries which cause the immediate death of his servant.

Declaration against deft. for injuries caused to E., pltf.'s "daughter & servant," by the negligent driving of deft.'s servant, by reason whereof she afterwards died ; claiming as special damage the loss of E.'s services, & her burial expenses. Plea (*inter alia*) that E. was killed on the spot :—*Held :* the plea was good.—OSBORN (OSBORNE) *v.* GILLETT (1873), L. R. 8 Exch. 88 ; 42 L. J. Ex. 53 ; 28 L. T. 197 ; 21 W. R. 409. S. C. Nos. 531, 539, *post.*

Annotations :—**Apprvd.** Clark *v.* London General Omnibus Co., [1906] 2 K. B. 648, C. A. I agree with the reasoning of the majority of the ct. & do not think the arguments of Bramwell, B., are well founded (LORD ALVERSTONE, C. J.). **Consd.** Jackson *v.* Watson, [1909] 2 K. B. 193, C. A. **Apprvd.** The Amerika, [1914] P. 167, C. A. **Refd.** Admiralty Comrs. *v.* S.S. Amerika, [1917] A. C. 38, H. L. **Mentd.** Appleby *v.* Franklin (1886), 17 Q. B. D. 93 ; Smith *v.* Selwyn, [1914] 3 K. B. 98, C. A. ; Berry *v.* Humm, [1915] 1 K. B. 627, C. A.

264. —— —— ——.]—A father cannot recover, either at common law or under Fatal Accidents Act, 1846 (c. 93), the funeral expenses to which he has been put in burying an unmarried infant daughter whose death was caused by defts.' negligence & who was residing with her father at the time.—CLARK *v.* LONDON GENERAL OMNIBUS CO., LTD., [1906] 2 K. B. 648 ; 75 L. J. K. B. 907 ; 95 L. T. 435 ; 22 T. L. R. 691 ; 50 Sol. Jo. 631, C. A.

Annotations :—**Folld.** Jackson *v.* Watson, [1909] 2 K. B. 193, C. A. ; The Amerika, [1914] P. 167, C. A. **Distd.** Berry *v.* Humm, [1915] 1 K. B. 627, C. A. **Consd** Admiralty Comrs. *v.* S.S. Amerika, [1917] A. C. 38, H. L.

See, further, NEGLIGENCE.

265. —— —— **Admiralty jurisdiction.**] — The Admlty. Ct. Act, 1861 (c. 10), s. 7, which gave the Admlty. Ct. "jurisdiction over any claim for damage done by any ship," did not give jurisdiction over claims for damages for loss of life under the former Act ; & the Admlty. Div. could not entertain an

action *in rem* for damages for loss of life under that Act.—SEWARD *v.* THE VERA CRUZ (1884), 10 App. Cas. 59; 54 L. J. P. 9; 52 L. T. 474; 49 J. P. 324; 33 W. R. 477; 1 T. L. R. 111; 5 Asp. M. L. C. 386, H. L.

Annotations:—**Distd.** The Swift, [1901] P. 168. **Consd.** Davidsson *v.* Hill, [1901] 2 K. B. 606. **Folld.** The Amerika, [1914] P. 167. **Consd.** British Columbia Electric Ry. Co. *v.* Gentile, [1914] A. C. 1034, P. C. **Refd.** The Englishman & The Australia, [1894] P. 239; Williams *v.* Mersey Docks & Harbour Board, [1905] 1 K. B. 804, C. A.; The Circe, [1906] P. 1. **Mentd.** The Theta, [1894] P. 280; The Tynwald, [1895] P. 142; Adam *v.* British & Foreign S.S. Co., [1898] 2 Q. B. 430; Whitechapel Board of Works *v.* Crow (1901), 84 L. T. 595; Cavendish *v.* Strutt, [1904] 1 Ch. 524; Headland *v.* Coster, [1905] 1 K. B. 219, C. A.; Bristol Corpn. *v.* Canning (1906), 95 L. T. 183; R. *v.* L. G. Board, *Ex p.* South Stoneham Union, [1908] 2 K. B. 368, C. A.; British Assocn. of Glass Bottle Manufacturers *v.* Nettlefold (1911), 27 T. L. R. 527; Date *v.* Gas Coal Collieries, [1915] 2 K. B. 454, C. A.

But *see, now,* Maritime Conventions Act, 1911 (c. 57).

266. —— —— ——.]—One of H.M.'s submarines was run into & sunk by a s.s., & the crew were drowned. In an action of damage by collision brought by the Admlty. Comrs. against the owners of the s.s. defts. submitted to judgment on the basis of paying to pltfs. 95 per cent. of their damage to be assessed by the Admlty. Registrar. Pltfs. claimed as an item of damage the capitalised amount of the pensions payable by them to the relatives of the deceased men:—*Held:* the claim failed (1) on the principle that in a civil ct. the death of a human being could not be complained of as an injury; (2) on the ground of remoteness, the pensions being voluntary payments in the nature of compassionate allowances.—ADMIRALTY COMRS. *v.* S.S. AMERIKA, [1917] A. C. 38; 86 L. J. P. 58; 116 L. T. 34; 33 T. L. R. 135; 61 Sol. Jo. 158; 13 Asp. M. L. C. 558, H. L.; *affg.* S. C. *sub. nom.* THE AMERIKA, [1914] P. 167, C. A. S. C. No. 503, *post.*

Annotation:—**Refd.** Berry *v.* Humm, [1915] 1 K. B. 627, C. A

See, further, ADMIRALTY.

267. —— **When recoverable—Independent cause of action.**]—Pltf. brought an action against defts. to recover damages for breach of warranty on the sale of a tin of salmon unfit for human food, which caused the death of pltf.'s wife. At the trial the jury found for pltf. & awarded to him as damages an amount which included £200, for the loss of his wife's services through her death:—*Held:* (1) where there was a cause of action, independently of the wrong causing the death, such as a breach of contract, damage arising from the death of a human being might be included as an element in ascertaining the damages; (2) pltf. was entitled to recover the damages.—JACKSON *v.* WATSON & SONS, [1909] 2 K. B. 193; 78 L. J. K. B. 587; 100 L. T. 799; 25 T. L. R. 454; 53 Sol. Jo. 447, C. A.

Annotations:—**Apld.** Cointat *v.* Myham, [1913] 2 K. B. 220. **Consd.** Berry *v.* Humm, [1915] 1 K. B. 627, C. A. **Refd.** The Amerika, [1914] P. 167, C. A.

E. Miscellaneous Acts.

268. Communication of libellous publication.]—No claim can be maintained by the publishers of a libellous work against a person informing the individuals libelled of the publication who bring actions against the publishers resulting in recovery of damages.—SAUNDERS *v.* SEYD & KELLY'S CREDIT INDEX CO., LTD., SEYD & KELLY'S CREDIT INDEX CO., LTD. *v.* SAUNDERS & CHAPMAN (1896), 75 L. T. 193; 12 T. L. R. 546, C. A.

269. Interference with administrator.]—H. died intestate leaving no children or kindred, & the King appointed pltf. to take out administration. Deft., though he knew there was no kindred, entered caveats & put pltf. to great charge, & for this cause pltf. brought an action. *Semble:* the action would not lie; although there was a *damnum* it was *absque injuria.*—MANNING *v.* NAPP (1692), 1 Salk. 37; 91 E. R. 38.

For full anns., *see* EXECUTORS & ADMINISTRATORS.

270. Use of name—Divorced husband peer—Wife using title.]—Where the marriage of a commoner with a peer of the realm has been dissolved at the instance of the wife, & she afterwards, on marrying a commoner, continues to use the title acquired by her first marriage, she does not thereby, though having no legal right to the user, commit such a legal wrong against her husband, & so affect his enjoyment of the incorporeal hereditament which he possesses in his title, as to entitle him, in the absence of malice, to an injunction to restrain her use of the title.—COWLEY (EARL) *v.* COWLEY (COUNTESS), [1901] A. C. 450; 70 L. J. P. 83; 85 L. T. 254; 50 W. R. 81; 17 T. L. R. 725, H. L. S. C. No. 196, *ante.*

Annotations:—**Refd.** *Re* Greenwood, Goodhart *v.* Woodhead, [1902] 2 Ch. 198; *Re* Croxon, Croxon *v.* Ferrers (1904), 89 L. T. 733.

271. —— **Name of house.**]—DAY *v.* BROWNRIGG, No. 237, *ante.*

For full anns., *see* S. C. No. 237, *ante.*

272. —— **Telegraphic address.**] — STREET *v.* UNION BANK OF SPAIN & ENGLAND, No. 252, *ante.*

273. —— **Name of goods.**]—BURGESS *v.* BURGESS, No. 247, *ante.*

For full anns., *see* S. C. No. 247, *ante.*

See, further, NAME & ARMS, CHANGE OF; TRADE MARKS, TRADE NAMES & DESIGNS.

274. Mere threats—No damage.]—Deft. claimed pltf. as his villein & with force & arms lay in wait for him to take, imprison, & use him as his villein so that he could not go about his business, whereupon pltf. brought an action on the case:—*Held:* pltf. had no cause of action, there being *damnum sine injuria.*

Neither the claim nor the threat gives a cause of action. How can that which follows give an action? It was pltf.'s folly that he did not go out upon his affairs. There are various cases in our law

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PART II. SECT. 3, SUB-SECT. 2—E.

m. *Society—Exclusion from.*]—A suit will not lie to force defts. to admit pltf. into their society.—RADHOO NISSEE *v.* RAM JUNOO NISSEE (1862), 2 Hay 83.—**IND.**

n. —— ——.]—In a suit for a decree declaratory of right to membership of a somaj (society), upon the allegation that the other members had excluded pltf.:—*Held:* as such exclusion neither deprived pltf. of caste nor affected any right of property, it was not cognisable by the civil ct. The members of a society are the sole judges whether a particular person is entitled to continue as a member or not.—SUDHARAM PATAR *v.* SUDHARAM (1869), 3 B. L. R. A. C. 91; 11 W. R. 457.—**IND.**

o. *Agreement to withdraw case—Case accidentally tried—Publication of judgment—Without defendant's malice or fraud.*]—K., deft. in a case in a magistrate's ct., paid the amount due to his creditor D., who promised to withdraw the case. In accordance with his promise, D. posted a letter to the magistrate's clerk withdrawing the case, which letter never reached its destination. The case was heard, & judgment given against K. This judgment appeared in a gazette supplied to business men, & K. in consequence suffered damage to his credit. K. thereupon sued D.:—*Held:* in the absence of malice or fraud on the part of D., the injury suffered by K. was *damnum absque injuria,* & K. was not entitled to succeed in tort.—KHAN *v.* DEENIK (1907), 24 S. C. 396; 17 C. T. R. 53.—**S. AF.**

p. *Breach of revenue laws.*]—Pltf., after averring that he was a taxpayer, secretary to the Manufacturers' Assocn., & interested in the due observance of Customs Act, 1906, & that deft., as Treasurer of the Colony, was permitting to be imported printed catalogues in parcels under a certain weight without payment of duty, prayed for a declaration that deft. was not entitled to give such permission, & for an interdict:—*Held:* in the absence of any averment of infringement of any right belonging to pltf., the declaration disclosed no cause of action.—BAGNALL *v.* COLONIAL GOVT. (1907), 24 S. C. 470; 17 C. T. R. 689.—**S. AF.**

274 i. *Damage due to plaintiff's act.*]—Where pltf.'s cattle, wrongfully on the lands of deft., have been lawfully distrained for poor rate, etc., due by deft., the trespass, even though not wilful, precludes pltf. from recovering from deft. the amount he has paid in order to release his cattle.—BERESFORD *v.* KENNEDY (1887), 21 I. L. T. 17.—**IR.**

Sect. 3.—*Damnum absque injuria: Sub-sect.* 2, *E. Sect.* 4: *Sub-sects.* 1, 2, *A. & B.*]

where a man has *damnum sine injuria*, such as if two conspire to indict a man, he has no remedy, unless he be in fact indicted & also acquitted thereon; so in this case (NEEDHAM, J., & BILLING, C.J.). —BROWN *v.* HAWKINS (1477), Y. B. Trin., 17 Edw. 4, p. 3, pl. 2.

Unfounded legal proceedings.]—*See* MALICIOUS PROSECUTION & PROCEDURE.

SECT. 4.—DE MINIMIS NON CURAT LEX.

SUB-SECT. 1.—IN GENERAL.

275. Former attitude of court—Court of Common Law.]—T. was lessee & pltf. under-lessee of premises at a rent of £10 a year. T. leased to other defts., H. & Co., who gave notice to pltf. to pay over his rent to them as landlords, & he paid them the rent for that year. Then T. sued pltf. for that & for other years' rent due to him; pltf. paid the first 4 years' rent into ct. & filed a bill asking that defts. might interplead as to the last year's rent:—*Held:* the trifling sum for which the suit was brought prevented the ct. from giving a decision.—SMITH *v.* TARGET (1795), 2 Anst. 529; 145 E. R. 957.

Annotations:—**Distd.** Crawford *v.* Fisher (1842), 1 Hare, 436. **Mentd.** Johnson *v.* Atkinson (1796), 3 Anst. 798.

276. —— —— Where real claim trivial.]—The ct. will stay proceedings in an action of contract, where it clearly appears to be brought to recover a sum under 40*s.*, although the sum claimed in the writ exceed that amount—especially if there has been, in addition, an abuse of the process of the ct. in issuing the writ prematurely.—STUART (STEWART) *v.* CAWSE (1859), 5 C. B. N. S. 737; 28 L. J. C. P. 192; 32 L. T. O. S. 256; 5 Jur. N. S. 650; 7 W. R. 187; 141 E. R. 296.

277. —— —— New trial—Verdict against evidence.]—A verdict was given for deft. against the evidence, but the action was frivolous & trifling & the real damage little or none:—*Held:* a new trial must be refused.—MACROW *v.* HULL (1764), 1 Burr. 11; 97 E. R. 161.

278. —— —— —— ——.]—A fire broke out on premises in part of which pltf. carried on the business of a licensed victualler, but pltf.'s goods were not destroyed by the fire. In an action against defts. for the wrongful conversion of pltf.'s goods by their servants, men of the fire brigade, the jury found that the fire brigade had custody of the premises for the purpose of extinguishing the fire; that the injury to pltf.'s goods was caused by the felonious acts of the men of the fire brigade, that the officers were guilty of negligence in not preventing the felonious acts by the men; & they assessed the damages at £15:—*Held:* it was the custom of the ct. not to grant a new trial on the ground that the verdict was against the weight of evidence where the damages did not exceed £20, except under peculiar circumstances, such as the trial of a right, or where the personal character of a person might be injured.—JOYCE *v.* METROPOLITAN BOARD OF WORKS (1881), 44 L. T. 811; 45 J. P. 667.

279. —— —— —— Misdirection.]—Where the ground of application for a new trial is misdirection, the amount of the verdict is not regarded.—HAINE *v.* DAVEY (1836), 1 Ad. & El. 892; 6 Nev. & M. K. B. 356; 111 E. R. 1019.

Annotations:—**Apprvd. but Distd.** Lee *v.* Evans (1862), 12 C. B. N. S. 368. **Mentd.** Ross *v.* Clifton (1841), 11 Ad. & El. 631; Watts *v.* Judd (1843), 5 Man. & G. 598; Langford *v.* Woods (1844), 7 Man. & G. 625; Nash *v.* Lucas (1867), 16 L. T. 610.

280. —— —— —— Discretion.]—The judge at the assizes tried a cause in which the question was to which party the stakes of a cricket match ought to have been paid. On objection that it was beneath the dignity of a ct. of justice to try such a cause:—*Held:* it was in the discretion of the judge whether he would try it; & if he thought proper to do so they could not set aside the verdict.—WALPOLE *v.* SANDYS (1825), 4 L. J. O. S. K. B. 29.

See, now, R. S. C., O. 39; PRACTICE & PROCEDURE.

281. —— Court of Equity.]—A suit in Ch. relating to an obligation of only £8 dismissed.—KNIGHT *v.* SMITH (1578), Ch. Cas. in Ch. 121; 21 E. R. 74.

282. —— ——.]—*Semble:* a litigant dragging parties before the ct. in trifling matters, which are of little benefit to him, but of much injury to them, has not the ear of the ct.

M. transferred a sum of £100 into the names of the rector & churchwardens of F. upon trust to apply the dividends in the purchase of fuel for the purpose of warming the parish church. Pltfs. moved for an inquiry into the sum of money standing in the names of defts., who were the churchwardens at the time the money was transferred, & for a scheme for the appointment of proper trustees. It was admitted that the church had been duly warmed:—*Held:* no case was made out which made it necessary for the ct. to interfere.—*Re* MITCHELL'S CHARITY (1838), 2 Jur. 837.

283. —— ——.]—Prior to R. S. C., 1883, the High Ct. of Justice would not entertain an action claiming that a sum under £10 might be declared a charge upon land, since the action was not one which, before Jud. Acts, was maintainable in a common law ct., & the old rule of the Ct. of Ch. still prevailed.—WESTBURY-ON-SEVERN RURAL SANITARY AUTHORITY *v.* MEREDITH (1885), 30 Ch. D. 387; 55 L. J. Ch. 744; 52 L. T. 839; 34 W. R. 217; 1 T. L. R. 641; C. A.

Annotation:—**Distd.** Guaranty Trust Co. of New York *v.* Hannay, [1915] 2 K. B. 536, C. A.

284. —— —— Maxim applied to give jurisdiction.]—On a question whether equity would supply the want of a surrender of copyholds which had been devised before 55 Geo. 3, c. 192:—*Semble:* the ct. did not go into the consideration of the provision made for the family, otherwise than where the heir was wholly disinherited or received so small a sum that the above maxim would apply to it.—ANDREWS *v.* WALLER (1733), 6 Vin. Abr. 237, pl. 12, tit. Copyhold, W. e.

285. —— Concurrent jurisdiction of inferior court.]—Where a matter which arose within the jurisdiction of the cts. of Wales was of value or difficulty, parties might take their remedy in the English Ct. of Ch., but if of small consequence it was an inducement with the ct. to dismiss the case with costs.—BRACE *v.* TAYLOR (1741), 2 Atk. 253; 26 E. R. 556.

For full anns., *see* EQUITY.

SUB-SECT. 2.—CASES WHERE MAXIM APPLIES.

A. Acts involving trivial Damage.

286. Trespass—By balloon.]—The ct. does not interfere to prevent trivial & insignificant trespasses.

PART II. SECT. 4, SUB-SECT. 1.

q. *General rule—Duty of court.*]—A suit instituted to recover a very small amount should be dismissed, as being beneath the dignity of the ct.—CHAINE *v.* DUNGANNON (1854), 6 Ir. Jur. 174.—**IR.**

r. —— ——.]—A writ of summons which claimed a sum of £1 7*s.* 11*d.* was set aside as being beneath the dignity of the ct., on account of the smallness of the sum claimed.—KILLEN *v.* GARVEY (1883), 17 I. L. T. 62.—**IR.**

s. —— *Nonsuit—Dismissal of appeal.*]—Where a nonsuit was erroneously granted by the cty. ct., & it appeared on appeal that pltf. was entitled to recover $4.86, the ct., acting on the above maxim, dismissed the appeal without costs.—WOODWARD *v.* FREDERICTON CITY (1888), 27 N. B. R. 211.—**CAN.**

t. —— *Appeal to Judicial Committee.*]—The Judicial Committee will not recommend the Crown to reverse a judgment in a suit in which no material right was tried & nominal damages alone were recovered.—GIRAUD *v.* PATERSON (1869), 38 L. J. P. C. 65; 18 W. R. 359, P. C.

PART II. SECT. 4, SUB-SECT. 2.—A.

286 i. *Trespass.*]—After a settlement between pltf. & deft., & payment to the

Suppose a person should apply to restrain an aerial wrong as by sailing through the air over a person's freehold in a balloon, this surely would be too contemptible to be taken notice of (SHADWELL, V.-C.). SAUNDERS *v.* SMITH, No. 227, *ante ;* No. 289, *post.*

For full anns., *see* S. C. No. 289, *post.*

287. —— ——.]—PICKERING *v.* RUDD, No. 226, *ante.*

For full anns., *see* S. C. No. 226, *ante.*

288. —— **Discharge of sewage.**]—A bill & information were filed to restrain the local board of health of a town from discharging sewage into a river, but they were dismissed with costs on the ground that the injury proved was trifling.—A.-G. *v.* GEE (1870), L. R. 10 Eq. 131 ; 23 L. T. 299 ; 34 J. P. 596.

Annotation :—**Refd.** Clowes *v.* Staffordshire Potteries Waterworks Co. (1872), 8 Ch. App. 125.

289. Infringement of copyright.]—Pltf. was the owner of the copyright of a number of reports of legal cases, & defts. were the author & publisher of Smith's Leading Cases. The ct. refused to interfere to prevent the infringement of a right producing no mischief.—SAUNDERS *v.* SMITH (1838), 3 My. & Cr. 711 ; 7 L. J. Ch. 227 ; 2 Jur. 491, 536 ; 40 E. R. 1100. S. C. Nos. 227, 286, *ante.*

Annotations :—**Distd.** Sweet *v.* Shaw (1839), 8 L. J. Ch. 216. **Refd.** Jarrold *v.* Houlston (1857), 3 Jur. N. S. 1051.

290. ——.]—Deft., a photographer, sold the right to reproduce the photograph of a lady which pltf., her father, had employed him to take. In an action for damages, delivery up of copies, & an injunction, the jury awarded pltf. a farthing damages :—*Held :* as far as the common law right was concerned there was no ground for an injunction.—HOLMES *v.* LANGFIER (1903), *Times*, 9th Nov.

B. Claims involving trivial Amounts.

291. Odd farthings.]—Deft. sold to pltf. £52 worth of oats at 10*s.* 9*d.* a quarter. Pltf. sued on the contract, claiming that deft. should have delivered 96 quarters, 6 bushels. On deft. alleging that the quantity claimed came to £52 0*s.* 0¾*d.* :—*Held :* the breach alleged by pltf. was good ; the difference was *inter minima*, just as the odd hours are not accounted in the year, which has 365 days & 6 hours.—LASTLOW *v.* THOMLINSON (1614), Hob. 88 ; Jenk. 287, p. 22 ; 80 E. R. 237.

292. Premium 6d.—Ad valorem stamp.]—Under 8 Anne, c. 9, s. 32, the stamp on an indenture of apprenticeship where 6*d.* only was the sum given with the apprentice was so small as to fall under the above maxim, and the indenture did not need to be stamped.—BAXTER *v.* FAULAM (1746) 1 Wils. 129 ; 95 E. R. 532.

Annotations :—**Foll'd.** R. *v.* Yarmouth (1754), Say, 170 **Apld.** Morton *v.* Brammer (1860), 8 C. B. N. S. 791.

See, now, Stamp Act, 1891 (c. 39).

293. Application of maxim—Question of degree.]—In harvesting barley about 30 bushels per acre were collected by the first raking. The rakings left on the ground amounted to about 3 bushels per acre, so that on setting up the tithes of the 30 the parson would have an eleventh part only :—*Held :* tithes were payable in respect of the rakings left. *Semble :* the quantity left at the second raking was too small to be worth attention.—GLANVILL (GLANVILLE) *v.* STACEY (1827), 6 B. & C. 543 ; 4 Dow. & Ry. M. C. 433 ; 9 Dow. & Ry. K. B. 626 ; 5 L. J. O. S. K. B. 186 ; 108 E. R. 551. S. C. No. 317, *post.*

294. —— ——.]—*Semble :* the ct. will not quash a rate because in the total rental of the place amounting to several thousand pounds there have been omissions of a trivial amount, such as £5 ; to do so would be to act in defiance of the above maxim :—*Held :* a difference of one-twelfth of the whole is material & not within the above maxim.—WHITE & JACKSON *v.* BEARD (1839), 2 Curt. 480. S. C. No. 313, *post.*

Annotations :—**Distd.** Asterley *v.* Adams (1871), L. R. 3 A. & E. 361. **Mentd.** Ramsbottom *v.* Duckworth (1847), 1 Exch. 506 ; R. *v.* Byrom (1848), 12 Q. B. 321 ; R. *v.* Wilkinson (1848), 12 J. P. 360 ; R. *v.* Crook (1857), 21 J. P. 627.

295. —— **Amount of claim—Not amount of verdict.**]—Under the maxim no action lay in a writ of waste for damage claimed to be of the value of a penny only. *Aliter*, if the jury found damages to the value of a penny.—YORK (DUKE) *v.* YORK (DUCHESS) (1431), Y. B. 9 Hen. 6, 66 b ; 22 Vin. Abr. 458, tit. " Waste " (N).

For full anns., *see* LANDLORD & TENANT.

296. —— —— ——.]—A ry. goods porter, employed at a harbour, was injured by accident, &, after some months' total incapacity, was employed by the day by the same employers at light work as latter of $20, for giving up his rights in land, pltf. abandoning any claim for damages for any cutting of trees previous to a certain Saturday afternoon, an action was brought by pltf. against deft. for damages for subsequent cutting ; the evidence established the cutting of one tree at a later hour on same Saturday afternoon. No value was fixed for this tree, or for what deft. did after taking the $20 :—*Held :* (1) the damage must have been very trivial, & such as formed no justification for bringing the action ; (2) pltf. should have judgment for damages at 20 cents, without costs, on account of the frivolous character of the action.—MELANSON *v.* WRIGHT (1896), 40 N. S. R. 598.—**CAN.**

286 ii. —— *Obstruction of highway.*]—Harbour Trust Commrs. leased to deft. council land as a site for a boat shed below high-water mark. The shed was erected on beams which rested for about a foot on the end of a public highway abutting on the harbour. The public were free to pass through the boat shed for the purpose of obtaining access to the water, & *vice versâ* :—*Held :* the obstruction caused by the ends of the beams resting on the public highway was too trifling to justify interference of the ct. — A.-G. ON RELATION OF ROSMAN *v.* MOSMAN MUNICIPAL COUNCIL (1910), 11 S. R. (N. S. W.) 133 ; 28 N. S. W. W. N. 41. —**AUS.**

PART II. SECT. 4, SUB-SECT. 2.—B.

u. *General rule—Duty of defendant.*]—The rule & policy of the ct. is to discourage suits for trifling amounts.

Where a bill was filed in respect of a small sum, including interest, the ct., without reference to the merits of the demand, dismissed the bill, but without costs, as deft. ought, in the circumstances, to have demurred or moved to take the bill off the file.—WESTBROOKE *v.* BROWETT (1870), 17 Gr. 339.—**CAN.**

v. —— *Action for board & lodging.*]—An action for £2 15*s.* for board & lodging is beneath the dignity of the Superior Ct. *Semble :* the ct. would, on application of deft., order the writ to be taken off the file.—MULLIGAN *v.* GRIMES, M'GONIGLE *v.* GRIMES (1880), 15 L. T. 7.—**IR.**

w. —— *Suit for tithes.*]—In a suit to recover £6 1*s.* 5*d.* for tithes, the bill may be demurred to or be dismissed at the hearing, on account of the smallness of the demand.—DISNEY *v.* TAAFE (1837), 1 Dr. & Wal. 94.—**IR.**

293 i. *Application of maxim—Question of degree.*]—By an error, the arrears of taxes, $2.30, were carried into treasurer's book as $2.50 & property worth from $600 to $800 was sold for $6.06. In an action to set aside the sale :—*Held :* (1) the difference might appear small, but the error represented $\frac{1}{240}$th of tax, while purchaser had only paid $\frac{1}{1200}$th value of land, and the above maxim did not apply. In such cases the proportion should rather be looked at than the actual amount. The assessment was perfectly legal, but the amount for which it was sold was in excess ; (2) pltf. entitled to a decree setting aside sale. On appeal the judgment was reversed on other grounds.—CLAXTON *v.* SHIBLEY (1885), 9 O. R. 451 ; 10 O. R. 295.—**CAN.**

293 ii. —— ——.]—Pltfs. agreed to sell to deft. "all the lambs shorn " the produce of pltfs.' flock on certain land. Pltfs. were to tend & care for the lambs to the best of their ability until delivery. Pltfs. tendered 2,942 lambs in performance of the contract, of which 156 were not shorn, & 153 not docked. Deft. refused to accept delivery. At the trial of the action, the jury found that the lambs " substantially speaking " were shorn and tendered, but negatived the existence of a custom, whereby a purchaser was bound to accept a small number of unshorn or undocked lambs :—*Held :* (1) the seller having tendered a quantity substantially less than he contracted to sell, the buyer might reject the whole ; (2) the finding of the jury must be disregarded, as it is only when the excess or deficiency is so slight as to be negligible, that the court will apply the above maxim. *Harland & Wolff v. Burstall & Co.* (1901), 84 L. T. 324, foll. ; *Shipton, Anderson & Co.* v. *Weil Bros. & Co.*, [1912] 1 K. B. 574, distd.—FARLEY & FARLEY *v.* LOUGHTNAN (1917), N. Z. L. R. 588.—**N.Z.**

Sect. 4.—De minimis non curat lex: Sub-sect. 2, B. & C.; sub-sect. 3, A. B. & C.]

a porters' mess-room attendant. He was paid the same wages as previously. Owing to a strike in Dublin causing diminution of traffic, he was out of work on four days, but not consecutively. He made no attempt to obtain work elsewhere on those days & applied for 7*s.* 10*d.* compensation in respect of them, saying his injury prevented him earning wages elsewhere during this period. The cty. ct. judge refused to award any compensation & merely granted a declaration of liability:—*Held:* without deciding whether or not the man was entitled to compensation during this period, & assuming everything in his favour, he would only be entitled to the difference between his average weekly earnings before & after the accident, & the effect of so short a time upon the calculation of his average weekly earnings after the accident was so trivial that the award of the cty. ct. judge was justified.—WOODHOUSE *v.* MIDLAND RY. CO., [1914] 3 K. B. 1034; 83 L. J. K. B. 1810; 111 L. T. 1084; 30 T. L. R. 653; 7 B. W. C. C. 690.

297. ———.]—PINDAR *v.* WADSWORTH, No. 306, *post.*

For full anns., *see* S. C. No. 306, *post.*

C. Miscellaneous Cases.

298. Accretions to land.]—*Semble:* if a fresh water river between the land of two owners insensibly gains on one or the other side, the property in the river continues as before, but if it be done sensibly & suddenly, or if there be other known boundaries, such as stakes or a known extent of land, the ownership of the soil remains according to the former bounds.—FORD *v.* LACEY (1861), 7 H. & N. 151; 30 L. J. Ex. 351; 7 Jur. N. S. 684; 158 E. R. 429.

Annotations:—**Distd.** Foster *v.* Wright (1878), 4 C. P. D. 438. **Refd.** Hindson *v.* Ashby, [1896] 2 Ch. 1, C. A. **Mentd.** G. W. Ry. Co. of Canada *v.* Braid, G. W. Ry. Co. of Canada *v.* Fawcett (1863), 1 New Rep. 527.

299. ———.]—The maxim would only apply with respect to gradual accretions not appreciable except after lapse of time (POLLOCK, C.B.).—NEW RIVER CO. *v.* HERTFORD LAND TAX COMRS. (1857), 2 H. & N. 129; 157 E. R. 53.

For full anns., *see* LAND TAX.

See, further, WATERS & WATERCOURSES.

300. Local custom.]—Although a custom which concerns freehold land ought to be throughout the county, a prescription concerning copyhold land is good in a particular place, for *de minimis non curat lex*, & the law is not altered thereby (WALMESLEY, J.).—TAVERNER *v.* CROMWELL (1594), Cro. Eliz. 353; 78 E. R. 601.

301. Right to cut heather, etc.—Effect of cutting grass & young shoots therewith.]—In an action of trespass deft. proved that for 60 years previous to commencement of the suit his predecessors & himself in a farm exercised the right by themselves & their servants to cut, during certain months of the year, brake, fern, heather & litter to be used upon the farm:—*Held:* he had not thereby proved the exercise of a right to mow the grass where there was no heather, nor of a right to cut down anything which could be fairly & reasonably called fir trees, even of young growth.

If in cutting the heather he cut what some people may call young fir trees, that is, the shoots of a year's growth, or things which are really not noticeable & which nobody could distinguish from the heather, or if he cut grass which was growing among the heather, it would be idle to suppose he is prevented from cutting the heather, because he may cut a few blades of grass or these very young trees (BRETT, L. J.).—DE LA WARR (EARL) *v.* MILES (1881), 17 Ch. D. 535; 50 L. J. Ch. 754; 44 L. T. 487; 29 W. R. 809, C. A.

Annotations:—**Distd.** Lyell *v.* Hothfield, [1914] 3 K. B. 911. **Refd.** Hollins *v.* Verney (1884), 13 Q. B. D. 304, C. A.; Brocklebank *v.* Thompson, [1903] 2 Ch. 344. **Mentd.** Lemaitre *v.* Davis (1881), 19 Ch. D. 281.

302. Disqualification of member of local authority.]—If a member of a local authority is concerned in some trifling contract with the board, such as the purchase of a paint brush or a few nails from him, it may be that the maxim would be applicable & the member would not be disqualified under Public Health Act, 1875 (c. 55), Sched. II., r. 64 (LOPES, J.)—NUTTON *v.* WILSON (1889), 22 Q. B. D. 744; 58 L. J. Q. B. 443; 53 J. P. 644; 37 W. R. 522, C. A.

For full anns., *see* LOCAL GOVERNMENT.

303. Will—Right of selection—Donee entitled to whole.]—Gift by a testator of his plate to trustees upon trust to permit his widow "to have & appropriate absolutely to herself such parts thereof as she should signify in writing her desire to possess":—*Held:* the widow was entitled to the whole of the plate.

Following the words literally she might take the whole of the plate with the exception of one article of probably no value, when the maxim would apply (JESSEL, M.R.).—ARTHUR *v.* MACKINNON (1879), 11 Ch. D. 385; 48 L. J. Ch. 534; 41 L. T. 275; 27 W. R. 704.

Annotation:—**Refd.** *Re* Sharland, Kemp *v.* Rozey (No. 2), (1896), 74 L. T. 664, C. A.

SUB-SECT. 3.—CASES WHERE MAXIM DOES NOT APPLY.

A. Questions of Right.

304. No actual damage.]—In an action for refusing to admit an elector's vote where the persons for whom he offered to vote were elected:—*Held:* the action lay.

This is not so inconsiderable a right as to apply the above maxim to it; an injury imports a damage when a man is thereby hindered of his right. If a man gives another a cuff on the ear, though it cost him nothing, no, not so much as little diachylon, yet he shall have his action (HOLT, C.J.).—ASHBY *v.* WHITE, Nos. 187, 208, 216, *ante.*

Annotation:—**Apld.** Hammerton *v.* Dysart, [1916] 1 A. C. 57, H. L.

For full anns., *see* S. C. No. 187, *ante.*

305. Amount of damage immaterial.] — Pltf. was indicted for a common trespass & acquitted. He sued out a writ of conspiracy. It was argued that the writ only lay in the case of an indictment for felony whereof if convicted prisoner might lose life

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PART II. SECT. 4, SUB-SECT. 2.—C.

x. *Erroneous inclusion of land in municipal area.*]—A Colonial Act authorised the Governor to declare a district a municipality. He made a proclamation defining certain boundaries for a municipality. The area included land not mentioned in the petition for incorporation, & omitted land which was mentioned:—*Semble:* the maxim might be material had the admitted excess been trivial.—GRAHAM *v.* BERRY (1865), 3 Moo. P. C. C. N. S. 207; 16 E. R. 78.—AUS.

y. *Performance of contract—Pleading & proof.*]—Pltf. had agreed to drive all logs remaining at a named date on a river past the mouth of a brook. In an action to recover the price therefor he averred in his declaration that the whole of the logs were so driven:—*Held:* an averment of performance.

This does not mean that pltf. should have proved that the whole of the logs were driven in the strictest literal construction of the words, as this would be harsh and unreasonable & impossible of performance. The maxim "*de minimis non curat lex*" might apply, to be used however with caution (*per* CUR.).—SUTHERLAND *v.* GILMOUR (1852), 7 N. B. R. (2 All.) 481.—CAN.

PART II. SECT. 4, SUB-SECT. 3.—A.

305 i. *Amount of damage immaterial.*]—Pltf. claimed a perpetual injunction, for damage by overflow of water from deft.'s lands on to his to the extent of under £2 per annum:—*Held:* the amount of the damage being so trifling was no ground for refusing a perpetual injunction, pltf. having established a legal right by an action of trespass against a former owner of deft.'s land.—WRIGHT *v.* TURNER (1863), 10 Gr. 67.—CAN.

& limb :—*Held :* a party was damaged by imprisonment whether for felony or trespass, though penalty in the one case was not as great as in the other ; accordingly his damage was less, but the law would take care that damage even to the smallest extent would be remedied (SCROPE, J.).—(1329), Y. B. 3 Ed. 3, fol. 19, pl. 34.

Annotations :—**Apld.** Jones *v.* Givin (1713), Gilb. 185. **Mentd.** A.-G. *v.* Starling (1663), 1 Keb. 675 ; Norris *v.* Palmer (1676), 2 Mod. Rep. 51 ; Roberts *v.* Savill (1697), 5 Mod. Rep. 405.

306. Trivial damage—Right of common.]—A commoner may maintain an action on the case for an injury done to the common by taking away from thence the manure which was dropped on it by the cattle, though his proportion of the damage be found only to the amount of a farthing ; at least, the smallness of the damage found is no ground for a nonsuit.—PINDAR *v.* WADSWORTH (1802), 2 East, 154 ; 102 E. R. 328. S. C. No. 297, *ante*.

Annotations :—**Folld.** Kitchen *v.* Knight (1824), M'Cle. 373. **Refd.** Bower *v.* Hill (1835), 1 Hodg. 45 ; Harrop *v.* Hirst (1868), L. R. 4 Exch. 43. **Mentd.** George *v.* Lysaght (1883), 49 L. T. 49 ; Robertson *v.* Hartopp (1889), 43 Ch. D. 484, C. A.

307. —— ——.]—Deft., being possessed of a portion of a lammas field, for which a right of common existed part of the year, took down the customary post & rail fences containing gaps through which the commoners' cattle might pass, & built a wall, with a single doorway, at which they might enter & return. In an action for disturbance of the right of common the commoners recovered a farthing damages :—*Held :* a farthing damages would sustain an action of this sort.—KITCHEN *v.* KNIGHT (1824), M'Cle. 373 ; 148 E. R. 156.

See, further, COMMONS & RIGHTS OF COMMON.

308. Liberty of subject affected.]—The ct. will not allow itself to be biased one way or the other by any consideration either of the technical character or the minuteness or apparent insignificance of points raised by counsel, if it appears that the requirements of the law in a case affecting liberty have not been complied with (LORD SELBORNE, C.). —GREEN *v.* PENZANCE, No. 91, *ante*.

Annotation :—**Refd.** Sweet *v.* Ely (1902), 86 L. T. 679.

For full anns., *see* S. C. No. 91, *ante*.

B. Disputes as to Land.

309. Obstruction.]—Pltf. purchased two of several plots of building land of which deft. was mtgee. in fee. The conveyance to which deft. & mtgor. were both parties, contained a grant of a right of way " along the roads or intended roads & ways delineated in the plan," & also a covenant by deft. that he had not incumbered the premises. Another plot had previously been sold to A. In the conveyance to A. (to which deft. as mtgee. was a party) mtgor. covenanted with A. that he would at his own expense " pave & complete & make fit for use, & at all times maintain in good repair, a private road marked ' Private Road A. B.' on the plan drawn in the margin of these presents [describing it], & will make such road of a width not less than 40 feet throughout its entire length." This was the road over which a right of way was granted to pltf. in his conveyance. In this deed was also a proviso that it should be lawful for A. " to erect & maintain a *porte-cochere* or projection extending over the foot pavement of the private road marked A. B. provided that the plan thereof be submitted to mtgor. & approved of by him." This portico when finished projected about 2 ft. into the carriage-way of the private road A. B., but there was ample space left for the convenient enjoyment by pltf. of the way granted to him :—*Held :* there being no substantial interference with the right of way or easement granted to pltf., he was not entitled to maintain an action against deft. upon his covenant.

" I wish to guard myself from saying that in any dispute as to land the maxim *de minimis* can have application. I think this is not so, but if pltf. had had the soil of this road, he would have a right of action for ever so little encroachment upon it " (BRETT, J.).—CLIFFORD *v.* HOARE (1874), L. R. 9 C. P. 362 ; 43 L. J. C. P. 225 ; 30 L. T. 465 ; 22 W. R. 828.

Annotations :—**Expld. & Folld.** Sketchley *v.* Berger (1893), 69 L. T. 754. **Folld.** Strick *v.* City Offices Co. (1906), 22 T. L. R. 667. **Apld.** Petter *v.* Parsons, [1914] 3 Ch. 653, C. A.

310. Trespass—Discretion of court.]—The ct. may refuse to grant an injunction to restrain persons from trespassing on land if the landowner is not injured thereby.

Pltf. bought land on an unfrequented part of the coast, & stopped up several paths which defts. asserted were public highways. Defts. removed the obstructions placed by pltf., who brought an action against them for an injunction to restrain them from trespassing on his land :—*Held :* (1) as between pltf. & defts., there were no public rights of way ; (2) pltf. was entitled to a declaration to that effect, & defts. must pay nominal damages ; (3) as pltf. was not, in the present state of the neighbourhood, injured by the public use of the ways in question, no injunction ought to be granted.—BEHRENS *v.* RICHARDS, [1905] 2 Ch. 614 ; 74 L. J. Ch. 615 ; 93 L. T. 623 ; 69 J. P. 381 ; 54 W. R. 141 ; 21 T. L. R. 705 ; 49 Sol. Jo. 685 ; 3 L. G. R. 1228.

311. Will—Gift to charity including trivial interest in land.]—A testator, who died before the coming into operation of Mortmain & Charitable Uses Act, 1891 (c. 73), gave so much of his residuary estate as might by law be applicable to charitable legacies to two charities. Part of this estate consisted of debentures in two Australian land cos. In the case of one co. the debentures were charged on all the real & personal property of the co. at maturity, & in the case of the other by way of floating security on all its undertaking & all its real & personal property. By Australian law money charged on land could be validly given to charities. At testator's death the only interests in land in England which the cos. possessed were leasehold offices of no appreciable value :—*Held :* (1) the debentures could not be given to charity, as, being charged upon the English leaseholds, they were " an interest in land " within Mortmain & Charitable Uses Act, 1888 (c. 42) ; (2) the maxim was not applicable, & there could be no apportionment.—*Re* DAWSON, PATTISSON *v.* BATHURST, [1915] 1 Ch. 626 ; 84 L. J. Ch. 476 ; 113 L. T. 19 ; 31 T. L. R. 277, C. A.

C. Amounts not trivial.

312. Question of degree—Distribution of booty.]—In considering the distribution of prize or booty taken by a joint British & Portuguese force in French Guiana :—*Held :* the Admlty. Ct. need not entertain British claims in all cases where the slightest assistance had been rendered by British subjects ; but the value in question being £32,000 & one hundred & forty-one British subjects asserting claims, the matter was not within the above maxim.—THE FRENCH GUIANA (1817), 2 Dods. 151.

313. —— **Rate.**]—WHITE & JACKSON *v.* BEARD, No. 294, *ante*.

For full anns., *see* S. C., No. 294, *ante*.

314. —— —— **Fraction of farthing.**]—Where the amount of a poor rate on so much in the pound involves the fraction of a farthing, a demand by the overseer of the whole farthing is an excessive & illegal demand.—MORTON *v.* BRAMMER (BRAMNER, BREMMER, BREMNER) (1860), 8 C. B. N. S. 791 ; 29 L. J. M. C. 218 ; 2 L. T. 600 ; 25 J. P. 216 ; 7 Jur. N. S. 211 ; 141 E. R. 1377.

Annotation :—**Refd.** Bavin *v.* Hutchinson (1862), 31 L. J. M. C. 229, Ex. Ch.

315. —— **Breach of revenue laws.**]—A ship was seized exporting a cargo of logwood from Jamaica

Sect. 4.—De minimis non curat lex: Sub-sect. 3, C. D. Sect. 5.]

to America in breach of the revenue laws. It was said the prohibited amount was not more than three tons :—*Held :* it being alleged to be the practice in the island, it could not be overlooked, & the ship was rightly condemned.

If the deviation were a trifle, which if continued in practice, would weigh little or nothing on the public interest, it might be overlooked. Three tons of wood perhaps would not be what the ct. could regard as a trifle (SIR W. SCOTT).—THE REWARD (1818), 2 Dods. 265.

316. —— Shareholder's interest.]—In a suit by pltf. on behalf of himself & all other shareholders & scripholders in a ry. co. except defts. against the directors for an account of all their dealings :—*Held :* the small value of pltf.'s interest, viz., £62 10*s.* at the utmost, subject to deductions of indefinite amount, so that it was very doubtful whether anything at all would come to him, was not so clearly below the dignity of the ct. as to prevent him from suing.—WILLIAMS *v.* SALMOND (1855), 2 K. & J. 463 ; 26 L. T. O. S. 292 ; 2 Jur. N. S. 251 ; 69 E. R. 864 ; *varied*, without reference to this point, 4 W. R. 344, C. A.

Annotations :—**Distd.** *Re* Court Grange Silver-lead Mining Co., *Ex p.* Sedgwick (1856), 2 Jur. N. S. 949. **Mentd.** Stupart *v.* Arrowsmith (1856), 3 Sm. & G. 176 ; Williams *v.* Page (1858), 24 Beav. 654.

317. —— Tithe.]—GLANVILL *v.* STACEY, No. 293, *ante*.

D. Miscellaneous Cases.

318. Disqualification of member of local authority.]—A member of a board of guardians agreed with the board to collect on their behalf rent receivable by them in respect of a certain house. There was no express agreement as to any fee or commission to be paid to the member for so doing. He collected the rent until the house was sold, & then paid to the board the amount of the rent received by him, less a sum which he claimed to be entitled to retain as commission, but afterwards he paid to the board the sum which he had retained. After receiving it the board declared the member's office of guardian to be vacant, on the ground that, by reason of charging commission for the collection of the rent, he had become disqualified under Local Government Act, 1893 (c. 73), s. 4 (1) (*e*), for being a member of the board :—*Held :* the fact that before the declaration of vacancy the employment had terminated, & the amount of commission had been paid by the member to the board, did not prevent him from being disqualified, & the office was vacant.—R. *v.* ROWLANDS, [1906] 2 K. B. 292 ; 75 L. J. K. B. 501 ; 95 L. T. 502 ; 70 J. P. 463 ; 4 L. G. R. 983.

319. Trivial nuisance becoming serious—Original acquiescence.]—If works likely to become a nuisance are erected, & carried on without any objection, the owners of adjoining estates, who acquiesced so long as no perceptible injury was sustained, are not precluded, when injury arises, from objecting to an extension of the works, or from pursuing their legal remedy to recover damages for injury sustained by such works ; & when an action has been brought & damages recovered the ct. will not restrain execution to obtain payment of the amount, or prevent pltf. in the action from taking other proceedings at law.—BANKART *v.* HOUGHTON (1859), 27 Beav. 425 ; 28 L. J. Ch. 473 ; 23 J. P. 260 ; 5 Jur. N. S. 282 ; 7 W. R. 197 ; 54 E. R. 167.

For full anns., *see* INJUNCTION.

Effect of trivial variations upon guarantee.]—*See* GUARANTEE.

SECT. 5.—EX TURPI CAUSA NON ORITUR ACTIO.

320. Crime—Murder.]—A wife who has been convicted of the murder of her husband cannot claim under a policy of insurance taken out by him in favour of his wife & family.

No system of jurisprudence can with reason include among the rights which it enforces rights directly resulting to the person asserting them from the crime of that person. If no action can arise from fraud, it seems impossible to suppose that it can arise from felony or misdemeanor (FRY, L.J.).—CLEAVER *v.* MUTUAL RESERVE FUND LIFE ASSOCN., [1892] 1 Q. B. 147 ; 61 L. J. Q. B. 128 ; 66 L. T. 220 ; 56 J. P. 180 ; 40 W. R. 230, C. A.

Annotations :—**Distd.** *Re* Carpenter's Estate (1895), 170 Pennsylvania Rep. 203; Gordon *v.* Metropolitan Police Chief Comr., [1910] 2 K. B. 1080, C. A. **Apld.** *In the Estate of* Crippen, [1911] P. 108 ; *In the Estate of* Hall, Hall *v.* Knight & Baxter, [1914] P. 1, C. A. **Mentd.** *Re* Burgess's Policy (1915), 85 L. J. Ch. 273.

321. —— —— Or manslaughter.]—No person may derive any benefit under the will of another whose death has been caused by the felonious act of that person, & there is no distinction in this respect between murder & manslaughter.

A., convicted of the manslaughter of B., had prior to her conviction been made a party to a probate suit, in which she claimed to be entitled to property under a will made by B. :—*Held :* after conviction she was properly struck out of the suit.—*In the Estate of* HALL, HALL *v.* KNIGHT & BAXTER, [1914] P. 1 ; 83 L. J. P. 1 ; 109 L. T. 587 ; 30 T. L. R. 1 ; 58 Sol. Jo. 30, C. A.

322. —— —— Persons claiming under criminal.]—No person can obtain, or enforce, any rights resulting to him from his own crime ; neither can his representative, claiming under him, obtain or enforce any such rights (EVANS, P.).—*In the Estate of* CRIPPEN, [1911] P. 108 ; 80 L. J. P. 47 ; 104 L. T. 224 ; 27 T. L. R. 258 ; 55 Sol. Jo. 273.

Annotations :—**Apprvd.** *In the Estate of* Hall, Hall *v.* Knight & Baxter, [1914] P. 1, C. A. **Mentd.** Mash *v.* Darley, [1914] 1 K. B. 1; Gayer *v.* Gayer (1917), 116 L. T. 322, C. A.

323. —— —— Murderer insane.]—A person who, by a special verdict given under Trial of Lunatic Act, 1883 (c. 38), is found guilty of murder but insane at the time, is not precluded from taking any benefit to which he may be entitled under the will of the murdered person, or, in a case of intestacy, from taking a share, as one of the statutory next of kin, of the murdered person's estate. *Qu. :* whether a murderer, who is not found to be insane, can take a distributive share under the intestacy of his victim.—*Re* HOUGHTON, HOUGHTON *v.* HOUGHTON, [1915] 2 Ch. 173 ; 84 L. J. Ch. 726 ; 113 L. T. 422 ; 31 T. L. R. 427 ; 59 Sol. Jo. 562.

See, further, INSURANCE ; WILLS.

324. Fraud—Fraudulent publication—No copyright.]—In case for infringement of copyright of a book entitled "Evening Devotions, etc., from the

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PART II. SECT. 5.

324 i. *Fraud—Recovery of money paid to alone for.*]—An action will not lie to recover money or goods given to another as an atonement for having defrauded him.—DOYLE *v.* GRIERSON (1794), Ridge L. & S. 268 (E).—**IR.**

324 ii. —— *Parties in pari delicto.*]—In an action for money had & received, defts. pleaded, by way of set-off, a promissory note given by pltf. to deft. The transactions between the parties were intended to defraud the creditors of pltf., & pltf. & deft. were *in pari delicto :*—*Held :* pltf. should not be aided by the ct. in enforcing his contract, & the verdict for him must be set aside.—BLAKE *v.* STEWART (1870), 2 N. S. R. 70.—**CAN.**

324 iii. —— *Fraudulent trade—Right to trade name—Pleading.*]—In 1899 the B. B. Co. started to sell in England liver pills which they called "F.'s Bile Beans for Biliousness." The advertisements of the co. stated that the basis of their bile beans was an Australian herb discovered by an eminent scientist after long research. These statements & others in the advertisements were false. In 1904 D. began to sell liver pills under the name of "D.'s Bile Beans." The co. raised an action of interdict against him, claiming exclusive use of the words "Bile Beans" :—*Held :*

German of S.," defts. pleaded that S. had written religious works in the German language, which had been translated into English, & were much valued; that pltf. employed H. to write the book mentioned in the declaration, with intent to defraud & deceive the public, & to make them believe that the book was a translation of an original written by S., fraudulently published it as & for a translation of an original work written in German by S.; & that he published with the book a false & fraudulent preface, the object of which was to induce the public to believe that the work was really a translation of a work written by S. On general demurrer: —*Held:* the matters stated in the plea were sufficient to negative the existence of a valid copyright in pltf., & to preclude him from maintaining any action for piracy.—WRIGHT *v.* TALLIS (1845), 1 C. B. 893; 14 L. J. C. P. 283; 5 L. T. O. S. 411; 9 Jur. 946; 135 E. R. 794.

325. Illegal purpose—Contract for—Contract to stifle prosecution.]—Illegality may be pleaded as a defence to an action on a bond.

Defts. being indicted for perjury, the prosecutor was corruptly induced not to appear & give evidence in consideration of a promissory note given him by pltf. Defts. executed a bond to indemnify pltf. In an action on the bond:—*Held:* the action was not maintainable.

This is a contract to tempt a man to transgress the law, to do that which is injurious to the community; it is void by the common law; & the reason why, by common law, such contracts are void, is for the public good. You shall not stipulate for iniquity. All writers upon our law agree in this, no polluted hand shall touch the pure fountains of justice. Whoever is party to an unlawful contract, if he has once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a ct. to fetch it back again. You shall not have a right of action when you come into a ct. of justice in this unclean manner to recover it back (WILMOT, C.J.).—COLLINS *v.* BLANTERN (1767), 2 Wils. K. B. 342; 95 E. R. 847.

Annotations:—**Follid.** Pole *v.* Harrobin (1782), 9 East, 418 n.; Paxton *v.* Popham (1808), 9 East, 408; Gas Light & Coke Co. *v.* Turner (1839), 5 Bing. N. C. 666. **Apld.** Kirwan *v.* Goodman (1841), 9 Dowl. 330. **Apprvd.** Keir *v.* Leeman (1844), 6 Q. B. 308. **Apld.** Benyon *v.* Nettlefold (1850), 3 Mac. & G. 94. **Folld.** Taylor *v.* Chester (1869), L. R. 4 Q. B. 309. **Distd.** Waugh *v.* Morris (1873), 42 L. J. Q. B. 57. **Consd.** Bourke *v.* Mealy (1878-9), 14 Cox, C. C. 329, Ir. **Apprvd.** Kearley *v.* Thomson (1890), 24 Q. B. D. 742, C. A. **Refd.** Edgcombe *v.* Rodd (1804), 5 East, 294; Fletcher *v.* Londes (1826), 3 Bing. 501; Greville *v.* Atkins (1829), 4 Man. & Ry. K. B. 372; Hill *v.* Manchester & Salford Waterworks Co. (1831), 2 B. & Ad. 544; Prole *v.* Wiggins (1836), 3 Bing. N. C. 230; Ward *v.* Lloyd (1843), 6 Man. & G. 785; Higgins *v.* Pitt (1849), 4 Exch. 312; Hegarty *v.* Shine (1878), 14 Cox, C. C. 124, Ir.; *Re* Coltman, Coltman *v.* Coltman (1881), 45 L. T. 392, C. A.; Reichel *v.* Oxford (1887), 35 Ch. D. 48, C. A.; Barclay *v.* Pearson, [1893] 2 Ch. 154; Hermann *v.* Charlesworth (1905), 74 L. J. K. B. 620, C. A. **Mentd.** Master *v.* Miller (1791), 4 Term Rep. 320; Kerrison *v.* Cole (1807), 8 East, 231; Morgan *v.* Horseman (1810), 3 Taunt. 241; Edwards *v.* Brown (1831), 1 Cr. & J. 307; Reynell *v.* Sprye (1852), 1 De G. M. & G. 656; Royal British Bank *v.* Turquand (1855), 5 E. & B. 248; Nawab Sidhee Nuzur Ally Khan *v.* Rajah Ozoodhyaran Khan (1866), 10 Moo. Ind. App. 540; Pickering *v.* Ilfracombe Ry. Co. (1868), L. R. 3 C. P. 235; *Re* Robinson's Settlmt., Grant *v.* Hobbs (1912), 106 L. T. 443, C. A.

326. —— —— Contract to rig market.]—An agreement between two or more to purchase shares in a co. in order to induce persons who might thereafter purchase shares in such co. to believe, contrary to the fact, that there was a *bonâ fide* market for its shares, & that the shares were at a real premium, is an illegal transaction & may be made the subject of an indictment for conspiracy; no action can be maintained in respect of such agreement or purchase of shares.

Pltf. brought an action against defts., stockbrokers, through whom he had purchased shares in a projected co., to obtain rescission of the contract for the purchase of such shares, & to recover back the purchase-money he had paid in respect of them to defts., on the ground that defts., while acting as

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(1) the complainers' trade was a fraudulent trade; (2) no action ought to be entertained by the cts. of Scotland to protect it or the name used in connection with it; (3) it was immaterial that the fraudulent nature of the trade was not pleaded, but was only disclosed at the trial.—BILE BEANS MANUFACTURING CO. *v.* DAVIDSON (1906), F. (Ct. of Sess.) 1181; 43 Sc. L. R. 827; 23 R. P. C. 725.—**SCOT.**

324 iv. —— *Stipulation for Commission by agent from third party.*]—A clerk of works with full charge of certain buildings in course of erection, unknown to his principal, stipulated with a measurer, as a condition of the latter's employment, for a commission on the tradesmen's accounts, as brought out in the measurements. The measurer having been employed, the clerk of works sought to recover his commission: —*Held:* the alleged contract for a commission was *pactum illicitum*, and action dismissed as irrelevant, with expenses to neither party.—MACDOUGALL *v.* BREMNER (1907), 44 S. L. R. 804; 15 S. L. T. 193.—**SCOT.**

z. *Illegal consideration—Compromise of penal action without leave of court.*]—18 Eliz. c. 5 prohibits the compromise of a *qui tam* action without leave of the ct. Where a pltf., who had brought a *qui tam* action, agreed to discontinue it upon being paid his costs, & in a subsequent action for those costs recovered much less than he thought the jury should have given him, the ct. refused a new trial.—BLECKER *v.* MEYERS (1848), 6 U. C. R. 134.—**CAN.**

a. —— —— *Pleading.*]—Where it appears on the face of the declaration that the consideration of deft.'s promise was a compromise, without leave of the ct., of a penal action, brought by pltf. as a common informer, the consideration will be held illegal, & the declaration bad.—HART *v.* MEYERS (1850), 7 U. C. R. 416.—**CAN.**

325 i. *Illegal purpose—Contract for—Contract to stifle prosecution.*]—Deft. being indicted for an assault occasioning actual bodily harm to pltf. & for common assault, a civil action for the assault was brought against him; this action was settled by deft. giving a note indorsed by B., for $1,000 for the damages sustained by pltf., & a fine was inflicted for common assault merely, the former charge in the indictment being withdrawn. The settlement was made & the note accepted by pltf. at deft.'s instance, & the judge, in sentencing deft., forbore to imprison because deft. had made compensation to pltf. In an action on the note:—*Held:* pltf. was entitled to recover, as there was no illegality of consideration, since the settlement was merely for pltf.'s private damage, & in no way affected the public interest, the law having been vindicated by the imposition of substantial punishment.—KNEESHAW *v.* COLLIER (1879), 30 C. P. 265.—**CAN.**

325 ii. —— —— *Intention to defraud creditors.*]—The ct. will not assist a pltf. who is seeking to carry out an illegal purpose, or who has already carried out such purpose in whole or in part; but, if the illegal purpose still rests in intention only, the objection of illegality does not apply. *Taylor* v. *Bowers* (1876), 1 Q. B. D. 219, apprvd.

A husband by agreement with his wife caused the title to real estate, purchased with his funds, to be put into her name, and money of his to be lodged in the savings bank in her name, & the land & money were in her name at her death. The land was so dealt with to secure a home in the event of his failing in business; but, in fact, no creditors of the husband had been defeated by the agreement. In an action by the husband against the exors. of the wife to recover the real estate & money on the basis of a trust:—*Held:* (1) the real estate & money belonged to the husband; (2) as the purpose of defeating pltf.'s creditors had not been carried out, pltf. was not barred by the intended illegality.—PERPETUAL EXORS. & TRUSTEES OF ASSOCN. OF AUSTRALIA, LTD. *v.* WRIGHT (1917), V. L. R. 372.—**AUS.**

325 iii. —— *Evasion of statute.*]—In an action by a principal against his agent for damages for misrepresentation made by him regarding land, it appeared that the agent had been employed to stake land. The names of certain persons had been used in staking the land. These persons were not really intending purchasers from the Govt., but were simply utilised to secure for pltf. a number of sections contrary to the Land Act, which provided for the purchase of one section at a time:—*Held:* the ct. would not aid pltf. with regard to any agreement entered into for the purpose of carrying out this fraud on the Land Act.—CLARK *v.* SWAN (1914), 27 W. L. R. 694. —**CAN.**

b. *Trespass to person—Communication of venereal disease.*]—The communication of venereal disease during illicit sexual intercourse is not an actionable wrong if the act of intercourse has been voluntary; & consent to the intercourse is not vitiated by the fact that it had been induced through wilful concealment of the disease. On the principle *ex turpi causa non oritur actio*, such action is unsustainable.—HEGARTY *v.* SHINE, [1878] 2 L. R. Ir. 273; 4 L. R. Ir. 288.—**IR.**

Sect. 5.—Ex turpi causa non oritur actio.]

pltf.'s brokers, had delivered their own shares to him instead of purchasing them upon the Stock Exchange. At the trial it appeared upon pltf.'s own case that the money sought to be recovered had been paid by pltf. in pursuance of an agreement between him & one of defts., by which such deft. was with the money to purchase upon the Stock Exchange a number of shares in the projected co. at a premium with the sole object of inducing the public to believe that there was a real market for the shares & that they were at a real premium, which pltf. & defts. well knew they were not:—*Held:* (1) the action was based upon an illegal contract, & could not be maintained; (2) it was immaterial that the illegality had not been pleaded.—SCOTT *v.* BROWN, DOERING MCNAB & CO., SLAUGHTER & MAY *v.* BROWN, DOERING MCNAB & CO., [1892] 2 Q. B. 724; 61 L. J. Q. B. 738; 67 L. T. 782; 57 J. P. 213; 411 W. R. 116; 8 T. L. R. 255; 36 Sol. Jo. 688; 4 R. 42.

Annotations:—**Distd.** *Re* Thomas, Jaquess *v.* Thomas, [1894] 1 Q. B. 747, C. A. **Apld.** Gedge *v.* Royal Exchange Insce., [1900] 2 Q. B. 214. **Distd.** Willis *v.* Lovick, [1901] 2 K. B. 195; Gordon *v.* Metropolitan Police Chief Comr., [1910] 2 K. B. 1080, C. A. **Apld.** *Re* Robinson's Settlmt., Gant *v.* Hobbs, [1912] 1 Ch. 717, C. A. **Distd.** Kregor *v.* Hollins (1913), 109 L. T. 225, C. A. **Apld.** North Western Salt Co. *v.* Electrolytic Alkali Co., [1913] 3 K. B. 422, C. A.; Farmers' Mart *v.* Milne, [1915] A. C. 106, H. L. **Mentd.** Brown *v.* Stock Exchange Com. (1892), 36 Sol. Jo. 752.

See, further, CONTRACT.

327. Immorality — Immoral publication — No copyright.] — STOCKDALE *v.* ONWHYN, No. 331, *post.*

For full anns., *see* S. C. No. 331, *post.*

328. —— —— ——.]—A novel written by pltf. described an episode which was nothing more nor less than a sensual adulterous intrigue, &, apart from its other objectionable features, advocated free love & justified adultery where the marriage tie has become merely irksome. Defts. exhibited a burlesque cinematograph film of the incidents of the novel. In an action for infringement of copyright:—*Held:* the action failed on the grounds (1) copyright did not exist in a book of such grossly immoral tendency; (2) the films themselves contained incidents of an indecently offensive character such as would have disentitled them to the protection of the ct., & pltf. in her action as framed had adopted & claimed the benefit derived from the films.—GLYN *v.* WESTON (WESTERN) FEATURE FILM CO., [1916] 1 Ch. 261; 85 L. J. Ch. 261; 114 L. T. 354; 32 T. L. R. 235; 60 Sol. Jo. 293. S. C. No. 330, *post.*

329. Indecency—Indecent publication—No copyright.]—Where an action in respect of infringement of copyright fails on the ground of indecency of the work, & the indecency has been repeated in the infringements, the action will be dismissed without costs. — BASCHET *v.* LONDON ILLUSTRATED STANDARD CO., [1900] 1 Ch. 73; 81 L. T. 509; 48 W. R. 56.

For full anns. *see* COPYRIGHT & LITERARY PROPERTY.

330. —— —— ——.] — GLYN *v.* WESTON FEATURE FILM CO., No. 328, *ante.*

331. Libel—Libellous publication—No copyright.] —The first publisher of a libellous or immoral work cannot maintain an action against any person for publishing a pirated edition.—STOCKDALE *v.* ONWHYN (1826), 5 B. & C. 173; 2 C. & P. 163; 2 State Tr. N. S. App. 988; 7 Dow. & Ry. K. B. 625; 4 L. J. O. S. K. B. 122; 108 E. R. 65. S. C. No. 327, *ante.*

Annotations:—**Folld.** Greville *v.* Chapman (1843), 8 Jur. 189. **Apld.** Hegarty *v.* Shine (1878), 14 Cox, C. C. 124, Ir.

See, further, COPYRIGHT & LITERARY PROPERTY.

332. —— —— No implied indemnity.]—*Semble:* the proprietor of a newspaper, convicted & fined for the publication of a libel in his paper inserted without his knowledge & consent by the editor, cannot recover against the editor the damages sustained by such conviction.—COLBURN *v.* PATMORE (1834), 1 Cr. M. & R. 73; 4 Tyr. 677; 3 L. J. K. B. Ex. 317; 149 E. R. 999.

Annotations:—**Distd.** Burrows *v.* Rhodes, [1899] 1 Q. B. 816. **Consd.** Leslie *v.* Reliable Advertising & Addressing Agency, [1915] 1 K. B. 652.

333. —— —— No express indemnity.]—In consideration that pltf. had published a libel at deft.'s request & had also consented to defend an action brought against pltf. for such publication deft. promised to indemnify pltf. against the costs of the action:—*Held:* promise void.—SHACKELL *v.* ROSIER, No. 567, *post.*

Annotations:—**Apld.** Bradlaugh *v.* Newdegate (1883), 11 Q. B. D. 1; Lound *v.* Grimwade (1888), 39 Ch. D. 605. **Distd.** Breay *v.* Royal British Nurses' Assocn. (1897), 76 L. T. 735; Burrows *v.* Rhodes, [1899] 1 Q. B. 816.

See, further, GUARANTEE.

Lottery—Action to recover prize won in.]—*See* GAMING & WAGERING.

Contribution between tortfeasors.]—*See* TORT.

334. Limits to maxim—Whole transaction not affected.]—The soil of a turnpike road was by Act of Parliament declared to be in the owners of the adjoining lands. K., the owner of land on both sides at a spot where the road was carried across a valley on an embankment, employed pltf. to construct a tunnel under the embankment. This was constructed by digging through half the width of the road, forming the tunnel, & then completing the other half in the same way. Before commencing the work K., obtained the consent of the road surveyor & the trustees:—*Held:* assuming that K., in the circumstances, could have been indicted for the nuisance to the highway, the partial obstruction to the highway did not render the whole proceeding so illegal as to prevent pltf., who was engaged on it, from recovering damages for a wrong sustained during progress of the work.—CATTLE *v.* STOCKTON WATERWORKS CO., No. 256, *ante.*

For full anns., *see* S. C. No. 256, *ante.*

335. —— Independent transaction.]—Pltf., a bookmaker, placed a sum of money, the proceeds of street betting, in a house occupied by a person who assisted him in his betting transactions. The house in question having been searched by the police under a warrant issued under Betting Act, 1853 (c. 119), s. 11, the money & a number of betting slips were seized & retained by the police for the purposes of certain proceedings taken against pltf. & his employee. In those proceedings pltf.'s employee was convicted, but pltf. was acquitted, & he now sued deft. for detaining the money:—*Held:* pltf. was entitled to recover.

The maxim has no application, as pltf. is not asking the ct. to enforce any illegal contract or to grant relief dependent in any way on any illegal transaction on his part, but is basing his claim solely on the unjustifiable detention by deft. of the money (MOULTON & BUCKLEY, L.JJ.).—GORDON *v.* METROPOLITAN POLICE CHIEF COMR., [1910] 2 K. B. 1080; 79 L. J. K. B. 957; 103 L. T. 338; 74 J. P. 437; 26 T. L. R. 645; 54 Sol. Jo. 719, C. A.

Part III.—Who may Sue and be Sued.

SECT. 1.—IN GENERAL.

SUB-SECT. 1.—MEMBERS OF THE ROYAL FAMILY.

336. Queen Consort.]—In an action of *quare impedit* by Queen Philippa:—*Held:* she could sue as a common person.—PHILIPPA (QUEEN) *v.* CHICHESTER (ABBESS) (1344), Y. B., 18 Edw. 3, 1, pl. 6.

337. Prince of Wales.]—A *scire facias* was issued to the King to enforce a judgment obtained by him as Prince of Wales.——(1413), Y. B., 1 Hen. 5, 7, pl. 2.

Annotation:—**Refd.** Prince's Case (1606), 8 Co. Rep. 1 a.

338. Prince Consort.]—Queen Victoria & pltf. respectively had occasionally for their amusement made drawings & etchings. Defts. printed & advertised for sale a catalogue of these etchings, which it was alleged had been surreptitiously obtained:—*Held:* defts. were not entitled to publish such catalogue, & pltf. was entitled to an injunction.—ALBERT (PRINCE) *v.* STRANGE (1849), 1 Mac. & G. 25; 1 H. & Tw. 1; 18 L. J. Ch. 120; 12 L. T. O. S. 441; 13 Jur. 109; 41 E. R. 1171.

Annotations:—**Refd.** Reade *v.* Conquest (1861), 9 C. B. N. S. 755; Hole *v.* Bradbury (1879), 12 Ch. D. 886; Pollard *v.* Photographic Co. (1888), 40 Ch. D. 345. **Mentd.** Morison *v.* Moat (1851), 9 Hare, 241; Jefferys *v.* Boosey (1854), 4 H. L. Cas. 819; Merryweather *v.* Moore (1892), 61 L. J. Ch. 505; Lamb *v.* Evans (1892), 62 L. J. Ch. 404, C. A.; Gilbert *v.* Star Newspaper (1894), 11 T. L. R. 4; Robb *v.* Green, [1895] 2 Q. B. 1, 315, C. A.; Philip *v.* Pennell (1907), 76 L. J. Ch. 663; Mansell *v.* Valley Printing Co., [1908] 2 Ch. 441, C. A.

See, further, CONSTITUTIONAL LAW.

SUB-SECT. 2.—PERSONS SUING THEMSELVES.

A. In General.

339. No right of action against oneself.]—Where pltfs. sued as exors., & defts. pleaded that the promises in the declaration were made jointly with pltfs.:—*Held:* a good plea in bar of the action.

How can a man sue himself in a ct. of law? It is impossible to say he can do so (BULLER, J.).—MOFFAT (MOFFATT) *v.* MILLENGEN (MULLENGEN) (1787), 2 Bos. & P. 125, n.; 2 Chit. 539; 126 E. R. 1193, n.

Annotations:—**Folld.** Mainwaring *v.* Newman (1800), 2 Bos. & P. 120. **Apld.** Fitzgerald *v.* Boehm (1821), 6 Moore, C. P. 332. **Distd.** Hammond *v.* Teague (1829), 3 Moo. & P. 474; Beecham *v.* Smith (1858), E. B. & E. 442.

340. ——.]—A man cannot have a right of action against himself. This would be an absurdity & a thing unknown to the law (LORD PENZANCE).—SIMPSON *v.* THOMSON (1877), 3 App. Cas. 279; 58 L. T. 1; 3 Asp. M. L. C. 567, H. L.

Annotations:—**Refd.** Soc. Anon. de Remorquage à Helice *v.* Bennetts, [1911] 1 K. B. 243. **Mentd.** Midland Insce. *v.* Smith (1881), 6 Q. B. D. 561; Burnand *v.* Rodocanachi (1881), 6 Q. B. D. 633, C. A.; Castellain *v.* Preston (1883), 11 Q. B. D. 380, C. A.; Sea Insce. *v.* Hadden (1884), 13 Q. B. D. 706, C. A.; Dufourcet *v.* Bishop (1886), 18 Q. B. D. 373; King *v.* Victorian Insce., [1896] A. C. 250, P. C.; Jackson *v.* S.S. Blanche, [1908] A. C. 126; The Amerika, [1914] P. 167, C. A.

341. ——.]—Defts. pleaded in bar to an action to recover a penalty for breach of Sunday Observance Act, 1780 (c. 49), a judgment in favour of a third party for the same penalty. That judgment was obtained in an action which was commenced in the name of R., with his consent, while pltf.'s action was pending, & was carried through to judgment by intervention of a solr. employed by defts. & without R.'s interference; it was commenced for the protection of defts. from any action brought or to be brought in respect of the penalty claimed in it, & for the purpose of taking the Home Secretary's opinion whether he would remit the penalty:—*Held:* the judgment recovered was no bar to an action for the same offence by a different pltf. on the ground the judgment had been recovered in an action in which the present defts. were both pltfs. & defts. (BRETT & COTTON, L.JJ.).—GIRDLESTONE *v.* BRIGHTON AQUARIUM CO. (1879), 4 Ex. D. 107; 48 L. J. Q. B. 373; 40 L. T. 473; 43 J. P. 428; 27 W. R. 523, C. A.

Annotations:—**Folld.** Forbes *v.* Samuel, [1913] 3 K. B. 706. **Refd.** Todd *v.* Robinson (1884), 50 L. T. 298.

342. Exceptions to rule—Action brought in different right.]—The survivor of two exors., who had taken out administration to the other, filed a bill to set aside a mtge. of part of the assets made by the deceased exor. as having been a breach of trust:—*Held:* his having taken out the administration did not disqualify him from maintaining the suit.—MILES *v.* DURNFORD, DURNFORD *v.* WOOD (1852), 2 De G. M. & G. 641; 21 L. J. Ch. 667; 19 L. T. O. S. 369; 42 E. R. 1022, C. A.

For full anns., *see* EXECUTORS & ADMINISTRATORS.

B. Covenants with Oneself.

343. Not actionable—If joint.]—No action will lie on a covenant by C. to pay a sum of money to A., B. & himself C., or the survivors or survivor of them on their joint account.—FAULKNER *v.* LOWE (1848), 2 Exch. 595; 11 L. T. O. S. 245; 154 E. R. 628.

Annotation:—**Dbtd.** Aulton *v.* Atkins (1856), 18 C. B. 249.

344. —— ——.]—A tenant for life purported, in exercise of the powers of Settled Estates Act, 1877 (c. 18), s. 46, to demise the settled premises to himself & his two partners for 21 years, the lease containing the usual lessee's covenants entered into by the three lessees jointly. A certain rent was reserved by the lease, but *dehors* the lease it was arranged between the partners that the tenant for life should be allowed to occupy the house rent free, & should receive an additional rent as compensation in the event of his ceasing to reside there. In an action by the remaindermen, after the death of the tenant for life, to recover possession of the premises from an assignee of the lease:—*Held:* the lease was void for non-compliance with the requirements of the above sect., because the covenants in the lease, being joint covenants by a man & others with himself, were not enforceable at law, & were not proper covenants within the sect., or such as the reversioners were entitled to have inserted in the lease.—BOYCE *v.* EDBROOKE, [1903] 1 Ch. 836; 72 L. J. Ch. 547; 88 L. T. 344; 51 W. R. 424.

Annotations:—**Folld.** Ellis *v.* Kerr, [1910] 1 Ch. 529. **Mentd.** Lacon *v.* Lacon, [1911] 1 Ch. 351.

345. —— ——.]—X. having assigned a life policy to A., B., & C., the trustees of his marriage settlement, he & A. & B. covenanted with A., B., & C., but not with them severally, that they, X., A., & B., or some of them, would pay the premiums on the policy. The premiums not having been paid, D., who had become a trustee in the place of C., & in whom, with A. & B., the benefit of the covenant had been vested, brought an action against X., A., & B., to enforce the covenant:—*Held:* (1) objection to the validity of the covenant on the ground that two of the covenantors were also covenantees was one of substance, not merely one of form; (2) no action would lie upon the covenant either at law or in equity; (3) the action must be dismissed.—ELLIS *v.* KERR, [1910] 1 Ch. 529; 79 L. J. Ch. 29; 102 L. T. 417; 54 Sol. Jo. 307.

Annotation:—**Folld.** Napier *v.* Williams, [1911] 1 Ch. 361.

Sect. 1.—*In general: Sub-sect.* 2, *B. & C. Sects.* 2, 3 & 4: *Sub-sects.* 1 & 2, *A.* (*a*) & (*b*).]

346. —— ——.]—A covenant by one with himself & others jointly is void. If a lessee purports to covenant with himself & other lessors jointly, although the covenant, if valid, is of such a kind as to run with the land, yet an assignee of the term is not bound in law or in equity.—NAPIER *v.* WILLIAMS, [1911] 1 Ch. 361; 80 L. J. Ch. 298; 104 L. T. 380; 55 Sol. Jo. 235.

347. When actionable—Between other parties.]—By an indenture between A. & B., & B.'s wife & C., of one part, & D. & E., & C., of another part, it was recited that F., also party to the deed, had requested to have a certain farm given up to him, in which B.'s wife was interested, he, F., giving sureties, namely, D., E., & C., for payment of an annuity to B.'s wife; it was witnessed that, in consideration of the covenants entered into by A., B., & his wife, & C., & of 10*s.*, D., E. & C. covenanted with A., B., & his wife & C., to pay the annuity. There followed covenants by A., B., for himself & his wife, & C. for quiet enjoyment, & for executing an assignment to F. when required. The deed was not executed by A. or B. In an action brought by A. & B. after the death of C. for breach of the covenant to pay the annuity:—*Held:* after C.'s death A. & B. might sue D.'s exors. (D. & E. being also dead) for non-payment of the annuity, though the covenant for such payment was entered into by & to C. —ROSE & WHITE *v.* POULTON (1831), 2 B. & Ad. 822; 1 L. J. K. B. 5; 109 E. R. 1348.

Annotations:—**Distd.** Boyce *v.* Edbrooke, [1903] 1 Ch. 836. **Expld.** Ellis *v.* Kerr, [1910] 1 Ch. 529. **Refd.** Hume *v.* Boland (1832), 2 Tyr. 575; Cardwell *v.* Lucas (1836), 2 M. & W. 111; Dewhirst *v.* Jones (1864), 3 H. & C. 60. **Mentd.** Cooch *v.* Goodman (1842), 2 Q. B. 580.

See, further, DEEDS & OTHER INSTRUMENTS.

C. Other Contracts.

348. Joint bailment—Action by joint bailors—Defence of delivery to one.]—Action by J. & two other pltfs. on a contract, on the deposit of goods by the three pltfs. with deft., not to give them up without the joint order of the three pltfs. Breach, that they were given up without the joint order. Plea, that they were given up to J., one of present pltfs., at his request. On demurrer:—*Held:* a good plea; for J., being disabled from suing for what he himself procured, could not at law sue, though joining other pltfs. with him.—BRANDON, ELLIS & HAIM GUEDALLA *v.* SCOTT & ROBINSON (1857), 7 El. & Bl. 234; 26 L. J. Q. B. 163; 3 Jur. N. S. 362; 5 W. R. 235; 119 E. R. 1234.

Annotation:—**Refd.** Smith *v.* Johnson (1858), 3 H. & N. 222.

349. Negotiable instrument—Same party liable & entitled to payment.]—*Assumpsit* by A., B., & C. against D. as one of the indorsers of a promissory note drawn by E. in favour of C., D. & himself, then in partnership, & by them indorsed to A., B., & C.; plea in bar that C., one of pltfs., was liable as an indorser together with D.:—*Held:* good on special demurrer.—MAINWARING, MAINWARING & CHATTERIS *v.* NEWMAN (1800), 2 Bos. & P. 120; 126 E. R. 1190.

Annotations:—**Consd.** *Ex p.* Bonbonus (1803), 8 Ves. 540. **Folld.** Foster *v.* Ward (1883), Cab. & El. 168. **Apld.** Boyce *v.* Edbrooke, [1903] 1 Ch. 836. **Refd.** Ellis *v.* Kerr, [1910] 1 Ch. 529.

350. —— ——.]—Pltf., holder of shares in a co., drew bills on the directors of the co. for goods furnished by him & his brother. The bills were accepted "for the directors" by the co.'s secretary, who had authority to accept bills drawn by pltf.'s brother:—*Held:* pltf. could not recover on these bills against the co.—NEALE *v.* TURTON (1827), 4 Bing. 149; 12 Moore, C. P. 365; 5 L. J. O. S. C. P. 133; 130 E. R. 725.

Annotations:—**Distd.** Beecham *v.* Smith (1858), E. B. & E. 442. **Apld.** Boyce *v.* Edbrooke, [1903] 1 Ch. 836; Ellis *v.* Kerr, [1910] 1 Ch. 529.

351. —— ——.]—A member of a joint-stock co. was employed by the co. as its agent to sell goods & received commission of 2 per cent. for his trouble, & 1 per cent. *del credere* for guaranteeing the purchaser. Having sold goods on account of the co., he drew on purchaser a bill of exchange, payable to his (the drawer's) own order, & after it had been accepted he indorsed it to the actuary of the co. The latter indorsed it to another member, managing director, who purchased goods for the co.; the co. was then indebted to him in a larger amount than the sum mentioned in the bill. The acceptor having become insolvent before the bill became due, the drawer received from him 10*s.* in the pound upon the amount of the bill by way of composition:—*Held:* (1) the indorsee being a member of the co., could not sue the drawer on the bill, as it was drawn by the latter on account of the co.; (2) he could not recover the sum received by the drawer on the bill, because that money must be taken to have been received by him in his character of a member of the co., & not on his own account.—TEAGUE *v.* HUBBARD (1828), 8 B. & C. 345; Dan. & Ll. 118; 2 Man. & Ry. K. B. 369; 6 L. J. O. S. K. B. 326; 108 E. R. 1071.

Annotation:—**Refd.** Beecham *v.* Smith (1858), E. B. & E. 442.

352. Partnership transactions—Private debt to firm.]—A. being indebted in his individual capacity to a house in trade, of which he himself was partner, in a sum of money the amount of which could not be exactly ascertained, covenanted to pay the firm all his then debts, & such other debts as should accrue. A. died without having satisfied the original debt, & having contracted further debts subsequent to execution of the deed:—*Held:* his exors., two of whom were partners in the house of trade, could not plead either of these debts by way of retainer, or as an outstanding specialty debt.

Upon this deed no action could have been maintained in a ct. of law against testator himself while living, or against his exors. after his decease, even if all the exors. had been strangers to the partnership (LORD ELLENBOROUGH, C.J.).—DE TASTET *v.* SHAW (1818), 1 B. & Ald. 664; 106 E. R. 244.

Annotations:—**Distd.** *Re* Morris's Estate, Morris *v.* Morris (1874), 10 Ch. App. 68. **Folld.** Ellis *v.* Kerr, [1910] 1 Ch. 529.

353. —— **Two firms with common partner.**]—Partners in a house of trade cannot maintain an action against partners in another house, of which one of the partners in pltf.'s house is also a member, for transactions which took place while he was partner in both houses, whether the action be brought in the lifetime of the common partner, or after his decease. After his decease the surviving partners of one house may sue the surviving partners of the other upon transactions subsequent to the decease of the common partner.—BOSANQUET *v.* WRAY (1815), 6 Taunt. 597; 2 Marsh. 319; 128 E. R. 1167.

Annotations:—**Folld.** Chitty *v.* Naish (1834), 2 Dowl. 511. **Apld.** Mills *v.* Fowkes (1839), 2 Arn. 62. **Distd.** Bosanquet *v.* Woodford (1843), 5 Q. B. 310; Beecham *v.* Smith (1858), E. B. & E. 442.

SUB-SECT. 3.—RIGHTS & LIABILITIES OF STRANGERS UNDER CONTRACTS.

See AGENCY; COMPANIES; CONTRACT; INFANTS & CHILDREN.

SECT. 2.—THE CROWN.

Actions by the Crown as plaintiff: *see* CONSTITUTIONAL LAW.

Actions against the Crown as defendant: *see* CONSTITUTIONAL LAW.

Petitions of right against the Crown: *see* CROWN PRACTICE.

Acts of State: *see* PUBLIC AUTHORITIES & PUBLIC OFFICERS.

SECT. 3.—**CROWN SERVANTS.**

Actions by the Attorney-General: *see* CONSTITUTIONAL LAW; HIGHWAYS, STREETS & BRIDGES; INJUNCTION; NUISANCE; PRACTICE & PROCEDURE.

Actions by Crown servants: *see* CONSTITUTIONAL LAW.

Actions against Crown servants: *see* CONSTITUTIONAL LAW.

Petitions of right against Government departments: *see* CROWN PRACTICE.

Acts of State: *see* PUBLIC AUTHORITIES & PUBLIC OFFICERS.

Executive powers, exemptions in exercise of: *see* PUBLIC AUTHORITIES & PUBLIC OFFICERS.

Judicial powers, exemptions in exercise of: *see* PUBLIC AUTHORITIES & PUBLIC OFFICERS.

SECT. 4.—**FOREIGN SOVEREIGNS AND GOVERNMENTS.**

SUB-SECT. 1.—ACTS OF STATE OF FOREIGN GOVERNMENTS: *see* PUBLIC AUTHORITIES & PUBLIC OFFICERS.

SUB-SECT. 2.—IN THEIR PRIVATE CAPACITY.

A. As Plaintiffs.

(a) In General.

354. Right to sue—At law and in equity.]—M., as agent for the King of Spain, received from the French Govt. a sum of money, which that Govt. had agreed to pay to the King of Spain in satisfaction of the claims of certain Spanish subjects in France. M. brought the money to England, & deposited a considerable portion of it in the hands of H. & Co., of L. The King of Spain applied to M. for the money, & M. refused to deliver it, on the pretence that he was bound to pay only to such subjects of Spain as should be found ultimately entitled to it. Bill in the name of the King of Spain against M. (out of the jurisdiction) & against H. & Co. for discovery, & payment of the money into ct. A demurrer to the bill for want of parties, etc., but chiefly on the ground that it had never been held that a foreign sovereign could sue in equity in England, was overruled. A foreign sovereign has a right to sue in England in equity as well as at law. In this case, the King of Spain was the only party entitled to the money in the first instance.—HULLET *v.* SPAIN (KING) (1828), 1 Dow. & Cl. 169; 6 E. R. 488, H. L.; *sub nom.* SPAIN (KING) *v.* HULLETT & WIDDER, 2 State Tr. N. S. 305.

Annotations:—**Refd.** Glyn *v.* Soares (1836), 1 Y. & C. Ex. 644; Brunswick *v.* Hanover (1844), 6 Beav. 1; Two Sicilies *v.* Willcox (1851), 1 Sim. N. S. 301; U.S.A. *v.* Wagner (1867), L. R. 3 Eq. 724. **Mentd.** Portugal *v.* Russell (1861), 31 L. J. Ch. 34; U.S.A. *v.* Prioleau, Prioleau *v.* U.S.A. (1865), 35 L. J. Ch. 7.

355. ——.]—A bill could not be maintained by a sovereign prince in India, against the East India Co. for an account of money, etc., advanced & paid in consequence of treaties in the nature of federal conventions, for the protection of their respective territories.—ARCOT (NABOB) *v.* EAST INDIA CO. (1793), 4 Bro. C. C. 180; 29 E. R. 841; *sub nom.* CARNATIC (NABOB) *v.* EAST INDIA CO., 2 Ves. 56.

Annotations:—**Consd.** Secretary of State in Council of India *v.* Kamachee Boye Sahaba (1859), 13 Moo. P. C. C. 22, P. C. **Expld.** Doss *v.* Secretary of State for India (1875), L. R. 19 Eq. 509. **Consd.** Compañhia de Mocambique *v.* British South Africa Co., [1892] 2 Q. B. 358, C. A. **Refd.** West Raud Central Gold Mining *v.* R., [1905] 2 K. B. 391; Salaman *v.* Secretary of State for India, [1906] 1 K. B. 613, C. A.

356. —— **Wrong committed by British subject.**]—AUSTRIA *v.* DAY & KOSSUTH, No. 362, *post.*

For full anns., *see* S. C. No. 362, *post.*

357. Description of plaintiff republic.]—A foreign sovereign State adopting the republican form of govt. & recognised by H.M. Govt., can sue in the cts. in its own name so recognised. Such a State is not bound to sue in the name of any officer of the Govt. or to join as co-pltf. any such officer on whom process may be served, & who may be called upon to give discovery upon a cross-bill.

The ct. may stay proceedings in the original suit until the means of discovery are secured in the cross-suit (LORD CHELMSFORD, C., & LORD CAIRNS, L.J.).—U.S.A. *v.* WAGNER (1867), 2 Ch. App. 582; 36 L. J. Ch. 624; 16 L. T. 646; 15 W. R. 1026, C. A. S. C. No. 380, *post.*

Annotations:—**Apld.** Liberia Republic *v.* Imperial Bank (1873), L. R. 16 Eq. 179. **Folld.** Penedo *v.* Johnson (1873), 29 L. T. 452; Peru Republic *v.* Weguelin, Weguelin *v.* Peru Republic (1875), L. R. 20 Eq. 140. **Refd.** Costa Rica Republic *v.* Erlanger (1875), 1 Ch. D. 171, C. A. **Mentd.** Welsbach Incandescent Gas Light Co. *v.* New Sunlight Incandescent Co. (1900), 83 L. T. 58, C. A.

358. —— **When insufficient.**]—A foreign State may sue in this ct.; but where a bill was filed by "the Govt. of the State of C. & Don H., a citizen of that State, & Minister Plenipotentiary from the same to the ct. of His Britannic Majesty, & now residing in the county of M.," a general demurrer was allowed to the bill, because the description of pltfs. did not enable defts. to know upon whom process was to be served in case a cross-bill were filed.—COLUMBIAN GOVERNMENT *v.* ROTHSCHILD (1826), 1 Sim. 94; 2 State Tr. N. S. App. 988; 5 L. J. O. S. Ch. 43; 57 E. R. 514.

Annotations:—**Expld.** Prioleau *v.* U.S.A. (1866), L. R. 2 Eq. 659; U.S.A. *v.* Wagner (1867), 2 Ch. App. 582. **Refd.** Hullett *v.* Spain (1828), 2 Bli. N. S. 31; Spain *v.* Hullett (1833), 7 Bli. N. S. 359. **Mentd.** Jervis *v.* Berridge (1873), 21 W. R. 395, C. A.

(b) Revolutionary Governments.

359. Not recognised, if not acknowledged here.]—Where a party was only the confidential agent of one of the powers contending in Chile for the mastery, the ct. refused to consider him as the agent of a foreign Govt.—CHILI REPUBLIC *v.* ROTHSCHILD, CHILI REPUBLIC *v.* BARING, [1891] W. N. 138.

360. ——.]—*Qu.*: whether a foreign State, not acknowledged by England (viz., the Govt. of Switzerland, in consequence of the revolution, suing for stock vested in trustees by the former Govt.), can maintain a suit in England.—DOLDER *v.* HUNTINGFIELD (LORD), ST. DIDIER *v.* HUNTINGFIELD (LORD) (1805), 11 Ves. 283; 32 E. R. 1097.

Annotations:—**Consd.** Peru Republic *v.* Dreyfus (1888), 38 Ch. D. 348, C. A. **Refd.** Hullett *v.* Spain (1828), 2 Bli. N. S. 31. **Mentd.** Faulder *v.* Stuart (1805), 11 Ves. 296; Agar *v.* Regent's Canal Co. (1815), Coop. G. 212; John *v.* Dacie (1824), 13 Price, 632; Brunswick *v.* Hanover (1844), 13 L. J. Ch. 107; Mason *v.* Wakeman (1848), 2 Ph. 516.

361. Rights of legitimate sovereign—Claim to property.]—During a revolution in Sicily the revolutionary Govt. sent defts., natives & inhabitants of Sicily, as envoys to England, & afterwards remitted to them moneys, which had been contributed by many thousands of the inhabitants of Sicily, with directions to purchase a steamship therewith, & defts. applied the moneys accordingly. The lawful sovereign of Sicily, after he had re-established his authority, filed a bill claiming the ship, which still remained in the port of London. Defts., in their answer, admitted the possession of documents relating to the matters in the bill, but said they held them as agents on behalf of the persons who entrusted them with the moneys, & submitted, in the absence of such persons, they ought not to be ordered to produce the documents:—*Held*: (1) production would be ordered, because pltf. represented the contributors of the moneys, & the revolutionary Govt. being at an end, defts. had either ceased to be agents or trustees for any one or had become agents or trustees for pltf.; (2) the King, who had re-established his authority, was

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entitled to sue for one of the ships, which remained in the port of London; (3) the persons who made the remittance were not necessary parties to the suit.—TWO SICILIES (KING) *v.* WILLCOX (1850-1). 1 Sim. N. S. 301; 7 State Tr. N. S. 1049; 20 L. J. Ch. 417; 15 Jur. 214; 61 E. R. 116; *sub nom.* TWO SICILIES (KING) *v.* PENINSULAR & ORIENTAL STEAM PACKET CO., 19 L. J. Ch. 202.

Annotations:—**Refd.** Austria *v.* Day (1861), 3 De G. F. & J. 217; U.S.A. *v.* Prioleau (1865), 2 Hem. & M. 559; Hennessy *v.* Wright (1888), 4 T. L. R. 597. **Mentd.** U.S.A. *v.* McRae (1867), 3 Ch. App. 79.

362. —— Protection of currency.]—The actual reigning sovereign of a foreign State in amity with Gt. Britain is entitled to sue in this ct. & to obtain an injunction to prevent the issuing of monetary notes manufactured in England, purporting to be notes of that foreign State, but having no sanction from its Govt., if the ct. is satisfied that some substantial injury will thereby accrue to the property of such foreign State & to that of pltf.'s subjects, whom he has a right to represent.

Monetary notes having been manufactured in England, purporting to be sanctioned by the State of Hungary, & signed by K., a native of Hungary, resident in England, "in the name of the nation," but which were unauthorised by the existing Govt., an injunction was granted to restrain their issue, & they were ordered to be delivered up to be cancelled at the suit of the Emperor of Austria as King *de facto* of Hungary.

A foreign sovereign may sue in our cts. for a wrong done to him by an English subject, unauthorised by the English Govt., in respect of property belonging to that foreign sovereign, either in his individual or corporate capacity (LORD CAMPBELL, C.).—AUSTRIA (EMPEROR) *v.* DAY & KOSSUTH (1861), 3 De G. F. & J. 217; 30 L. J. Ch. 690; 4 L. T. 494; 7 Jur. N. S. 639; 9 W. R. 712; 45 E. R. 861, C. A. S. C. No. 356, *ante*.

Annotations:—**Distd.** U.S.A. *v.* McRae (1867), L. R. 4 Eq. 327. **Mentd.** Portugal *v.* Russell (1861), 31 L. J. Ch. 34; A.-G. *v.* Sillem (1863), 2 H. & C. 431; R. *v.* Sillem (1864), 11 L. T. 223; Ainsworth *v.* Walmsley (1866), 1 R. 1 Eq. 518; Springhead Spinning Co. *v.* Riley (1868), L. R. 6 Eq. 551; Mulkern *v.* Ward (1872), L. R. 13 Eq. 619; Pattisson *v.* Gilford (1874), L. R. 18 Eq. 259; Prudential Assce. *v.* Knott (1875), 10 Ch. App. 142; Levy *v.* Walker (1879), 10 Ch. D. 436, C. A.; Hole *v.* Bradbury (1879), 12 Ch. D. 886; *Re* Riviere's Trade Mk. (1884), 26 Ch. D. 48, C. A.; Foster *v.* Globe Venture Syndicate (1900), 82 L. T. 253; Stevens *v.* Chown, Stevens *v.* Clark, [1901] 1 Ch. 894.

363. —— Limitations on rights.]—Where the sovereign power in a State is for a time *de facto* exercised by an usurping individual or body the original sovereign on restoration is entitled on the ground of *jus in rem* to all public property which existed before the usurpation, & is found in specie after its termination, & he also becomes entitled *jure successionis* to all other public property of the usurper. In an English ct. of equity the latter right can only be enforced subject to the same correlative rights & obligations as if the usurper himself were seeking to enforce it. The original sovereign cannot have a decree for an account against an agent of the usurper, unless he submits to be bound by all such obligations as would have been binding upon the usurper if pltf.—U.S.A. *v.* MCRAE (1869), L. R. 8 Eq. 69; 38 L. J. Ch. 406; 20 L. T. 476; 17 W. R. 764.

Annotations:—**Refd.** Peru Republic *v.* Dreyfus (1888), 38 Ch. D. 348; Chili Republic *v.* London & River Plate Bank (1894), 10 T. L. R. 658, C. A.; West Rand Central Gold Mining Co. *v.* R., [1905] 2 K. B. 391.

364. —— ——.]—An action was brought by the *de jure* Govt. of Peru against defts., claiming to set aside an agreement of compromise of May 29, 1885, to have an account taken of all dealings & transactions between pltfs. & defts. under an agreement of June, 1876, & consequential relief. Defts. moved under R. S. C., O. 25, r. 4, to strike out the statement of claim, which sought relief on the footing that a compromise of certain disputes between a foreign *de facto* Govt. (recognised by this country) & defts. was not binding upon pltfs. the succeeding *de jure* Govt.:—*Held:* the statement of claim must be struck out as (1) the acts of a foreign *de facto* & recognised Govt. by their duly authorised agents must be treated by the tribunals of this country as binding upon their *de jure* successors; (2) the *de jure* Govt., after retaining with full knowledge of the facts the money paid to their predecessors as one of the terms of compromise, could not afterwards repudiate the arrangement.—PERU REPUBLIC *v.* PERUVIAN GUANO CO. (1887), 36 Ch. D. 489; 56 L. J. Ch. 1081; 57 L. T. 337; 36 W. R. 217; 3 T. L. R. 848.

For full anns., *see* PUBLIC AUTHORITIES & PUBLIC OFFICERS.

(c) Proceedings by Agents.

365. Action maintainable—Contract with agent in official capacity.]—There is no such rule as that the monarch or other titular head of a foreign sovereign State is the only person who can sue here in respect of the public property or interest of that State.

The Spanish Minister of Marine in Madrid & two other persons brought an action in the Ct. of Sess. against resp. for damages for failure to deliver warships within the time stipulated by contract. The parties to the contract were described as "The Chief of the Spanish Royal Navy Commission," & "the Commissary of the Commission (mentioning their names) both in the name & representation of the Spanish Minister of Marine in Madrid, hereinafter called the Spanish Govt. on the one part," & resps. (a shipbuilding co. in Scotland) on the other part:—*Held:* the Spanish Minister of Marine for the time being was entitled to maintain the action though not Minister of Marine at the date of the contract.—YZQUIERDO *v.* CLYDEBANK ENGINEERING & SHIPBUILDING CO., LTD., [1902] A. C. 524; 71 L. J. P. C. 94; 87 L. T. 339; 18 T. L. R. 773, H. L.

For full anns. *see* CONTRACT.

366. Action not maintainable—Inferior against superior.]—A subordinate officer of a foreign Govt. cannot without its authority file a bill in the name of his Govt. against the superior officer in this country.—LIBERIA REPUBLIC *v.* IMPERIAL BANK, LTD. & CHINERY (1871), 25 L. T. 866.

367. Evidence of authority.]—Application was made for a grant of administration to the agent of the Elector of Hesse, a foreign prince, for recovery of a debt due to the late Elector from the estate of the late Duke of York:—*Held:* administration should be granted for the purpose of substantiating proceedings in Ch.; but the ct. declined to extend it to the receipt of the debt without some further authority from the Elector or his Minister of State than mere instructions to recover the debt. Subsequently a power of attorney from the Minister of State executed by the directions of the Elector of Hesse was produced, & the ct. revoked the administration granted as above & decreed a new administration limited to further proceedings in Ch. & to the receipt of the said debt.—*In the Goods of* HESSE, (ELECTOR) (1827), 1 Hag. Ecc. 93; 162 E. R. 518.

Annotations:—**Refd.** Faulkner *v.* Daniel (1843), 3 Hare, 199 Davies *v.* Chanter (1847), 10 L. T. O. S. 477.

(d) Effect of suing.

i. In General.

368. Submission to jurisdiction.]—A foreign prince who comes voluntarily as a suitor into a ct. of law in England becomes subject, as to all matters connected with that suit, to the jurisdic-

tion of the ct.—ROTHSCHILD *v.* PORTUGAL (QUEEN) (1839), 3 Y. & C. Ex. 594 ; 160 E. R. 838.

369. ——.]—PRIOLEAU *v.* U.S.A., Nos. 373, 379, *post.*

For full anns., *see* S. C. No. 379, *post.*

ii. *Security for Costs.*

370. Liable to give.]—If an independent foreign sovereign seeks to enforce performance of a commercial contract in the English cts. he will be liable to give security for costs. Deft. is not too late in his application if he applies promptly after delivery of a materially amended declaration, although he has pleaded to the original declaration. *Semble :* if deft. does not require a stay of proceedings, it is incumbent on pltf. to show that deft. has not applied to pltf. for security previous to obtaining the rule.—GREECE (KING) *v.* WRIGHT (1837), 6 Dowl. 12 ; Will. Woll. & Dav. 594 ; 1 Jur. 944.

Annotations :—**Folld.** Edinburgh & Leith Ry. Co. *v.* Dawson (1839), 7 Dowl. 573. **Refd.** U.S.A. *v.* Wagner (1867), L. R. 3 Eq. 724.

371. ——.]—If an independent foreign sovereign seeks to enforce performance of a commercial contract in the English cts. he will be liable to give security for costs.—BRAZIL (EMPEROR) *v.* ROBINSON (1837), 6 Ad. & El. 801 ; 5 Dowl. 522 ; 6 L. J. K. B. 168 ; 1 Nev. & P. K. B. 817 ; Will. Woll. & Dav. 278 ; 112 E. R. 308.

Annotations :—**Folld.** Greece *v.* Wright (1837), 6 Dowl. 12. **Refd.** U.S.A. *v.* Wagner (1867), L. R. 3 Eq. 724 ; The Charkieh (1873), L. R. 4 A. & E. 59.

iii. *Counterclaims.*

372. Cross-bill—Answer.]—A foreign sovereign prince, being declared entitled to sue in the English Ct. of Ch. in his political capacity, claimed the privilege of putting in an answer, by his agent, or without oath or signature, to a cross-bill, filed against him by defts., to his original bill :—*Held :* he stood on the same footing with ordinary suitors as to the rules & practice of the ct., & was bound, like them, to answer a cross-bill personally & upon oath.—SPAIN (KING) *v.* HULLETT (1833), 7 Bli. N. S. 359 ; 1 Cl. & Fin. 333 ; 5 E. R. 808.

Annotations :—**Refd.** Glyn *v.* Soares (1836), 1 Y. & C. Ex. 644 ; Brunswick *v.* Hanover (1844), 6 Beav. 1 ; Taylors *v.* Carpenter (1847), 9 L. T. O. S. 514 ; Kingsford *v.* G. W. Ry. Co. (1864), 16 C. B. N. S. 761 ; Prioleau *v.* U.S.A. (1866), L. R. 2 Eq. 659 ; U.S.A. *v.* Wagner (1867), L. R. 3 Eq. 724. **Mentd.** Portugal *v.* Glyn (1837-40), 7 Cl. & Fin. 466 ; Austria *v.* Day (1861), De G. F. & J. 217.

373. ——.]—PRIOLEAU *v.* U.S.A., No. 369, *ante*, No. 379, *post.*

For full anns., *see* S. C. No. 379, *post.*

374. Liability to counterclaim—Or cross-action.]—STROUSBERG *v.* COSTA RICA REPUBLIC, No. 389, *post.*

For full anns., *see* S. C., No. 389, *post.*

375. —— **Security—Admiralty Court.**]—Where a foreign Govt. is pltf. in an action of damage in the Admlty. Ct. the ct. has jurisdiction, under Admlty. Ct. Act, 1861 (c. 10), s. 34, to order the action by pltf. to be stayed until security has been given to meet the damages claimed by deft.—THE NEWBATTLE (1885), 10 P. D. 33 ; 54 L. J. P. 16 ; 52 L. T. 15 ; 33 W. R. 318 ; 5 Asp. M. L. C. N. S. 356, C. A.

376. —— **Limitations on liability.**]—Where in an action for the appointment of new trustees of a fund deft. counterclaimed for damages for libel :—*Held :* (1) the ct. would, as a rule, strike out the counterclaim & leave deft. to bring an independent action in respect of the libel ; (2) the fact that pltfs. were a foreign Govt. against whom deft. could not bring an action for libel was not sufficient reason for allowing him to proceed by counterclaim so as to take advantage of the circumstance that pltfs. had, by bringing their action, submitted to the jurisdiction of the ct., & pltfs. should be treated as having submitted to the jurisdiction only as regards matters properly raisable in their action ; (3) as a matter of discretion in the particular case, a counterclaim so foreign to the subject-matter of the action must be struck out under R. S. C., O. 19, r. 3, independently of the question of jurisdiction. —SOUTH AFRICAN REPUBLIC *v.* LA COMPAGNIE FRANCO-BELGE DU CHEMIN DE FER DU NORD, [1897] 2 Ch. 487 ; 66 L. J. Ch. 747 ; 77 L. T. 241 ; 46 W. R. 67, C. A.

Annotations :—**Apld.** Factories Insce. *v.* Anglo-Scottish General Commercial Insce. (1913), 29 T. L. R. 312. **Refd.** South African Republic *v.* Transvaal Northern Ry. Co. (1897), 67 L. J. Ch. 92 ; South African Republic *v.* La Compagnie Franco-Belge du Chemin de Fer du Nord, [1898] 1 Ch. 190.

iv. *Discovery.*

377. Discovery.]—A foreign prince who sues in the name of an agent in a ct. of law in England cannot be called upon to answer a bill for discovery in aid of the defence at law as he is not a party to the record.—PORTUGAL *v.* GLYN, No. 378, *post.*

378. ——.]—A loan raised in 1833 for Don Miguel, as King of Portugal, for the use of his Govt., consisted partly of bills of exchange, in two parts, drawn upon bankers in London, who accepted the first parts in the course of their business for a customer. The second parts, having been remitted to the treasury of Portugal, indorsed to the treasurer of the royal treasury there, on account of the loan, came, after the dethronement of Don Miguel, into the possession of Queen Donna Maria, and were by her orders indorsed by the treasurer to S. in London, with instructions to recover the amount. An action having been brought by S. on the bills against the acceptors, they filed a bill of discovery, in aid of their defence, against him and the Queen of Portugal, charging that she was interested in the bills of exchange :—*Held :* as the Queen of Portugal was not a party to the record at law, she was not a proper party to the bill of discovery.—PORTUGAL (QUEEN) *v.* GLYN (1840), 7 Cl. & Fin. 466 ; 7 E. R. 1147, H. L.

379. ——.]—A sovereign Power, whether amenable to the jurisdiction of the ct. or not, & whether capable of deposing on oath or not, if it commence proceedings for relief in this ct., must conform to the practice & regulations for administration of justice laid down by the ct.

Where the United States of America commenced proceedings by bill against defts., British subjects, for relief with respect to the sale of certain shipments of cotton, & defts. had filed a cross-bill praying discovery against the United States of America by its President, & defts. to the cross-bill had not filed any answer :—*Held :* (1) the proceedings in the original suit should be stayed until defts. in the cross-suit had put in a full & sufficient answer to the cross-bill of discovery ; (2) the President was improperly made a party deft. to the bill.—PRIOLEAU *v.* U.S.A. & JOHNSON (1866), L. R. 2 Eq. 659 ; *sub nom.* U.S.A. *v.* PRIOLEAU, PRIOLEAU *v.* U.S.A., 36 L. J. Ch. 36 ; 14 L. T. 700 ; 12 Jur. N. S. 724 ; 14 W. R. 1012. S. C. Nos. 369, 373, *ante.*

Annotations :—**N.F.** U.S.A. *v.* Wagner (1867), 2 Ch. App. 582, C. A. **Refd.** South African Republic *v.* La Compagnie Franco-Belge du Chemin de Fer du Nord, [1897] 2 Ch. 487, C. A.

380. ——.]—U.S.A. *v.* WAGNER, No. 357, *ante.*

For full anns., *see* S. C. No. 357, *ante.*

381. ——.]—The proceedings in an original suit by a foreign Govt. were stayed until pltfs. therein should furnish the name or names of some person or persons who could give proper discovery on oath if made deft. or defts. to the cross-bill.—PERU REPUBLIC *v.* WEGUELIN, WEGUELIN *v.* PERU REPUBLIC (1875), L. R. 20 Eq. 140 ; 44 L. J. Ch. 583 ; 32 L. T. 426 ; 23 W. R. 776.

Annotation :—**Refd.** Costa Rica Republic *v.* Erlanger (1875), 1 Ch. D. 171, C. A.

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382. ——.]—Where deft. to a suit brought by a foreign sovereign State filed a cross-bill against such State & the President thereof as deft. for the purposes of discovery, & no appearance was entered to such cross-bill, a motion to stay all proceedings in the original suit until appearance should be entered was granted so far as the State was concerned but refused so far as the President was concerned. The practice is the same in the case of a foreign Govt. as in the case of a corpn.—COSTA RICA REPUBLIC *v.* ERLANGER (1875), 1 Ch. D. 171; 45 L. J. Ch. 145; 24 W. R. 151; 1 Char. Pr. Cas. 110, C. A.

Annotation:—**Refd.** Willis *v.* Baddeley, [1892] 2 Q. B. 324, C. A.

383. Right to discovery—Limitations on.]—Bill by the United States of America against an agent in England of the Confederate States for discovery & payment of moneys received by him as such agent. Plea of an Act of Congress declaring forfeiture of property of persons holding office or agency under the Confederate Govt. Averment that pltfs. had instituted proceedings for forfeiture of property of deft. in Alabama, & that discovery would expose him to forfeiture of such property, unless pltfs. waived their claim to it:—*Held:* the plea was a bar to the discovery only, but not to the relief sought.—U.S.A. *v.* MCRAE (1867), 3 Ch. App. 79; 37 L. J. Ch. 129; 17 L. T. 428; 16 W. R. 377, C. A.

Annotations:—**Refd.** *Re* Derbyshire County Council, [1896] 2 Q. B. 297, C. A. **Mentd.** Copin *v.* Adamson, Copin *v.* Strachan (1874), 31 L. T. 242.

B. As Defendants.

(a) In General.

384. Immune from jurisdiction.]—An action cannot be maintained in any English ct. against a foreign potentate for anything done or omitted to be done by him in his public capacity as representative of the nation of which he is the head; & no English ct. has jurisdiction to entertain any complaints against him in that capacity.

Where a plaint was entered in the Lord Mayor's Ct. against the Queen of Portugal "as reigning sovereign & supreme head of the nation of Portugal" to recover a debt alleged to be due from the Portuguese Govt., & a foreign attachment had issued according to the custom of London, the ct. made absolute a rule for prohibition to restrain proceedings in the action & in the attachment. The same principle was applied to a case where a plaint was entered in the Lord Mayor's Ct. against the Queen of Spain, not expressly as reigning sovereign & head of the Spanish nation, but where it appeared by affidavit that pltf.'s sole cause of action arose upon a Spanish Govt. bond purporting to have been issued under a decree of the Cortes sanctioned by the Regent of Spain, in the name of the Queen, then a minor. The writ of prohibition may in such cases be granted on the application of the Queen (deft.) before she has appeared to the action in the Lord Mayor's Ct.; or on the application of the garnishee, either before or after he has pleaded *nil debet*.—WADSWORTH *v.* SPAIN (QUEEN), DE HABER *v.* PORTUGAL (QUEEN) (1851), 17 Q. B. 171; 8 State Tr. N. S. 53; 20 L. J. Q. B. 488; 16 Jur. 164; 117 E. R. 1246; *sub nom.* R. *v.* LONDON CORPN., *Re* WORDSWORTH *v.* SPAIN (QUEEN), *Re* DE HABER *v.* PORTUGAL (QUEEN), 18 L. T. O. S. 39, 40.

Annotations:—**Refd.** Westoby *v.* Day (1853), 2 E. & B. 605; Gladstone *v.* Musurus Bey (1862), 1 New Rep. 178; London Corpn. *v.* Cox (1867), L. R. 2 H. L. 239; Lariviere *v.* Morgan (1872), 7 Ch. App. 550; Cooke *v.* Gill (1873), L. R. 8 C. P. 107; Whinney *v.* Schmidt (1873), L. R. 8 C. P. 118; The Charkieh (1873), L. R. 4 A. & E. 59; The Parlement Belge (1880), 5 P. D. 197, C. A. **Mentd.** Portsmouth *v.* Inclosure Comrs. (1861), 3 L. T. 779; Cox *v.* London Corpn. (1862), 32 L. J. Ex. 64; Kingsford *v.* G. W. Ry. Co. (1864), 10 Jur. N. S. 804; Frith *v.* Guppy (1866), L. R. 2 C. P. 32; Worthington *v.* Jeffries (1875), L. R. 10 C. P. 379; Mighell *v.* Johore, [1894] 1 Q. B. 149, C. A.; The Broadmayne, [1916] 1 P. 64, C. A.

385. ——.]—BRUNSWICK *v.* HANOVER, No. 403, *post*.

For full anns. *see* S. C. No. 403, *post*.

386. ——.]—MUNDEN *v.* BRUNSWICK, Nos. 391, 401, *post*.

For full anns. *see* S. C. No. 401, *post*.

387. ——.]—An independent foreign sovereign is entitled to immunity from civil proceedings in the cts. of this country unless upon being sued he elects to waive his privilege & submit to the jurisdiction.—MIGHELL *v.* JOHORE, Nos. 394, 404, 406, *post*.

Annotation:—**Refd.** *Re* Suarez, Suarez *v.* Suarez [1917] 2 Ch. 131.

For full anns., *see* S. C. No. 394, *post*.

388. —— **Divorce.**]—A foreign sovereign cannot be made a co-resp. in a suit for divorce in the High Ct. in England; where a prince has been named as co-resp. in a petition, the ct. will, on proof of his status, order his name to be struck out.—STATHAM *v.* STATHAM & BARODA (GAEKWAR), [1912] P. 92; 81 L. J. P. 33; 105 L. T. 991; 28 T. L. R. 180. S. C. Nos. 405, 408, *post*.

—— **Admiralty.**]—*See* ADMIRALTY.

(b) Exceptions to the Rule.

389. Administration of fund—Counterclaim.]—To attempt to make a foreign sovereign or State amenable to the jurisdiction of our cts. would be offensive to the spirit & principles of international law, & a foreign sovereign or State cannot be served with a writ or other process of our cts. The only apparent exceptions to this rule are: (1) Where a foreign sovereign or State has come into our cts. to seek redress against deft., in which case deft. may assert any claim he has by way of counterclaim or cross-action in order that complete justice may be done. (2) Where both pltf. & a foreign sovereign or State have claims upon funds in the hands of third persons within the jurisdiction of the English cts., in which case the foreign sovereign or State may be joined as deft. in order to be enabled to assert any claim to the funds in question.—STROUSBERG *v.* COSTA RICA REPUBLIC (1880), 44 L. T. 199; 29 W. R. 125, C. A. S. C. No. 374, *ante*.

Annotations:—**Consd.** South African Republic *v.* Transvaal Northern Ry. Co. (1897), 67 L. J. Ch. 92; South African Republic *v.* La Compagnie Franco-Belge du Chemin de Fer du Nord, [1898] 1 Ch. 190. **Refd.** Mighell *v.* Johore, [1894] 1 Q. B. 149, C. A.

390. ——.]—If a foreign Govt. or State having notice of a suit instituted in England for the administration of a fund in which it is entitled to claim an interest does not appear & submit its rights to the jurisdiction of the ct., the ct. will proceed in its absence.

PART III. SECT. 4, SUB-SECT. 2.—B a).

384 i. *Immune from jurisdiction.*]—An independent sovereign prince is privileged from suit in the Cts. of British India. The Thakur of Palitana is an independent sovereign prince.—LADKUVARBAI *v.* SARSANGJI PRATABSANGJI (1870), 7 Bom. O. C. 150.—**IND.**

384 ii. ——.]—The Rajah of Hill Tipperah is a sovereign prince within Ch. XXVIII. of Act X. of 1877 (India), & cannot be sued personally in the Cts. of British India except under the conditions specified in s. 433 of that Act. The fact of a deft. not subject to the jurisdiction of a ct. having waived his privilege in previous suits against him does not give the ct. jurisdiction to entertain a suit against him in which he pleads that he is not subject to such jurisdiction.

A member of the royal family of Hill Tipperah brought a suit against the Rajah to have it declared that with respect to certain land forming portion of the possessions of the Rajah, he was entitled to the post of Jubaraj & to succeed to such land on the death of the Rajah:—*Held:* the British Cts. had no jurisdiction to entertain the suit, it not being one for immovable property.—BEER CHUNDER MANIKKYA *v.* RAJ COOMAR NOBODERP CHUNDER DEB BURMONO (1883), I. L. R. 9 Calc. 535; 12 C. L. R. 465.—**IND.**

In Nov., 1870, the French Govt. instructed their bankers in London to open a special credit in favour of pltf. for £40,000, to be paid to him ratably as certain goods contracted to be supplied by pltf. should be delivered. Part of the contract was performed, & a proportionate part of the money was paid to pltf., but a dispute having arisen as to the rest of the contract, pltf. filed his bill against the bankers & the French Republic for a declaration & performance of the trusts of the residue of the £40,000. The French Republic did not appear:—*Held:* the ct. had jurisdiction over the fund, & in the absence of the French Republic would proceed to ascertain as it best could the rights of the parties who appeared.—MORGAN *v.* LARIVIERE (1875), L. R. 7 H. L. 423; 44 L. J. Ch. 457; 32 L. T. 41; 23 W. R. 537; *affg. S. C. sub nom.* LARIVIERE *v.* MORGAN (1872), 7 Ch. App. 550.

Annotations:—**Refd.** The Charkieh (1873), L. R. 4 A. & E. 59; Foreign Bondholders Corpn. *v.* Pastor (1874), 23 W. R. 109; The Parlement Belge (1880), 5 P. D. 197, C. A. **Mentd.** Twycross *v.* Dreyfus (1877), 5 Ch. D. 605, C. A.

Counterclaim.]—*See* Nos. 375, 376, 389, *ante*.

391. Waiver.]—Deft., having entered an appearance in person as "C. F. A. W., Duke of Brunswick & Luneberg, sued as C. F. A. W. D'Este, commonly called Duke of Brunswick," delivered a plea to the jurisdiction, with an affidavit of verification, respectively intituled "C. F. A. W., sovereign Duke of Brunswick & Luneberg, sued as C. F. A. W. D'Este, commonly 'called Duke of Brunswick." Pltf., treating the plea as a nullity, signed judgment. The ct. refused to set aside the judgment without an affidavit of merits.—MUNDEN *v.* BRUNSWICK, No. 386, *ante;* No. 401, *post*.

Annotations:—**Refd.** Wadsworth *v.* Spain (1851), 17 Q. B. 171; London Corpn. *v.* Cox (1867), L. R. 2 H. L. 239. For full anns., *see* S. C. No. 401, *post*.

392. —— Extent of.]—Pltf. brought an action to restrain K., & his agent in England, & A. & Co., agents for the Japanese Govt., from infringing pltf.'s patent for the manufacture of shells & projectiles. Shells, alleged to be infringements of the patent, had been made by K. in Prussia, & had been purchased there for the Japanese Govt., & brought to England to be put on board Japanese ships of war & taken to Japan. In Dec., 1877, an injunction was granted restraining A. & Co. from allowing removal of the shells. In May the Mikado of Japan obtained leave to be added as deft. to the suit so far as it might be necessary for applying for leave to remove the shells. The M.R., on the application of the Mikado, having made an order giving him leave to remove the shells notwithstanding the injunction, pltf. appealed:—*Held:* (1) the ct. had no jurisdiction to interfere with the property of a foreign sovereign in this country; (2) the Mikado was at liberty to remove the shells; (3) the Mikado, in submitting to be made a deft. in the action for the purpose of obtaining leave to remove his property, did not thereby lose his rights as a foreign sovereign.—VAVASSEUR *v.* KRUPP (1878), 9 Ch. D. 351; 39 L. T. 437, C. A.

Annotations:—**Apld.** The Parlement Belge (1880), 5 P. D. 197, C. A. **Mentd.** Moses *v.* Marsden, [1892] 1 Ch. 487, C. A.; *Re* Miller's Patent (1894), 63 L. J. Ch. 324; British Westinghouse Electric & Manufacturing Co. *v.* Electrical Co. (1911), 55 Sol. Jo. 689.

393. —— Acts amounting to.]—*Semble:* if a sovereign assumes the character of a trader, & sends a vessel belonging to him to this country to trade here, he must be considered to have waived any privilege which might otherwise attach to the vessel as the property of a sovereign.—THE CHARKIEH (1873), L. R. 4 A. & E. 59; 42 L. J. Adm. 17; 28 L. T. 513; 1 Asp. M. L. C. 581. S. C. No. 409, *post*.

Annotations:—**Distd.** The Constitution (1879), 4 P. D. 39. **Consd.** The Parlement Belge (1880), 5 P. D. 197, C. A. **Refd.** Mighell *v.* Johore, [1894] 1 Q. B. 149, C. A.; Foster *v.* Globe Venture Syndicate (1900), 82 L. T. 253. **Mentd.** The Heinrich Bjorn (1885), 10 P. D. 44, C. A.

394. —— Time for—Acts not constituting.]—A foreign sovereign cannot submit to the jurisdiction until the jurisdiction is involved. The fact that a foreign sovereign has been residing in this country, & has entered into a contract here, under an assumed name, does not amount to a submission to the jurisdiction, or render him liable to be sued for breach of the contract.—MIGHELL *v.* JOHORE (SULTAN), [1894] 1 Q. B. 149; 63 L. J. Q. B. 593; 70 L. T. 64; 58 J. P. 244; 10 T. L. R. 115; 9 R. 447, C. A. S. C. No. 387, *ante;* Nos. 404, 406, *post*.

Annotations:—**Consd.** *Re* Republic of Bolivia Exploration Syndicate, [1914] 1 Ch. 139. **Mentd.** Foster *v.* Globe Venture Syndicate, [1900] 1 Ch. 811; *Re* Suarez, Suarez *v.* Suarez, [1917] 2 Ch. 131.

395. —— Unauthorised act of agent.]—A vessel, the property of a foreign sovereign, was arrested in an action for damage by collision. Thereupon the local agent for the vessel in England, without the knowledge or authority of the foreign sovereign, instructed solrs., who procured the release of the vessel by giving an undertaking to put in bail, & also entered an appearance in the action unconditionally. Pltfs., on being informed of the facts, refused to allow the action to be dismissed:—*Held:* the action must be dismissed with costs.—THE JASSY, [1906] P. 270; 75 L. J. P. 93; 95 L. T. 363; 10 Asp. M. L. C. 278.

Annotation:—**Refd.** *Re* Republic of Bolivia Exploration Syndicate, [1914] 1 Ch. 139.

(c) Proceedings against Agents.

396. Sovereign to be made party.]—The object of the suit was to charge deft. in respect of acts done by him as agent of the King of Spain:—*Held:* the King of Spain must be named as a party to the suit.—DE LA TORRE *v.* BERNALES (1818), 1 Hov. Supp. 149; 34 E. R. 729.

Annotation:—**Refd.** Brunswick *v.* Hanover (1844), 6 Beav. 1.

397. ——.]—A bill was filed against a firm in London, as agents of the Peruvian Govt., & receivers of moneys from that Govt., which were to be applied by them as trustees in accordance with the terms of the Peruvian Loan, 1862. The Peruvian Govt. was not made a party to the bill:—*Held:* the bill was demurrable for want of parties.—SMITH *v.* WEGUELIN (1867), 15 W. R. 558.

398. —— Action not maintainable against agent.]—The bond of a foreign Govt. creates nothing but a debt of honour, & the promise contained in it cannot be enforced in the cts. of this country against English agents of the Govt. who have funds belonging to it in their hands, even though the Govt., after notice of an action by the bondholder against the agents, makes no claim to the funds. If such an action against the agent could be maintained, it would amount to an assumption of a jurisdiction over the foreign Govt. As the latter cannot be sued in the cts. of this country, neither can its agents be sued in the absence of the principals.—TWYCROSS *v.* DREYFUS (1877), 5 Ch. D. 605; 46 L. J. Ch. 510; 36 L. T. 752, C. A.

399. —— Injunction granted against agent.]—Though a foreign Govt. cannot be sued in England without its own consent, yet the agent of a foreign Govt. may be restrained from transmitting to it securities which the bill alleges should be deposited in this country.—FOREIGN BONDHOLDERS CORPN. *v.* PASTOR (1874), 23 W. R. 109.

400. Service on ambassador—R. S. C., 1875, O. 2, r. 4.]—Application was made on behalf of pltf., representing Turkish bondholders, for leave to issue the writ & to serve a copy of it on the Turkish Ambassador, with a view to giving the Sultan of Turkey, who was named deft., notice of the proceedings:—*Held:* (1) the Sultan could be named as a party if he desired it, though the writ would be inoperative against him; (2) leave for service on the ambassador must be refused as being contrary

Sect. 4.—Foreign Sovereigns & Governments: Subsect. 2, B. (c) & (d). Sects. 5 to 16 incl.]

to the comity of nations.—STEWART *v.* BANK OF ENGLAND, [1876] W. N. 263.

(d) Questions of Status.

401. Time when immunity attaches—Time of action brought or plea pleaded.]—To an action on an annuity deed deft. pleaded that at the time of making the deed he was reigning sovereign Duke of Brunswick & Luneberg; that the deed was made by him within his dominions; & that from the time of the making until action brought he had been & still was justly entitled to all rights, prerogatives, & privileges appertaining to him as such. On demurrer to the replication:—*Held:* the plea was bad for not stating that deft. was reigning sovereign duke at the time of action brought or plea pleaded. *Semble:* the defence that the contract was made by deft. in character of a sovereign prince would be a good plea in bar, but not a good plea to the jurisdiction.—MUNDEN *v.* BRUNSWICK (DUKE) (1847), 10 Q. B. 656; 2 New Pract. Cas. 213; 6 State Tr. N. S. 403; 16 L. J. Q. B. 300; 9 L. T. O. S. 532; 11 Jur. 801; 116 E. R. 248. S. C. Nos. 386, 391, *ante*.

Annotations:—**Consd.** Mighell *v.* Johore, [1894] 1 Q. B. 149, C. A. **Refd.** Wadsworth *v.* Spain (1851), 17 Q. B. 171; London Corpn. *v.* Cox (1867), L. R. 2 H. L. 239.

402. —— Territory annexed—Devolution of liabilities before annexation.]—Pltfs., residents in India, filed a bill against the Secretary of State for India praying that certain bonds upon which money had been lent to the then King of Oude in 1794 by persons whom they now represented might be declared to create a charge on the revenues of Oude, & that the Secretary of State for India might be declared liable to pay to pltfs. the amount due on such bonds:—*Held:* as the debt was not enforceable against the King of Oude before the annexation, it was not enforceable now.—DOSS *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL (1875), L. R. 19 Eq. 509, 535; 32 L. T. 294; 23 W. R. 773.

Annotations:—**Folld.** Reiner *v.* Salisbury (1876), 2 Ch. D. 378. **Refd.** Companhia de Mocambique *v.* British South Africa Co., De Sousa *v.* British South Africa Co., [1892] 2 Q. B. 358, C. A.; Cook *v.* Sprigg, [1899] A. C. 572, P. C.; West Rand Central Gold Mining Co. *v.* R., [1905] 2 K. B. 391.

403. Sovereign prince—Also British subject.]—General demurrer to a bill filed by the Duke of Brunswick against the King of Hanover, as Duke of Cumberland & a British subject residing within the jurisdiction, claiming an account of property received by deft. as pltf.'s guardian under a settlement effected in 1833 by William IV., & the reigning Duke of Brunswick, purporting to act as the legitimate *agnati* of pltf., & in pursuance of authority entrusted to them by a decree of the German Diet:—*Held:* (1) (by H. L.) a foreign sovereign coming to England cannot be made responsible in the cts. here for acts done by him in his sovereign character in his own country, even though such sovereign be also a British subject residing within the jurisdiction; (2) (by LORD LANGDALE, M.R., no opinion being expressed in H. L.) such a foreign sovereign, being a subject of the Queen, is liable to be sued in this country in respect of any acts done by him as a subject, but acts done out of this realm, & doubtful acts, are to be attributed to his sovereign character, & it is for pltf. to show that the act complained of was done in the character of a subject.—BRUNSWICK (DUKE) *v.* HANOVER (KING) (1848), 2 H. L. Cas. 1; 9 E. R. 993, H. L. S. C. No. 385, *ante*.

Annotations:—**Apprvd.** De Haber *v.* Portugal (1851), 20 L. J. Q. B. 488. **Refd.** Gladstone *v.* Musurus Bey (1862), 1 Hem. & M. 495; Cox *v.* London Corpn. (1863), 2 H. & C. 401, Ex. Ch.; Smith *v.* Weguelin (1869), L. R. 8 Eq. 198; Larivière *v.* Morgan (1872), 26 L. T. 339; The Charkieh (1873), L. R. 4 A. & E. 59; Hettihewage Siman Appu *v.* Queen's Advocate (1884), 9 App. Cas. 571, P. C.; Mighell *v.* Johore, [1894] 1 Q. B. 149, C. A.; South African Republic *v.* La Compagnie Franco-Belge du Chemin de Fer du Nord, [1898] 1 Ch. 190. **Mentd.** London Corpn. *v.* Cox (1867), L. R. 2 H. L. 239; The Parlement Belge (1880), 5 P. D. 197, C. A.; Musurus Bey *v.* Gadban, [1894] 1 Q. B. 533.

404. —— Though under protectorate.]—MIGHELL *v.* JOHORE, Nos. 387, 394, *ante;* No. 406, *post*.

For full anns., *see* S. C. No. 394, *ante*.

405. —— Under suzerainty.]—STATHAM *v.* STATHAM & BARODA, No. 388, *ante;* No. 408, *post*.

406. Evidence of status—Certificate from Foreign or Colonial Office conclusive.]—A certificate from the Foreign or Colonial Office is conclusive as to the status of a foreign sovereign.—MIGHELL *v.* JOHORE, Nos. 387, 394, 404, *ante*.

Annotation:—**Folld.** Foster *v.* Globe Venture Syndicate, [1900] 1 Ch. 811.

For full anns., *see* S. C. No. 394, *ante*.

407. —— ——.]—The ct. takes judicial cognizance not only of the status, but also of the boundaries of foreign States, & if in doubt will apply for information to the Secretary of State for Foreign Affairs, whose reply is conclusive.—FOSTER *v.* GLOBE VENTURE SYNDICATE, LTD., [1900] 1 Ch. 811; 69 L. J. Ch. 375; 82 L. T. 253; 44 Sol. Jo. 314.

408. —— Certificate from India Office.]—In the case of an Indian sovereign prince a certificate from the India Office is accepted as evidence of his status.—STATHAM *v.* STATHAM & BARODA, Nos. 388, 405, *ante*.

409. —— Other evidence.]—In considering the international status of the Khedive of Egypt, the ct. may inquire into the general history of the Govt. of Egypt., the firmans of the Porte, & European treaties concerning the relations between Egypt & the Porte, & may obtain direct information from the Foreign Office.—THE CHARKIEH, No. 393, *ante*.

Annotations:—**Refd.** The Parlement Belge (1880), 5 P. D. 197, C. A.; Foster *v.* Globe Venture Syndicate, [1900] 1 Ch. 811.

For full anns., *see* S. C. No. 393, *ante*.

SECT. 5.—**DIPLOMATIC OFFICERS.**

See CONSTITUTIONAL LAW.

SECT. 6.—**ALIEN FRIENDS AND ALIEN ENEMIES.**

See ALIENS.

SECT. 7.—**BANKRUPTS.**

See BANKRUPTCY & INSOLVENCY.

SECT. 8.—**INFANTS.**

See INFANTS & CHILDREN.

SECT. 9.—**PERSONS EN VENTRE SA MÈRE.**

See INFANTS & CHILDREN.

SECT. 10.—**LUNATICS.**

See LUNATICS & PERSONS OF UNSOUND MIND.

SECT. 11.—**COMPANIES AND CORPORATIONS.**

See COMPANIES; CORPORATIONS.

SECT. 12.—**PARTNERS.**

See PARTNERSHIP.

SECT. 13.—**TRADE UNIONS.**

See TRADE & TRADE UNIONS.

SECT. 14.—**UNINCORPORATED BODIES.**

See PRACTICE & PROCEDURE.

SECT. 15.—**PERSONS SUED IN REPRESENTATIVE CAPACITY.**

See PRACTICE & PROCEDURE.

SECT. 16.—**HUNDREDORS AND INHABITANTS OF COUNTY.**

See CONSTITUTIONAL LAW; COURTS; PRACTICE & PROCEDURE.

Part IV.—Conditions Precedent to Action.

SECT. 1.—AWARD, VALUATION, DECISION, ETC., OF THIRD PARTY.

SUB-SECT. 1.—AWARD OF AN ARBITRATOR: *see* ARBITRATION.

SUB-SECT. 2.—ARCHITECT'S AND ENGINEER'S CERTIFICATE: *see* BUILDING CONTRACTS, ENGINEERS & ARCHITECTS.

SUB-SECT. 3.—VALUATIONS.

410. Bailment—Furnished house—Damage to furniture.]—A tenant of a furnished house agreed in writing to deliver up possession, together with the furniture, at expiration of the tenancy, in good order, & in the event of any loss, damage or breakage, to make good or pay for the same, the amount to be paid, in case of dispute, to be settled by two valuers:—*Held:* the settlement by two valuers of the amount to be paid by the tenant was a condition precedent to the lessors' right to bring an action for damage or loss done.—BABBAGE *v.* COULBURN (1882), 9 Q. B. D. 235, n.; 52 L. J. Q. B. 50; 46 L. T. 283, 794; 30 W. R. 950, C. A.

Contract of sale—Price dependent on valuation—How far enforceable by specific performance.]—*See* SPECIFIC PERFORMANCE.

—— —— **Sale of goods.**]—*See* SALE OF GOODS.

SUB-SECT. 4.—APPROVAL, ETC., OF THIRD PARTY.

411. Horse-race—Steward's decision.]—Where the rules of certain races provided that all disputes should be settled by the stewards, & two stewards had been named, one of whom, on a dispute arising as to which horse was entitled to the stakes of a race, gave his opinion in writing that pltf. was entitled to them:—*Held:* pltf. could not recover the stakes on the award of that steward alone, although it appeared the other steward had stated he would acquiesce in whatever his colleague did; to make the sole award of the latter available, it must be clearly shown that both the disputing parties & the stakeholder also submitted to his sole authority.—MARRYAT *v.* BRODERICK (1837), 2 M. & W. 369; Murph. & H. 96; 6 L. J. Ex. 113; 1 Jur. 242; 150 E. R. 799.

412. —— ——.]—Deft. was stakeholder of a race, which was to be decided by the award of four stewards. After the race the stewards met, but were unable to agree, two being in favour of pltf.'s horse & two in favour of another horse. In an action by pltf. to recover the stakes:—*Held:* (1) it was a condition precedent that there should be a decision of the stewards if practicable; (2) pltf. could not submit the question to the jury or recover back the amount of contribution.

Pltf. is not entitled to call evidence that his horse won, because certain persons have been appointed by all parties to decide which horse was the winner (MARTIN, B.).—BROWN *v.* OVERBURY (1856), 11 Exch. 715; 25 L. J. Ex. 169; 20 J. P. 454; 4 W. R. 252; 156 E. R. 1018.

Annotations:—**Apprvd.** Scott *v.* Avery (1855–6), 5 H. L. Cas. 811. **Distd.** Sadler *v.* Smith (1869), L. R. 4 Q. B. 214. **Refd.** Parr *v.* Winteringham (1859), E. & E. 394; Mills *v.* Bayley (1863), 2 H. & C. 36; Dines *v.* Wolfe (1869), L. R. 2 P. C. 280; Spackman *v.* Plumstead Board of Works (1885), 10 App. Cas. 229.

SECT. 2.—CONSENT.

Necessity for the *fiat* or leave of the Attorney-General: *see* CORPORATIONS; CRIMINAL LAW & PROCEDURE; CROWN PRACTICE.

Necessity for the consent of the Charity Commissioners: *see* CHARITIES; COUNTY COURTS.

Necessity for the consent of a trustee in bankruptcy or of a liquidator: *see* BANKRUPTCY & INSOLVENCY; COMPANIES.

Instituting proceedings in the name of, or joining, parties without their consent: *see* PRACTICE & PROCEDURE.

The Attorney-General as a necessary party: *see* CHARITIES; CROWN PRACTICE; NUISANCE; PRACTICE & PROCEDURE.

413. Consent of Attorney-General—Action for penalties—Brought by member of public—Public Health Act, 1848 (c. 63).]—Deft., a proprietor of stock in the M. Pier Co., & a member of the local board of health at M., in this latter capacity attended a meeting of the board & voted upon a question upon which the M. Pier Co. was interested:—*Held:* assuming deft. to have incurred by so doing the penalty imposed by s. 19 of the above Act, an action for such penalty could not be brought against him by a person who, not being a party grieved otherwise than as one of the public, had not obtained the consent of the A.-G. pursuant to s. 133.—BOYCE *v.* HIGGINS (1853), 14 C. B. 1; 23

PART IV. SECT. 1, SUB-SECT. 4.

c. *Treasury—Amount of gratuity to be fixed by—Amount not in dispute.*]—The town clerk appointed by the Commrs. of C. having, on the passing of Local Government (Ir.) Act, 1898, become clerk of the C. Urban District Council, was dismissed by the council for "misleading the council." The clerk brought an action by civil bill against the council for £42 "gratuity" under s. 116 of the above Act:—*Held:* (1) the existence of the "misconduct or incapacity," which would be an answer to pltf.'s action, was a question of fact to be tried, the resolution reciting such misconduct or incapacity not being decisive of the matter; (2) the only jurisdiction of the Treasury was as to the "amount" in case of "dispute," & where there was no dispute the fixing of the amount by the Treasury could not be a condition precedent to a right of action; (3) in such case an action was the appropriate remedy, & an application for a *mandamus* would not be successful. —REILLY *v.* COOTEHILL URBAN DISTRICT COUNCIL (Q. B.) (1900), 35 I. L. T. 33.—**IR.**

d. *Presbyterian Church committee—Infirm ministers' benefit to be approved by.*]—A fund established by the Presbyterian Church in Victoria called "The Infirm Ministers' Fund" consisted of rates paid by ministers, donations, bequests, & surplus revenue. All ministers were invited to become contributors. The revenue alone of the fund was available for allowances to beneficiaries. By r. 9 "all contributors seeking to become beneficiaries transmit" (*sic*) "their applications to the committee through their presbyteries, & the committee after due consideration & inquiry forwards their decision to the Assembly for final approval." Pltf. brought an action against defts. as representing the Church & the General Assembly thereof, alleging that he was a contributor to the fund; that he became incapacitated by infirmity & applied through the presbytery to the committee to be placed on the fund as a beneficiary; but that the General Assembly wrongfully neglected to put him on the fund; & he claimed that the Assembly be ordered to place him as a beneficiary upon the fund, & that those administering the fund should pay the moneys due to him:—*Held:* r. 9 constituted a condition precedent to the right of pltf. to bring an action, & it was necessary first to obtain the decision o fthe committee in pltf.'s favour & the subsequent approval of such decision by the General Assembly. — ELLIOTT *v.* JOHNSTONE (1902), 28 V. L. R. 259.—**AUS.**

Sect. 2.—Consent. Sect. 3.—Demand or Request: Sub-sect. 1, A.]

L. J. C. P. 5; 22 L. T. O. S. 103; 17 J. P. 808; 18 Jur. 333; 2 W. R. 73; 2 C. L. R. 95; 139 E. R. 1.

Annotations:—**Folld.** Hollis *v.* Marshall (1858), 2 H. & N. 755. **Refd.** Robinson *v.* Currey (1880), 6 Q. B. D. 21.

414. —— —— Consent to be pleaded—Stay.] In an action to recover a penalty under Cheltenham Improvement Act, 1852 (c. l.), which incorporated Public Health Act, 1848, s. 133, brought by a person who was not a party aggrieved:—*Held:* (1) the declaration was bad, as not alleging the consent of the A.-G.; (2) although the want of consent of the A.-G. was an objection which might have been taken by plea or demurrer, it was also a ground for staying the proceedings after trial.—HOLLIS *v.* MARSHALL (1858), 2 H. & N. 755; 27 L. J. Ex. 235; 30 L. T. O. S. 334; 22 J. P. 210; 6 W. R. 365; 157 E. R. 311.

Annotation:—**Distd.** Knowlden *v.* R. (1864), 33 L. J. M. C. 219.

415. —— —— Public Health Act, 1875 (c. 55)—Where consent necessary.]—Deft., acting as chairman of a local board after disqualification, made a complaint to the members thereof as to certain conduct of pltf., clerk to the board; pltf., fearing he might be dismissed from his office, resigned it, & sued deft. to recover a penalty of £50 for acting without qualification:—*Held:* (1) pltf. was not a "party aggrieved" within s. 253 of the above Act; (2) he could not sue for the penalty without the consent of the A.-G.—ROCHFORT *v.* ATHERLEY (1876), 1 Ex. D. 511.

416. *S. P.* SMITH *v.* FIELDHOUSE (1876), 35 L. T. 602.

Annotation:—**Refd.** Fletcher *v.* Hudson (1880), 5 Ex. D. 287, C. A.

417. —— —— —— Where consent not necessary—Party aggrieved.]—At an election for a member of the local board at W., applt. & M. were the only candidates: M. was declared to be elected, he having obtained 94 votes & applt. 89. Applt., without the consent of the A.-G., preferred an information under Sched. II., r. 69, of the above Act against resps. charging them with fabricating in part the voting paper of D., a person entitled to three votes at the election; but the justices dismissed it on the ground that applt. was not a "party aggrieved" within s. 253, & that the consent of the A.-G. was requisite:—*Held:* (1) applt. was a "party aggrieved" within the stat.; (2) the dismissal of the information was wrong.—VERDIN *v.* WRAY (1877), 2 Q. B. D. 608; 46 L. J. M. C. 170; 35 L. T. 942; 41 J. P. 484; 25 W. R. 274; 41 J. P. Jo. 69.

418. —— —— —— —— Express provision.]—In an action against a member of a local board to recover a penalty for acting without qualification, the penalty being by Sched. II., r. 270, of the above Act, made recoverable by any person:—*Held:* (1) the provision of r. 70 that the penalty might be recovered by any person was an express provision to which the words in s. 253 "except as in this Act expressly provided" were intended to refer; (2) in actions for penalties under that rule the consent of the A.-G. was not necessary.—FLETCHER *v.* HUDSON (1880), 5 Ex. D. 287; 49 L. J. Q. B. 793; 43 L. T. 404; 45 J. P. 5, C. A.

Annotation:—**Refd.** Dodd *v.* Pearson, [1911] 2 K. B. 383.

419. Consent of Local Government Board—Rivers Pollution Act, 1876 (c. 75)—Necessary before notice of action.]—Where proceedings are proposed to be taken by a sanitary authority under the above Act for an offence against Part III. of the Act, relating to manufacturing & mining pollutions, the two months' notice of intention to take proceedings which the Act requires to be given to the offender cannot be given until the consent of the Local Govt. Board to the taking of the proceedings has been obtained. *West Riding of Yorkshire Rivers Board* v. *Scarr End Mill Co.* (1901), 65 J. P. 776, overd.—WEST RIDING OF YORKSHIRE RIVERS BOARD *v.* ROBINSON BROTHERS, [1907] 1 K. B. 431; 76 L. J. K. B. 426; 96 L. T. 162; 71 J. P. 137; 23 T. L. R. 249; 51 Sol. Jo. 207; 5 L. G. R. 409, C. A.

420. —— —— Not necessary before notice of action.]—It is not necessary to obtain the consent of the Local Govt. Board under Part III. of the above Act before giving notice under s. 13 to the alleged offender.—WEST RIDING OF YORKSHIRE RIVERS BOARD *v.* SCARR END MILL CO. (1901), 65 J. P. 776.

Annotation:—**Overd.** West Riding of Yorkshire Rivers Board *v.* Robinson, [1907] 1 K. B. 431, C. A.

421. Penal action—Consent of party to whom moiety of penalty is to be paid.]—The consent of the party to whom the moiety of a penalty is to be paid (not being pltf.) is not necessary in prosecuting a *qui tam* action.— —— *v.* SMITH (1815), 2 Chit. 392.

SECT. 3.—DEMAND OR REQUEST.

Actions based on a request, express or implied, by defendant: *see* CONTRACT.

SUB-SECT. 1.—DEMAND NOT A CONDITION PRECEDENT.

A. Demand on Defendant unnecessary.

422. General rule—No demand necessary—Whether debt payable on demand—Or at given time or place.]—Where a man engages to pay on demand what is to be considered his own debt, he is liable to be sued upon that engagement without any previous demand, & a tender, or readiness to pay, must come from deft. But if he engages to pay on demand what is not his debt, what he is under no obligation to pay, what, but for such engagement, he would never be liable to pay to any one, a demand is essential, & part of pltf.'s title. Further, the fixing a special time & place for payment does not make an actual demand at that time & place necessary, as part of pltf.'s title, in a case in which otherwise the demand would not be necessary, a tender or readiness to pay at the time &

PART IV. SECT. 2.

417 i. *Consent of Attorney-General—Public Health (Ireland) Act*, 1874 (c. 93)—*Where consent not necessary.*]—The Comrs. of the township of B. laid sewage pipes along or in the bed of a stream which ran into the contiguous one of K., where, partly covered as a sewer & partly open in its course, it eventually joined a public main sewer which communicated with the sea. The K. Comrs. having filed a bill shortly before the passing of Public Health (Ireland) Act, 1874, to restrain the discharge of the B. sewage into their district or sewers:—*Held:* as the suit was not solely connected with the preservation of the public health or the suppression of a public nuisance, it was properly instituted by bill, and the A.-G.'s sanction was unnecessary.—KINGSTOWN TOWNSHIP COMRS. *v.* BLACKROCK (1876), 10 Eq. 160.—**IR.**

419 i. *Consent of Local Government Board—Consent must be pleaded.*]—In an action by poor law guardians for recovery of rates brought in one of the Superior Cts. against the immediate lessor of lands, pltfs. must aver in their statement of claim that the Local Govt. Board has given its consent to the institution of the action.—CLAREMORRIS UNION GUARDIANS *v.* MARTIN (1882), 10 L. R. Ir. 342.—**IR.**

●. *Consent of Advocate-General—Code of Civil Procedure (India)—Form of consent.*]—The "consent in writing" of the Advocate-General or other officer appointed by the Local Govt. Board for the purpose required by s. 539 of the Code of Civil Procedure is a condition precedent to the institution of the suit to which such consent relates. If no valid consent is given before institution of the suit, the mistake cannot subsequently be rectified, unless by means of withdrawal of the suit with premission to institute a fresh suit. The consent in writing must be a specific permission given to two or more persons by name: a permission given to one appct. by name "& another" is not a sufficient compliance with the sect.—GOPAL DEI *v.* KANNO DEI (1904), I. L. R. 26 All. 162.—**IND.**

place being matter of defence, & of defence only (BAYLEY, J.).—ROWE *v.* YOUNG, Nos. 431, 457, *post.*

Annotation :—**Refd.** *Re* Mayor, *Ex p.* Whitworth (1841), 2 Mont. D. & De G. 158.
For full anns., *see* S. C. No. 457, *post.*

423. —— ——.]—In *assumpsit* an innkeeper declared & proved that deft. brought his horse to him & agreed to pay 6*d.* per day and night by way of livery. A debt of £20 was thus incurred. In his declaration pltf. pleaded *licet sæpius requisitus* without alleging any request *de facto :—Held :* good ; for the ground of the action was a debt, in which case the law presumes a promise & the request is not part & parcel of the consideration, as distinguished from an action founded on a collateral matter, in which case a request must be expressly alleged.—HOSTLER'S CASE (1605), Yelv. 66 ; 80 E. R. 46.

For full anns., *see* INNS & INNKEEPERS.

424. —— ——.]—In debt & detinue the bringing of the action & demand of the writ is a demand & request ; but in action upon the case & upon debt a request must be laid ; so if the request is made part of the contract, it becomes part of the debt & ought to be alleged.—HERN & STUB'S CASE (1627), Godb. 400 ; 78 E. R. 236.

Annotation :—**Apprvd.** Rowe *v.* Young (1820), 2 Bli. 391.

425. —— —— **Unless special stipulation.**]—A request for payment of a debt is immaterial, unless the parties to the contract have stipulated that is shall be made ; if they have not, the law requires no notice or request, but the debtor is bound to find out the creditor & pay him the debt when due (PARKE, B.).—WALTON *v.* MASCALL, No. 448, *post.*

Annotation :—**Refd.** Barber *v.* Mackrell (1892), 67 L. T. 108.

426. Debt payable on demand.]—In debt on a bond payable if demanded, the action is a sufficient demand.—DOCKREY *v.* TANNING (1610), Cro. Jac. 242-; 79 E. R. 209.

427. ——.]—Where the promise is to pay upon request, a request is unnecessary to be stated or proved.—RING *v.* ROXBOROUGH (1832), 1 L. J. Ex. 169 ; 2 Jur. 468.

428. ——.]—Where there is a present debt and a promise to pay on demand, the demand is not considered to be a condition precedent to the bringing of an action.—*Re* BROWN'S ESTATE, BROWN *v.* BROWN, No. 462, *post.*

For full anns., *see* S. C. No. 462, *post.*

429. —— **Though payable with interest.**]—An action on a bond, conditioned generally for payment of a specified sum with interest, may be brought without a demand being made.—GIBBS *v.* SOUTHAM (1834), 5 B. & Ad. 911 ; 3 Nev. & M. K. B. 155 ; 110 E. R. 1025.

Annotation :—**Refd.** Ameer-oon-Nissa *v.* Moorad-oon-Nissa (1855), 6 Moo. Ind. App. 211.

430. —— ——.]—In the case of money lent, payable upon request, with interest, no demand is necessary before action. There is no obligation in law to give any notice, though if the parties choose to make it part of the contract that notice shall be given they may do so. The debt which constitutes the cause of action arises instantly on the loan (PARKE, B.).—NORTON *v.* ELLAM, Nos. 434, 460, *post.*

Annotations :—**Apld.** Jackson *v.* Ogg (1859), John. 397 ; *Re* George, Francis *v.* Bruce (1890), 44 Ch. D. 627.
For full anns., *see* S. C. No. 434, *post.*

431. Negotiable instrument—To charge acceptor.]—In an action on a bill of exchange against the acceptor, presentment for payment, generally speaking, need not be averred or proved (BAYLEY, J.).—ROWE *v.* YOUNG, No. 422, *ante ;* No. 457, *post.*

For full anns., *see* S. C. No. 457, *post.*

432. —— **To charge maker.**]—In debt on a note, payable on demand, it is not necessary to allege a demand in the declaration.—RUMBALL *v.* BALL (1711), 10 Mod. Rep. 39 ; 88 E. R. 616.

Annotations :—**Refd.** *Re* George, Francis *v.* Bruce (1890), 44 Ch. D. 627 ; *Re* Brown's Estate, [1893] 2 Ch. 300. **Mentd.** Bishop *v.* Young (1800), 2 Bos. & P. 78 ; Priddy *v.* Henbrey (1832), 1 B. & C. 674.

433. —— —— **Though joint maker surety.**]—The rule that, where a man agrees to pay on demand a debt, not his own, demand is necessary to create a right of action against him, does not apply to the case of a joint & several promissory note in which one of the makers is known to join only as a surety for the other.—*Re* MAYOR, *Ex p.* WHITWORTH (1841), 2 Mont. D. & De G. 158.

434. —— —— **Though payable with interest—Difference where payable at sight.**]—A promissory note, payable on demand, is a present debt, & payable without any demand ; & Stat. Limitations begins to run from the date of it. The fact that the note is payable with interest makes no difference ; but it is otherwise in the case of a note payable at sight, because there, by the terms of the contract, it must be shown before action brought (PARKE, B.).—NORTON *v.* ELLAM (1837), 2 M. & W. 461 ; Murph. & H. 69 ; 6 L. J. Ex. 121 ; 1 Jur. 433 ; 150 E. R. 839. S. C. No. 430, *ante ;* No. 460, *post.*

Annotations :—**Folld.** Jackson *v.* Ogg (1859), John. 397 ; *Re* Bethell (1887), 34 Ch. D. 561 ; *Re* George, Francis *v.* Bruce (1890), 44 Ch. D. 627 ; *Re* Brown's Estate, [1893] 2 Ch. 300.

435. —— **Though payable on given day.**]—A person who accepts a bill of exchange or makes a promissory note, payable on a given day, is liable to pay it when that day arrives although no demand is made (CHANNELL, B.).—MALTBY *v.* MURRELLS (1860), 5 H. & N. 813 ; 29 L. J. Ex. 377 ; 2 L. T. 362 ; 157 E. R. 1405.

See, now, Bills of Exchange Act, 1882 (c. 61), ss. 52 (1), 87 (1).

436. —— **Collateral undertaking.**]—Deft., being indebted to pltf. upon two bills of exchange, signed the following undertaking : " I hereby debar myself from all future plea of Stat. Limitations in case of my being sued for recovery of the amount of the said bills, & of the interest, etc., & I hereby promise to pay them separately or conjointly with the full amount of legal interest, whenever my circumstances may enable me to do so, & I may be called upon for that purpose." In *assumpsit* upon this undertaking, to which Stat. Limitations was pleaded :—*Held :* (1) no demand was necessary before the bringing of the action ; (2) the deft. was not bound to give notice of his ability to pay ; (3) the time limited by the stat. began to run from the fact of his ability taking place, though pltf. had no knowledge of it.—WATERS *v.* THANET (EARL) (1842), 2 Q. B. 757 ; 2 Gal. & Dav. 166 ; 6 Jur. 708 ; 114 E. R. 295.

437. Enforcement of guarantee.]—P. borrowed a sum of money from a loan society of which he was a member, & defts., who were not members, joined him in a bond & promissory note for the amount. By the terms of the loan P. was to repay the money by weekly instalments. One of the society's rules directed the managing committee to inform the sureties when the instalments were four weeks in arrear, & empowered them to commence legal proceedings against the sureties. P. died in 1859, having repaid a portion of the loan, but being at the time of his death more than four weeks in arrear. Defts. were not informed of this till an action was brought in 1862 on the bond & note :—*Held :* the rules of the society formed no part of defts.' contract so as to afford them any ground of equitable defence.—PRICE *v.* KIRKHAM (1864), 3 H. & C. 437 ; 5 New Rep. 59 ; 34 L. J. Ex. 35 ; 11 L. T. 314 ; 29 J. P. 8 ; 159 E. R. 601.

438. Agreement for composition — Duty of

Sect. 3.—Demand or Request: Sub-sect. 1, A. & B.; sub-sect. 2, A.]

debtor.]—Pltf., drawer of a bill of exchange accepted by deft., agreed with deft. & the rest of deft.'s creditors to take a composition of 8*s.* in the £, to be secured by promissory notes to be given by deft. payable on days certain, certain debts to be assigned to the creditors, upon which they were to execute a general release. The assignment was executed, & all the creditors except pltf. received their composition & executed the release. Pltf. might have received his promissory notes if he had applied for them, but it did not appear that he had ever done so or that deft. had ever tendered them to him. Pltf. afterwards, when the days of payment of his promissory notes had expired, sued deft. on the bill of exchange:—*Held:* he was not precluded by the agreement from recovering.—CRANLEY *v.* HILLARY (1813), 2 M. & S. 120; 105 E. R. 327.

Annotations:—**Distd.** Soward *v.* Palmer (1818), 2 Moore, C. P. 274; Salomonson *v.* Blyth (1825), 3 L. J. O. S. Ch. 169; Shipton *v.* Casson (1826), 4 L. J. O. S. K. B. 199. **Refd.** Garrard *v.* Woolner (1832), 8 Bing. 258; Oushton *v.* Trotter (1833), 2 Nev. & M. K. B. 71; Emmet *v.* Dewhurst (1851), 3 Mac. & G. 587.

439. Ejectment.]—On the death of a tenant at will, his heir-at-law entered into possession and continued to occupy until an action of ejectment was brought by the devisees of the owner of the land:—*Held:* the action was maintainable without a notice to quit or demand of possession.—DOE d. BURGESS *v.* THOMPSON (1836), 5 Ad. & El. 532; 2 Har. & W. 451; 1 Nev. & P. K. B. 215; 6 L. J. K. B. 57; 111 E. R. 1266.

440. Detinue.]—If an action is brought in detinue, upon a promise to redeliver on request, to recover only the thing itself, an actual request before action brought is unnecessary; the action is itself a sufficient request.—WARD *v.* MARTINE, No. 455, *post.*

441. Conversion.]—Where there is a wrongful taking the taking is in itself a conversion, and a previous demand is not necessary to support an action.—GRAINGER *v.* HILL (1838), 4 Bing. N. C. 212; 1 Arn. 42; 5 Scott, 561; 7 L. J. C. P. 85; 132 E. R. 769.

For full anns., *see* MALICIOUS PROSECUTION & PROCEDURE.

B. Demand on Third Party unnecessary.

442. Bill of exchange—Demand on drawer—Unnecessary to charge indorser.]—In an action by the indorsee of an inland bill of exchange against the indorser, a demand on the drawer need not be shown.—HEYLYN (HEYLIN) *v.* ADAMSON (1758), 2 Burr. 669; 2 Keny. 379; 97 E. R. 503. S. C. No. 458, *post.*

Annotations:—**Refd.** Muilman *v.* D'Eguino (1795), 2 Hy. Bl. 565. **Mentd.** Blisard *v.* Hirst (1770), 5 Burr. 2670; Brown *v.* Harraden (1791), 4 Term Rep. 148; Ballingalls *v.* Gloster (1803), 3 East, 481; Rowe *v.* Young (1820), 2 Bli. 391.

443. Enforcement of guarantee—Demand from principal debtor unnecessary.]—In debt by the lessor on a bond given by the lessee & deft. in a penal sum, conditioned for payment of the rent at the day & place mentioned in the lease, pltf. may assign for breach non-payment of rent at the day & place, without showing a demand of the rent.—REDE *v.* FARR (1817), 6 M. & S. 121; 105 E. R. 1188.

For full anns., *see* GUARANTEE.

444. —— ——.]—It is not necessary, in a declaration against a person on his undertaking to be answerable for or to pay the debt of another, to aver a request made to the principal debtor himself, in the first instance, to pay the debt before the guarantor was resorted to; at least an averment that principal debtor had neglected & refused to repay the money is sufficient for the purpose of maintaining the action against the guarantor.—LILLEY *v.* HEWITT (1822), 11 Price, 494; 147 E. R. 543.

For full anns., *see* GUARANTEE.

445. —— —— **Bill of exchange.**]—The buyer having accepted a bill of exchange for the price of the goods, & becoming bkpt. before the bill became due, the guarantor who paid the seller after bkpcy. of the buyer may recover back the money from the buyer, without proving that any demand was made upon him as acceptor of the bill, before such payment by the guarantor, this not being an action upon the bill itself, & the notorious insolvency of the buyer-acceptor being at least a *primâ facie* warrant to the guarantor to dispense with the making of such demand by the seller who held the bill; but it might still be competent for the buyer to defend himself against this action by the guarantor, by showing that if a demand for payment had been made upon him by the holder, the bill would have been paid.—WARRINGTON *v.* FURBOR (1807), 8 East, 242; 6 Esp. 89; 103 E. R. 334.

Annotations:—**N.F. & Distd.** Murray *v.* King (1821), 5 B. & Ald. 165. **Distd.** Camidge *v.* Allenby (1827), 6 B. & C. 373. **Refd.** Philips *v.* Astling (1809), 2 Taunt. 206; Holborow *v.* Wilkins (1822), 2 Dow. & Ry. K. B. 59; Van Wart *v.* Woolley (1824), 3 B. & C. 439; Hitchcock *v.* Humfrey

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PART IV. SECT. 3, SUB-SECT. 1.—A.

439 i. *Ejectment.*]—Where a tenant, under a parol lease for 7 years, holds over after the expiration of the term, no notice to quit is necessary, before bringing an action of ejectment against him.—DOE d. PARKINSON *v.* HAUBTMAN (1839), 2 N. B. R. (Ber.) 434.—**CAN.**

439 ii. ——.]—M., senior, devised land to T., & also provided that M., junior, should have full possession & control of the property until T. should settle permanently thereon. T. died about 2 years after testator's decease, without having made a permanent settlement. The heirs of T. having brought ejectment against M., junior:—*Held:* T.'s heirs could bring ejectment without previous demand of possession.—DOE d. MURRAY *v.* MURRAY (1874), 15 N. B. R. (2 Pug.) 361.—**CAN.**

i. *Dower—Claim for.*]—Pltf. filed a bill to establish claim to dower in certain lands. Deft. admitted claim, asserting that he had not refused, but consented to the dower, and submitting that pltf.'s remedy was at common law. Before suit, pltf. made a written demand of dower:—*Held:* under the existing law no demand of dower was necessary.—GRIEVE *v.* WOODRUFF (1877), 1 A. R. 617.—**CAN.**

441 i. *Conversion.*]—D. conveyed two horses to pltf. by bill of sale, D. retaining possession of the horses. During the continuance of the security deft. took the horses under an alleged distress for rent against D. In an action of trover by pltf. against deft. for converting the horses:—*Held:* the property being in pltf., he was not bound under the plea of not guilty to show a right to present possession, nor was any demand of possession necessary.—COATES *v.* GOSLIN (1880), 20 N. B. R. 323.—**CAN.**

g. *Replevin.*]—The writ alleged only an unjust detention, & no unlawful taking:—*Held:* the possession of deft. being wrongful, no demand was requisite to sustain replevin.—WALLACE *v.* LAIDLAW (1881), 14 N. S. R. (2 R. & G.) 420.—**CAN.**

h. ——.]—Where goods were lent to the insolvent by pltf. & retained by the assignee:—*Held:* they could be replevied without demand.—DENNISON *v.* GAVAZA (1885), 18 N. S. R. (6 R. & G.) 490; 6 C. L. T. 540.—**CAN.**

i. *Short delivery of goods.*]—Where two parties agree to exchange saw-logs, & one receives a greater quantity than the other, a demand of the deficiency by the latter is not necessary to entitle him to sue for breach of the contract.—MCLEOD *v.* WALKER (1889), 28 N. B. R. 550.—**CAN.**

j. *Claim for rent.*]—Several natives, tenants in common of a parcel of land, joined in a lease to deft. for the term of 42 years at an annual rent. The lease contained this covenant by the lessee: "It is agreed that the lessee shall have the sole & full right at all times to fell, cut, remove, etc., all timber & trees upon the land; & also that the lessee shall pay to the lessors as the price for such timber & trees a sum equal to £10 per acre, & will pay on account of the price a fixed annual sum of £1 per acre until the price shall have been fully paid; such fixed annual sum shall be payable," etc.:—*Held:* the sum mentioned was not merely purchase-money for the timber, but was rent reserved upon an addition to the demise of the land; & it was not necessary as a condition to an action for recovery of the land for default in payment of such money to make the demand prescribed by Property Law Act, 1908, s. 94.—TE PEEHI *v.* SMITH (C. A.) (1909), 29 N. Z. L. R. 171.—**N.Z.**

(1843), 5 Man. & G. 559; Barber *v.* Mackrell (1892), 67 L. T. 108. **Mentd.** Boydell *v.* Drummond (1809), 11 East, 142; Rein *v.* Lane (1867), 8 B. & S. 83; Horsey *v.* Graham (1869), 21 L. T. 530; Armytage *v.* Wilkinson (1878), 3 App. Cas. 355, P. C.

446. ——— ——— ———.]—The condition of a bond after reciting that deft. & J. S. had delivered & indorsed to pltf. a bill of exchange, drawn by J. S. & accepted by A. B., was that deft. & J. S., or either of them, their heirs, etc., should pay, or cause to be paid, to pltf., his exors., etc., the sum secured by the bill within 1 month after it should become due & payable, in case it should not be then paid by the acceptor, to pltf., his exors., etc., according to the tenor of the bill, together with interest from the time the bill became due:—*Held:* to an action on this bond it was not a good plea that the bill when due had not been presented for payment to the acceptor, or that due notice of its dishonour had not been given to deft. & J. S., or either of them.—MURRAY *v.* KING (1821), 5 B. & Ald. 165; 106 E. R. 1153.

Annotation:—**Distd.** Holborrow *v.* Wilkins (1822), 2 Dow. & Ry. K. B. 59.

447. ——— ——— ———.]—Where a person not party to a bill guarantees payment by the acceptor, he is not entitled to require proof of presentment or of notice of dishonour.—HITCHCOCK *v.* HUMFREY (1843), 5 Man. & G. 559; 6 Scott, N. R. 540; 12 L. J. C. P. 235; 1 L. T. O. S. 109; 7 Jur. 423; 134 E. R. 683.

Annotations:—**Apprvd.** Carter *v.* White (1883), 25 Ch. D. 666, C. A. **Mentd.** Pim *v.* Glazebrook (1845), 2 C. B. 429.

448. ——— ——— **Promissory note.**]—Where a person guarantees payment of a promissory note, if it is not duly honoured & paid by the maker according to its tenor & effect, he is liable on his guarantee, if the note is not paid by the maker when due, without any presentment to him for that purpose. An action on such guarantee need not aver a presentment of the note by the maker when due, or a request to him to pay it, & if such request is averred, a plea which traverses the request is bad in substance.—WALTON *v.* MASCALL (MASKELL, MASKALL) (1844), 13 M. & W. 72, 452; 2 Dow. & L. 410; 14 L. J. Ex. 54; 4 L. T. O. S. 158; 153 E. R. 188, Ex. Ch. S. C. No. 425, *ante*.

Annotation:—**Refd.** Barber *v.* Mackrell (1892), 67 L. T. 108.

See, further, BILLS OF EXCHANGE, PROMISSORY NOTES & NEGOTIABLE INSTRUMENTS; GUARANTEE.

SUB-SECT. 2.—DEMAND A CONDITION PRECEDENT.

A. Démand necessary under Contract.

449. Contract to pay on request.]—Deft.'s dog killed pltf.'s sheep, & deft. afterwards, in consideration that pltf. would not sue him for the sheep, promised to recompense him on request:—*Held:* Stat. Limitations ran from the request; for, where a thing is to be done upon request, until request there is no cause of action.

When divers things are to be done & performed before a man can have an action, all these things ought to be completed before the action can be brought (*per* CUR.).—SHUTFORD & BOROUGH'S CASE (1628), Godb. 437; 78 E. R. 257.

450. Contract to pay on demand.]—Where the defeasance of a bond was to pay a sum of money on demand:—*Held:* pltf. must prove a demand before he could succeed.—CARTER *v.* RING (1813), 3 Camp. 459.

Annotations:—**Refd.** Gibbs *v.* Southam (1834), 5 B. & Ad. 911; Ameer-oon-Nissa *v.* Moorad-oon-Nissa (1855), 6 Moo. Ind. App. 211; *Re* Brown's Estate, [1893] 2 Ch. 300.

451. ———.]—If the defeasance on a warrant of attorney states that it is given to secure payment of a sum of money on demand, & in case default shall be made, then judgment to be entered up & execution issue, an actual demand must be made; a proposal to settle amicably does not amount to such a demand.—NICHOLL *v.* BROMLEY (1821), 2 Brod. & Bing. 464; 5 Moore, C. P. 307; 129 E. R. 1045.

452. ———.]—To debt on a bond, conditioned to pay money on demand, deft. pleaded that no demand had been made before action. Replication, that there had been such a demand:—*Held:* the replication was good.—THORNE *v.* JENKINS (1844), 12 M. & W. 614; 14 L. J. Ex. 76; 152 E. R. 1344.

453. Contract to save harmless.]—In *assumpsit* on a promise to save pltf. harmless of all damages & losses, etc., a declaration that deft. had not saved him harmless, but suffered him to be sued, whereby he was enforced to lay out divers sums of money, etc., is bad, & not aided by the verdict; for he ought to have alleged a special request, shown where, for what, & how much he was damnified.—PALMER *v.* KNIGHTS (1634), Cro. Car. 385; 79 E. R. 936.

454. Contract to deliver on request.]—Deft. agreed to deliver an original share in a co. on demand for value received:—*Held:* an actual request to deliver was necessary to support an action for non-delivery.—GREEN *v.* MURRAY (1842), 6 Jur. 728. S. C. No. 474, *post*.

455. ——— **Bailment.**]—Where deft. promised to redeliver a deed upon request:—*Held:* (1) the action, being for recovery of damages, would not lie without an actual request; (2) pltf., not having alleged a request, was not entitled to recover. WARD *v.* MARTINE (1661), 1 Sid. 66; 82 E. R. 973. S. C. No. 440, *ante*.

456. *S. P.* WILKINSON *v.* VERITY (1871), L. R. 6 C. P. 206; 40 L. J. C. P. 141; 19 W. R. 604; *sub nom.* WILLIAMSON *v.* VERITY, 24 L. T. 32.

For full anns., *see* LIMITATION OF ACTIONS.

457. Bill of exchange—Accepted payable at particular place.]—If a bill of exchange be accepted payable at a particular place, the declaration in an action on such bill against the acceptor must aver presentment at that place, and the averment must be proved.—ROWE *v.* YOUNG (1820), 2 Bli. 391; 2 Brod. & Bing. 165; 4 E. R. 372. S. C. Nos. 422, 431, *ante*.

Annotations:—**Folld.** Cowie *v.* Halsall (1821), 4 B. & Ald. 197. **Distd.** Rhodes *v.* Gent (1821), 5 B. & Ald. 244. **Refd.** Treacher *v.* Hinton (1821), 4 B. & Ald. 413; Gibb *v.* Mather (1832), 8 Bing. 214; Skelton *v.* Halstead (1842), 11 L. J. Q. B. 331; Haldane *v.* Johnson (1853), 8 Exch. 689; Saul *v.* Jones (1858), 1 E. & E. 59. **Mentd.** Smith *v.* Doe d. Jersey (1821), 2 Brod. & Bing. 473; *Re* Dilworth, *Ex p.* Lancaster Canal (1831), Mont. 27; *Re* Mayor, *Ex p.* Whitworth (1841), 2 Mont. D. & De G. 158; Smith *v.* Virtue (1860), 9 C. B. N. S. 214.

See, now, Bills of Exchange Act, 1882 (c. 61), ss. 19 (2) (*c*), 52 (2).

458. ——— **Presentment to acceptor—To charge indorser.**]—An indorsee of a bill of exchange in an action against an indorser must show that he has used all due diligence against the acceptor.—HEYLYN *v.* ADAMSON, No. 442, *ante*.

For full anns., *see* S. C. No. 442, *ante*.

See, now, Bills of Exchange Act, 1882 (c. 61), s. 45.

459. Promissory note—Payable at particular place.]—A note promising to pay on demand at a particular place must be presented, and a demand of payment made, at that place, unless the maker discharges the holder from the presentment and

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PART IV. SECT. 3, SUB-SECT. 2.—A.

459 i. *Promissory note—Payable at particular place.*]—In an action by payee against maker, a promissory note is admissible in evidence under the common money counts, although made payable at a particular place; the right of recovery, however, is suspended until presentment be made at the place, on or after the time of payment.—MERRITT *v.* WOODS (1838), 2 N. B. R. (Ber.) 261. —**CAN.**

459 ii. ——— ———.]—A demand of payment of a promissory note made payable at a particular place may not be

Sect. 3.—Demand or Request: Sub-sect. 2, A. & B.]

demand.—BOWES *v.* HOWE (1813), 5 Taunt. 30; 128 E. R. 596.

Annotations:—**Distd.** Turner *v.* Stone (1843), 1 Dow. & L. 122. **Folld.** Sands *v.* Clarke (1849), 3 C. B. 751. **Refd.** Rowe *v.* Young (1820), 2 Bli. 391. **Mentd.** *Re* East of England Banking Co. (1868), L. R. 6 Eq. 368.

460. —— Payable at sight.]—NORTON *v.* ELLAM, Nos. 430, 434, *ante.*

For full anns., *see* S. C. No. 434, *ante.*

461. Collateral sum payable on demand.]—It is not necessary to allege a request in a declaration in an action on the case for a debt; but if it is for a collateral sum, the day of the request must be alleged, and a general averment of "*sæpius requisitus*" is not sufficient.—BIRKS (BERKS) *v.* TRIPPET (TRIPETT) (1666), 2 Keb. 126; 1 Wms. Saund. 28, 32; 1 Sid. 303; 84 E. R. 80.

Annotations:—**Distd.** Maylam *v.* Norris (1845), 1 C. B. 244. **Folld.** *Re* Brown's Estate, [1893] 2 Ch. 300. **Refd.** Rowe *v.* Young (1820), 2 Bli. 391; Simpson *v.* Routh (1824), 2 B. & C. 682; *Re* Dilworth, *Ex p.* Lancaster Canal Co. (1831), 1 Mont. 27; Hooper *v.* Woolmer (1850), 10 C. B. 370. **Mentd.** Child *v.* Sands (1693), 1 Salk. 31; Wharton *v.* King (1831), 2 B. & Ad. 528; Creswick *v.* Harrison (1850), 10 C. B. 441; Harrison *v.* Creswick (1853), 13 C. B. 399; Jewell *v.* Christie (1867), L. R. 2 C. P. 296.

462. —— Enforcement of guarantee—Covenant to pay on demand.]—Where there is a present debt and a covenant or promise to pay on demand, the demand is not considered a condition precedent to bringing the action; but where there is a covenant or promise to pay a collateral sum on demand —*e.g.*, in a covenant by a surety for the principal debtor—request must be made before action brought, or before the money can be considered as owing by the collateral debtor.

A mtge. of Sept., 1867, contained a joint & several covenant by a father & son to pay the mtgee. £3,000 "on demand," & that they would, "in the meantime from the date hereof," pay interest on same at the rate therein mentioned. The father, who had joined as surety only, died in Nov., 1872, & his estate was being administered in an action commenced in Apr., 1880. No claim was made against the father's estate in respect of his liability on the covenant in the mtge. until July, 1889. The mtgee. now claimed to be let in as a creditor of the father's estate in respect of the amount due on the mtge., which the son was unable to pay:—*Held:* (1) the right of action did not accrue against the father's estate until July, 1889, when demand was first made; (2) mtgee. was entitled to come in & prove his claim against the father's estate without disturbing any dividends already distributed.—*Re* BROWN'S ESTATE, BROWN *v.* BROWN, [1893] 2 Ch. 300; 62 L. J. Ch. 695; 69 L. T. 12; 41 W. R. 440; 3 R. 463. S. C. No. 428, *ante.*

Annotation:—**Mentd.** Edwards *v.* Walters, [1896] 2 Ch. 157, C. A.

463. —— —— ——.]—Under a lease by pltf. to T., T. covenanted to pay the rent at the days & in manner therein mentioned, & to pay interest should the rent be behind three quarters; & deft. covenanted that T. should at all times during the term pay to pltf. the rent at the respective days, & also interest, & should duly observe all the covenants, & that if T. should neglect to pay the rent for 40 days deft. should pay on demand:—*Held:* deft. was not chargeable until after 40 days & demand made.—SICKLEMORE *v.* THISTLETON (1817), 6 M. & S. 9; 105 E. R. 1146.

Annotations:—**Refd.** *Re* Colnaghi, *Ex p.* Marks (1838), 3 Deac. 133; Macintosh *v.* Midland Counties Ry. Co. (1845), 14 M. & W. 548; Jowett *v.* Spencer (1846), 15 M. & W. 662; *Re* Brown's Estate, [1893] 2 Ch. 300. **Mentd.** Hoggett *v.* Exley (1840), 6 Bing. N. C. 207.

464. —— —— ——.]—The condition of a bond provided that the bond was to be void if the surety should pay to the obligees such sums as they should advance to the principal debtor, within three calendar months "after receiving notice to pay such sums":—*Held:* in assigning a breach of the condition it was not enough to aver that the surety "had & received notice" that certain sums were due from principal debtor without averring a notice or request to pay.—BATSON *v.* SPEARMAN (1838), 9 Ad. & El. 298; 3 Per. & Dav. 77; 112 E. R. 1225.

Annotation:—**Refd.** Jones *v.* Williams (1841), H. & W. 80.

465. —— —— ——.]—Pltf. advanced money to a borrower under an agreement providing for repayment within three months of the receipt of a written notice requiring repayment, & deft. guaranteed repayment of the loan "as per" the agreement. The borrower died, leaving no estate, & no letters of administration were taken out. No written notice requiring repayment was ever given by pltf. In an action against his surety:—*Held:* (1) the giving of the notice was a condition precedent to repayment; (2) as the condition had not been performed, repayment never became due; (3) deft. was not liable.—RICKABY *v.* LEWIS (1905), 22 T. L. R. 130; 50 Sol. Jo. 113.

B. Demand required by Law.

466. Demand distinguished from cause of action.]—A ry. co. was empowered by stat. to divert a canal, and it was enacted that, if by certain specified causes the canal should be so obstructed that boats could not pass, the ry. co. should pay the

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made on the very day it falls due to fix the maker, although there must be a demand at the place upon or after the day, before bringing the action.—RATCHFORD *v.* GRIFFITH (1843), 4 N. B. R. (2 Kerr.), 112.—**CAN.**

k. *Mortgage—Notice demanding payment.*]—Deft. produced a mtge. in fee given by pltf. to C. By the mtge. the mtgor. was to remain in possession until 3 months' notice in writing, after default, demanding payment. The mtge. had been discharged by certificate registered a week after the commencement of the action, & it was contended that pltf. had no legal title when he began his suit:—*Held:* he might nevertheless recover, for no notice was proved to have been given as required by the mtge., & he was entitled to possession against mtgee.—SIDEY *v.* HARDCASTLE (1854), 11 U. C. R. 162.—**CAN.**

l. *Contract to take property.*]—In an action for specific performance of an alleged agreement, the allegation was that deft., on selling land to pltfs., promised to make them a profit of $30,000 within 60 days, or take the property himself:—*Held:* this was an alternative promise to make pltfs. a profit within a certain time, or take the property himself. The action which had been taken on the first part, relating to the profit, should have been taken on the promise as a whole. Had the action been brought on the whole promise, pltfs., before commencement, should have drawn up an agreement, or assignment, and tendered it to deft. for execution. Before pltfs. could sue they must satisfy the ct. that they did put the option to deft., either to pay or take the property.—FLETCHER *v.* HOLDEN (1914), 27 W. L. R. 896.—**CAN.**

PART IV. SECT. 3, SUB-SECT. 2.—B.

m. *Attachment to enforce payment of costs.*]—When a consent is entered into & made a rule of ct. for the postponement of a trial upon payment of costs, & the party to whom the costs are payable afterwards dies, his personal representative is not deprived of the usual remedies by action or attachment for enforcing the payment of the costs; but there must first be an order for the payment of the costs, & a regular demand made on behalf of the personal representative, before an attachment can be issued.—BROWNRIGG *v.* HAMILTON (1832), Alc. & N. 170.—**IR.**

n. *Action against sheriff for overplus.*]—In an action against a sheriff for the overplus of money levied under an execution, pltf. must prove a demand of the money before action brought.—RUGGLES *v.* BEIKIE (1833), 3 O. S. 276.—**CAN.**

o. *Action against district council—Account stated.*]—Where a district council was sued upon the common money count on account stated:—*Semble:* (1) it was not necessary before action to give a notice to the treasurer of the district of the claims of pltfs. against the district; (2) it was necessary, in order to a right of action, to aver a request from pltfs. to defts. to pay over the money due.—HURON DISTRICT COUNCIL *v.* LONDON DISTRICT COUNCIL (1847), 4 U. C. R. 302.—**CAN.**

p. *Action against Public Works Commissioners.*]—In order to institute an action against the Commrs. of Public Works in Ireland, it was necessary, under 1 & 2 Will. 4, c. 33, s. 91, to apply to the Ct. of Exchequer for liberty so to do; but previous to granting such

canal co. by way of ascertained damages a liquidated sum according to the time during which the obstruction should continue; and that in default of payment on demand made on the ry. co.'s treasurer, etc., the canal co. might recover the sum by action of debt or on the case. It was also enacted that no action should be brought for anything done or omitted to be done in pursuance of the Act, or in execution of the powers or authorities given by it, without 20 days' notice nor unless the action should be brought within 6 calendar months next after the act committed, or in case there should be a continuation of damage then within 6 calendar months next after the doing such damage should have ceased. The declaration stated that the canal, by means of defts.' works, became obstructed on a certain day & continued so obstructed for 99 hours next following, & that defts. refused payment when demanded:—*Held:* (1) an action of debt for liquidated damages incurred by obstructing the canal was an action for something done in pursuance of the Act; (2) the limitation clause applied; (3) the time of limitation ran from the last obstruction, not from the demand of payment.

The demand may indeed be necessary to maintain the action; but it cannot be considered as the cause of it (LORD DENMAN, C.J.).—KENNETT & AVON CANAL NAVIGATION PROPRIETORS *v.* GREAT WESTERN RY. CO. (1845), 7 Q. B. 824; 4 Ry. & Can. Cas. 190; 14 L. J. Q. B. 325; 9 Jur. 788; 115 E. R. 698.

467. Money paid by mistake.]—To enable a pltf. to maintain an action for money paid by mistake as money had & received by deft., notice of the mistake must have been given to deft. & a demand made (MARTIN & BRAMWELL, BB.).—FREEMAN *v.* JEFFRIES (1869), L. R. 4 Exch. 189; 38 L. J. Ex. 116; 20 L. T. 533.

Annotations:—**Distd.** Baker *v.* Courage, [1910] 1 K. B. 56. **Mentd.** Colonial Bank *v.* Exchange Bank of Yarmouth (1885), 54 L. T. 256, P. C.; Bradford Corpn. *v.* Ferrand, [1902] 2 Ch. 655; Tendring Hundred Waterworks *v.* Jones, [1903] 2 Ch. 615.

468. Failure of consideration—Annuity void through informality.]—The grantee of an annuity void on account of an informality in the deeds cannot maintain an action for money had and received to recover back the money until he has demanded fresh deeds from the grantor. But it is not necessary for grantee to tender back the old deeds previous to the commencement of such action.—WIDDLE *v.* LYNAM (1798), Peake, Add. Cas. 30.

469. Detinue.]—Pltf.'s watch, which had been bought some years previously at deft.'s shop, was stolen from pltf., who gave information of the theft to deft. The watch was subsequently purchased by B., who sent it to deft. for an opinion as to whether it was a genuine antique watch. Deft. wrote both to pltf. & to B. telling them that it was the watch which had been stolen & inquiring as to their wishes in the matter. No answer was sent by pltf. to deft.'s letter, but a few days afterwards a clerk of pltf.'s solrs. called at deft.'s shop, & on being shown the watch demanded that it should be then & there handed over to him, and, on this request being refused, at once served deft. with a writ in detinue which he had taken out on pltf.'s behalf about two hours previously. Upon the facts given in evidence:—*Held:* (1) there had been no wrongful refusal on deft.'s part to return the watch to pltf. before the date of issue of the writ; (2) pltf. had no cause of action against deft. either in detinue or in trover.—CLAYTON *v.* LE ROY, No. 176, *ante*; No. 480, *post*.

For full anns., see S. C. No. 176, *ante*.

470. —— Illegal pledge.]—Under M. S. Act, 1854 (c. 104), s. 50, a pledge by the master & sole owner of a ship of the certificate of registry, though for a good & sufficient consideration, is illegal & void; & an action will lie by the master & sole owner against the person detaining it, after a demand made upon him to return it for purposes of navigation.—WILEY *v.* CRAWFORD (1861), 1 B. & S. 265; 30 L. J. Q. B. 319; 4 L. T. 653; 25 J. P. 516; 7 Jur. N. S. 943; 9 W. R. 741; 1 Mar. L. C. 653; 121 E. R. 713, Ex. Ch.

471. Conversion—Where demand necessary.]—Pltf.'s goods & servants were on land which deft. recovered in ejectment. Deft., on entering under the writ of possession, turned pltf.'s servants off the land & would not let them remain to remove the goods. There being no subsequent demand or refusal:—*Held:* the jury might find that there was no conversion.

Deft. had a right to turn off pltf.'s servants. Pltf. certainly had a right to the goods; but he should have sent some one with proper authority to demand & receive them; if deft. had then refused to deliver them or to permit pltf. or his servants to remove them, there would have been clear conversion (LORD DENMAN, C.J.).—THOROGOOD *v.* ROBINSON (1845), 6 Q. B. 769; 14 L. J. Q. B. 87; 115 E. R. 290.

472. —— ——.]—A. agreed to build an organ for B. and to fix it in the parish church of C. for £768 to be paid by certain yearly instalments, the property in the organ remaining in A. until the instalments were paid. The instalments being unpaid, A. demanded the organ of the vicar of C. and the churchwardens. The vicar kept the church door locked and refused to allow the organ to be removed, claiming a lien upon it. The churchwardens did nothing:—*Held:* the vicar was liable in trover, and not the churchwardens.

To entitle pltf. to maintain this action, it must be shown that deft. refused to deliver up the organ after pltf.'s right to demand it had accrued (WILLES, J.).—WALKER *v.* CLYDE & WREN (1861), 10 C. B. N. S. 381; 142 E. R. 500.

Demand & refusal as evidence of conversion, *see* TROVER & DETINUE.

Demand & its effect in cases of recovery of land, *see* LANDLORD & TENANT; in cases of tender, *see* CONTRACT.

Demand of warrant, *see* PUBLIC AUTHORITIES & PUBLIC OFFICERS.

Effect of demand upon Statutes of Limitation, *see* LIMITATION OF ACTIONS.

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application, the ct. required facts to be stated on affidavit to satisfy the ct. that the party seeking to sue had made a demand of the sum alleged to be due before serving his notice of motion, in order to afford the commrs. an opportunity of either discharging their liability, or of resisting the demand.—CALDWELL *v.* BOARD OF WORKS, [1856] 8 Ir. Jur. (1 Ir. Jur. N. S.) 106 (E).—**IR.**

q. *Action on bond to secure costs.*]—On an application for liberty to sue upon the bond given to secure the costs of an appeal against a decree of the ct.:—*Held:* the party moving must show a demand from, & refusal of the costs by, the sureties named in the bond.—STORES *v.* CRYSLER (1858), 1 Ch. Ch. 14.—**CAN.**

r. *Action of account.*]—Pltf. declared that deft. was his tenant in common, & received in respect of rent the sum of £48 15*s.* more than came to his just share & proportion. On demurrer:—*Held:* the declaration was bad for want of an averment of request & refusal to render an account.—PURCELL *v.* HARDING (1866), 15 W. R. 128 (Ir.).—**IR.**

469 i. *Detinue.*]—An action of detinue does not lie against a bailee of goods until demand made by the bailor, after the determination of the bailment & before action brought.—CULLEN *v.* BARCLAY (1881), 10 L. R. Ir. 224.—**IR.**

s. *Replevin — Wrongful seizure of goods.*]—Pltf. brought replevin for goods seized under a warrant of distress for water rates, & the writ alleged an unjust detention, but contained no allegation of an unlawful taking. Deft. denied the detention, & justified under a distress for water rates, to which pltf. replied disputing the liability:—*Held:* as there was no complaint in the writ of an unlawful taking, & no proof of a demand of the goods by pltf., he could not recover in this form of action.—INGLIS *v.* GREENWOOD (1881), 14 N. S. R. (2 R. & G.) 2.—**CAN.**

Sect. 3.—Demand or Request: Sub-sect. 2, C. (a), (b), (c), & (d). Sect. 4.]

C. Sufficiency of Demand.

(a) What constitutes Demand.

473. Commencement of action—Not sufficient.] —Where a demand is necessary to give a right of action, commencement of the action is not of itself a sufficient demand (ABBOTT, C.J.).—SIMPSON *v.* ROUTH (1824), 2 B. & C. 682; 2 Dow. & Ry. M. C. 193; 4 Dow. & Ry. K. B. 181; 2 L. J. O. S. K. B. 163; 107 E. R. 536. S. C. No. 477, *post.*

Annotations:—**Folld.** Davis *v.* Cary (1850), 15 Q. B. 418. **Refd.** Charrinton *v.* Johnson (1845), 13 M. & W. 856; Ameer-oon-Nissa *v.* Moorad-oon-Nissa (1855), 6 Moo. Ind. App. 211. **Mentd.** Long *v.* Greville (1824), 4 Dow. & Ry. K. B. 632.

474. Demand of different thing—Not sufficient.] —Under a contract to deliver a share in a co. on demand, a demand of the price of the share is not a sufficient demand to deliver the share.—GREEN *v.* MURRAY, No. 454, *ante.*

475. Demand without production of authority—Not sufficient.]—In a case in which a demand before action was necessary, the demand relied on was made by a stranger, who, on being asked if he had authority from pltf. to make the demand, said he had a written authority in his pocket, but refused to produce it, saying there was no need for him to show it:—*Held:* the demand was not sufficient.—CHARRINTON (CHARINGTON, CHARRINGTON) *v.* JOHNSON (1845), 13 M. & W. 856; 14 L. J. Ex. 299; 4 L. T. O. S. 398; 9 J. P. 279; 153 E. R. 359.

(b) Evidence of Demand.

476. Letter referring to previous demand—Surrounding circumstances.]—To an action of trover for wine, commenced Oct., 1833, Stat. Limitations was pleaded. The wine, in pipe, had been deposited by C. for pltf. in deft.'s cellar by her leave. C. became bkpt., & his assignees claiming the wine, pltf.'s solrs. warned deft. by letter in Dec., 1826, not to give it up to any person unauthorised by them. Deft. kept the wine, & bottled part of it at, or soon after, the end of 1826, at which time it was becoming injured by remaining in the wood. Afterwards, but it did not appear when, she consumed part of the wine so bottled. In Nov., 1827, pltf.'s solrs. again wrote to deft. saying they were instructed to proceed at law against her, & referring to a demand of the wine, stated in the letter to have been made upon her by them in the preceding Mar., but offered to indemnify her against the claim of any other person if she would deliver the wine within a week; in default of which they stated that the proceedings would be commenced. The application was not noticed. A subsequent demand & refusal were proved. The jury having found for pltf.; on motion to enter a nonsuit:—*Held:* on this evidence the jury was not bound to conclude that there had been a demand & refusal more than six years before action brought.—PHILPOTT *v.* KELLEY (1835), 3 Ad. & El. 106; 4 Nev. & M. K. B. 611; 1 Har. & W. 134; 4 L. J. K. B. 139; 111 E. R. 353.

Annotations:—**Refd.** Parry *v.* Roberts (1835), 3 Ad. & El. 118. **Mentd.** Plant *v.* Cotterill (1860), 5 H. & N. 430.

477. Admission of demand—Plea of tender not.] —Where a demand is necessary to give a right of action, a plea of tender does not admit the demand.

If it had appeared that pltf. had demanded a settlement generally, & the tender had been made upon that, or if the tender had been made in pursuance of any meeting for the purpose of settling accounts, it might have superseded the necessity of any other demand (BAYLEY, J.).—SIMPSON *v.* ROUTH, No. 473, *ante.*

Annotations:—**Folld.** Long *v.* Greville (1824), 4 Dow. & Ry. K. B. 632. **Refd.** Charrinton *v.* Johnson (1845), 13 M. & W. 856.

For full anns., *see* S. C. No. 473, *ante.*

478. Presumption of demand—After verdict.]—34 Geo. 3, c. 85, enacted, by s. 7, that a moiety of the money to be allowed to a clerk should be paid by the proprietors for the time being of one portion of a navigation; &, by s. 9, that if any proprietor should neglect or refuse to pay the sums allowed & due to the clerk on demand made, etc., such sums might be recovered by action of debt in the name of such clerk against the proprietor, with double costs:—*Held:* as no right of action was given to the clerk against a proprietor except on demand & refusal to pay, it must be presumed after verdict on a count by the clerk against a proprietor without stating a demand, & *nil debet* pleaded, that a demand was proved. *Qu.:* whether such a count, not stating a demand, would have been good on special demurrer.—TIBBITS *v.* YORKE (1835), 4 Ad. & El. 134; 5 Nev. & M. K. B. 609; 5 L. J. K. B. 54; 111 E. R. 738.

(c) Time of Demand.

479. Demand too late—After time fixed for doing act demanded.]—An arbitrator awarded that a party should on or before Mar. 23 next execute a certain indenture. No demand of execution of the indenture was made on or before that day, but was made at subsequent times, when execution was refused:—*Held:* an attachment ought not to be granted. *Qu.:* whether in the circumstances an action would lie against the party for his refusal to execute the indenture.—DOE d. WILLIAMS *v.* HOWELL (1850), 5 Exch. 299; 19 L. J. Ex. 232; 15 L. T. O. S. 69; 155 E. R. 128.

For full anns., *see* ARBITRATION.

480. —— After issue of writ—Detinue—Conversion.]—CLAYTON *v.* LE ROY, Nos. 176, 469, *ante.*

Annotation:—**Refd.** Eastern Construction Co. *v.* National Trust Co. (1913), 83 L. J. P. C. 122, P. C.

481. Allowance of time for complying with demand.]—A covenant to pay money immediately upon demand must receive a reasonable construction so as to allow the debtor time to procure the

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PART IV. SECT. 3, SUB-SECT. 2.—C. (a).

t. *Between solicitor & client.*]—An intimation from a client to his attorney, who has collected money, that the client wishes it paid over, is a sufficient demand to support an action for money had & received. It is not necessary that the demand should be made at the attorney's residence or place of business, unless he objects on that ground.—GILBERT *v.* PALMER (1850), 6 N. B. R. (1 All.) 667.—**CAN.**

u. *Demand without authority.*]—A notice to an attorney demanding payment of money received by him in his professional capacity, signed by a person who was not shown to have had any authority to make the demand, & served by one who had no authority to receive the money, is not a sufficient demand to support an action for money had & received, though the person who signed the notice was afterwards the attorney in the suit.—ROBINSON *v.* PALMER (1851), 7 N. B. R. (2 All.) 223.—**CAN.**

PART IV. SECT. 3, SUB-SECT. 2.—C. (c).

v. *Reasonable time before action.*]—Pltf. deposited £100 with deft. as stakeholder, to abide the result of a race to be run on Nov. 5 between the horses of pltf. & K.; the race was not decided, & on Nov. 11 pltf. demanded the money, which deft. refused to pay, stating that K. claimed it as the winner of the race: an action for the money was brought on Nov. 22:—*Held:* a reasonable time had elapsed between the demand & the commencement of the suit, & deft. was liable.—KINNEY *v.* STUBBS (1858), 9 N. B. R. (4 All.) 126.—**CAN.**

w. ——.]—In an action on an instrument in the following form:—"$1,200. Edmundston, N.B., July 12, 1899. Received from the Rev. N. B. the sum of $1,200, for which I am responsible, with interest at the rate of 7 per cent. per annum, upon production of this receipt & after 3 months' notice. F. L.":—*Held:* pltf. could recover as for a promissory note, & a demand for immediate payment more than 3 months before the action was a sufficient notice.—LA FOREST *v.* BABINEAU (1906), 37 S. C. R. 521.—**CAN.**

money, and, if the demand is not made by the creditor himself, to inquire into the authority of the person making it to receive the money.—TOMS *v.* WILSON (1863), 4 B. & S. 455; 2 New Rep. 454; 32 L. J. Q. B. 382; 8 L. T. 799; 10 Jur. N. S. 201; 11 W. R. 952; 122 E. R. 529, Ex. Ch.

Annotations:—**Apprvd.** Moore *v.* Shelley (1883), 8 App. Cas. 286, P. C. **Refd.** Arkins *v.* Brunton (1866), 15 L. T. 84, Ir.; Wharlton *v.* Kirkwood (1873), 22 W. R. 93; Fitzgerald's Trustee *v.* Mellersh, [1892] 1 Ch. 385. **Mentd.** Johnson *v.* L. & Y. Ry. Co. (1878), 3 C. P. D. 499.

(*d*) *Parties.*

482. Demand sufficient—Plaintiff entitled at time of demand—Title acquired after wrongful delivery.]—In an action for wrongfully depriving pltfs. of goods it appeared the goods had been consigned to England from a colony. The bills of lading provided that the goods were to be delivered to the order of the consignor or his assigns. The consignor drew bills of exchange on the consignee against the consignment, & sold them with the bills of lading annexed, which he had indorsed in blank, to a colonial bank, who sent them to a bank in London with a hypothecation note empowering the London bank to sell the goods if the bills of exchange were not accepted or not paid at maturity. The goods arrived in England and were delivered to defts., a ry. co., to be delivered to the order of the shipowners. The consignee paid the freight & other shipping charges & accepted the bills of exchange, but before the bills became due he induced defts. wrongfully to deliver the goods to him without producing a delivery order from the shipowners. When the bills became due the consignee requested pltfs. to advance the money & take up the bills. They did so, & received the bills of exchange & the bills of lading from the London bank, & ultimately obtained delivery orders from the shipowners in exchange for the bills of lading. When they presented the delivery orders to defts. they found that the goods had been already given up to the consignee, & they thereupon commenced the present action:—*Held:* (1) pltfs. must be taken to be pledgees of the goods, & had a property sufficient to entitle them to maintain the action independently of Bills of Lading Act, 1855 (c. 111); (2) pltfs.' right of action was not affected by the fact that at the date of the wrongful delivery they had not acquired their title to the goods.—BRISTOL & WEST OF ENGLAND BANK *v.* MIDLAND RY. CO., [1891] 2 Q. B. 653; 61 L. J. Q. B. 115; 65 L. T. 234; 40 W. R. 148; 7 T. L. R. 627; 7 Asp. M. L. C. 69, C. A.

Annotation:—**Expld.** London Joint Stock Bank *v.* British Amsterdam Maritime Agency (1910), 104 L. T. 143.

483. Demand not sufficient—Goods in custodia legis.]—In an action of trover for a chaise it appeared B. had hired the chaise in question from pltf. & had placed it at livery with deft., & that whilst it was in deft.'s possession in London it was attached by process out of the Sheriff's Ct. Pltf. demanded the chaise, but deft., alleging that it had been attached, refused to deliver it:—*Held:* there was no evidence of a conversion by deft., the chaise being at the time of the demand in the custody of the law, & not of deft.—VERRALL *v.* ROBINSON (1835), 2 Cr. M. & R. 495; 4 Dowl. 242; 1 Gale, 244; 5 Tyr. 1069; 150 E. R. 213.

Annotations:—**Distd.** Catterall *v.* Kenyon (1842), 3 Q. B. 310. **Refd.** Towne *v.* Lewis (1849), 7 C. B. 608; Pillot *v.* Wilkinson (1868), 2 H. & C. 72; Levy *v.* Lovell (1880), 14 Ch. D. 234, C. A.

484. Persons jointly entitled—Demand to be made by all.]—If an award directs a document to be delivered to three persons they must all make demand at the same time or execute a power of attorney authorising one person to make it, so that deft. may know the demand to be made by their joint authority.—SYKES *v.* HAIGH (1835), 4 Dowl. 114; 2 Scott, 193.

Annotations:—**Distd.** Corbett d. Clymer *v.* Nicholls (1851), 2 L. M. & P. 87. **Consd.** Baily *v.* Curling (1851), 20 L. J. Q. B. 235.

485. Persons jointly liable—Demand on some sufficient.]—In an action by A. against C. and D., as overseers, to recover a penalty under Disorderly Houses Act, 1751 (c. 36), it appeared A. & B. had given the requisite notices with respect to a disorderly house kept by E., & that E. was prosecuted & pleaded guilty, whilst F. & G. were overseers, & that after C. & D. came into office E. was sentenced. A. thereupon demanded in writing the penalty from C. & D., who refused to pay it:—*Held:* (1) the demand was properly made on C. & D., & not on their predecessors F. & G.; (2) it was not necessary to make any demand on the churchwardens as well as on C. & D.; (3) it was not necessary for the demand to be in writing; (4) no objection having been taken to the form of the demand either at the trial or on obtaining a rule *nisi* to enter a nonsuit, it was too late to do so upon the argument in support of such rule.—BURGESS *v.* BOETEFEUR & BROWN (1844), 7 Man. & G. 481; 8 Scott, N. R. 194; 13 L. J. M. C. 122; 8 Jur. 621; 135 E. R. 193.

SECT. 4.—**NOTICE OF ACTION.**

The Public Authorities Protection Act, 1893 (c. 61), s. 2 (*c*), repeals so much of any Public General Act as enacts that in any proceeding to which the Act applies notice of action is to be given. The earlier cases dealing with notice of action under Public General Acts are therefore omitted from this title, but will be collected, so far as they are still of importance, under PUBLIC AUTHORITIES & PUBLIC OFFICERS. Cases under Private Acts which are not affected by the above Act will be dealt with under their appropriate title.

Part V.—Suspension of Right of Action.

SECT. 1.—**BY AGREEMENT TO REFER TO ARBITRATION.**

See ARBITRATION.

SECT. 2.—**BY RECEIPT OF A NEGOTIABLE INSTRUMENT.**

See BILLS OF EXCHANGE, PROMISSORY NOTES & NEGOTIABLE INSTRUMENTS.

SECT. 3.—**BY DISTRESS.**

486. Distress damage feasant.]—Pltf. distrained a beast *damage feasant*, & put it in the common pound, from whence it escaped without his assent, he not being satisfied for the damage; then pltf. brought trespass for breaking his close, & treading down his grass, etc.:—*Held:* the action was not maintainable, unless pltf. showed that the escape was without his default.—VASPER (VASPOR) *v.* EDDOWS (EDWARDS, EDDOWES) (1700–1702), Holt, K. B. 256; 1 Ld. Raym. 719; 12 Mod. Rep. 658; 1 Salk. 248; 90 E. R. 1040; *sub nom.* JASPER *v.* EADOWES (1703), 11 Mod. Rep. 21.

Annotations:—**Distd.** Lees *v.* Wright (1822), 1 Dow. & Ry. K. B. 391. **Apld.** Williams *v.* Price (1832), 3 B. & Ad. 695; Lehain *v.* Philpott (1875), L. R. 10 Exch. 242. **Mentd.** R. *v.* Cotton (1751), Park, 112; Knowles *v.* Blake (1829), 5 Bing. 499.

Sect. 3.—By Distress. Sect. 4: Sub-sect. 1.]

487. ——.]—Deft.'s pony got into pltf.'s field & kicked a filly. Pltf. distrained the pony *damage feasant.* Deft. refused to pay the consideration demanded, & pltf., whilst retaining the pony, brought an action for damages in the cty. ct.:—*Held:* pltf. had a valid distress in respect of the damage to his filly, but his right to recover damages by action was suspended so long as the distress continued. He could not retain the distress & bring an action as well.—BODEN *v.* ROSCOE, [1894] 1 Q. B. 608; 58 J. P. 368; 42 W. R. 445; *sub nom.* ROSCOE *v.* BODEN (RODEN) (1894), 63 L. J. Q. B. 767; 70 L. T. 450; 10 T. L. R. 317; 38 Sol. Jo. 291; 10 R. 173.

488. Distress for rent.]—Where goods are taken under a distress for rent, the landlord cannot, so long as he holds the goods, sue the tenant in debt (BAYLEY & HOLROYD, JJ.).—EDWARDS *v.* KELLY (1817), 6 M. & S. 204; 105 E. R. 1219.

Annotations:—**Apld.** Lehain *v.* Philpott (1875), L. R. 10 Exch. 242. **Mentd.** Thomas *v.* Williams (1830), 10 B. & C. 664; Rounce *v.* Woodyard (1846), 8 L. T. O. S. 186; Fitzgerald *v.* Dressler (1859), 7 C. B. N. S. 374; Harburg Indiarubber Comb Co. *v.* Martin, [1902] 1 K. B. 778.

489. ——.]—A landlord who elects to enforce his remedy by distress against a tenant in arrear with rent, cannot, so long as he detains the distress without sale, maintain an action against the tenant for the same rent, even although the goods distrained are not of sufficient value to satisfy the amount distrained for.—LEHAIN *v.* PHILPOTT (1875), L. R. 10 Exch. 242; 44 L. J. Ex. 225; 33 L. T. 98; 39 J. P. 584; 23 W. R. 876.

Annotation:—**Refd.** Philpott *v.* Lehain (1877), 35 L. T. 855.

See, further, DISTRESS.

SECT. 4.—ACTIONS IN RESPECT OF FELONIOUS TORTS.

SUB-SECT. 1.—IN GENERAL.

490. Explanation & extent of rule.]—Three different views have been held at different times & by different authorities, namely: (1) the private wrong & injury has been entirely merged & drowned in the public wrong, & no cause of action ever arose or could arise; (2) although there was no actual merger, it was a condition precedent to the accruing of the cause of action that the public right should have been vindicated by the prosecution of the felon; (3) there is neither a merger of the civil right, nor is it a strict condition of precedent to such right, that there shall have been a prosecution of the felon; but there is a duty imposed upon the injured person not to resort to the prosecution of his private suit to the neglect & exclusion of the vindication of the public law. This last view is the correct one.—MIDLAND INSCE. *v.* SMITH, No. 540, *post.*

Annotation:—**Refd.** Admiralty Comrs. *v.* S.S. Amerika, [1917] A. C. 38, H. L.
For full anns., *see* S. C. No. 540, *post.*

491. —— **Civil right merged in felony.**]—If a man beats A.'s servant so that he dies, A. has no action against the other for the battery & loss of service, because, the servant dying of the extremity of the battery, it is now become an offence to the Crown, being converted into felony, & that drowns the particular offence & private wrong offered to A. before, & his action is thereby lost (TANFIELD, J.).—HIGGINS *v.* BUTCHER (1606), Yelv. 89; 80 E. R. 61.

Annotations:—**Folld.** Cooper *v.* Witham (1668), 1 Sid. 375. **N.F.** Osborn *v.* Gillett (1873), L. R. 8 Exch. 88. **Expld. & Dbtd.** Admiralty Comrs. *v.* S.S. Amerika, [1917] A. C. 38, H. L. **Refd.** Wells *v.* Abrahams (1872), L. R. 7 Q. B. 554; Midland Insce. *v.* Smith (1881), 6 Q. B. D. 561; Jackson *v.* Watson, [1909] 2 K. B. 193, C. A.

492. —— —— **No action even after conviction.**]—Deft., on the prosecution of pltf., had been convicted of bigamy. Subsequently pltf. brought an action against deft. for inducing her to marry him, he being in fact married to another woman at the time, & recovered £200 damages. In arrest of judgment it was objected that the charge amounted to felony & that the action was merged in the felony:—*Held:* entry of judgment upon the verdict must be stayed till further order.—PROCTOR *v.* BURY (1742), Barnes, 450; 94 E. R. 999.

493. —— —— **Limited to trespass or tort.**]—The law, proceeding on principles of public policy, has wisely said that, where a case amounts to felony, you shall not recover against the felon in a civil action, but that rule does not appear by any printed authority to have been extended beyond actions of trespass or tort, in which it is said that the trespass is merged in the felony. Whether this rule extends to any case after the offender is brought to justice or whether at any time it may be resorted to in an action between persons guilty of no crime are questions upon which I have formed no opinion (BULLER, J.).—MASTER *v.* MILLER, Nos. 550, 631, *post.*

Annotation:—**Consd.** *Re* Jermyn, *Ex p.* Elliott (1837), 2 Deac. 179.
For full anns., *see* S. C. No. 631, *post.*

494. —— ——.]—Where a felony has been committed the law will not permit the person injured to proceed against the offender in a civil suit, but for the sake of the public he must seek his remedy by a criminal prosecution, & the civil action shall merge in the felony.—GIBSON & JOHNSON *v.* MINET & FECTOR, No. 525, *post.*

Annotations:—**Refd.** Stone *v.* Marsh (1827), 6 B. & C. 551; White *v.* Spettigue (1845), 13 M. & W. 603; Ashpitel *v.* Bryan (1864), 5 B. & S. 723.
For full anns., *see* S. C. No. 525, *post.*

495. —— —— **Qualifications on rule.**]—The maxim that "the civil right is always merged in the felony" is not universally correct, & must be taken with qualification. The object of the rule is to cause public justice to have the prior claim to satisfaction; & whenever public justice has been satisfied, the private right becomes restored.—STONE *v.* MARSH, Nos. 501, 518, 534, *post.*

Annotation:—**Refd.** Admiralty Comrs. *v.* S.S. Amerika, [1917] A. C. 38, H. L.
For full anns., *see* S. C. No. 534, *post.*

496. —— **Prosecution condition precedent to action.**]—In an action of trespass against deft. for breaking into pltf.'s house & taking £3,000 in money deft. pleaded that pltf. procured him to be indicted & convicted for having burglariously broken into the house & feloniously taken same sum which was the said trespass. Pltf. demurred:—*Held:* the demurrer was good on the ground of a defect in pleading, since deft. had not pleaded precisely that he had been actually indicted & convicted, but only that pltf. procured him to be indicted & convicted.

Although deft. had been convicted of feloniously taking the goods, nevertheless the owner could have an action of trespass & recover damages; if a man took the goods of A. he could sue him civilly in an action of trespass, or by way of an appeal of felony, criminally, but if he brought an appeal of felony &

PART V. SECT. 4, SUB-SECT. 1.

491 i. *Explanation & extent of rule—Civil right merged in felony—Application to statutory civil remedy.*]—*Qu.*: whether an action under 23 & 24 Geo. 3, c. 20 (Ir.), against inhabitants of a parish, for unlawfully, riotously, & tumultuously assembling, & by force seizing & detaining meal, the property of pltf., proceeding from one market to another, can be maintained under the Act, when the wrong complained of amounts to a common law felony.—DUDGEON *v.* BURKE, [1847] 10 I. L. R. 10.—IR.

was nonsuited, he could not afterwards bring an action of trespass (DODRIDGE & WHITLOCK, JJ.).

If the goods were taken *animo furandi* the only proper remedy of the owner was by appeal of felony or by indictment; although, if he brought an action of trespass, deft. could not plead that he had stolen them or taken them *animo furandi*, for he cannot aver his own intention (JONES, J.).—MARKHAM *v.* COBB (1625), Lat. 144; W. Jo. 147; Noy, 82; 82 E. R. 316. S. C. No. 509, *post.*

Annotations:—**Consd.** Wells *v.* Abrahams (1872), L. R. 7 Q. B. 554; Midland Insce. *v.* Smith (1881), 6 Q. B. D. 561. **Refd.** Anon. (1682), Skin. 119; Stone *v.* Marsh (1827), 6 B. & C. 551; Appleby *v.* Franklin (1885), 17 Q. B. D. 93.

497. —— ——.]—Where a tort is also a felony, action lies on the tort after conviction for the felony; but before conviction the action would not lie.—DAWKES *v.* COVENEIGH (1652), Sty. 346; 82 E. R. 765.

Annotations:—**Folld.** Marsh *v.* Keating (1834), 1 Bing. N. C. 198. **Apprvd.** Wells *v.* Abrahams (1872), L. R. 7 Q. B. 554. **Consd.** Midland Insce. *v.* Smith (1881), 6 Q. B. D. 561; Admiralty Comrs. *v.* S.S. Amerika, [1917] A. C. 38, H. L.

498. —— —— **Rule applicable in bankruptcy.**]—The ct. will not permit a proof to be made for a debt which has been incurred through a felonious act committed by the bkpt., unless the creditor has first prosecuted bkpt. in a criminal ct., although the party had entered up judgment & sued out execution upon the bond given to secure the debt.—*Re* JERMYN, *Ex p.* ELLIOTT (1837), 2 Deac. 179; 3 Mont. & A. 110; *sub nom. Re* ELLIOTT, *Ex p.* JERMYN, 6 L. J. Bcy. 41, C. of R.

Annotations:—**Folld.** *Re* M'Master (1858), 32 L. T. O. S. 288, Ir. **Distd.** *Re* Shepherd, *Ex p.* Ball (1879), 10 Ch. D. 667, C. A. **Refd.** The Princess Royal (1870), L. R. 3 A. & E. 41. **Mentd.** *Re* Jermyn, *Ex p.* Elliott (1838), 3 Deac. 343.

499. —— **Duty to prosecute first.**]—Where a criminal, & consequently an injurious act towards the public has been committed, which is also a civil injury to a person, that person is not to be permitted to seek redress for the civil injury to the prejudice of public justice, & to waive the felony & go for the conversion (ROLFE, B.).—WHITE *v.* SPETTIGUE, No. 537, *post.*

Annotations:—**Folld.** Lee *v.* Bayes (1856), 18 C. B. 599. **Consd.** Wells *v.* Abrahams (1872), L. R. 7 Q. B. 554. No doubt there are many dicta of high authority to the effect that when there has been a private injury to a civil right, which may also be the subject of criminal prosecution for felony, it is the duty of the person injured to prosecute for the criminal offence, before he can pursue his remedy by action for the private injury. Although there are many dicta to that effect I cannot find any case where that rule of law has been applied before the cases of *White* v. *Spettigue* & *Gimson* v. *Woodfull* (BLACKBURN, J.). **Folld.** Osborn *v.* Gillett (1873), L. R. 8 Exch. 88. **Consd.** Midland Insce. *v.* Smith (1881), 6 Q. B. D. 561; Smith *v.* Selwyn, [1914] 3 K. B. 98, C. A. **Refd.** Admiralty Comrs. *v.* S.S. Amerika, [1917] A. C. 38, H. L.
For full anns., *see* S. C. No. 537, *post.*

500. —— ——.]—If a person has good reason to believe his goods have been stolen, he cannot maintain trover against the person who bought them of the supposed thief without he has done everything in his power to bring the thief to justice.

You must do your duty to the public before you seek a benefit to yourself (BEST, C.J.).—GIMSON *v.* WOODFULL (1825), 2 C. & P. 41.

Annotations:—**Distd.** Peer *v.* Humphrey (1835), 2 Ad. & El. 495. **Overd.** White *v.* Spettigue (1845), 13 M. & W. 603. **Consd.** Midland Insce. *v.* Smith (1881), 6 Q. B. D. 561. **Refd.** *Re* Hertford (1842), 1 Hare, 584; Lee *v.* Bayes (1856), 18 C. B. 599; Wells *v.* Abrahams (1872), L. R. 7 Q. B. 554; Admiralty Comrs. *v.* S.S. Amerika, [1917] A. C. 38, H. L.

501. —— ——.]—STONE *v.* MARSH, No. 495, *ante*, Nos. 518, 534, *post.*

For full anns., *see* S. C. No. 534, *post.*

502. —— ——.]—WELLS *v.* ABRAHAMS, Nos. 506, 510, 515, *post.*

For full anns., *see* S. C. No. 515, *post.*

503. —— ——.]—Whatever may have been thought in the early part of the seventeenth century, or even in Lord Ellenborough's day, it is now quite clear that the rule of public policy which, in cases of felony, admittedly requires the person aggrieved to institute criminal proceedings before pursuing any civil remedy against the felon, only suspends & does not require the destruction of the civil remedy. Before any question of public policy can arise it has first to be ascertained whether civil proceedings will lie at all. Most felonies involve a wrong less than a felony, & for such a wrong civil proceedings will lie when once the demands of public policy have been satisfied. But there may be felonies where the only wrong is the felony itself, & it may well be that the felony cannot be made the subject of complaint in civil proceedings (LORD PARKER).—ADMLTY. COMRS. *v.* S.S. AMERIKA, No. 266, *ante.*

For full anns., *see* S. C. No. 266, *ante.*

504. —— —— **Qualifications on rule.**]—It is a variance with the interests of society, & contrary to the principles of public policy, to allow a party, injured by any felonious act, to seek civil redress until he has prosecuted the offender. But the principle must not be extended beyond what public policy requires; & its application depends upon the circumstances of the particular case (LORD LYNDHURST, C.). — *Re* MARSH, *Ex p.* BOLLAND (1828), Mont. & M. 315; 7 L. J. O. S. Ch. 10; (1831), 1 Mont. & A. 570. S. C. Nos. 517, 536, *post.*

Annotations:—**Apprvd.** *Re* Jermyn, *Ex p.* Elliott (1837), 3 Mont. & A. 110. **Mentd.** *Re* Redpath, *Ex p.* G. N. Ry. Co. (1857), 30 L. T. O. S. 211.

505. —— —— —— **Prosecution by third person.**]—The civil remedies for suing the felon, which belong to the person whose property has been feloniously taken, are suspended, after discovery of the commission of the offence, until the conviction of the felon in order that the dignity of the law may be vindicated by the prosecution & conviction of the felon. But it is indifferent by whom the felon is prosecuted.—CHOWNE *v.* BAYLIS (1862), 31 Beav. 351; 31 L. J. Ch. 757; 6 L. T. 739; 26 J. P. 579; 8 Jur. N. S. 1028; 11 W. R. 5; 54 E. R. 1174. S. C. No. 522, *post.*

Annotation:—**Refd.** Clegg *v.* Rees (1871), 25 L. T. 261.

—— —— —— **Conviction on other charges.**]—*See* Nos. 517—521, *post.*

—— —— —— **Prosecution impossible.**]—*See* Nos. 526—528, *post.*

—— —— —— **Wrong done to third person.**]—*See* Nos. 531—541, *post.*

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498 i. —— *Prosecution condition precedent to action—Rule applicable in bankruptcy.*]—A proof of debt in bkpcy. cannot be rejected on the ground that the debt arose in circumstances which would support a charge of felony, & that the creditor has not first prosecuted bkpt.; but application may be made in the name of the Crown to stay the payment of a dividend.—*Re* WATERS, *Ex p.* CITY ADVANCE CO. (1887), L. R. 5 S. C. 449.—**N.Z.**

504 i. —— *Duty to prosecute first—Qualifications on rule—Local operation of rule.*]—To an action on promissory notes the defence was that they were given to procure the withdrawal of a charge of felony which pltf. had made against deft. in Utah in the United States:—*Held:* pltf. would not have been bound first to take criminal proceedings for the felony before suing in Canada on the notes, the suspension of the civil remedy being a matter of purely local policy.—TOPONCE *v.* MARTIN (1876), 38 U. C. R. 411.—**CAN.**

504 ii. —— —— —— *Application to India.*]—It is doubtful whether the doctrine that a person injured by a felonious act cannot seek civil redress without prosecuting the felon in the criminal cts. applies to India.—TALUK BOARD PRESIDENT *v.* BURDE LAKSHMINARAYANA KAMPTHI, No. 539 ii. *post.*—**IND.**

Sect. 4.—Actions in respect of felonious torts: Subsects. 2 & 3, A. & B.]

SUB-SECT. 2.—HOW FAR RULE ENFORCEABLE.

506. Method of enforcement formerly doubtful.]—Though there are many *dicta* of high authority to the effect that, when there has been a private injury to a civil right which may also be the subject of criminal prosecution for felony, it is the duty of the person injured to prosecute for the criminal offence before he can bring action for the private injury, it does not appear by what means the duty is to be enforced.—WELLS *v.* ABRAHAMS, No. 502, *ante;* Nos. 510, 515, *post.*

Annotations:—**Consd.** Midland Insce. *v.* Smith (1881), 6 Q. B. D. 561. **Distd.** Appleby *v.* Franklin (1885), 17 Q. B. D. 93. **Consd.** S. *v.* S. (1889), 16 Cox, C. C. 566, Ir. **Refd.** Osborne *v.* Gillett (1873), 42 L. J. Ex. 53; *Re* Shepherd, *Ex p.* Ball (1879), 10 Ch. D. 667, C. A.; Whitmore *v.* Farley (1880), 43 L. T. 192; Roope *v.* D'Avigdor (1883), 10 Q. B. D. 412; Smith *v.* Selwyn, [1914] 3 K. B. 98, C. A.; Admiralty Comrs. *v.* S.S. Amerika, [1917] A. C. 38, H. L. For full anns., *see* S. C. No. 515, *post.*

507. ——.]—*Qu.:* whether the rule in fact exists, or whether, assuming it does exist, there is any practical method of enforcing it.—*Re* SHEPHERD, *Ex p.* BALL, Nos. 521, 526, 528, 533, *post.*

Annotations:—**Consd.** Midland Insce. *v.* Smith (1881), 6 Q. B. D. 561; Roope *v.* D'Avigdor (1883), 10 Q. B. D. 412. **Refd.** *Re* Guerrier, *Ex p.* Leslie (1882), 20 Ch. D. 131, C. A.; Appleby *v.* Franklin (1885), 17 Q. B. D. 93. For full anns., *see* S. C. No. 533, *post.*

508. Objection not to be raised by defendant.]—Trespass will not lie for taking money, if it appear, either in the evidence or in the pleadings on the part of pltf., to be felony, except the party had been prosecuted for the crime, but deft. cannot show the felony in bar of the trespass.—LUTTERELL *v.* REYNELL (1670), 1 Mod. Rep. 282; 86 E. R. 887.

Annotations:—**N.F.** R. *v.* Parker (1783), 3 Doug. K. B. 242. **Refd.** Wells *v.* Abrahams (1872), L. R. 7 Q. B. 554; Midland Insce. *v.* Smith (1881), 6 Q. B. D. 561. **Mentd.** Admiralty Comrs. *v.* S.S. Amerika, [1917] A. C. 38, H. L.

509. ——.]—MARKHAM *v.* COBB, No. 496, *ante.*

For full anns., *see* S. C. No. 496, *ante.*

510. ——.]—WELLS *v.* ABRAHAMS, Nos. 502, 506, *ante;* No. 515, *post.*

For full anns., *see* S. C. No. 515, *post.*

511. —— **No demurrer.**]—A statement of claim alleging deft.'s felony as the cause of action is not demurrable on the ground that it fails to allege that deft. has been prosecuted for the felony, or to state circumstances showing such prosecution to be impossible.—ROOPE *v.* D'AVIGDOR (1883), 10 Q. B. D. 412; 48 L. T. 761; 47 J. P. 248.

Annotation:—**Apprvd.** Appleby *v.* Franklin (1885), 17 Q. B. D. 93.

512. Duty of judge—To nonsuit.]—Where in a civil action it appears that the wrong complained of involves a charge of felony, the proper course is not to proceed with the trial, but to prosecute for the criminal offence.

In an action for an assault the evidence proved that deft. had committed a rape on pltf. The judge at the trial then considered the ground of complaint involved a charge of felony & nonsuited pltf.:—*Held:* the nonsuit was rightly directed.—WELLOCK *v.* CONSTANTINE (1863), 2 H. & C. 146; 2 F. & F. 791; 32 L. J. Ex. 285; 7 L. T. 751; 9 Jur. N. S. 232; 159 E. R. 61.

Annotations:—**N.F.** Wells *v.* Abrahams (1872), L. R. 7 Q. B. 554; *Re* Shepherd, *Ex p.* Ball (1879), 10 Ch. D. 667, C. A. **Consd.** Midland Insce. *v.* Smith (1881), 6 Q. B. D. 561. **N.F.** *Re* Guerrier, *Ex p.* Leslie (1882), 20 Ch. D. 131, C. A. **Distd.** Appleby *v.* Franklin (1885), 17 Q. B. D. 93. **N.F.** S. *v.* S. (1889), 16 Cox, C. C. 566, Ir. **Consd.** Admiralty Comrs. *v.* S.S. Amerika, [1917] A. C. 38, H. L. **Refd.** Osborne *v.* Gillett (1873), 42 L. J. Ex. 53.

513. —— —— **Question for jury.**]—In an action for money had & received, if it appears deft. received the money from pltf. to carry to a bank, & that, instead of so doing, deft. kept it, the judge will leave it to the jury to say whether deft. received it with intent to steal it & then feloniously converted it; & if the jury finds this in the affirmative, the judge will direct a verdict to be entered for deft. & that deft. shall be tried for the felony on this finding.—PROSSER *v.* ROWE (1826), 2 C. & P. 421.

514. —— **To strike out allegation.**]—*Semble:* where an action is brought by a person injured by a felonious act against the person committing it, without having previously prosecuted him, the ct. will strike out the allegation of felony from the statement of claim.—APPLEBY *v.* FRANKLIN, No. 532, *post.*

Annotation:—**Refd.** Smith *v.* Selwyn, [1914] 3 K. B. 98, C. A.

515. —— **To proceed—Intervention of Attorney-General.**]—Where at a trial for a civil injury pltf. proves facts which may amount to a felony, it is not the duty of the judge to nonsuit pltf. or to direct the jury that if they find a felony has been committed by deft. they must find against pltf. It does not lie in the mouth of deft. after the trial, while denying the felony, to question the judge's ruling on the ground that he should have nonsuited or so directed the jury. *Semble:* in such a case an application to the summary jurisdiction of the ct. to stay the action might be made by the A.-G. *Qu.:* whether by deft. himself.—WELLS *v.* ABRAHAMS (1872), L. R. 7 Q. B. 554; 41 L. J. Q. B. 306; 26 L. T. 433; 36 J. P. 710; 20 W. R. 659; 36 J. P. Jo. 260. S. C. Nos. 502, 506, 510, *ante.*

Annotations:—**Consd.** Midland Insce. *v.* Smith (1881), 6 Q. B. D. 561. **Distd.** Appleby *v.* Franklin (1885), 17 Q. B. D. 93; S. *v.* S. (1889), 16 Cox, C. C. 566, Ir. **Refd.** Osborne *v.* Gillett (1873), 42 L. J. Ex. 53; *Re* Shepherd, *Ex p.* Ball (1879), 10 Ch. D. 667, C. A.; Whitmore *v.* Farley (1880), 43 L. T. 192; Roope *v.* D'Avigdor (1883), 10 Q. B. D. 412. **Mentd.** Wightwick *v.* Pope, [1902] 2 K. B. 99, C. A.; Smith *v.* Selwyn, [1914] 3 K. B. 98, C. A.; Admiralty Comrs. *v.* S.S. Amerika, [1917] A. C. 38, H. L.

PART V. SECT. 4, SUB-SECT. 2.

512 i. *Duty of judge—To nonsuit.*]—In an action for seduction, pltf.'s daughter having sworn that the intercourse between her & deft. was accomplished by force, deft.'s counsel called for a nonsuit, the evidence establishing a rape, & the civil injury being merged in the felony. The judge refused to nonsuit, & told the jury that, even though they should believe that the only intercourse was accomplished by force, yet pltf. was not thereby precluded from maintaining her action. Pltf. having obtained a verdict, upon motion to set it aside:—*Held:* (1) in order to defeat the action, the evidence should be such as to satisfy the judge that deft. might properly be tried & convicted of a felony; (2) the evidence in the case being insufficient, the judge was right not to nonsuit; (3) the direction to the jury was wrong, & the verdict should be set aside, for the question whether there was sufficient evidence of a rape was a question for the judge, who, if he thought there was, should have nonsuited pltf.—HAYES *v.* SMITH (1825), Sm. & Bat. 378.—**IR.**

512 ii. —— ——.]—In an action for debauching pltf.'s daughter & servant, it appearing that the injury was committed under circumstances of violence, which made it a proper case for a prosecution for a rape, & the judge having directed the jury to find for deft., in case they were satisfied that a rape had been committed:—*Held:* this was not the proper course; he should have nonsuited pltf.—QUINLAN *v.* BARBER (1825), Batty, 47.—**IR.**

512 iii. —— ——.]—In an action for seducing pltf.'s daughter, when the evidence was such as to satisfy the judge that a rape had been committed, pltf. was nonsuited:—*Held:* the question as to the sufficiency of evidence of a rape in such case was one for the judge, & should not be left to the jury.—GORDON *v.* FLUSKEY (1841), Arm. Mac. & Og. 155.—**IR.**

512 iv. —— ——.]—In an action against a carrier for non-delivery of a package of money, pltfs.' agent proved that within a week after delivering the parcel to deft. he found that deft. had absconded; that he then sued out an attachment against deft. as an absconding debtor; & that, as he believed, deft. was at the time of the trial in gaol, charged with stealing the money:—*Held:* the evidence sufficiently showed a felony, as deft. upon it might, as a bailee, be properly convicted of larceny under C. S. C. c. 92, s. 55, & a nonsuit must be ordered.—LIVINGSTONE *v.* MASSEY (1863), 23 U. C. R. 156.—**CAN.**

516. —— To stay action.]—An action for damages based upon a felonious act on the part of deft. committed against pltf. is not maintainable so long as deft. has not been prosecuted or a reasonable excuse shown for his not having been prosecuted, & the proper course for the ct. to adopt in such a case is to stay further proceedings in the action until deft. has been prosecuted.—SMITH *v.* SELWYN, [1914] 3 K. B. 98 ; 83 L. J. K. B. 1339 ; 111 L. T. 195, C. A.

Annotation :—**Consd.** Admiralty Comrs. *v.* S.S. Amerika, [1917] A. C. 38, H. L.

SUB-SECT. 3.—WHERE RULE INAPPLICABLE.

A. After Conviction.

517. Conviction on other charges.]—F., a partner in a bank, by means of a forged power of attorney, sold certain stock, the proceeds of which were received by the bank & ultimately misappropriated by F., who was afterwards executed for other forgeries. In the bkpcy. of the bank :—*Held :* the owners of the stock were entitled to prove against the joint estate.

In the circumstances it became unnecessary for the parties injured in this case to institute any prosecution. There was no ground or principle of public policy that required it, & it was by no means clear that they had the means of effectually instituting & carrying on a prosecution (LORD LYNDHURST, C.).—*Re* MARSH, *Ex p.* BOLLAND, No. 504, *ante ;* No. 536, *post.*

Annotations :—**Apprvd.** *Re* Jermyn, *Ex p.* Elliott (1837), 3 Mont. & A. 110. **Refd.** *Re* Redpath, *Ex p.* G. N. Ry. Co. (1857), 30 L. T. O. S. 211.

518. ——.]—STONE *v.* MARSH, Nos. 495, 501, *ante ;* No. 534, *post.*

For full anns., *see* S. C. No. 534, *post.*

519. ——.]—MARSH *v.* KEATING, No. 535, *post.*

For full anns. *see* S. C., No. 535, *post.*

520. ——.]—Where a debt arises out of a felonious act of the debtor the civil remedy is suspended only until public justice is satisfied.

Where pltf., who claimed to be a creditor for the amount paid by him on a forged cheque, had commenced a prosecution upon which a true bill was found & prisoner was arraigned, but prosecutor had abstained from bringing on the trial by a direction of the judge, who thought the ends of justice satisfied by sentencing prisoner for another forgery to which he had pleaded guilty :— *Held :* (1) pltf. had done enough to satisfy the rule of law ; (2) his civil remedy revived.—DUDLEY & WEST BROMWICH BANKING CO. *v.* SPITTLE (1860), 1 John. & H. 14 ; 2 L. T. 47 ; 8 W. R. 351 ; 70 E. R. 642.

Annotations :—**Folld.** Chowne *v.* Baylis (1862), 31 Beav. 351. **Apprvd.** Bourke *v.* Mealy (1879), 14 Cox, C. C. 329, Ir. **Refd.** *Re* Shepherd, *Ex p.* Ball (1879), 10 Ch. D. 667, C. A.

521. ——.]—*Re* SHEPHERD, *Ex p.* BALL, No. 507, *ante ;* Nos. 526, 528, 533, *post.*

For full anns., *see* S. C. No. 533, *post.*

522. Debt arising out of felony—Good consideration for securities.]—A clerk, having robbed his employers of money, gave them, on discovery of his frauds & before prosecution, an equitable security on policies & lands for the amount. He was afterwards prosecuted & convicted :—*Held :* (1) the debt was a good consideration for the securities ; (2) the securities were valid.—CHOWNE *v.* BAYLIS, No. 505, *ante.*

For full anns., *see* S. C. No. 505, *ante.*

B. Where Conviction is not essential.

523. Acquittal.]—After an acquittal of deft. upon an indictment for a felonious assault upon pltf. by stabbing him pltf. may maintain trespass to recover damages for the civil injury, if he is not shown to have colluded in procuring such acquittal. —CROSBY *v.* LENG (1810), 12 East, 409 ; 104 E. R. 160.

Annotations :—**Apld.** Keating *v.* Marsh, Marsh *v.* Keating (1834), 1 Mont. & A. 582, 606, H. L. **Consd.** *Re* Jermyn, *Ex p.* Elliott (1837), 2 Deac. 179 ; Midland Insce. *v.* Smith (1881), 6 Q. B. D. 561. **Refd.** Scott *v.* Seymour (1862), 6 L. T. 607 ; Admiralty Comrs. *v.* S.S. Amerika, [1917] A. C. 38, H. L. **Mentd.** *Re* Marsh, *Ex p.* Bolland (1828), Mont. & M. 315.

524. —— On technical grounds.]—Bkpt., an actuary of a savings bank, had embezzled various sums of money to a large amount & made false entries & alterations in the cash-books to conceal the deficiency in his accounts, but the precise sums embezzled, or on what day they were taken, the trustees of the bank were unable to point out. The comrs. refused to allow the trustees to prove against bkpt.'s estate until they prosecuted him for embezzlement, upon which they preferred five several indictments against him, but failed in convicting him through their inability to prove an embezzlement of any specific sum according to the requisites of the law. Upon a second application of the trustees to prove the comrs. refused to admit their proof for any sums which were not included in the indictments :—*Held :* the trustees, having *bonâ fide* prosecuted the indictments against bkpt. & used their best endeavours to convict him of the felony, were entitled to prove for the whole amount of the sum he had embezzled.—*Re* JONES, *Ex p.* JONES (1833), 3 Deac. & Ch. 525 ; 2 Mont. & A. 193 ; 3 L. J. Bcy. 11.

Annotations :—**Folld.** *Re* M'Master (1858), 32 L. T. O. S. 288.

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516 i. —— *To stay action—Felonious assault.*]—Pltf.'s action was for damages for assault by deft. Pltf. also caused an information & complaint to be laid charging deft. with having committed a felony. The same assault was the basis of the action & of the charge of felony :—*Held :* the policy of the law required that before the party injured by any felonious act could seek civil redress for it the matter should be heard & disposed of before the criminal tribunal in order that the justice of the county might be first satisfied in respect to the public offence ; & the judge should stop a civil action as not yet ripe for trial until the question of the felony should be tried & determined.—TAYLOR *v.* MCCULLOUGH (1885), 8 O. R. 309.—**CAN.**

516 ii. —— —— ——.]—In an action by an infant, suing by her next friend the statement of claim averred that deft. assaulted & beat pltf., an infant, under 16 years, & had carnal knowledge of her. Deft. moved to stay proceedings on the ground that the only cause of action disclosed by the statement of claim was a felony, for which deft. had not been prosecuted :—*Held :* (1) the statement of claim did not unequivocally or necessarily charge a felony ; (2) the ct. in the exercise of its discretion ought not to stay proceedings. *Smith* v. *Selwyn*, [1914] 3 K. B. 98, distd.—CARLISLE *v.* ORR, [1917] 2 I. R. 633.—**IR.**

516 iii. —— —— *Bankruptcy proceedings.*]—In a case of embezzlement, the right of action is not merged in the felony, but is suspended merely. The ct. is not bound to interfere by stopping civil proceedings in every case of felony ; & ought not to do so, unless there is a probability of criminal justice being defeated through them. Bkpcy. proceedings were allowed on the part of a creditor whose claim was for money embezzled from him, the debtor having absconded.—*Re* HERDSON, 2 J. R. N. S. S. C. 221.—**N.Z.**

516 iv. —— ——.]—Where a civil action claiming damages for acts which, on the face of the pleadings, amounted to a felony, was instituted, & an application came before the ct. for an adjournment of the trial on the ground of the illness of a material witness :—*Held :* the ct. should not of its own motion, where no application was made by deft., & where no prosecution was pending, stay the action on the ground of the felony not having been prosecuted.—A. *v.* B. (1889), 24 L. R. Ir. 235 ; *sub nom.* S. *v.* S., 16 Cox, C. C. 566.—**IR.**

516 v. —— ——.]—The ct., being satisfied that resp. to a petition for a declaration of nullity of marriage on the ground of bigamy had committed the offence, granted a decree *nisi*, intimating that, assuming (as to which, *qu.*) in the Matrimonial Causes jurisdiction the rule that a prosecution for a felony should precede proceedings for civil relief, unless good reason is shown for not having prosecuted, applies, yet, inasmuch as no such question was raised by the pleadings, the ct. ought not to regard the rule, & must leave the matter to be the subject of a substantive application to stay.—BARKER *v.* BARKER (1916), V. L. R. 695.—**AUS.**

Sect. 4.—*Actions in respect of felonious torts: Subsect.* 3, *B. & C.*]

Ir.; **Refd.** *Re* Jermyn, *Ex p.* Elliott (1837), 3 Mont. & A. 110.

525. Failure to prosecute—Where criminal intention not clear.]—A bill of exchange was drawn in favour of a fictitious payee with the knowledge as well of the acceptor as the drawer, & the name of such payee was indorsed on it by the drawer with the knowledge of the acceptor, which fictitious indorsement purported to be to the drawer himself or his order. The drawer then indorsed the bill to an innocent indorsee for a valuable consideration. Afterwards the bill was accepted, but it did not appear that there was an intent to defraud any particular person:—*Held:* (1) the facts found by the jury did not amount necessarily to a felony; (2) the making of the bill was not so criminal that the policy of the law would not suffer an action to be founded upon it; (3) the innocent indorsee might recover against the acceptor as on a bill payable to bearer; (4) perhaps also in such case he might recover against the acceptor as on a bill payable to the order of the drawer, or on a count stating the special circumstances.—GIBSON & JOHNSON *v.* MINET & FECTOR (1791), 1 Hy. Bl. 569; 2 Bro. Parl. Cas. 48; 126 E. R. 326. S. C. No. 494, *ante.*

Annotations:—**Refd.** White *v.* Spettigue (1845), 13 M. & W. 603; Ashpitel *v.* Bryan (1864), 5 B. & S. 723. **Mentd.** Master *v.* Miller (1791), 4 Term Rep. 320; Bishop *v.* Hayward (1791), 4 Term Rep. 470; Bennett *v.* Farnell (1807), 1 Camp. 130; *Re* Stein, *Ex p.* Royal Bank of Scotland (1815), 2 Rose, 197; *Ex p.* Royal Bank of Scotland (1815), 19 Ves. 310; Stone *v.* Marsh (1827), 6 B. & C. 551; Saunderson *v.* Piper (1829), 5 Bing. N. C. 425; *Re* Jones, *Ex p.* Jones (1833), 3 Deac. & Ch. 525; Beeman *v.* Duck (1843), 11 M. & W. 251; *Re* Lawrence, Mortimore & Schrader (1861), 4 L. T. 184; *Re* Harris (1864), 13 W. R. 275; Vagliano *v.* Bank of England (1888), 22 Q. B. D. 103; Vagliano *v.* Bank of England (1889), 23 Q. B. D. 243; Chamberlain *v.* Young, [1893] 2 Q. B. 206, C. A.

526. —— Where prosecution impossible.]—Though a person injured by a felony is not allowed by the policy of the law to seek civil redress, if he has failed in his duty of bringing or attempting to bring the felon to justice, the rule does not apply where the offender has been brought to justice at the instance of some other person injured by a similar offence, or where prosecution is impossible by reason of the death of the offender, or where he has escaped from the jurisdiction before a prosecution could have been commenced by exercise of reasonable diligence (BAGGALLAY, L.J.).—*Re* SHEPHERD, *Ex p.* BALL, Nos. 507, 521, *ante;* Nos. 528, 533, *post.*

Annotations:—**Apprvd.** Midland Insce. *v.* Smith (1881), 6 Q. B. D. 561. **Refd.** Admiralty Comrs. *v.* S.S. Amerika, [1917] A. C. 38, H. L.
For full anns., *see* S. C. No. 533, *post.*

527. —— —— Death.]—A creditor's suit was instituted by A. against the representatives of B. The bill alleged that B. had been a confidential clerk of A.; that B. had fraudulently appropriated money belonging to A. & concealed the fraud by false entries in A.'s books; & that the fraud had not been discovered until B.'s death. The bill sought for payment to A. of the sums appropriated. A demurrer on the ground that the alleged acts, being felonious, were not the subject of a civil remedy was overruled.—WICKHAM *v.* GATRILL (GATTRELL) (1854), 2 Sm. & G. 353; 2 Eq. Rep. 805; 23 L. J. Ch. 783; 23 L. T. O. S. 252; 18 J. P. 677; 18 Jur. 768; 2 W. R. 673; 65 E. R. 433.

528. —— —— Extent of exception.]—*Qu.:* if the felon goes abroad, whether the injured party must not wait until he comes back again.—*Re* SHEPHERD, *Ex p.* BALL, Nos. 507, 521, 526, *ante;* No. 533, *post.*

For full anns., *see* S. C. No. 533, *post.*

529. Collateral transaction — Substitution of genuine bill for forged bill—Action on genuine bill.]—If A., indorsee for value of a bill of exchange, to which B. the indorser had forged the acceptance of C., delivers it up to B., on his solicitation, & receives from him in lieu thereof a bill accepted by D. without consideration, A. may maintain an action on this bill against D., unless there was an agreement between him & B. to stifle a prosecution for forgery.—WALLACE *v.* HARDACRE (1809), 1 Camp. 45.

Annotations:—**Apld.** Williams *v.* Bayley (1866), L. R. 1 H. L. 200; Jones *v.* Merionethshire Permanent Benefit Bldg. Soc., [1892] 1 Ch. 173, C. A.

530. —— —— ——.]—Even if there can be no proof for a debt which originates in a felony, unless the person seeking to prove has done his best to bring the felon to justice, that principle has no application to a case where the original debt does not arise out of a felony.

A bank took from a customer, as security for his overdraft, bills drawn by him to which he had forged the acceptances. On discovering the forgery the bank communicated with the customer & handed back to him the forged acceptances, receiving in exchange joint & several promissory notes of the customer & his father:—*Held:* (1) the debt was founded on the original transaction, *i.e.*, the overdraft, not on a felony or on forbearance to prosecute; (2) the bank was entitled to prove in the bkpcy. of the customer for the amount of the balance due from him on his current account, without the necessity of prosecuting him for felony; (3) it was immaterial whether or not the bank had agreed not to prosecute.—*Re* GUERRIER, *Ex p.* LESLIE (1882), 20 Ch. D. 131; 51 L. J. Ch. 689; 46 L. T. 548; 30 W. R. 344; 15 Cox, C. C. 125, C. A.

C. Actions by or against Third Persons.

531. No duty to prosecute—Plaintiff not victim of criminal act.]—Where a master claims damages for loss of service, it is no defence that the act causing the loss was felonious, since there is no greater duty in pltf. than in any one else to prosecute for the felony (BRAMWELL, B.).—OSBORN *v.* GILLETT, No. 263, *ante;* No. 539, *post.*

Annotations:—**Apld.** Appleby *v.* Franklin (1885), 17 Q. B. D. 93. The principle upon which this rule is founded seems to be that the interest of the public requires that the law shall be vindicated, before the individual who is wronged shall be permitted to have recourse to a civil remedy. There is, no doubt, strong authority in support of the rule, but it only applies to the party injured by the felonious act of deft. This is clearly pointed out in *Osborn* v. *Gillett.* I think we are bound by the decision in *Osborn* v. *Gillett* (HUDDLESTON, B.). **Refd.** Admiralty Comrs. *v.* S.S. Amerika, [1917] A. C. 38, H. L.
For full anns., *see* S. C. No. 263, *ante.*

532. —— ——.]—The rule that no action is maintainable to recover damages caused by a felonious act until the person committing it has been prosecuted only applies where pltf. is the person to whom the wrong constituting the felony is done & deft. the person committing the felonious act. A master may maintain an action against a person causing injury to his servant by administering noxious drugs to her with intent to procure abortion without having previously prosecuted that person.—APPLEBY *v.* FRANKLIN (1885), 17 Q. B. D. 93; 55 L. J. Q. B. 129; 54 L. T. 135; 50 J. P. 359; 34 W. R. 231; 2 T. L. R. 170. S. C. No. 514, *ante.*

Annotation:—**Refd.** Smith *v.* Selwyn, [1914] 3 K. B. 98, C. A.

526 i. *Failure to prosecute—Where prosecution impossible.*]—Where the facts alleged disclose a criminal offence, as well as an actionable civil wrong, but deft. is not within the jurisdiction of the criminal ct. & refuses to submit to trial & abide the issue, a civil action will not be stayed upon his application pending the disposition of criminal proceedings.—A.-G. *v.* KELLY (1915), 32 W. L. R. 518, 771; 9 W. W. R. 83, 243, 492, 863; 24 D. L. R. 297, 660; 25 Man. R. 621, 696.—**CAN.**

533. —— Trustee in bankruptcy of person injured.]—S., a banker's clerk, committed a felony by embezzling his employer's moneys & absconded & was afterwards made bkpt. The bankers carried in a proof for the sum S. had embezzled & subsequently became bkpt. :—*Held :* (1) assuming the bankers were debarred from proving until they had prosecuted S., the obligation to prosecute did not extend to their trustee in bkpcy., even though the bkpcy. occurred after they had themselves tendered a proof ; (2) the proof ought to be admitted. *Qu. :* whether a voluntary assignee of the injured person would be relieved from the obligation.—*Re* SHEPHERD, *Ex p.* BALL (1879), 10 Ch. D. 667 ; 48 L. J. Bcy. 57 ; 40 L. T. 141 ; 27 W. R. 563 ; 14 Cox, C. C. 237, C. A. S. C. Nos. 507, 521, 526, 528, *ante.*

Annotations :—**Consd.** Midland Insce. *v.* Smith (1881), 6 Q. B. D. 561. The question was once more discussed in the case of *Re Shepherd, Ex p. Ball,* when the doctrine that it was a condition precedent to the enforcing a civil remedy, that the felon should rst have been prosecuted, if it ever had any solid foundation, was finally exploded (WATKIN WILLIAMS J.) ; Roope *v.* D'Avigdor (1883), 10 Q. B. D. 412. **Refd.** *Re* Guerrier, *Ex p.* Leslie (1882), 20 Ch. D. 131, C. A. ; Appleby *v.* Franklin (1885), 17 Q. B. D. 93. **Mentd.** Admiralty Comrs. *v.* S.S. Amerika, [1917] A. C. 38, H. L.

534. Innocent third persons—Partners.]—A. forged a power of attorney, under which stock, which stood in the names of certain trustees, was sold out & transferred to the buyers. The sum produced by the sale was carried to a fund belonging jointly to A. & his partners. Two of his three partners knew of the money thus produced being carried to their partnership fund, but did not know it was produced by a forgery. A. was afterwards convicted & executed for another forgery ; no laches or connivance being attributable to the trustees : —*Held :* the trustees might adopt the transfer (though as against them it would not have been binding, & though it originated in a forgery) & recover the amount of the produce from the other partners.—STONE *v.* MARSH (1827), 6 B. & C. 551 ; 9 Dow. & Ry. K. B. 643 ; 5 L. J. O. S. K. B. 201 ; 108 E. R. 554. S. C. Nos. 495, 501, 518, *ante.*

Annotations :—**Apprvd.** *Re* Marsh, *Ex p.* Bolland (1828), Mont. & M. 315. **Foll.** *Re* Jones, *Ex p.* Jones (1833), 3 Deac. & Ch. 525 ; Marsh *v.* Keating (1834), 1 Bing. N. C. 198. **Consd.** *Re* Elliott, *Ex p.* Jermyn (1837), 6 L. J. Bcy. 41. **Foll.** White *v.* Spettigue (1845), 1 Car. & Kir. 673. It appears to me that the Q. B. Ct. has rightly explained the law, in the case of *Stone* v. *Marsh,* to which I have already referred. The law must be taken with this distinction, that the rule of public policy, by which a person is prevented from asserting a civil right, where a felony has been committed with respect to the supposed subject of that right, applies only to proceedings between that party & the felon, or at most, the felon & the persons with whom he must be sued ; & that, where the action is brought against a third party, who has nothing to do with the matter, the rule does not apply (POLLOCK, C.B.) ; Wickham *v.* Gatrill (1854), 2 Sm. & G. 353 ; *Re* Redpath, *Ex p.* G. N. Ry. Co. (1857), 30 L. T. O. S. 211 ; Dudley & West Bromwich Banking Co. *v.* Spittle (1860), 1 John. & H. 14. **Consd.** *Re* Shepherd, *Ex p.* Ball (1879), 10 Ch. D. 667, C. A. ; Midland Insce. *v.* Smith (1881), 6 Q. B. D. 561. **Refd.** Lee *v.* Bayes (1856), 18 C. B. 599 ; Chowne *v.* Baylis (1862), 31 Beav. 351 ; The Princess Royal (1870), L. R. 3 A. & E. 41 ; Admiralty Comrs. *v.* S.S. Amerika, [1917] A. C. 38, H. L. **Mentd.** Bishop *v.* Jersey 1854), 22 L. T. O. S. 326 ; Smith *v.* Selwyn, [1914] 3 K. B. 98, C. A.

535. —— ——.]—F., a partner in a bank, caused stock belonging to K. to be sold out by a forged power of attorney ; the proceeds were paid to the account of the bank, at the house of the bank's agents, & were appropriated by F., who was afterwards executed for other forgeries. The partners of F. were ignorant of the fraud, but might, with common diligence, have known it :—*Held :* K. could maintain an action against the partners for money had & received on the grounds (1) the partners had no privity or share in F.'s felonious act, & there was no felony committed by them in which the civil right arising against them could merge or be suspended ; (2) F. having been executed for a similar forgery before action brought, it became impossible without any default in K. that he should be prosecuted & convicted for this felony.—MARSH *v.* KEATING (1834), 1 Bing. N. C. 198 ; 8 Bli. N. S. 651 ; 2 Cl. & Fin. 250 ; 1 Mont. & A. 582 ; 1 Scott, 5 ; 131 E. R. 1094. S. C. No. 519, *ante.*

Annotations :—**Consd.** *Re* Jermyn, *Ex p.* Elliott (1837), 3 Mont. & A. 110. **Foll.** White *v.* Spettigue (1845), 13 M. & W. 603 ; Wickham *v.* Gatrill (1854), 2 Sm. & G. 353 ; Lee *v.* Bayes (1856), 18 C. B. 599 ; Dudley & West Bromwich Banking Co. *v.* Spittle (1860), 1 John. & H. 14 ; Chowne *v.* Baylis (1862), 31 Beav. 351. **Refd.** Vaughan *v.* Matthews (1849), 13 Q. B. 187 ; *Re* Shepherd, *Ex p.* Ball (1879), 10 Ch. D. 667, C. A. **Mentd.** Bonzi *v.* Stewart (1842), 4 Man. & G. 295 ; Bishop *v.* Jersey (1854), 22 L. T. O. S. 326 ; Bank of Ireland *v.* Evan's Trustees (1855), 25 L. T. O. S. 272, H. L. ; Bailey *v.* Johnson (1871), L. R. 6 Exch. 279 ; Reid *v.* Rigby, [1894] 2 Q. B. 40 ; De Witte *v.* Addison (1899), 80 L. T. 207, C. A. ; Oliver *v.* Bank of England, [1902] 1 Ch. 610, C. A. ; Jacobs *v.* Morris, [1902] 1 Ch. 816, C. A. ; Covell *v.* Scamell (1910), 103 L. T. 535 ; Burdett *v.* Horne (1911), 27 T. L. R. 402.

536. —— —— Proof in bankruptcy.]—*Re* MARSH, *Ex p.* BOLLAND, Nos. 504, 517, *ante.*

For full anns., *see* S. C. No. 504, *ante.*

537. Purchaser.]—Where stolen goods come into the hands of an innocent person by private purchase, & he sells them in the way of trade, he is liable to an action of trover at the suit of the owner, though no steps have been taken by him to find out & prosecute the felon, for the obligation which the law imposes on a person to prosecute the thief does not apply where the action is against a third person innocent of the felony.—WHITE *v.* SPETTIGUE (1845), 1 Car. & Kir. 673 ; 13 M. & W. 603 ; 14 L. J. Ex. 99 ; 4 L. T. O. S. 317 ; 9 J. P. 761 ; 9 Jur. 70 ; 153 E. R. 252. S. C. No. 499, *ante.*

Annotations :—**Foll.** Lee *v.* Bayes (1856), 18 C. B. 599. **Consd.** Wells *v.* Abrahams (1872), L. R. 7 Q. B. 554. **Foll.** Osborn *v.* Gillett (1873), L. R. 8 Exch. 88. **Consd.** Midland Insce. *v.* Smith (1881), 6 Q. B. D. 561. **Refd.** Appleby *v.* Franklin (1885), 17 Q. B. D. 93. **Mentd.** Smith *v.* Selwyn, [1914] 3 K. B. 98, C. A. ; Admiralty Comrs. *v.* S.S. Amerika, [1917] A. C. 38, H. L.

538. Action against third person.]—To entitle the owner of stolen property to maintain an action for converting it against a third person, in whose possession he finds it, it is not necessary he should first have prosecuted the felon.—LEE *v.* BAYES & ROBINSON (ROBINSON & BAYES), (1856), 18 C. B. 599 ; 26 L. T. O. S. 221 ; 20 J. P. 694 ; 2 Jur. N. S. 1093 ; 139 E. R. 1504.

For full anns., *see* MARKETS & FAIRS.

539. Action when maintainable—Master.]—The defence that the act complained of amounted to a felony does not apply to an action brought against a master for damages sustained through the wrongful act of a servant.—OSBORN *v.* GILLETT, Nos. 263, 531, *ante.*

Annotation :—**Refd.** Admiralty Comrs. *v.* S.S. Amerika, [1917] A. C. 38, H. L.

For full anns., *see* S. C. No. 263, *ante.*

PART V. SECT. 4, SUB-SECT. 3.—C.

539 i. *Action when maintainable—Master.*]—Declaration under C. S. C., c. 78, by the administratrix, M., that deft. by his servant wrongfully & in violation of Temperance Act, 1864 (c. 18), in the township of A., there in force, furnished & gave W., while in deft.'s inn, intoxicating liquors, whereby he became & was intoxicated, & while so intoxicated did assault the intestate, whereby he was immediately killed :—*Held :* the Act gave the civil remedy, at any rate against the innkeeper, notwithstanding a felony might have been committed which had not been prosecuted for.—MCCURDY *v.* SWIFT (1866), 17 C. P. 126.—**CAN.**

539 ii. —— *Principal.*]—Under the terms of a contract between a contractor & a Local Board the President of the Board imposed on deft. a fine of R20 in respect of illegal excessive collections made by his agent. Deft. not having paid the fine, the President instituted a civil suit for the amount of the fine :—*Held :* the suit was maintainable, although the acts of deft.'s agent amounted to a criminal offence & no criminal proceedings were taken against the agent. The doctrine that a person injured by a felonious act cannot seek civil redress without prosecuting the felon in the criminal cts. does not apply where a principal is sued in the civil cts. in respect of the wrongful acts of his agent.—TALUK BOARD, KUNDAPUR, PRESIDENT *v.* BURDE LAKSHMINARAYANA KAMPTHI (1908), I. L. R. 31 Mad. 54.—**IND.**

Sect. 4.—Actions in respect of felonious torts: Sub-sect. 3, C. & D., & Sects. 5, 6, 7, & 8. Parts VI., VII., & VIII.: Sect. 1: Sub-sect. 1, A.]

540. —— Husband.]—The pltf. co. had granted a fire policy to S., & during currency of the policy the wife of S. feloniously burnt the property insured. The co. not admitting any claim on the policy brought an action against S. & his wife for damage done by the act of the wife.—*Held:* the action could not be maintained.

If the action could be maintained, it would be unnecessary to show that the felon had been prosecuted (WATKIN WILLIAMS, J.).—MIDLAND INSURANCE CO. *v.* SMITH (1881), 6 Q. B. D. 561; 50 L. J. Q. B. 329; 45 L. T. 411; 45 J. P. 699; 29 W. R. 850. S. C. No. 490, *ante*.

Annotations:—**Refd.** Admiralty Comrs. *v.* S.S. Amerika, [1917] A. C. 38, H. L. **Mentd.** Trinder, Anderson *v.* North Queensland Insce. (1897), 66 L. J. Q. B. 802.

541. —— Following proceeds of felony.]—To a bill, following life insurances, effected by pltfs.' clerk with pltfs.' money procured by embezzlement & transferred to defts. for valuable consideration but with notice, a demurrer was allowed, the transaction amounting to felony, & not raising a civil contract, & the policies not being pltfs.' property.—COX *v.* PAXTON (1810), 17 Ves. 329; 34 E. R. 127.

Annotations:—**Refd.** *Re* Hertford (1842), 1 Hare, 584; The Princess Royal (1870), L. R. 3 A. & E. 41.

D. Misdemeanours.

542. Failure to prosecute immaterial—Perjury.]—The ct. will not delay the trial of an action until after the trial of an indictment for perjury in a matter relating to the cause.—JOHNSON *v.* WARDLE (1835), 1 Har. & W. 219.

543. —— ——.]—Where a person is indicted for perjury before the perjured person has brought case for the perjury, the action should not be tried before the indictment has terminated, but if case is brought before the indictment the action shall first be tried.—ANON. (1662), 1 Sid. 69; 82 E. R. 974.

544. —— ——.]—It is doubtful if case lies for perjury by which a party is damaged until there has been a conviction for the perjury.—BROAD *v.* HANCOCK (1661), 1 Sid. 50; 82 E. R. 963.

545. ——.]—An action cannot be maintained where the declaration alleges a case of felony; but it is otherwise where the declaration alleges only a misdemeanor.—FISSINGTON *v.* HUTCHINSON (1866), 15 L. T. 390.

SECT. 5.—**CONVICTION FOR TREASON OR FELONY.**
See CRIMINAL LAW & PROCEDURE.

SECT. 6.—**UNDER VEXATIOUS ACTIONS ACT, 1896 (c. 51).**
See PRACTICE & PROCEDURE.

SECT. 7.—**BY ORDER OF COURT.**
SUB-SECT. 1.—STAY OF PROCEEDINGS.
See PRACTICE & PROCEDURE.

SUB-SECT. 2.—JURISDICTION IN EQUITY TO RESTRAIN ACTIONS AT LAW.
See EQUITY.

SECT. 8.—**DEATH.**
SUB-SECT. 1.—CHANGE OF PARTIES AT DEATH.
See PRACTICE & PROCEDURE.

SUB-SECT. 2.—ACTIO PERSONALIS MORITUR CUM PERSONÂ.
See EXECUTORS & ADMINISTRATORS.

Part VI.—Extinction of Right of Action.

Accord & satisfaction: *see* CONTRACT.
Actio personalis moritur cum personâ: see EXECUTORS & ADMINISTRATORS.
Assignment of rights of action: *see* CHOSES IN ACTION.
Bankruptcy & assignment of bankrupt's rights: *see* BANKRUPTCY & INSOLVENCY.
Limitation of actions: *see* LIMITATION OF ACTIONS.
Merger: *see* CONTRACT; ESTOPPEL; JUDGMENTS & ORDERS.
Payment & discharge of rights: *see* CONTRACT.
Release: *see* CONTRACT.

Part VII.—Forms of Action.

Commencement of: *see* p. 9, *ante*.
Pleadings in modern actions: *see* PLEADING; PRACTICE & PROCEDURE.
Actions *in rem* & *in personam: see* ADMIRALTY; CONFLICT OF LAWS; JUDGMENTS.
Actions of contract & of tort: *see* p. 19, *ante*; COUNTY COURTS.
Actions, transitory or local: *see* COURTS.

Part VIII.—Maintenance and Champerty.

SECT. 1.—**IN GENERAL.**
SUB-SECT. 1.—MAINTENANCE.
A. Definition and Scope of Term.

546. Definition.]—Maintenance exists when a man maintains an action in order to have a part or the whole of the thing about which the action is brought, or to have any other thing for the sake of maintaining the same quarrel, or if a man has no reason or no lawful pretext for meddling except his own bad will; in all these cases he is a maintainor (MARTIN, J.).—ROTHEWEL *v.* PEWER, Nos. 548, 638, 649, 650, 654, 666, *post*.

For full anns., *see* S. C. No. 638, *post*.

547. ——.]—It is not lawful for a stranger to request any one to be of counsel for, say, my adversary; for he has no business to meddle in the matter (NEWTON, C.J., & PASTON, J.).—POMEROY *v.* BUCKFAST, Nos. 579, 651, 652, 668, 674, *post*.

For full anns., *see* S. C. No. 668, *post*.

548. —— Champerty included.]—All champerty is maintenance, & where a party may have a writ of maintenance he may as well have one of champerty.—ROTHEWEL *v.* PEWER, No. 546, *ante;* Nos. 638, 649, 650, 654, 667, *post.*

For full anns., *see* S. C. No. 638, *post.*

549. Application of doctrine.]—The law of maintenance is confined to cases where a man improperly, & for the purpose of stirring up litigation & strife, encourages others either to bring actions, or to make defences they have no right to make (LORD ABINGER, C.B.).—FINDON *v.* PARKER, Nos. 644, 655, 661, 669, 692, *post.*

Annotations:—**Refd.** *Re* Cambrian Mining Co. (1882), 48 L. T. 114; British Cash & Parcel Conveyors *v.* Lamson Store Service Co., [1908] 1 K. B. 1006, C. A.
For full anns., *see* S. C. No. 661, *post.*

550. —— In ancient times.]—It is curious, and not altogether useless, to see how the doctrine of maintenance has from time to time been received in Westminster Hall. At one time not only he who laid out money to assist another in his cause, but he that by his friendship or interest saved him an expense which he would otherwise be put to, was held guilty of maintenance. Nay, if he officiously gave evidence it was maintenance; so that he must have a *subpœna*, or suppress the truth. That such doctrine, repugnant to every honest feeling, should be soon laid aside must be expected. A variety of exceptions was soon made, &, amongst others, it was held that if a person has any interest in the thing in dispute, though on contingency only, he may maintain an action on it (BULLER, J.).—MASTER *v.* MILLER, No. 493, *ante;* No. 631, *post.*

Annotations:—**Consd.** *Re* Elliott, *Ex p.* Jermyn (1837), 6 L. J. Bcy. 41; Fitzroy *v.* Cave, [1905] 2 K. B. 364, C. A.; Holden *v.* Thompson, [1907] 2 K. B. 489. **Refd.** Bradlaugh *v.* Newdegate (1883), 11 Q. B. D. 1.
For full anns., *see* S. C. No. 631, *post.*

551. —— Maintenance distinguished from instigating actions.]—A declaration alleged that deft. unlawfully & maliciously did advise, procure, instigate, & stir up T. to commence & prosecute an action against pltf., wherein certain issues were joined, as to which pltf. was acquitted:—*Held:* no cause of action appeared, the declaration not showing maintenance, as the action appeared not to have been commenced when deft. interfered, & not alleging want of reasonable & probable cause.—FLIGHT *v.* LEMAN (1843), 4 Q. B. 883; 1 Dav. & Mer. 67; 12 L. J. Q. B. 353; 1 L. T. O. S. 287; 7 Jur. 557; 114 E. R. 1130.

Annotations:—**Distd.** Bradlaugh *v.* Newdegate (1883), 11 Q. B. D. 1. **Consd.** Neville *v.* London Express Newspapers, [1917] 1 K. B. 402. **Refd.** Cotterell *v.* Jones (1851), 11 C. B. 713; Oram *v.* Hutt, [1914] 1 Ch. 98, C. A.

552. —— Bankrupt cannot bring action for maintenance.]—A bkpt. cannot bring an action for maintenance on the ground that deft. incited & supported bkpcy. proceedings in which he had no common interest, since the cause of action (if any) passed to the trustee in bkpcy.; & such an action may be summarily dismissed upon summons as frivolous & vexatious.—METROPOLITAN BANK *v.* POOLEY (1885), 10 App. Cas. 210; 54 L. J. Q. B. 449; 53 L. T. 163; 49 J. P. 756; 33 W. R. 709, H. L.

Annotations:—**Refd.** British Cash & Parcel Conveyors *v.* Lamson Store Service Co., [1908] 1 K. B. 1006, C. A.; Boaler *v.* Power, [1910] 2 K. B. 229, C. A. **Mentd.** Tucker *v.* Collinson (1886), 54 L. T. 263, C. A.; Magrath *v.* Reichel (1887), 57 L. T. 850; Lawrence *v.* Norreys (1888), 39 Ch. D. 213, C. A.; Barrett *v.* Day, Day *v.* Foster (1890), 43 Ch. D. 435; Haggard *v.* Pelicier, [1892] A. C. 61, P. C.; Bruce *v.* Ailesbury (1892), 36 Sol. Jo. 865; Fletcher *v.* Bethom (1893), 68 L. T. 438; Logan *v.* Bank of Scotland (1905), 94 L. T. 153, C. A.; Neville *v.* London Express Newspapers, [1917] 1 K. B. 402.

553. —— ——.]—No person can bring an action for maintenance unless he has been a party to the proceedings maintained.

In bkpcy. proceedings the trustee of bkpt.'s estate rejected two proofs. A solr. acting for an interested party induced the creditor to appeal, & undertook, if the appeal was unsuccessful, personally to indemnify him against the costs of the appeal. On appeal one proof for a sum of £68,295 was allowed, & the second proof was withdrawn by consent. In an action by bkpt. against the solr., claiming damages for alleged maintenance by the solr., the judge in chambers struck out the statement of claim as disclosing no cause of action, & as being frivolous & vexatious:—*Held:* the order appealed from was right.—BOTTOMLEY *v.* BELL (1915), 31 T. L. R. 591; 59 Sol. Jo. 703, C. A.

554. —— Criminal proceedings.]—The doctrine of maintenance is confined to civil actions, & does not apply to criminal proceedings, the "maintaining" of which is therefore not illegal. Where a person gives a guarantee whereby he agrees to indemnify a solr. in respect of the costs of criminal proceedings to be undertaken against another person, & such proceedings are taken & costs incurred, the solr. can maintain an action on such guarantee, & the person sued thereon cannot set up as a defence that the agreement was void as being tainted with the illegality of maintenance.—GRANT *v.* THOMPSON (1895), 72 L. T. 264; 43 W. R. 446; 11 T. L. R. 207; 18 Cox, C. C. 100; 15 R. 290.

555. —— Proceedings affecting custody of person.]—*Qu.:* whether the law against maintenance has any application to cases involving questions of the custody of the person (PHILLIMORE, J.).—HOLDEN *v.* THOMPSON, No. 670, *post.*

For full anns., *see* S. C. No. 670, *post.*

556. —— Company.]—A limited co. may be liable for maintenance.—NEVILLE *v.* LONDON EXPRESS NEWSPAPERS, LTD., [1917] 1 K. B. 402; 86 L. J. K. B. 1055; 116 L. T. 156; 33 T. L. R. 138. *Affd.* on this point, [1917] 2 K. B. 564, C. A. S. C. Nos. 560, 725, *post.*

557. Result of maintained action—Immaterial.]—Pltf.'s success or failure in the maintained action merely goes to the *quantum* of damages in the action for maintenance.—BRADLAUGH *v.* NEWDEGATE, Nos. 569, 640, 722, *post.* As *expld.* in ORAM *v.* HUTT, Nos. 559, 570, 646, 683, *post.*

Annotation:—**Folld.** Neville *v.* London Express Newspapers, [1917] 2 K. B. 564, C. A.
For full anns., *see* S. C. No. 569, *post.*

558. —— ——.]—It is immaterial what the result may be. It is the wanton intermeddling that is the cause of action (BRAY, J.).—SCOTT *v.*

PART VIII. SECT. 1, SUB-SECT. 1.—A.

548. i. *Definition — Champerty included.*]—"Champerty" is a species of "maintenance" & of the same character, but with the additional feature of a condition or bargain providing for a participation in the subject-matter of the litigation.—PITCHAKUTTI CHETTI *v.* KAMALA NAYAKKAN (1863), 1 Mad. 153. —**IND.**

549 i. *Application of doctrine—In modern times.*]—The Acts against maintenance & champerty have fallen into disuse; but although the letter of them has not been executed, the spirit of them has been uniformly enforced by cts. of equity.—KENNEY *v.* BROWNE (1796), 3 Ridg. P. C. 462.—**IR.**

549 ii. —— ——.]—The doctrine of maintenance & champerty is largely modified by modern cases.—ALLAN *v.* MCHEFFEY (1861), 5 N. S. R. (1 Old. 120).—**CAN.**

549 iii. —— ——.]—The laws of maintenance & champerty as they existed in England on Nov. 19, 1858, are in force in British Columbia, & an agreement for a champertous consideration is absolutely null & void.—BRIGGS & GIEGERICH *v.* FLEUTOT (1904), 10 B. C. R. 309.—**CAN.**

557 i. *Result of maintained action—Immaterial.*]—An action lies for maintenance notwithstanding that the party who was maintained was unsuccessful, on proof of special damage.—NEWSWANDER *v.* GIEGERICH (1906), 12 B. C. R. 272; 39 S. C. R. 355.—**CAN.**

Sect. 1.—In General: Sub-sect. 1, A. & B.; sub-sect. 2.]

NATIONAL SOC. FOR PREVENTION OF CRUELTY TO CHILDREN & PARR, Nos. 679, 684, 723, *post.*

Annotation:—**Apld.** Neville *v.* London Express Newspapers, [1917] 1 K. B. 402.

559. ——— ———.]—An action for maintenance lies whether present pltf. succeeded or failed in the maintained action, since, in either case, the maintainer for his part has done all that he can to harass the party sued.

It may be as much against public interest (which is the foundation of this head of wrongs) to stir up an action which lies indeed, but would never have been brought if the tort-sufferer had been left to himself, as to maintain an action which does not lie at all (LORD SUMNER).—ORAM *v.* HUTT, Nos. 570, 646, 683, *post.*

Annotation:—**Folld.** Neville *v.* London Express Newspapers, [1917] 2 K. B. 564, C. A.

560. ——— ———.]—An action for maintenance will lie although the maintained action has been decided in favour of pltf.—NEVILLE *v.* LONDON EXPRESS NEWSPAPERS, No. 556, *ante*; No. 725, *post.*

561. Maintenance no defence to maintained action.]—A domestic servant having met with injury by accident in the course of her work, applied to her approved society under National Insurance Act, 1911 (c. 55). The society instigated proceedings by her for compensation under Workmen's Comp. Act, 1906 (c. 58), induced her to sign a retainer to their solrs., gave her a partial indemnity against costs, & found the out-of-pocket expenses. The cty. ct. judge held that the proceedings were taken by the woman, & awarded her compensation:—*Held:* (1) this was a finding of fact that could not be interfered with; (2) although possibly the society might be exposed to an action based on maintenance, the fact that the woman had been "maintained" by the society would be no answer to the proceedings under the latter Act.—SKELTON *v.* BAXTER, [1916] 1 K. B. 321; 85 L. J. K. B. 181; 114 L. T. 56; 32 T. L. R. 130; 60 Sol. Jo. 120; 9 B. W. C. C. 97, C. A.

B. Facts constituting Maintenance.

562. Money given for maintenance—Not so expended.]—An action may lie for maintenance, though the money given for maintenance be not in fact so expended. A. gives money to B. to distribute for a suit between C. and D. B. does not distribute it. A. is nevertheless punishable in an action for maintenance, because if B. had distributed it they had both been punishable.—ANON. (1452), Jenk. 101; 145 E. R. 72. S. C. Nos. 675, 718, *post.*

563. Agent acting for principal—Not maintenance.]—If an action is commenced against a town by agreement the town can appoint some one to prosecute it & to disburse money for the purposes of the suit, & this is not maintenance.—WANLANCE *v.* PHILIPSON (1614), 1 Roll. Rep. 57; 81 E. R. 325.

564. Action in another's name.]—No action lies against a creditor for suing his debtor, though the result is to draw all the other creditors upon debtor; but where a third person brings an action in the name of another & without his privity, this is maintenance, which is a tortious act, & an action lies.—THURSTON *v.* UMMONS (1639), March, 47, pl. 76; 82 E. R. 405. S. C. No. 717, *post.*

565. Bond.]—Where a bond was conditioned to perform the article of an indenture whereby deft. agreed to assign certain obligations to pltf. & covenanted that the moneys should be paid on or within 8 days after the days limited by the bonds:—*Held:* the condition was for maintenance & the bond void.—HODSON *v.* INGRAM (1648), Aleyn, 60; 82 E. R. 915.

566. Election petition—Bill for discovery disallowed.]—To a bill against two defts. for a discovery whether pltfs. were not employed by one of defts., a peer, as solrs. to present & prosecute a petition to the House of Commons on behalf of the other deft., complaining of an undue election & return, a general demurrer was allowed, principally because such a transaction amounted to maintenance at the common law, & incidentally on the ground of public policy.—WALLIS *v.* PORTLAND (DUKE) (1797), 8 Bro. Parl. Cas. 161; 3 Ves. 494; 3 E. R. 508. S. C. No. 728, *post.*

Annotations:—**Dbtd.** Findon *v.* Parker (1843), 11 M. & W. 675. **Apprvd.** Bradlaugh *v.* Newdegate (1883), 11 Q. B. D. 1. **Refd.** Stevens *v.* Bagwell (1808), 15 Ves. 139; Reynell *v.* Sprye (1852), 1 De G. M. & G. 660; *Re* Cambrian Mining Co. (1882), 48 L. T. 114; Harris *v.* Brisco (1886), 17 Q. B. D. 504, C. A.; Alabaster *v.* Harness, [1895] 1 Q. B. 339, C. A.; Neville *v.* London Express Newspapers, [1917] 1 K. B. 402.

567. Indemnity against costs—Libel action.]—Pltf. published a libel at deft.'s request, & on his undertaking to indemnify him against the consequence of such publication, & defended an action brought against him for libel at deft.'s request, & on his promise to indemnify him against the costs of such action:—*Held:* (1) the consideration, namely, publication of the libel, was illegal; (2) if the consideration could be rejected, deft. was guilty of maintenance, as having voluntarily & officiously undertaken to maintain pltf. in a suit with which deft. had no connection, & to which he was an entire stranger.—SHACKELL (SHACKWELL) *v.* ROSIER (1836), 2 Bing. N. C. 634; 2 Hodg. 17; 3 Scott, 59; 5 L. J. C. P. 193; 132 E. R. 245. S. C. No. 333, *ante.*

Annotations:—**Apprvd.** Bradlaugh *v.* Newdegate (1883), 11 Q. B. D. 1. **Consd.** Burrows *v.* Rhodes, [1899] 1 Q. B. 816. **Refd.** Breay *v.* Royal British Nurses Assocn. (1897), 76 L. T. 735. **Mentd.** Lound *v.* Grimwade (1888), 39 Ch. D. 605.

568. ———.]—In an action for an account of tithes:—*Held:* the evidence of a witness, who had entered into an agreement with defts. to bear part of the costs of the suit, was inadmissible, the agree-

PART VIII. SECT. 1, SUB-SECT. 1.—B.

565 i. *Bond.*]—For the purposes of meeting the expenses of an appeal, applt. executed a bond in consideration of the obligee agreeing to defray such expenses. The obligee in due course advanced R.3,700. Applt. obtained possession of the property, but declined to pay the sum advanced upon which the obligee sued him upon the bond:—*Held:* the bond was a gambling in litigation, which it would be contrary to public policy to enforce.—CHUNNI KUAR *v.* RUP SINGH (1888), I. L. R. 11 All. 57.—**IND.**

567 i. *Indemnity against costs—Simoniacal contract.*]—*Semble:* a contract by T., a clerk in holy orders, to indemnify W., who claimed the right of presentation to a living, against the costs of litigation to establish that right, if W., in case of success, would present T. to the living, is both champerty & maintenance.—LITTLEDALE *v.* THOMPSON (1879), 4 L. R. Ir. 43.—**IR.**

567 ii. ——— *Unwilling co-litigant.*]—On a motion on behalf of deft. to strike case out of list on ground that appeal, although in his name, was neither on his behalf nor in his interest, but was by churchwardens and others who had no interest in the matter sufficient to give them a right to intermeddle in the litigation, & were acting contrary to his wishes, the ct. disagreed on the question of indemnity against costs being maintenance, & the motion was held over.—LANGTRY *v.* DUMOULIN (1884), 7 O. R. 644.—**CAN.**

a. *Absence of common interest.*]—Pltf., who had been a shareholder of a mining co., agreed with deft., the principal shareholder of the co., to give him assistance for the purpose of enabling him to win a suit pending between deft. & another shareholder in relation to an option originally held by the co. In consideration of the proposed assistance, deft. agreed to pay pltf. a sum in cash in the event of winning the suit, & a further sum when a sale of the property was effected. At the time of the agreement pltf. had ceased to be a shareholder, & had no interest, legal or equitable, to justify his interference:—*Held:* the contract was illegal on the ground of maintenance.—CRAIG *v.* THOMPSON. (1907), 42 N. S. R. 150; 4 E. L. R. 383.—**CAN.**

b. *Contract for loan to carry on suit.*]—Specific performance was decreed of a lease, though the lease formed part of an arrangement whereby, as a consideration for the lease, pltf. was to lend deft. money to enable him (*inter alia*) to commence legal proceedings against the then tenant of the subject-matter of the intended lease.—PITCHAKUTTI CHETTI *v.* KAMALA NAYAKKAN (1863), 1 Mad. 153.—**IND.**

ment being illegal for maintenance.—JESUS COLLEGE, OXFORD *v.* GIBBS (1834), 1 Y. & C. Ex. 145; 4 L. J. Ex. Eq. 42; 160 E. R. 59.

For full anns., *see* CORPORATION.

569. ——.]—Deft. caused a writ to be issued in the name of C. against pltf. claiming the penalty (£500) imposed by Parliamentary Oaths Act, 1866 (c. 19), s. 5, upon any person sitting or voting in the House of Commons without having made & subscribed the oath appointed by that Act. Deft. was a member of Parliament, & the action was in reality his action, C. being without any means of paying any costs. After commencement of the action, deft. gave to C. a bond by which he indemnified C. against all costs & expenses C. should incur or become liable to pay in the action or in any way relating thereto; but deft. could claim no right to nor interest in the penalty, should it be recovered. It was proved that C. had consented to the use of his name, but he would not have authorised the action but for the bond:—*Held:* (1) deft. & C. had no common interest in the result of the action for the penalty; (2) deft.'s conduct constituted maintenance, for which an action would lie at the suit of pltf.; (3) pltf. was entitled to recover as damages all the costs he had been put to in resisting C.'s action, amounting to a complete indemnity for every loss occasioned by the maintenance of deft.

To bind oneself after commencement of a suit to pay the expenses of another in that suit, more especially if that other be a person himself of no means, & the suit be one he cannot bring, is still, as it always was, maintenance; & for such maintenance an action will lie (LORD COLERIDGE, C.J.).—BRADLAUGH *v.* NEWDEGATE (1883), 11 Q. B. D. 1; 52 L. J. Q. B. 454; 31 W. R. 792. S. C. No. 557, *ante;* Nos. 640, 722, *post.*

Annotations:—**Folld.** Harris *v.* Brisco (1886), 17 Q. B. D. 504, C. A.; Scott *v.* N. S. P. C. C. & Parr (1909), 25 T. L. R. 789. **Apld.** Neville *v.* London Express Newspapers, [1917] 1 K. B. 402. **Refd.** Metropolitan Bank *v.* Pooley (1885), 10 App. Cas. 210; James *v.* Kerr (1889), 40 Ch. D. 449; Alabaster *v.* Harness, [1895] 1 Q. B. 339, C. A.; Holden *v.* Thompson, [1907] 2 K. B. 489; British Cash & Parcel Conveyors *v.* Lamson Store Service Co., [1908] 1 K. B. 1006, C. A.; Cole *v.* Booker (1913), 29 T. L. R. 295. **Mentd.** Grant *v.* Thompson (1895), 72 L. T. 264.

570. ——.]—ORAM *v.* HUTT, No. 559, *ante;* Nos. 646, 683, *post.*

For full anns., *see* S. C. No. 559, *ante.*

—— **Purchase during litigation.**]—*See* Nos. 623, 624, *post.*

—— **Effect of common interest.**]—*See* Nos. 643, 656, 660, 661, *post.*

—— **Given by solicitors.**]—*See* Nos. 704—708, *post.*

571. Liquidation—Agreement to assist creditors' claim—No belief that debt due.]—Pltf. & defts. were shareholders of a co. which was being compulsorily wound up, defts. having a disputed claim as creditors against the co. In these circumstances, & in order to give defts. time to buy up the claims of other creditors, an agreement was made between pltf. & defts. by which, in consideration that pltf. would use his best endeavours to support defts. in postponing the making of a call by the liquidators of the co. & in getting defts.' claim sustained, defts. promised to indemnify pltf. against any call which might be made on him in respect of his shares in the co. In an action for breach of such promise:—*Semble:* the agreement to assist defts. in sustaining their claim, if pltf. believed it was not due, was bad on the ground of maintenance (WILLES, J.).—ELLIOTT *v.* RICHARDSON (RICHARDS) (1870), L. R. 5 C. P. 744; 39 L. J. C. P. 340; 22 L. T. 858; 18 W. R. 1157.

For full anns., *see* CONTRACT.

SUB-SECT. 2.—BARRATRY, ETC.

572. Barratry—Common barrator defined.]—A common barrator is a common mover or stirrer up or maintainer of suits, quarrels, or parties, either in cts., or in the country, in cts. of record, & in the cty. hundred, & other inferior cts. In the country in three manners: (1) in disturbance of the peace; (2) in taking or detaining of the possession of houses, lands or goods, etc., which are in question or controversy, not only by force but also by subtilty & deceit; (3) by false invention & sowing of calumny, rumours, & reports, whereby discord & disquiet arises between neighbours.—CASE OF BARRATRY (1588), 8 Co. Rep. 36b.; 77 E. R. 528.

573. —— ——.]—A barrator is one who stirs up suits among his neighbours.—MAN'S CASE (1627), Palm. 450; 81 E. R. 1165.

574. —— ——.]—The word "barrator" is a word of art & should be employed where one is indicted for promoting suits & being a common oppressor of his neighbours. Proof that one is a common oppressor of his neighbour is good evidence of barratry.—R. *v.* HARDWICKE (1666), 1 Sid. 282; 82 E. R. 1107.

575. —— ——.]—If a counsellor at law encourage a man to bring false actions through malice & for purposes of oppression, he may be indicted as a common barrator.—R. *v.* —— (1686), 3 Mod. Rep. 97; 87 E. R. 62.

576. —— ——.]—The ct. is bound to protect strangers against the injury arising from the stirring up of quarrels & lawsuits, & ought to repress every tendency to that offence, which is called, in legal language, barratry. The fact that a suit has been, in a great measure, instituted & possibly instigated by pltf.'s attorney is not sufficient. It is extremely difficult to draw the proper boundary between advice, encouragement, & instigation of a client to institute a suit, & all these may proceed from an earnest desire to redress the wrongs suffered by a poor & uninfluential person. If the suit be substantially that of the attorney, & the client can neither gain nor lose by it, the case would be very different.—WILLIAMS *v.* PAGE (1858), 24 Beav. 654; 27 L. J. Ch. 425; 30 L. T. O. S. 360; 4 Jur. N. S. 102; 53 E. R. 510.

For full anns., *see* .

577. Unlawful instigation of action—Without reasonable & probable cause.]—A count in case charging that deft. unlawfully, maliciously, & without any reasonable or probable cause, & without having any interest in the suit therein mentioned, instigated A., a pauper, to commence & prosecute an action against pltf., by reason whereof A. did commence & prosecute such action, etc., whereby pltf. suffered damage, is good.—PECHELL *v.* WATSON, Nos. 719, 720, *post.*

Annotations:—**Apprvd.** Bradlaugh *v.* Newdegate (1883), 11 Q. B. D. 1. **Refd.** Cotterell *v.* Jones (1851), 11 C. B. 713; Collins *v.* Cave (1860), 6 H. & N. 131, Ex. Ch.; Harris *v.* Brisco (1886), 17 Q. B. D. 504, C. A.; Neville *v.* London Express Newspapers, [1917] 1 K. B. 402.

For full anns., *see* S. C. No. 719, *post.*

578. Embracery.]—It is "embracery" for either a party or a stranger to instruct the jurors by writing or word of mouth, or to promise them a reward for their appearance.—JEPPS *v.* TUNBRIDGE & WISEMAN (1611), Moore, K. B. 815; 72 E. R. 924.

579. ——.]—POMEROY *v.* BUCKFAST, No. 547, *ante;* Nos. 651, 652, 668, 674, *post.*

For full anns., *see* S. C. No. 668, *post.*

580. ——.]—An attorney may not labour jurors in the behalf of his client; for that is embracery.—BRADLEY & JONES' CASE (1613), Godb. 240; 78 E. R. 139.

Sect. 1.—*In General: Sub-sect.* 3.]

SUB-SECT. 3.—CHAMPERTY.

581. Definition.]—Champerty is a species of maintenance, being a bargain with a pltf. or deft. to divide the land, *campum partiri*, or other matter sued for between them, if they prevail at law, whereupon the champertor is to carry on the party's suit at his own expense (WILLIAMS, J.).—RADCLIFFE *v.* ANDERSON, No. 715, *post.*

For full anns., see S. C. No. 715, *post.*

582. ——.]—The offence of champerty is the unlawful maintenance of a suit in consideration of some bargain to have part of the thing in dispute or some profit out of it (TINDAL, C.J.).—STANLEY *v.* JONES, Nos. 587, 732, *post.*

For full anns., *see* S. C. No. 587, *post.*

583. ——.]—Champerty is but a form of maintenance, though it be maintenance aggravated by an agreement to have part of the thing in dispute (CHITTY, J.).—GUY *v.* CHURCHILL, No. 607, *post.*

For full anns., *see* S. C. No. 607, *post.*

584. —— Application to Prize Court.]—Champerty is the unlawful maintenance of a suit in consideration of a bargain for part of the thing, or some profit out of it, & is not confined to cts. of common law, but extends to the Prize Ct. An assignment to Navy agents of part of the subject of a prize suit then depending was held void as amounting to champerty.—STEVENS *v.* BAGWELL (1808), 15 Ves. 139; 33 E. R. 707. S. C. No. 622, *post.*

Annotations:—**Consd.** Morwan *v.* Thompson (1830), 3 Hag. Ecc. 239. **Apprvd.** Stanley *v.* Jones (1831), 7 Bing. 369. **Refd.** Reynell *v.* Sprye (1852), 1 De G. M. & G. 656; James *v.* Kerr (1889), 40 Ch. D. 449. **Mentd.** Alexander *v.* Wellington (1830), 2 Russ. & M. 35; Noble *v.* Willock (1873), 8 Ch. App. 778; Willock *v.* Noble (1875), L. R. 7 H. L. 580; Anderson *v.* Morten, [1907] 2 K. B. 248.

585. Champertous agreements—Agreement to procure or give evidence.]—A contract by a person to communicate information on terms of getting a share of any property that may thereby be recovered by the person to whom the information is to be given, & nothing more, is not champerty or void. But if the arrangement is not merely that information shall be given, but also that the person who gives it, & who is to share in what may be recovered, shall himself recover the property or actively assist in recovery of it by procuring evidence or similar means, the arrangement is contrary to the policy of the law. In such a case the agreement is not the less contrary to the policy of the law because the property is in the hands of trustees or in ct., & no hostile action may be necessary to recover it, though the criminal offence of champerty may not have been committed.—REES *v.* DE BERNARDY, Nos. 592, 738, *post.*

For full anns., *see* S. C. No. 592, *post.*

586. —— ——.]—Where a person undertakes to make out the title of another to an estate, and is to have a part of the lands as a satisfaction for his trouble, though the agreement for this purpose is artfully drawn in order to keep it out of the stats. of champerty, he will not be entitled to have specific performance decreed here, but will be left to his remedy at law.—POWELL *v.* KNOWLER (1741), 2 Atk. 224; 26 E. R. 539. S. C. No. 729, *post.*

Annotations:—**Consd.** James *v.* Kerr (1889), 40 Ch. D. 449. **Refd.** Reynell *v.* Sprye (1852), 1 De G. M. & G. 660.

587. —— ——.]—Pltf. entered into an agreement with deft. to furnish & procure evidence to enable him (deft.) to maintain an action against third persons, in consideration of deft.'s paying him a clear eighth part of the sum recovered:—*Held:* (1) this contract in substance & effect amounted to champerty; (2) it was illegal.—STANLEY *v.* JONES (1831), 7 Bing. 369; 5 Moo. & P. 193; 9 L. J. O. S. C. P. 51; 131 E. R. 143. S. C. No. 582, *ante*; No. 732, *post.*

Annotations:—**Folld.** Sprye *v.* Porter (1856), 7 E. & B. 58. **Distd.** Hilton *v.* Woods (1867), L. R. 4 Eq. 432. **Folld.** Hutley *v.* Hutley (1873), L. R. 8 Q. B. 112; Ball *v.* Warwick (1881), 50 L. J. Q. B. 382. **Apld.** Bradlaugh *v.* Newdegate (1883), 11 Q. B. D. 1. **Distd.** Guy *v.* Churchill (1888), 40 Ch. D. 481. Maintenance, when spoken of in the books, means unlawful maintenance, but the maintenance of the suit of another is lawful where the persons maintaining have an interest in the thing in variance (CHITTY, J.). **Folld.** Rees *v.* De Bernardy, [1896] 2 Ch. 437. **Refd.** Simpson *v.* Lamb (1857), 7 E. & B. 84; Anderson *v.* Radcliffe (1860), 1 L. T. 487, Ex. Ch.

588. —— ——.]—The declaration stated that; in consideration that pltf., at deft.'s request, had given deft. a certain letter by means of which he was enabled to end disputes & differences that had arisen between himself & third persons & to recover certain property, deft. promised to give pltf. £1,000:—*Held:* this declaration disclosed a sufficient consideration for deft.'s promise.—WILKINSON *v.* OLIVEIRA (1835), 1 Bing. N. C. 490; 1 Scott, 461; 131 E. R. 1206.

589. —— ——.]—A. had a right which was supposed to be of uncertain extent, likely to be resisted or questioned, & not susceptible immediately or easily of proof. B. undertook the ascertainment & establishment of this right on the terms of the expenditure for the purpose being his & of his having half the benefit of what should be so obtained:—*Held:* such an agreement (whether it amounted strictly in point of law to champerty or maintenance so as to constitute a punishable offence or not) must be considered against the policy of the law, mischievous, & such as a ct. of equity ought to discourage & relieve against.—REYNELL *v.* SPRYE, SPRYE *v.* REYNELL (1852), 1 De G. M. & G. 660; 21 L. J. Ch. 633; 42 E. R. 710.

Annotations:—**Folld.** Rees *v.* De Bernardy, [1896] 2 Ch. 437. **Refd.** *Re* Tratt, *Ex p.* James (1853), 3 De G. M. & G. 493; Bradlaugh *v.* Newdegate (1883), 11 Q. B. D. 1; Hermann *v.* Charlesworth (1905), 74 L. J. K. B. 620, C. A. **Mentd.** Parr *v.* Jewell (1855), 1 K. & J. 671; Adams *v.* Lloyd (1858), 27 L. J. Ex. 499; Trail *v.* Baring (1864), 33 L. J. Ch. 521; Arkwright *v.* Newbold (1881), 17 Ch. D. 301, C. A.

590. —— —— **Right of trustee in bankruptcy to enforce.**]—An agreement to furnish existing documents & information to enable a person to recover property of his right to which he is not aware, in

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PART VIII. SECT. 1, SUB-SECT. 3.

581 i. *Definition—No application to India.*]—Although the English law of champerty does not apply in India, champerty or maintenance to be open to objection must have the qualities attributed to it by the English law, *i.e.*, it must be something against policy & justice, something tending to promote unnecessary litigation, something that in a legal sense is immoral & to the constitution of which a bad motive is in the same sense necessary. To determine that, it is necessary to look at the substance & not merely the language of the instrument. The test to be applied is whether the transaction is merely the acquisition of an interest in the subject of the litigation *bonâ fide* entered into, or whether it is an unfair or illegitimate transaction got up for the purpose merely of spoil or litigation, disturbing the peace of families and carried on from a corrupt or improper motive. A fair agreement to supply funds to carry on a suit in consideration of having a share in the property if recovered ought not to be regarded as *per se* opposed to public policy. But agreements of this kind ought to be carefully watched.—GOSSAIN RAMDHUN PURI *v.* GOSSAIN DALMIR PURI (1909), 14 C. W. N. 191.—**IND.**

581 ii. *S. P.* CHEDAMBARA CHETTY *v.* RENJA KRISHNA MUTHU VIRA PUCHANJA NAIKER (1874), 13 B. L. R. P. C. 509; L. R. 1 I. A. 241; 22 W. R. 148.—**IND.**

581 iii. *S. P.* CHUNDERKANT MOOKERJEE *v.* RAMCOOMAR KOONDOO (1874), 13 B. L. R. 530; 22 W. R. 138.—**IND.**

581 iv. *S. P.* RAMCOOMAR COONDOO *v.* CHUNDER KANTO MOOKERJEE (1876), 2 App. Cas. 186; I. L. R. 2 Calc. 233; L. R. 4 I. A. 23, P. C.—**IND.**

581 v. *S. P.* MOHKAM SINGH *v.* RUP SINGH (1893), I. L. R. All. 352; L. R. 20 I. A. 127.—**IND.**

581 vi. *S. P.* BHAGWAT DAYAL SINGH *v.* DEBI DAYAL SAHU (1908), I. L. R. 35 Calc. 420; S. C. 12 C. W. N. 393; L. R. 35 I. A. 48.—**IND.**

581 vii. *S. P.* DEBI DYAL SAHOO *v.* BHAN PERTAB SINGH (1904), I. L. R. 31 Calc. 433; 8 C. W. N. 408.—**IND.**

581 viii. *S. P.* BALDEO SAHAI *v.* HARBANS (1911), I. L. R. 33 All. 626.—**IND.**

consideration of receiving a share of the property to be recovered, is not illegal if no suit is depending & no stipulation is made for the commencement of any suit. But it is illegal to agree for such a consideration to supply evidence sufficient to enable a person to recover property in case of its being necessary to resort to legal proceedings for its recovery.

T. died a bachelor & intestate, possessed of personal property, without any known relation, & administration was granted to the solr. of the Treasury as nominee of the Queen. Pltf. informed deft., who was unaware that he was next of kin to T. or entitled to the property, that he would give such information & evidence, if it became necessary for deft. to institute proceedings for recovery of the property, that by means of such information & evidence deft. should recover the property, provided he would enter into an agreement to pay pltf. one-fifth of the property so recovered. An agreement was entered into, proceedings were taken for recovering the property, pltf. gave information & evidence in pursuance of the agreement, & deft. recovered the property as next of kin to T.; but failed to pay pltf. his agreed share:—*Held:* the agreement was void for maintenance.

Where a person, after agreeing to supply evidence for the recovery of property in consideration of receiving a share, petitions the Insolvent Debtors Ct. and a vesting order is made, his right to sue vests in the assignee, & the insolvent is not entitled to sue in the event of the assignee not interfering.—SPRYE *v.* PORTER (1856), 7 E. & B. 58; 26 L. J. Q. B. 64; 28 L. T. O. S. 229; 21 J. P. 55; 3 Jur. N. S. 330; 5 W. R. 81. S. C. No. 731, *post.*

Annotations:—**Distd.** Hilton *v.* Woods (1867), L. R. 4 Eq. 432. **Folld.** Hutley *v.* Hutley (1873), L. R. 8 Q. B. 112. Champerty is said to be the most odious form of maintenance (LUSH, J.). **Apld.** Bradlaugh *v.* Newdegate (1883), 11 Q. B. D. 1. **Folld.** James *v.* Kerr (1889), 40 Ch. D. 449; Rees *v.* De Bernardy, [1896] 2 Ch. 437. **Refd.** Earle *v.* Hopwood (1861), 9 C. B. N. S. 566; Ball *v.* Warwick (1881), 50 L. J. Q. B. 382; Savill *v.* Langman (1898), 79 L. T. 44, C. A.; Glegg *v.* Bromley, [1912] 3 K. B. 474, C. A. Champerty, after all, is only a particular form of maintenance (PARKER, J.).

591. —— ——.]—HUTLEY *v.* HUTLEY, Nos. 596, 648, 734, *post.*

For full anns., *see* S. C. No. 648, *post.*

592. —— ——.]—Deft., a next of kin agent, discovered that certain real estate in New Zealand passed on the death of an intestate to two coheiresses-at-law, widows in poor circumstances unacquainted with business affairs, aged 70 & 72 respectively. The property was of considerable value, & was in the hands of the public trustee at Wellington, New Zealand, where an order had been obtained in favour of another claimant of the property whose claim had been prosecuted by deft. After obtaining from this claimant a promise not to communicate on the subject with the coheiresses deft. had an interview with them at which he informed them that they were entitled to certain property, but he did not disclose its value. Deft. then induced them to sign two documents whereby they agreed that he was to have one-half of the property recovered. The women had no independent advice and were allowed no time for consideration. From the evidence it appeared that, though the documents did not so stipulate, deft. represented to the women & induced them to believe he would recover the property for them, & also that if they once signed they could never escape from the contract. The agreement was made in May, 1889, & was never repudiated by the two women, who both died in 1893. From time to time they received payments in respect of the property on the footing of the agreement. In an action brought by the respective legal personal representatives of the two coheiresses-at-law to set aside the agreement:—*Held:* the agreement was in the nature of champerty & void.—REES *v.* DE BERNARDY, [1896] 2 Ch. 437; 65 L. J. Ch. 656; 74 L. T. 585; 12 T. L. R. 412. S. C. No. 585, *ante;* No. 738, *post.*

Annotations:—**Folld.** Wedgerfield *v.* De Bernardy (1908), 24 T. L. R. 497. **Refd.** Glegg *v.* Bromley, [1912] 3 K. B. 474, C. A.

593. —— ——.]—Pltf. was informed by deft. that he had become entitled, under a settlement, will, & intestacy, to certain property (a fact of which he was not previously aware). At an interview pltf. signed an agreement to pay one-third of the net amount to be recovered, & subsequently mtged. his share of the property to secure an advance & also payment of all moneys due under the agreement:—*Held:* neither the agreement nor the mtge. was champertous.—WEDGERFIELD *v.* DE BERNARDY (1908), 25 T. L. R. 21, C. A.

594. —— **Agreement to supply funds for share of proceeds—Bond.**]—Money was advanced to an heir-at-law by a subscription from different persons, & among the rest from his attorney, to enable him to prosecute suits; & an absolute bond was taken from him for double the sum lent, with a defeasance, executed some days after, declaring that, if he did not recover the estate or half of it, the bond was to be delivered up:—*Held:* the transaction was unconscionable, savouring of champerty & dangerous to public justice.—STRACHAN *v.* BRANDER (1759), 1 Eden, 303; 28 E. R. 701. S. C. No. 737, *post.*

Annotations:—**Consd.** Wood *v.* Downes (1811), 10 Ves. 120. **Folld.** James *v.* Kerr (1889), 40 Ch. D. 449.

595. —— ——.]—Cause adjourned in order to make a person party who had agreed with pltfs. to advance the expenses of the suit upon condition of

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594 i. *Champertous agreements—Agreement to supply funds for share of proceeds.*]—An agreement to contribute towards the costs of a lawsuit in consideration of receiving a share in the result is not necessarily champertous. S., after filing declaration in an action, arranged with a third person that if he would pay part of the costs he should receive a share of the proceeds:—*Held:* there was no such trafficking or speculation in lawsuits as to bring the matter under the operation of the rule regarding champerty.—PATZ *v.* SALZBURG (1907), T. S. 526.—**S. AF.**

594 ii. —— —— *Law in India.*]—An agreement to furnish money for itigation on the terms of sharing the property to be recovered thereby is not necessarily void in India, unless accompanied by circumstances which lead to the conclusion that it was not a *bonâ fide* one for the acquisition of an interest in the subject-matter of litigation, but an illegitimate transaction got up for the purpose merely of spoil, or of litigation, disturbing the peace of families, & carried on from a corrupt & improper motive.—TARACHAND *v.* SUKLAL (1888), I. L. R. 12 Bom. 559.—**IND.**

594 iii. *S. P.*] RAGHUNATH *v.* NIL KANTH (1893), I. L. R. 20 Calc. 843.—**IND.**

594 iv. —— —— ——.]—H. joined in a suit for possession of immovable property under an agreement with other pltfs. that he should defray the costs & that he should then become proprietor of one-half of the property in suit & be entitled to half the costs:—*Held:* H. had no right to join in the suit.—HAZARI LAL *v.* JADAUN SINGH (1882), I. L. R. 5 All. 26.—**IND.**

594 v. —— —— ——.]—For the purpose of meeting the expenses of a suit, pltf., who was in straitened circumstances, agreed with deft. that the latter in consideration of paying such expenses should have half the property & half the mesne profits, with all his costs, in the event of success. The suit was brought, & deft. obtained possession of half the property. Pltf. sued to recover possession of the half on the ground that the agreement was illegal & void:—*Held:* the agreement was unfair, unreasonable, extortionate, & contrary to public policy within Contract Act (IX. of 1872) (India), s. 23, & pltf. was entitled to recover possession of the land in suit on payment of compensation for the advances made by deft. in the former litigation, with interest at 12 per cent. per annum.—HUSAIN BAKHSH *v.* RAHMAT HUSAIN (1888), I. L. R. 11 All. 128.—**IND.**

594 vi. —— —— —— *Surrounding circumstances looked at to explain.*]—R. entered into an agreement with G. that if a suit, then about to be brought by G. for recovery of land, should be decided in favour of G., R. was to pay G. R85, & G. was to make over to R. half the land recovered. R. was to pay R50 in certain proportions, which R. was to lose if the suit was not decided in favour of G. G. recovered the land, & R. sued him upon the above agreement. *Semble:* the agreement was not void on the ground of champerty; at any

Sect. 1.—*In General: Sub-sect.* 3. *Sect.* 2: *Sub-sect.* 1.]

sharing the benefits.—CHAMEAU *v.* RILEY (1838), Coop. Pr. Cas. 336; 2 Jur. 1081; 47 E. R. 533.

596. —— ——.]—HUTLEY *v.* HUTLEY, No. 591, *ante*; Nos. 648, 734, *post.*

For full anns., *see* S. C. No. 648, *post.*

597. —— —— **Binding agreement to proceed with litigation unnecessary.**]—An agreement by a person having no interest in an action to furnish money to enable one of the parties to carry it on in consideration of a share of the money recovered amounts to champerty, although the party to whom the money is to be advanced enters into no correlative agreement to proceed with the litigation.

Pltf. advanced to R. the sum of £30 upon his signing an undertaking to pay to pltf. one-third of the amount of any damage, R., might recover in an action against a certain ry. co. R. had already recovered a verdict against the ry. co., but a new trial had been granted. In the second trial he obtained a verdict for £130. Before pltf. gave notice to the ry. co. of his charge upon the verdict the co. had been served with a garnishee order *nisi* obtained by defts., who had recovered judgment against R. in default of appearance for £200 7*s.* The ry. co. was ordered to pay the sum of £43 6*s.* 8*d.*, that being one-third of the amount recovered by R., into ct.; & an issue was directed to try the rights of pltf. to this sum against deft.:—*Held:* the agreement between pltf. & R. amounted to champerty, & was void.—BALL *v.* WARWICK (1881), 50 L. J. Q. B. 382; 44 L. T. 218; 29 W. R. 468. S. C. No. 750, *post.*

598. —— —— **Bonus.**]—Pltf., who was in very poor circumstances, & pressed by creditors, was party to proceedings in the Probate Ct. in which he claimed to be entitled, as heir, to a share of real estate. He entered into an agreement with defts. for the advance of a sum of money, & for further advances to meet his immediate necessities & to enable him to prosecute his claim in the probate suit, & he agreed to employ the solr. named by defts. & to pay them a bonus of £225 in case he should succeed in establishing his claim, & he charged the advances, with interest at 5 per cent., & the bonus upon the property which he should recover. Pltf.'s title was established. He brought an action to redeem upon payment of the advances & interest, but without payment of the bonus:—*Held:* (1) the agreement savoured of champerty; (2) the bonus could not be recovered.—JAMES *v.* KERR (1889), 40 Ch. D. 449; 58 L. J. Ch. 355; 60 L. T. 212; 53 J. P. 628; 37 W. R. 279; 5 T. L. R. 174. S. C. No. 741, *post.*

Annotations:—**Consd.** Cole *v.* Booker (1913), 29 T. L. R. 295. **Mentd.** Mainland *v.* Upjohn (1889), 41 Ch. D. 126; Field *v.* Hopkins (1890), 44 Ch. D. 524, C. A.; Eyre *v.* Wynn-Mackenzie (1893), 63 L. J. Ch. 239; Rees *v.* De Bernardy, [1896] 2 Ch. 437; Biggs *v.* Hoddinott, Hoddinott *v.* Biggs, [1898] 2 Ch. 307, C. A.; Santley *v.* Wilde, [1899] 2 Ch. 474, C. A.; Carritt *v.* Bradley, [1910] 2 K. B. 550, C. A.

599. —— —— **Agreement not involving litigation—Application to licensing justices.**]—The tenant of a beerhouse agreed with a firm of brewers—one of whom was a magistrate—that, in consideration of their paying all costs of his application to the licensing magistrates for a licence (which involved that the brewers should give the support of their name & business reputation to such application), he would tie the beer trade of the premises where licensed to them & their successors in business for a specific term of years:—*Held:* (1) no question of litigation was involved; (2) the agreement was not void on the ground of champerty.—SAVILLE BROTHERS, LTD. *v.* LANGMAN (1898), 79 L. T. 44; 14 T. L. R. 504; 42 Sol. Jo. 633, C. A.

SECT. 2.—ASSIGNMENT OF INTEREST IN LITIGATION.

SUB-SECT. 1.—ASSIGNMENT OF MERE RIGHT OF LITIGATION.

NOTE.—The Statute of Maintenance, 32 Hen. 8, c. 9, s. 2, was repealed by Land Transfer Act,

rate, it was capable of explanation by a consideration of the surrounding circumstances, which pltf. should have had an opportunity of giving in evidence.—RAMRAV KHUNDERAV *v.* GOVIND PANDSHET (1869), 6 Bom. A. C. 63.—**IND.**

c. —— *Agreement to divide proceeds of suit.*]—By deed of 1832 between B., V., & V.'s brother, C., reciting that to avoid litigation & expense in establishing their rights & to forward the prosecution of a suit then depending to recover certain property, & for the purpose of determining all questions & differences existing between the parties, they agreed, if the suit succeeded, to divide between them the whole of such property, & the estates were conveyed to V. & C. upon trust to carry on the suit & upon its termination to assign one moiety to B.; V. & C. meanwhile to be, as to a moiety, trustees for B., who covenanted to give his full & active personal aid & assistance in all matters relating to the suit. Afterwards V. & C. filed a bill of revivor & supplement against the original defts.:—*Held:* the contract under the deed of 1832 amounted to champerty; on that ground the bill must be dismissed with costs.—MOORE *v.* CREED (1838), 1 Dr. & War. 521 (C.).—**IR.**

d. —— *Agreement to pay costs of proceedings.*]—Pltfs. having a judgment against B. & P., agreed with deft. that if such judgment, or any portion of it, should be realised from property pointed out by him, he, deft., should have one-third of the amount so realised; "all costs incurred to be payable by him if successful, the amount to be a first charge on any proceeds; the net balance to be divided." Goods pointed out by deft. having been seized, were found, on an interpleader issue, to be claimant's. Pltfs. thereupon sued deft. on the agreement:—*Held:* if such agreement extended to the costs it was illegal as being contrary to public policy, if not within the definition of champerty; & if it did not so extend pltfs. could not recover.—KERR *v.* BRUNTON (1865), 24 U. C. R. 390.—**CAN.**

e. —— *Agreement to pay costs of election petition.*]—A political association may agree to pay the costs of an election petition without infringing the principles of law which prohibit champerty.—NORTH SIMCOE ELECTION, EDWARDS *v.* COOK (1874), 1 H. E. C. 617; 10 C. L. J. 232.—**CAN.**

f. —— *Existence of agreement as avoiding right of action.*]—The general principle is that all champertous agreements are void—the older cases say "*malum in se.*" If, then, a party to a champertous agreement must rely upon the illegal agreement to sustain an action, he fails; but if he, although a party to such agreement, can make out his case without calling in the agreement, the existence of the invalid agreement does not void the right of action he has without it.—COLVILLE *v.* SMALL (1910), 17 O. W. R. 745; 2 O. W. N. 371; 22 O. L. R. 426.—**CAN.**

g. —— *In India—Agreement to supply funds on security of property in dispute.*]—A contract made in good faith by a person with a litigant to supply him with funds to carry on the suit on the security of the property in dispute will be enforced. Such contract is distinguishable from an officious intermeddling in the suits of other persons, or acts tending to prevent unnecessary litigation.—NUTHOO LALL *v.* BUDREE PERSHAD (1869), 1 N. W. 1.—**IND.**

h. —— ——.]—H., being apprehensive that (in consequence of an action of trespass brought by A. & B. in the S. C. against C.) he was in danger of being deprived of a piece of land of which he was possessed, entered into an agreement with K. that K. should conduct the pending case at his own cost, & that after H. had proved that the land was his sole property, K. & H. should erect a building on it at their joint expense, & enjoy the rents & profits jointly during the lifetime of H., after whose death the property with the building was to be the absolute property of K.:—*Held:* the agreement (considered in its surrounding circumstances) did not savour of maintenance or champerty, nor was it void as being against public policy.—DAMODHAR MADHAVJI *v.* KAHANDAS NARANDAS (1871), 8 Bom. O. C. 1.—**IND.**

i. —— —— *Inadequate consideration for sale—Speculative suit.*]—A suit having been dismissed on the ground that a sale upon which it was based had been made for a consideration so inadequate as to support the belief that it was in the nature of champerty:—*Held:* the elements required to bring the case within the authorities on the law of champertous transactions in India were wanting. It was not a case in which an improper interest had been acquired in the unrighteous litigation of other people. The fact that a suit may be speculative does not render it champertous.—SIVA RAMAYYA *v.* ELLAMMA (1898), I. L. R. 22 Mad. 310.—**IND.**

PART VIII. SECT. 2, SUB-SECT. 1.

j. *Statute of Maintenance,* 32 Hen. 8, *c.* 9—*Application—Nova Scotia.*]—It

1897 (c. 65), s. 11, but cases in reference to the former Act have been included among the Colonial cases *infra*, that Act still being in force in certain colonies.

600. Agreement to sue & divide lands recovered.]—An agreement made by parties out of possession to proceed in a ct. of equity to recover & to divide lands, etc., when recovered, is contrary to

has never been decided that the above Act, against selling pretended titles, is in force in Nova Scotia, & it might well be held otherwise, but inasmuch as that Act has been declared to be only the expression of the common law, it has been treated as if in force, but is subject to the fate of all obsolete Acts.—MCDONALD *v.* MCDONALD (1905), 38 N. S. R. 261.—**CAN.**

k. —— *Conveyance by person out of possession.*]—Deft. took a lease of W. of certain lands, whereas W., as the deft. knew, never had been in possession of the land:—*Held:* the lease, being made by one out of possession & not sealed or delivered upon the land, was within the above Act, which was to repress the practice of many who for the furtherance of their pretended right conveyed their interest to great persons & with their countenance oppressed the possessors.—SLYWRIGHT & PAGE'S CASE (1588), 1 Leon. 166; 1 And. 201; Gouldsb. 101; 74 E. R. 153.—**ENG.**

l. —— ——.]—B., claiming to be tenant in tail, with remainder to C., in fee of lands in the adverse possession of D., conveyed by lease & released all his interest to C.:—*Held:* the conveyance was not within the above Act.—ANSON *v.* LEE (1831), 4 Sim. 364; 58 E. R. 136.—**ENG.**

m. —— ——.]—Where A. in the actual possession of land as owner, claiming the fee, gives a mtge. to B., who assigns to the lessor of pltf., a deed given by the heir-at-law of a former owner to deft. while out of possession, & subsequent to the mtge., is void, as against the common law & the above Act.—DOE d. MOFFAT *v.* SCRATCH (1848), 5 U. C. R. 357.—**CAN.**

n. —— ——.]—A. died in 1840. After his death B., his wife, remained in the exclusive possession of his land until her second marriage with deft. They both continued the actual possession, the wife claiming to have a life estate under A.'s will. C., the eldest son of the testator A. & B., while out of possession, conveyed the land, & all his interest in it, as heir-at-law, to the lessor of pltf.:—*Held:* C.'s deed to the lessor of pltf. was void, both at common law & by the above Act. *Semble:* the above Act applies in Ontario, as well to terms for years, as to estates in fee.—DOE d. CLARK *v.* MCINNES (1848), 6 U. C. R. 28.—**CAN.**

o. —— ——.]—A deed of bargain & sale made by a party out of possession, while another person is in actual possession claiming the fee, is void both at common law & under the above Act. A party in possession as tenant will not be allowed to purchase from a stranger over his landlord's head.—DOE d. SIMPSON *v.* MOLLOY (1849), 6 U. C. R. 302.—**CAN.**

p. —— ——.]—In ejectment it was objected that certain deeds under which pltf. claimed, executed in 1835, 1841, & 1844, were void because strangers then held possession claiming the fee. It appeared that J. in 1842 "bought the possession" from H. & was succeeded by his son & by deft., who had cleared about 18 acres; & that in 1845 he had negotiated for the purchase of the fee.—*Held:* not sufficient to avoid the deeds under the above Act, for the evidence showed rather that the parties in possession did not claim the fee. *Semble:* the objection at all events could have applied only to the 18 acres cleared.—SMITH *v.* HALL (1866), 25 U. C. R. 554.—**CAN.**

q. —— —— *Void as against party in possession.*]—In 1828 certain land in Upper Canada was granted by the Crown to King's College. In 1841, while M., who had entered on the land, was in possession, King's College conveyed it to G. In 1849 G. conveyed to the wife of M., who signed the conveyance though not a party to it. In an action by the successors in title of M.'s wife to recover possession, defts. claiming title through M. alleged that the conveyance to G. in 1841, the grantor not being in possession, was void under the above Act:—*Held:* (1) assuming the possession of M. began before the grant from the Crown, M. could not avail himself of the above Act, as he would have to establish disseisin of the grantor, & the Crown could not be disseised; nor would it avail as against the patentee, as the original entry, not being tortious, the possession would not become adverse without a new entry: (2) if the possession began after the grant, the deed to G. in 1841 was not absolutely void under the Act, but only void as against the party in possession, & M. being in possession, a conveyance to him would have been good under s. 4, & the deed to his wife, a person appointed by him, was equally good.—WEBB *v.* MARSH (1893), 22 S. C. R. 437.—**CAN.**

r. —— —— *Sale by administrator.*]—A sale by an administrator of a "pretended right of title" to premises of a term in which the intestate died possessed, but of which the administrator never had possession, is within the prohibition of the above Act.

A., possessed of a term, died in 1828. B., who had during A.'s life resided on part of the premises, at A.'s death claimed & took possession of the whole & retained it till he died in 1829, having by his will devised the premises to C., who remained in undisturbed possession until 1841, when A.'s next of kin took out letters of administration & sold his right or title in the premises to D.:—*Held:* the conveyance was void by the Act.—DOE d. WILLIAMS *v.* EVANS (1845), 1 C. B. 717.—**ENG.**

s. —— —— *Litigation not contemplated.*]—By agreement in writing between A. & B. reciting that A. was expecting to become seised in fee of a certain messuage, etc., on the death of S., widow, as the devisee under her will (which messuage, etc., were then in the occupation of lessees, under a lease of which A. was assignee), & that A. had contracted to sell all the possibility & expectancy of an estate & interest in the premises to B. for all A.'s estate & interest therein, expectant as aforesaid, for £2,000, which B. thereby agreed to pay him, A. promised & agreed with B. that he would within 3 months from the decease of S., in case A. became devisee of the premises, convey same to B., his heirs & assigns, & make him a good title, & that B. should in that event become entitled to the rents & profits from the day of S.'s decease; & that, in case A. should not become the devisee in fee of the premises or should not make a good title within 6 months from the decease of S., A. should within the latter period repay the £2,000 (without interest) to B., & that A. should execute a certain indenture assigning a policy on his life, as a security for such repayment, B. to reassign if the conveyance should be perfected according to the agreement. The indenture was executed accordingly. Neither A. nor any person under whom he claimed had had possession of the premises or the reversion or remainder thereof, or taken the rents or profits within a year before such execution. B. was not the heir of S. & had no interest in her life or death, unless by the above agreement. On demurrer, in an action of covenant on the indenture:—*Held:* the agreement was not illegal as a bargain, contrary to the above Act, for a grant of a pretended right or title to hereditaments of which the grantor was not in possession.—COOK *v.* FIELD (1850), 15 Q. B. 460; 19 L. J. (Q. B.) 441; 14 Jur. 951; 117 E. R. 534.—**ENG.**

t. —— ——. *Claim by vendor to benefit of exception in statute.*]—A vendor, in order to have the benefit of the exception under the above Act, must in truth claim under some person in possession a year before the bargain made: a mere pretended, fraudulent claim, under a person of whom vendor knew nothing, & with whom he had no privity, will not satisfy the above Act. The ct. will refuse a new trial merely on the ground that there was not direct evidence of the value of the property; the situation & condition of the land having been proved, & the sum acknowledged to have been paid for the land in the deed by deft. being evidence of value.—BALDWIN q.t. *v.* HENDERSON (1846), 3 U. C. R. 287.—**CAN.**

u. —— —— *Giving note in payment—Pleading.*]—To bring the giving of a note in payment of land within the above Act care must be had to allege enough to meet the provisions of the Act.

Where deft. merely averred that pltf. was not, for a year next before the bargain, "in receipt of the rents & profits," without saying that he was not "in possession of the land, or of the reversion or remainder thereof":—*Held:* plea bad.—NICOLLS *v.* MADILL (1849), 6 U. C. R. 415.—**CAN.**

w. —— ——.]—The main object of the above Act was for the protection of actual possessors against buyers of titles of pretended owners, that is, persons out of possession. It could never have been intended to prevent the actual possessor from perfecting his title.—MARSH *v.* WEBB (1892), 19 A. R. 564.—**CAN.**

x. —— —— *Purchase of equity of redemption.*]—A person having an equity of redemption conveyed all her rights to a stranger while another was in possession of the legal estate derived from the mtgee.:—*Held:* such conveyance was not a deed made against the above Act, since the grantors held an equity & had a right to convey it to whom they pleased, & what they had conveyed was not a pretended right.—MACKENZIE *v.* MILLER (1841), 6 O. S. 459.—**CAN.**

y. —— —— *Transfer of right of purchase from Crown.*]—M., in 1839, having a right of purchase of a lot from the Crown, mtged. to B. to secure payment of a sum by instalments, the last of which would fall due in 1849. Soon after the mtge. M. gave to B. a bond for a deed, on certain conditions to be fulfilled by B., who took possession. In 1850, pltf. went in under an agreement for purchase from B., who had not fulfilled the conditions of his bond. In 1851, deft. took an assignment of B.'s mtge., & in same year he claimed before the heir & devisee commission, making the usual affidavit of ignorance of any adverse claim, & obtained a patent. Pltf. brought an action founded *(inter alia)* on the above Act in respect of the buying M.'s pretended right:—*Held:* admitting pltf.'s allegations to be true, no ground of action would be shown.—SHIELDS *v.* DE BLAQUIERE (1854), 12 U. C. R. 386.—**CAN.**

z. —— *Agreement to divide lands when recovered.*]—An agreement made

Sect. 2.—Assignment of Interest in Litigation: Sub-sects. 1 & 2.]

the policy of the law. *Qu.:* whether a ct. of equity can entertain a bill stating such an agreement.—CHOLMONDELEY (MARQUIS) *v.* CLINTON (LORD (1821), 4 Bli. 1; 4 E. R. 721, H. L.

For full anns., *see* EQUITY.

601. Assignment of right to sue—For fraud.]—An assignment of a bare right to file a bill in equity for a fraud committed on the assignor is contrary to sound policy & void. Cts. of equity will give no encouragement to contracts which savour of maintenance or champerty, though such contracts may not be within the strict legal limits assigned to those offences.

Where A., who was entitled to certain property under his father's will, for a valuable consideration assigned the whole of that property (except a reversionary interest in the funds) to B., his father's exor., & afterwards assigned the whole of his interest under his father's will (including the reversionary interest) to C.:—*Held:* C. could not maintain a bill to set aside the first assignment on the ground of fraud committed by B. against A., the latter refusing to join as pltf. in the suit.—PROSSER *v.* EDMONDS (1835), 1 Y. & C. Ex. 481; 160 E. R. 196. S. C. No. 744, *post.*

Annotations:—**Distd.** Wilson *v.* Short (1848), 6 Hare, 366; Cook *v.* Field (1850), 15 Q. B. 460; Radcliffe *v.* Anderson (1860), E. B. & E. 819; Dickinson *v.* Burrell (1866), 35 Beav. 257. **Apld.** Alabaster *v.* Harness, [1895] 1 Q. B. 339, C. A. **Distd.** Dawson *v.* G. N. & City Ry. Co., [1905] 1 K. B. 260, C. A. **Apprvd. & Distd.** Defries *v.* Milne, [1913] 1 Ch. 98, C. A. **Consd.** Bruty *v.* Edmundson (1915), 113 L. T. 1197. **Refd.** Cockell *v.* Taylor (1852), 15 Beav. 103; Bradlaugh *v.* Newdegate (1883), 11 Q. B. D. 1; Fitzroy *v.* Cave, [1905] 2 K. B. 364, C. A. British Cash & Parcel Conveyors *v.* Lamson Store Service Co., [1908] 1 K. B. 1006, C. A.; Oram *v.* Hutt, [1913] 1 Ch. 259.

602. —— For damages.]—The law of champerty & maintenance is not affected by Jud. Act, 1873 (c. 66), s. 25 (6); a mere right of action to recover damages for breach of contract, or damage arising out of assault, is not a legal chose in action capable of being assigned (RIGBY, L.J.).—MAY *v.* LANE (1894), 64 L. J. Q. B. 236; 71 L. T. 869; 43 W. R. 193; 39 Sol. Jo. 132, C. A. S. C. No. 749, *post.*

Annotations:—**N.F.** Earle's Shipbuilding & Engineering Co. *v.* Atlantic Transport Co. (1899), 43 Sol. Jo. 691. **Expld.** Torkington *v.* Magee, [1902] 2 K. B. 427. **Folld.** Dawson *v.* G. N. & City Ry. Co., [1904] 1 K. B. 277. **Refd.** Swans & Clelands Graving Dock & Shipway *v.* Maritime Insce., [1907] 1 K. B. 116.

603. —— ——.]—Pltfs. in Sept., 1896, agreed to build a ship for W. In July, 1898, W. sold the ship to defts., the building of the ship, owing to strikes, being uncompleted, together with the benefit of the contract with pltfs. as & from the date of delivery of the ship. In an action by pltfs. for work & labour done, defts. counterclaimed for damages for the improper way in which the work had been done:—*Held:* (1) the claim for damages was a legal chose in action, & was assignable; (2) defts. were entitled on the counterclaim to such damages as W. would have been entitled.—EARLE'S SHIPBUILDING & ENGINEERING CO. *v.* ATLANTIC TRANSPORT CO. (1899), 43 Sol. Jo. 691.

604. —— ——.]—An assignment of the right to recover damages for voluntary waste is void.—DEFRIES *v.* MILNE, [1913] 1 Ch. 98; 82 L. J. Ch. 1; 107 L. T. 593; 57 Sol. Jo. 27, C. A.

605. —— Right to proceed with winding-up petition.]—A creditor of a co. being unable to obtain payment of his debt presented a petition to wind up the co. Before the petition was heard he sold his debt & the right to proceed with the petition to a shareholder of the co., who obtained leave to amend the petition by making himself a co-petitioner:—*Held:* (1) the sale of the right to proceed with a winding-up petition ought not to be allowed; (2) the petition must be dismissed.—*Re* PARIS SKATING RINK CO. (1877), 5 Ch. D. 959; 37 L. T. 298; 25 W. R. 701, C. A. S. C. No. 751, *post.*

606. —— By trustee in bankruptcy.]—S., trustee in bkpcy. of W., issued a writ in an action claiming

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by parties out of possession to proceed in a ct. of equity to recover & to divide lands, etc., when recovered, is contrary to the above Act.—CHOLMONDELEY (EARL) *v.* CLINTON (LORD) (1821), 4 Bli. 1.—**ENG.**

a. —— *Lease of tithes—Involving enforcement of payment.*]—Agreement to lease the rectorial tithes of a parish, including the tithes of 90 acres supposed to be within the parish, but which had not paid tithes to the lessor during his incumbency, with a stipulation that the intended lessee would, within a given time, take such legal proceedings for the recovery of the tithes of the 90 acres as his counsel should advise:—*Held:* not within the above Act.—WHITE *v.* GARDNER (1835), 1 Y. & C. (Ex.) 385.—**ENG.**

b. —— *Sale of pretended right.*]—A testator died, leaving a will, by which he directed that his debts should be paid as soon as practicable after his decease, & gave & bequeathed to his extrix. & exors. all his real & personal property in trust, to sell, etc., such tracts or parcels of land as might be necessary for carrying his intention into effect. He then gave the residue of his real & personal property to his wife during her life, & after her death to such of his children as might then be living—share & share alike. About 20 years after his death his widow (who had married again) & W., for three of the children then living, conveyed a lot to R. in fee; & R. conveyed to L. who was in possession when deft. took his deed. About same time the widow & one of the sons conveyed another lot to pltf., who was in possession when deft. took his deed for the lot. About 16 years after these deeds were made deft. took a deed of bargain & sale of both lots from all the surviving children:—*Held:* (1) there was nothing to prevent the children from conveying their reversionary interest; (2) deft. was not liable in a *qui tam* action for purchasing a disputed title under the above Act.—ROSS q.t. *v.* MEYERS (1851), 9 U. C. R. 284.—**CAN.**

c. —— —— *Sale of right of entry.*]—A., owner of lands, conveyed to pltf. by deed, which was never recorded; pltf. conveyed to others, who registered their deeds; deft., A.'s son & heir-at-law, subsequently released to S., the release being recorded; deft. had never been in possession, but the persons to whom pltf. conveyed were. Pltf. sued deft. for the penalty under the above Act for selling a pretended right:—*Held:* (1) 14 & 15 Vict. c. 7 would not apply in deft.'s favour, for that only allowed the sale of a right of entry, & as his father's deed was binding upon him, he had no such right; (2) by the registration of the deed to S. the conveyance to pltf. became fraudulent in its inception, & he could not recover. *Semble:* the effect of the later Act was to repeal the earlier Act, & not merely to permit the sale of a right of entry subject to the penalty.—BABY q.t. *v.* WATSON (1855), 13 U. C. R. 531.—**CAN.**

d. —— —— *Penal action—Compromise.*]—Leave was given to compromise a penal action under the above Act for buying pretended titles, on paying the Crown's share into ct.—MAY *v.* DETRICK (1836), 5 O. S. 77.—**CAN.**

e. —— —— —— *When buyer not liable.*]—The true owner of an estate is not liable to the penalty under the above Act when the person in possession of the land is in privity with him, either as an overholding tenant, or as a person let in on a contract to purchase from him, & not setting up any conflicting title.—BENNS q.t. *v.* EDDIE (1844), 2 U. C. R. 286.—**CAN.**

i. —— —— *Verbal bargains.*]—A mere verbal bargain for the sale of land would not subject a person to the penalty under the above Act, for buying a pretended title.—AUBREY q.t. *v.* SMITH (1850), 7 U. C. R. 213.—**CAN.**

k. *Agreement to sue & divide proceeds recovered.*]—A claim was assigned to pltf. by a document authorising assignee to sue & recover & out of proceeds, first to pay costs, and then divide what remained equally between assignor & assignee:—*Held:* champerty of the plainest kind. When an action is brought by an assignee in his own name & the assignment is shown to be champertous then the ct. treats it as "invalid" and void for all purposes, & the ct. refuses its aid to a pltf. whose title is tainted with illegality.—COLVILLE *v.* SMALL, p. 72, *ante.*—**CAN.**

601 i. *Assignment of right to sue—For arrears of rent.*]—A. seised of lands in 1783 demised part to S., & afterwards died, leaving four daughters, co-heiresses. E., one of the co-heiresses, in 1794, demised her one-fourth part of the lands not demised to S., to N. J., son of E., died in 1820, leaving a widow & a son, C., who was at the time of his father's death abroad, & never returned to Ireland. The widow, in 1822, by a deed reciting that she was devisee of all J.'s property, conveyed the reversion on N.'s lease to P. In 1865, C. by deed, assigned his interest in the lands, & all arrears of rent due to T.:—*Held:* this assignment, as far as it related to the arrears, was bad, as tending to maintenance.—TWISS *v.* NOBLETT (1869), I. R. 4 Eq. 64.—**IR.**

to have a deed which had been executed by bkpt. prior to his bkpcy., purporting to be an absolute conveyance by bkpt. to deft. of the equity of redemption in certain mtged. freehold & leasehold hereditaments, set aside, so far as it purported to be an absolute conveyance, & a declaration that the deed ought only to stand as security for the sum actually paid by deft. Subsequently an agreement was come to between C. & S., with the sanction of the committee of inspection, that C. should purchase all the trustee's right in the property, & a deed was executed to carry that agreement into effect. C. thereupon obtained, under R. S. C., O. 50, r. 1, an order *ex p.* appointing him pltf. in place of S. On motion by deft. in the action to discharge the last-mentioned order on the ground that the sale by S. was in reality the sale of a right to bring an action & within the rule against champerty & maintenance:—*Held:* (1) the right to bring the action was part of the "property" of bkpt. within Bkpcy. Act, 1869 (c. 71), s. 4; (2) as such "property" it was by force of s. 17 vested in the trustee; (3) whether B. himself could have assigned the right or not, his trustee was by s. 25 (6) empowered to sell it; (4) the rule against champerty & maintenance had no application.—SEEAR *v.* LAWSON, CHATTERTON *v.* LAWSON (1880), 15 Ch. D. 426; 49 L. J. Bcy. 69; 42 L. T. 893; 28 W. R. 929, C. A.

Annotations:—**Apld.** Guy *v.* Churchill (1888), 40 Ch. D. 481. Both maintenance & champerty are founded on the same principle or policy of law, viz., the tendency of the transactions to prevent the course of justice. But adopting the principle of *Seear* v. *Lawson*, I do not think I am carrying it beyond its true limits in holding that it covers the case before me. It would be too fine a distinction to hold that the arrangement is void, merely because the bkpt.'s estate gets back part of the money that may be recovered in the action (CHITTY, J.). **Folld.** Howard *v.* Fanshawe, [1895] 2 Ch. 581; *Re* Perkins, Poyser *v.* Beyfus, [1898] 2 Ch. 182, C. A. **Refd.** Defries *v.* Milne, [1913] 1 Ch. 98, C. A. **Mentd.** Burr *v.* Wimbledon L. B. (1887), 56 L. T. 329.

607. —— ——.]—Pltfs., a trading firm claiming to have accounts between them & defts., their brokers, reopened, became bkpt. pending the action, & their right of action was assigned by the trustee in bkpcy., with the approval of the committee of inspection, to F., on the terms that F. should continue the action at his own risk & expense, & that one-fourth of whatever should be recovered in the action by F. should be paid to the trustee in bkpcy., & the remaining three-fourths to be retained by F. F. was himself a creditor in the bkpcy. & was acting as trustee for himself & other creditors, including pltfs.' solrs., on the record, & pltfs.' solrs. were acting for F. in the continuation of the action:—*Held:* (1) having regard to the relationship between the parties, the assignment was not champertous; (2) it was immaterial that some of the creditors were to carry on the action at their own risk & expense, & to take a larger share of the fruits of the action than they would otherwise have done.—GUY *v.* CHURCHILL (1888), 40 Ch. D. 481; 58 L. J. Ch. 345; 60 L. T. 473; 5 T. L. R. 149; 37 W. R. 504. S. C. No. 583, *ante*.

Annotation:—**Refd.** Howard *v.* Fanshawe, [1895] 2 Ch. 581.

608. Commission of lunacy—Agreement to sue out—No suit—No property in litigation.]—By indenture made in 1827 between A. & his eldest son B. (reciting that C. was seised of large real estates, was never married, & was then in a state of mental & bodily imbecility; that in the event of his dying so seised intestate & without issue A., as his heir-at-law, would be entitled to the reversion of his estates in fee; that A. was desirous of having a commission of lunacy sued out for the protection of C. & his property & of his own reversion; & that B., at A.'s request, agreed to sue out & prosecute such commission & take other necessary law proceedings at his own expense in A.'s name), A., in consideration of the agreement & of love & affection for B., covenanted to convey all the estates that would descend to him on the decease of C. to the use of himself for life, remainder to the uses expressed respecting the estate of A. in B.'s marriage settlement, being for the benefit of B. & the heirs male of the marriage. The commission was issued. C. was declared a lunatic, & B. was reimbursed for his expenses out of his estate. A. was then 63 years of age; C. was 40; B. was younger. C. died in 1829, & A. entered into possession of his real estates & conveyed them to his second son, D., for valuable consideration. On a bill filed by B. to set aside that conveyance & for specific performance of the covenant:—*Held:* the indenture of covenant was not void or illegal for champerty or maintenance, as there was no suit to be maintained & no property in litigation to be divided.—PERSSE *v.* PERSSE (1840), 7 Cl. & Fin. 279; West, 110; 4 Jur. 358; 7 E. R. 1073.

Annotation:—**Apld.** Williams *v.* Williams (1865), 2 Drew. & Sm. 378.

SUB-SECT. 2.—ASSIGNMENT OF PROPERTY FOR PURPOSES OF LITIGATION.

609. Assignment of policy—Indemnity against costs included.]—A policy of assurance on goods was effected in the names of pltfs. as agents, A., B., C., & D. being interested in the goods to the full amount insured, & the policy being effected on their account & for their sole use & benefit. A. being called as a witness for pltfs. was objected to, & thereupon an indenture was executed by A. after commencement of the action whereby (after reciting that pltfs. had effected the policy; that A., B., C., & D. were the persons interested; that actions had been commenced in the names of pltfs.; & that, they being desirous of an indemnity against the costs, the ct. of C. P. had ordered A., B., C., & D. to indemnify & that L. & R. had agreed to do it) A., B., C., & D., in consideration thereof & of 10s., assigned to L. & R. all their interest in the policy & all benefit to be derived therefrom, & all moneys to be recovered in the said actions, to & for their own exclusive use & benefit:—*Semble:* the assignment to L. & R. was illegal as maintenance.—BELL *v.* SMITH (1826), 5 B. & C. 188; 7 Dow. & Ry. K. B. 846; 4 L. J. O. S. K. B. 140; 108 E. R. 70.

For full anns., *see* EVIDENCE.

610. Sale of title by person out of possession.]—A., possessed of a term, died in 1828. B., who had during A.'s life resided on part of the premises, at A.'s death claimed & took possession of the whole &

PART VIII. SECT. 2, SUB-SECT. 2.

610 i. *Sale of title by person out of possession.*]—BURKE *v.* GREENE, No. 610 v, *post*.—IR.

610 ii. ——.]—A. brought ejectment for recovery of premises, which he claimed under a conveyance from B., grantee of C., who had, at the time of the grant, been out of the actual possession of, & of the receipt of the rents & profits of, the premises for several years, & which possession pltf. sought to obtain by the present action:—*Held:* (1) 10 Car. I. sess. 3, c. 15 (Ir.) against maintenance, etc., & the unlawful buying of titles, was in force, & was not affected by 8 & 9 Vict. c. 106, s. 6, which applied exclusively to England; (2) the deed under which A. claimed was void.—NELSON *v.* SMALL (1862), 13 I. C. L. R. 558; 7 Ir. Jur. N. S. 379.—IR.

610 iii. ——.]—Pltf. bought land in the occupation of one who claimed to be the owner from a vendor, who did not own the subject of the purchase & whom pltf. agreed to indemnify against the costs of the litigation which both anticipated, & who was to share in the fruits of the contemplated law-suit:—*Held:* this contract savoured of maintenance & champerty.—WIGLE *v.* SETTERINGTON (1872), 19 Gr. 512.—CAN.

610 iv. ——.]—An assignee of property whose assignor was not in possession when the assignment was made, can only recover, even from the hands of third persons, upon showing that he would have had a right to enforce specific performance of his contract against his assignor if the property

Sect. 2.—Assignment of Interest in Litigation: Sub-sects. 2 & 3.]

retained it till he died in 1829, having by his will devised the premises to C., who remained in undisturbed possession until 1841, when A.'s next of kin took out letters of administration & sold his right or title in the premises to D. :—*Held :* the conveyance was void at common law.—DOE d. WILLIAMS *v.* EVANS (1845), 1 C. B. 717 ; 14 L. J. C. P. 237 ; 5 L. T. O. S. 175 ; 9 Jur. 712 ; 135 E. R. 724. S. C. No. 747, *post.*

Annotations :—**Distd.** Jenkins *v.* Jones (1882), 9 Q. B. D. 128, C. A. **Refd.** Kennedy *v.* Lyell (1885), 15 Q. B. D. 491.

611. Sale of legacy—Legatee too poor to sue.]—A legatee, too poor to sue, assigned the legacy for less than it was worth to pltf., who bought it for the purpose of enforcing payment by suit:—*Held :* this did not amount to champerty or maintenance.—TYSON *v.* JACKSON (1861), 30 Beav. 384 ; 54 E. R. 937.

For full anns., *see* LIMITATION OF ACTIONS.

612. Purchase of shares—To found right to injunction against company.]—The purchase of shares in a co. for the purpose of instituting a suit to restrain the carrying out of an agreement alleged to be illegal is not maintenance, or anything savouring of maintenance.—HARE *v.* LONDON & NORTH WESTERN RY. CO. (1860), John. 722 ; 30 L. J. Ch. 817, 821 n. ; 2 L. T. 229 ; 7 Jur. N. S. 1145, 1147 n. ; 8 W. R. 352 ; 70 E. R. 610.

Annotations :—**Consd.** Mid. Ry. Co. *v.* L. & N. W. Ry. Co. 1866), L. R. 2 Eq. 524. **Refd.** Russell *v.* Wakefield Waterworks (1875), 44 L. J. Ch. 496.

613. *S. P.* BLOXAM *v.* METROPOLITAN RY. CO. (1868), L. R. 3 Ch. 337 ; 18 L. T. 41 ; 16 W. R. 490, C. A.

Annotations :—**Distd.** Robson *v.* Dodds (1869), L. R. 8 Eq. 301. **Folld.** Salisbury *v.* Metropolitan Ry. Co. (1869), 38 L. J. Ch. 249. **Distd.** Yool *v.* G. W. Ry. Co. (1870), 39 L. J. Ch. 562. **Consd.** Mutter *v.* E. & M. Ry. Co. (1888), 38 Ch. D. 92, C. A. **Mentd.** Bardwell *v.* Sheffield Waterworks 1872), L. R. 14 Eq. 517; *Re* National Bank of Wales, (1899) 2 Ch. 629, C. A.; Hinds *v.* Buenos Ayres Grand National Tramways, [1906] 2 Ch. 654.

614. Purchase of estate for purpose of setting aside previous agreement.]—The purchase of an estate for the purpose of setting aside a previous agreement affecting the property on the ground of fraud partakes of the nature of champerty, & will not be enforced in equity.

In 1861 pltf. was colonel & deft. M. lieutenant-colonel of a volunteer rifle corps. Adjoining the premises occupied by deft. C. was a leasehold piece of land convenient for the regiment which M. requested C. to purchase on its behalf, & C. bought it in 1861 for £500. In March, 1862, C. wrote to M. stating that he was willing to give the land to the regiment for the whole of the term held by him ; that the regiment was to observe all the covenants of the lease, to pay a merely nominal rent, & to level & prepare the ground suitable for drill. M. signed this letter & had it stamped as if it were a mutual agreement, & paid the nominal rent for one year in advance. In June, 1864, he also executed a deed purporting to assign the land to himself & deft. H. as trustees for the regiment. Shortly before this date pltf. & C. had entered into another agreement by which the former was to purchase of the latter the said lands without reservation, except as to the disputed right claimed by M. in respect of the letter of March, 1862, & was to be at liberty to use C.'s name in all proceedings necessary for setting aside that letter & any rights that might be claimed under it :—*Held :* the agreement, which in effect was the purchase of a right by pltf., to complain of the alleged fraud committed against C. savoured too much of maintenance for the ct. to enforce it.—DE HOGHTON *v.* MONEY (1866), 2 Ch. App. 164 ; 15 L. T. 403 ; 15 W. R. 214, C. A. S. C. No. 745, *post.*

615. Assignment of right to claim for breach of trust.]—The tenant for life of a trust estate mtged. it, & it was sold by the mtgee. After the sale the purchaser & mtgee., for a nominal consideration, assigned to the tenant for life certain alleged arrears of interest & profits of part of the trust fund, which, as pltf. alleged, the trustees had made in excess of the interest for which they had accounted. A bill filed against the trustees on the title conferred by this assignment for an account of their profits was dismissed with costs.—HILL *v.* BOYLE (1867), L. R. 4 Eq. 260. S. C. No. 746, *post.*

616. Sale of company's undertaking—Partly to raise fund for litigation—Partly to secure continued working.]—A co. (which was being wound up under supervision of the ct.) was desirous of bringing an action against F. to rescind a contract for purchase of the co.'s mine, & to recover the purchase-money of £70,000 from F. The co. had no funds wherewith to prosecute the litigation. A new co. was formed, & an agreement under seal entered into between the old & new co. whereby the mine & plant were assigned to the new co., who were to provide money, not exceeding £30,000, partly for the purposes of the litigation against F. & partly to prevent deterioration by working the mine. The deed contained a clause empowering the liquidator of the old co. to repurchase the mine & plant. This clause was inserted in order that, if the action against F. succeeded & he repaid the £70,000, the liquidator might be in a position to reconvey the mine to him. The deed was subsequently confirmed, not by a special resolution, but by a resolution at one meeting passed by a large majority of shareholders. F. took out a summons for leave to bring an action to impeach the deed, & there was a cross-summons by the liquidator to obtain the sanction of the ct. to the deed :—*Held :* (1) the essence of the transaction was that it was a mode of converting the mines & plant into money to be used partly for the litigation & partly to prevent deterioration by working the mine ; (2) the deed was not bad on the ground either of maintenance or of champerty. —*Re* CAMBRIAN MINING CO. (1882), 48 L. T. 114.

For full anns., *see* COMPANIES.

617. Assignment to trustee to sue & obtain adjudication in bankruptcy.]—Pltf. took from creditors of deft. an absolute assignment of their debts in consideration of a covenant by him that, if he

were come back to the hands of the assignor.—BOODHUN SINGH *v.* MUSSAMUT LUTEEFUN (1874), 22 W. R. 535.—**IND.**

610 v. —— *Kinship immaterial.*]—A bill to enforce a title acquired by conveyance from a person out of possession in consideration of money advanced, & to be advanced, on suits respecting the recovery of the estate, was dismissed, as being a case of clear & distinct maintenance, although the grantor & grantee were first cousins.—BURKE *v.* GREENE (1814), 2 Ball. & B. 517.—**IR.**

611 i. *Sale of legacy.*]—A., entitled to one moiety of a testator's property, assigned it :—*Held :* a suit by the assignee against the exor., for an account of what had been lost by his wilful default, would not be open to the objection of champerty.—SCULLY *v.* DELANY, (1840) 2 I. Eq. R. 379 (C.).—**IR.**

1. *Assignment of mortgage for purpose of setting aside prior mortgage.*]—Where an assignment was executed by a puisne incumbrancer to another, for the purpose of filing a bill to impeach a prior mtge. for fraud, & which bill was filed ; the ct. dismissed the bill with costs, it being evident that the alleged fraud was the ground upon which pltf. principally relied, & the agreement between the parties savouring strongly of champerty & maintenance.—MCCHALL *v.* BANKS (1863), 10 Gr. 25.—**CAN.**

615 i. *Assignment of right to claim for breach of trust.*]—An heir-at-law supposed to have a right to call trustees to account & to impeach sales made by them, assigned his interest to a third person ; the consideration only to be paid in case of success :—*Held :* a merely speculative purchase of this kind savouring of maintenance or champerty could not be enforced in equity.—LITTLE *v.* HAWKINS (1872), 19 Gr. 267.—**CAN.**

should recover the amount of the debts from deft., he would pay over to them the amounts of their respective debts, or so much thereof as he might be able to realise after payment of the costs necessarily incurred by him. Notice in writing of the assignment was given to deft. It appeared that pltf. & deft. were co-directors of a co., & pltf., being dissatisfied with the action of deft. as director of the co., took the assignment with a view to procuring an adjudication of bkpcy. against deft., & so getting him removed from the directorate of the co.:—*Held:* the assignment of the debts was not invalid as savouring of maintenance or being otherwise against public policy.—FITZROY *v.* CAVE, [1905] 2 K. B. 364; 74 L. J. K. B. 829; 93 L. T. 499; 54 W. R. 17; 21 T. L. R. 612, C. A.

Annotations:—**Consd.** Bruty *v.* Edmundson (1915), 113 L. T. 1197. **Refd.** British Cash & Parcel Conveyors *v.* Lamson Store Service Co., [1908] 1 K. B. 1006, C. A.; Powell *v.* Hemsley (1909), 101 L. T. 262, C. A. **Mentd.** Defries *v.* Milne, [1913] 1 Ch. 98, C. A.

SUB-SECT. 3.—ASSIGNMENT OF PROPERTY SUBJECT OF LITIGATION.

618. Purchase of lands in litigation.]—A person who purchases lands in litigation for good consideration, & not for the purpose of maintaining their previous owner, is not guilty of champerty.——— (1347), Y. B. 21 Ed. 3; Hil. 10 B. 33; 2 Rol. Abr. 113 b.

619. ———.]—The mere fact of purchasing lands in litigation was held by all the sergeants to constitute the purchaser guilty of champerty.—ANGUS (EARL) *v.* ——— (1376), 50 Lib. Ass., p. 323, pl. 3.

620. ——— **Pending actions relating to property purchased—Specific performance.**]—A. & B., having jointly contracted for the purchase of an estate, submitted all matters in difference between them to arbn., & the arbitrator awarded that they should join in authorising a sale of their interest in the estate. Although a suit was depending against them for the specific performance of the contract for purchase, & it was yet undetermined whether the vendors could make a good title, no report having been made under an order of reference as to the title in that suit, specific performance of the award was decreed. An award directing the sale of such an interest is not objectionable under the doctrine of maintenance & champerty.—WOOD *v.* GRIFFITH (1818), 1 Swan. 44; 1 Wils. Ch. 34; 36 E. R. 291.

Annotations:—**Refd.** Hawksworth *v.* Brammall (1840), 5 My. & Cr. 281; Cockell *v.* Taylor, Collett *v.* Preston, Preston *v.* Collett (1852), 15 Beav. 103; Ram Coomar Coondoo *v.* Chunder Canto Mookerjee (1876), 2 App. Cas. 186, P. C.; James *v.* Kerr (1889), 40 Ch. D. 449. **Mentd.** Nickels *v.* Hancock (1855), 3 Eq. Rep. 689; Blackett *v.* Bates (1865), 2 Hem. & M. 610; Commercial Development Corpn. *v.* Atkins & Applegarth (1902), 19 R. P. C. 93, C. A.

621. ——— ——— **Rent — Dilapidations.**] — An agreement between the seller & purchaser of an estate that the purchaser, bearing the expense of certain suits commenced by the seller against an occupier for arrears of rent, should have the rent to be so recovered, & any sum that could be recovered for dilapidations, & that the purchaser, bearing the expenses, might use the seller's name in actions which he might think fit to commence against the occupier for arrears of rent or dilapidations, is not void as savouring of champerty or maintenance.

There is no champerty in an agreement to enable the *bonâ fide* purchaser of an estate to recover for rent due or injuries done to it previously to the purchase (*per* CUR.).—WILLIAMS *v.* PROTHEROE (1829), 5 Bing. 309; 3 Y. & J. 129; 2 Moo. & P. 779; 130 E. R. 1080, Ex. Ch.

Annotations:—**Apld.** Dawson *v.* G. N. & City Ry. Co., [1905] 1 K. B. 260, C. A. An assignment, part of a *bonâ fide* transaction the object of which was to transfer to pltf. the property of the assignor with all the incidents which attached to it in his hands, seems to be very far removed from being a transfer of a mere right of litigation. This conclusion appears to be in accordance with the decision in *Williams* v. *Protheroe*, where it was held in the Exch. Ch. that there was no champerty in an agreement containing provisions for the purpose of enabling the *bonâ fide* purchaser of an estate to recover for rent due or injuries done to it previously to the purchase (STIRLING, L.J.). **Refd.** Defries *v.* Milne, [1913] 1 Ch. 98, C. A.

622. Assignment of part of subject of prize suit.]—STEVENS *v.* BAGWELL, No. 584, *ante*.

For full anns., *see* S. C. No. 584, *ante*.

623. Purchase of interest subject of suit—Indemnity.]—It is not maintenance to purchase an interest which is the subject of a suit; but if the purchaser gives an indemnity against all costs that have been or may be incurred by the seller in the prosecution of the suit the transaction amounts to maintenance.

After decree in a creditor's suit pltf. sold a debt which he had proved in the cause, & took from the purchaser a deed of indemnity against all expenses he had incurred & might incur in the suit, & his name continued to be used as pltf. in the suit, together with that of purchaser:—*Held:* (1) this transaction amounted to maintenance; (2) the bill must, upon that ground, be dismissed.—HARRINGTON *v.* LONG (1833), 2 My. & K. 590; 39 E. R. 1069. S. C. No. 748, *post*.

Annotations:—**Consd.** Hunter *v.* Daniel (1845), 4 Hare, 420; Knight *v.* Bowyer (1857), 2 De G. & J. 421. **Distd.** Anderson *v.* Radcliffe (1860), 6 Jur. N. S. 578, Ex. Ch.; Hilton *v.* Woods (1867), L. R. 4 Eq. 432. **Folld.** Bradlaugh *v.* Newdegate (1883), 11 Q. B. D. 1. **Consd.** Fitzroy *v.* Cave, [1905] 2 K. B. 364, C. A. **Refd.** Booth *v.* Creswicke (1842), 6 Jur. 1023; Simpson *v.* Lamb (1857), 7 E. & B. 84. **Mentd.** Anderson *v.* Wallis (1842), 12 L. J. Ch. 291.

624. ——— ———.]—Several suits at law & in equity, to determine the title to certain lands, were pending, between persons claiming to be mtgees. of such lands & one who claimed the same lands in fee by title, under a settlement paramount to the mtge. Pltf. claiming to be a subsequent mtgee. of the same lands, contracted to purchase the interests of the prior mtgees. in their principal moneys, arrears of interest & securities, & to pay the purchase-moneys at certain stipulated times, all of which (except an annuity) were to be paid in 1843, & to pay & indemnify the prior mtgees. against the past & future costs of the suits & proceedings. In a suit for specific performance of the agreement:—*Held:* pltf. being interested, as second mtgee., in the subject of the suits, the contract was not to be deemed champerty.—HUNTER *v.* DANIEL, Nos. 643, 663, *post*.

For full anns., *see* S. C. No. 643, *post*.

625. Mortgage of fund in court pendente lite.]—A person prosecuting his claim to a fund in ct., to which he was ultimately found entitled, mtged. it *pendente lite* to enable him to carry on his claim:—*Held:* the mtge. was not void for champerty.—COCKELL *v.* TAYLOR, COLLETT *v.* PRESTON, PRESTON *v.* COLLETT (1851), 15 Beav. 103; 21 L. J. Ch. 545; 51 E. R. 475.

Annotations:—**Folld.** Radcliffe *v.* Anderson (1860), E. B. & E. 819. **Refd.** Dickinson *v.* Burrell (1866), 35 Beav. 257; *Re* Cambrian Mining Co. (1882), 48 L. T. 114; James *v.* Kerr (1889), 40 Ch. D. 449. **Mentd.** Barnard *v.* Hunter (1856), 28 L. T. O. S. 152, C. A.

626. Assignment of annuity pendente lite.]—One of three annuities & a share of another of them were, pending a suit in which the title to them was in litigation, purchased in the name of T. T. by the deed transferring them to him covenanted to indemnify the vendors against past & future costs; & at the same time he executed a declaration of trust showing that the purchase was made principally on behalf of certain solrs. who acted in the suit for the parties entitled to the residue of the three annuities, but were not the solrs. of vendors:—*Held:* (1) the purchase was not affected by the laws relating to champerty & maintenance; (2) even assuming it to be voidable as between the

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vendors & purchasers, the objection could not be taken by third persons.—KNIGHT *v.* BOWYER (1858), 2 De G. & J. 421; 27 L. J. Ch. 520; 31 L. T. O. S. 287; 4 Jur. N. S. 569; 6 W. R. 565; 44 E. R. 1053, C. A.

Annotations:—**Refd.** Radcliffe *v.* Anderson (1860), E. B. & E. 819; Anderson *v.* Radcliffe (1860), 29 L. J. Q. B. 128, Ex. Ch. **Mentd.** Bagnall *v.* Carlton (1877), 6 Ch. D. 371, C. A.; Hunt *v.* Luck, [1902] 1 Ch. 428, C. A.; East Stonehouse U. C. *v.* Willoughby, [1902] 2 K. B. 318.

SUB-SECT. 4.—ASSIGNMENT OF PROPERTY SUBJECT OF POSSIBLE LITIGATION.

See, further, CHOSES IN ACTION.

627. Debt.]—A. is indebted to B., & C. to A. A. assigns the debt due to him by C. to B. This is not maintenance.—ANON. (1459), Jenk. 109; 145 E. R. 76.

For full anns., *see* BONDS.

628. ——.]—Buying bills of debt is not maintenance.—PENSON *v.* HICKBED (1590), Cro. Eliz. 170; 78 E. R. 427.

629. —— Obligation—Consideration present or past.]—If a man assigns an obligation to another for a precedent debt due by him to the assignee, that is not maintenance; but if he assigns it for a consideration then given by way of contract, that is maintenance.—HARVEY *v.* BATEMAN (1595), Noy, 52; 74 E. R. 1020.

630. —— —— Assignment to creditor.]—B. is indebted to A. & C. to B. in a like amount; B. pays A. in satisfaction of his debt; this is lawful & no maintenance. On the other hand, while the gift of an obligation to a stranger is good, the sale of it is maintenance unless to the debtor of the donor or vendor.—LANE *v.* MALLORY (1613), Jenk. 292; 145 E. R. 212.

631. Chose in action—Formerly not assignable.]—It is laid down in our old books that for avoiding maintenance a chose in action cannot be assigned or granted over to another. The good sense of that rule seems to be questionable; & in early as well as modern times it has been so explained away, that it remains at most only an objection to the form of action in any case (BULLER, J.).—MASTER *v.* MILLER (1791), 4 Term Rep. 320; 100 E. R. 1042. *Affd.* 5 Term Rep. 367. S. C. Nos. 493, 550, *ante.*

Annotations:—**Apprvd.** Balfour *v.* Sea Fire Life Assce. (1857), 3 C. B. N. S. 300. **Consd.** Fitzroy *v.* Cave, [1905] 2 K. B. 364, C. A.; Holden *v.* Thompson, [1907] 2 K. B. 489. **Refd.** *Re* Cambrian Mining Co. (1882), 48 L. T. 114; Bradlaugh *v.* Newdegate (1883), 11 Q. B. D. 1. **Mentd.** Shaw *v.* Jakeman (1803), 4 East, 201; Knill *v.* Williams (1809), 10 East, 431; Paton *v.* Winter (1809), 1 Taunt. 420; Powell *v.* Divett (1812), 15 East, 29; Bathe *v.* Taylor (1812), 15 East, 412; Sanderson *v.* Symonds (1819), 1 Brod. & Bing. 426; *Re* Jermyn, *Ex p.* Elliott (1837), 2 Deac. 179; Davidson *v.* Cooper (1843), 11 M. & W. 778; Parry *v.* Nicholson (1845), 13 M. & W. 778; Agricultural Cattle Insce. *v.* Fitzgerald (1851), 16 Q. B. 432; Burchfield *v.* Moore (1854), 3 E. & B. 683; Gardner *v.* Walsh (1855), 5 E. & B. 83; *Re* Smith, *Ex p.* Yates (1857), 27 L. J. Bcy. 10, n.; Noble *v.* Ward (1867), L. R. 2 Exch. 135; Aldous *v.* Cornwall (1868), 9 B. & S. 607; Hirschman *v.* Budd (1873), L. R. 8 Exch. 171; Suffell *v.* Bank of England (1882), 9 Q. B. D. 555, C. A.; *Re* Salomon & Naudzus (1899), 81 L. T. 325; *Re* Goodbody & Balfour, Williamson (1899), 82 L. T. 484, C. A.; Bradford Corpn. *v.* Ferrand, [1902] 2 Ch. 655.

632. Agreement with creditor—Charge on securities in other hands—Securities to be recovered.]—A., a creditor, who had instituted proceedings at law & in equity against B., his debtor, entered into an agreement with B. to abandon those proceedings & give up his securities in consideration of B. giving him a lien on securities in the hands of C., another creditor, with authority to sue C., & agreeing to use his best endeavours to assist in adjusting his accounts with the holder of the securities, & in recovering the securities:—*Held:* (1) the agreement did not amount to champerty, being in effect an agreement by B. to assign to A. his equity of redemption in the securities held by C. in exchange for the prior securities which B. had held; (2) it would have done so if it had stipulated that A. should maintain the proceedings instituted by B. against the holder of the securities in consideration of the profits to be derived by B. from the suit.—HARTLEY *v.* RUSSELL (1825), 2 Sim. & St. 244; 3 L. J. O. S. Ch. 146; 57 E. R. 339.

Annotations:—**Consd.** Hunter *v.* Daniel (1845), 4 Hare, 420; James *v.* Kerr (1889), 40 Ch. D. 449. **Refd.** Harrington *v.* Long (1833), 2 My. & K. 590.

633. Purchase of undisputed right—Subsequently discovered to be disputed.]—Though the ct. will not enforce a contract for the purpose of a litigated right, yet if a lawful contract for the purchase of an undisputed right be made, and the necessity for litigation as against third persons arise out of circumstances afterwards discovered, the purchaser or assignee is not precluded from suing upon his contract. It is not champerty where the right purchased was originally clear, but the litigation is the result of circumstances subsequently arising or subsequently known.—WILSON *v.* SHORT (1848), 6 Hare, 366; 17 L. J. Ch. 289; 10 L. T. O. S. 519; 12 Jur. 301; 67 E. R. 1207.

For full anns., *see* AGENCY.

634. Real property—Subject to litigation—Conveyance valid.]—A conveyance, whether voluntary or for valuable consideration, of property which the grantor has previously conveyed by a deed voidable in equity is not void on the ground of champerty. For where property which is subject to litigation is conveyed by one person to another, the right to sue in respect of it passes as incident to it; but the mere right to sue with respect to it cannot be assigned.

A. having executed a conveyance of real estate to B., which was liable to be set aside on equitable grounds, afterwards made a voluntary settlement of the same property in trust for himself for life, with remainder to his children as he should appoint, and in default of appointment to all his children who should attain 21, or (being daughters) should marry, in equal shares:—*Held:* the infant children of A. could maintain a bill, making A. & the trustees of the settlement defts., to set aside the conveyance to B.—DICKINSON (DICKENSON) *v.* BURRELL, STOURTON *v.* BURRELL (1866), L. R. 1 Eq. 337; 35 Beav. 257; 35 L. J. Ch. 371; 13 L. T. 660; 12 Jur. N. S. 199; 14 W. R. 412.

Annotations:—**Apld.** Dawson *v.* G. N. & City Ry. Co., [1905] 1 K. B. 260, C. A.; Defries *v.* Milne, [1913] 1 Ch. 98, C. A.

635. —— Benefit of contract—Right to sue for breach.]—The benefit of a contract to purchase

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PART VIII. SECT. 2, SUB-SECT. 4.

627 i. *Debt—Assignment without immediate consideration for half sum recovered.*]—Pltf. brought an action against deft., an administratrix, claiming to be a creditor of the estate in respect of two notes. An action had been brought previously against the administratrix in respect of these notes, in which she had successfully pleaded the full administration of the estate. Pltf., with knowledge of this action & its result, had agreed to buy the notes, & to pay for them half the amount realised:—*Held:* pltf. had obtained the notes merely to get the right to sue into his hands & had agreed to divide whatever was recovered; he could not prove for the notes.—*Re* CANNON, OATES *v.* CANNON (1886), 13 O. R. 70.—**CAN.**

631 i. *Chose in action.*]—An attempted transfer of a right to recover damages for breach of a covenant to repair is not within the doctrine of champerty & maintenance. *Semble:* the presence of circumstances constituting champerty or maintenance will vitiate an assignment of a chose in action otherwise valid.—REYNOLDS *v.* NAPIER (1882), L. R. 1 C. A. 277.—**N.Z.**

634 i. *Real property—Avoidable conveyance—Devise of right to set aside.*]—The right to set aside a conveyance improperly obtained by a solr. from his client is devisable. The heir-at-law need not be a party to the devisee's suit to set it aside.—UPPINGTON *v.* BULLEN (1842), 2 Dr. & War. 184; 1 Con. & L. 291.—**IR.**

a reversionary interest was assigned by the purchaser. The vendor having refused to perform the contract:—*Held:* (1) no objection could be taken on the ground of champerty; (2) the assignee was entitled to sue for damages for breach of contract.—TORKINGTON *v.* MAGEE, [1902] 2 K. B. 427; 71 L. J. K. B. 712; 87 L. T. 304; 18 T. L. R. 703: *revsd.* on appeal on the merits, [1903] 1 K. B. 644, C. A.

Annotations:—**Refd.** Glegg *v.* Bromley, [1912] 3 K. B. 474, C. A. **Mentd.** Tolhurst *v.* Associated Portland Cement Manufacturers (1900), [1902] 2 K. B. 660.

SUB-SECT. 5.—ASSIGNMENT OF PROCEEDS OF LITIGATION.

638. Assignment of right to compensation under Lands Clauses Consolidation Act, 1845 (c. 18).]—An assignment of a claim under s. 68 of the above Act to compensation in respect of an interest in land, injuriously affected within the sect., is valid.—DAWSON *v.* GREAT NORTHERN & CITY RY. CO., [1905] 1 K. B. 260; 74 L. J. K. B. 190; 92 L. T. 137; 69 J. P. 29; 21 T. L. R. 114, C. A.

Annotations:—**Consd.** Turner *v.* Mid. Ry. Co. (1911), 104 L. T. 347. **Refd.** Defries *v.* Milne, [1913] 1 Ch. 98, C. A. **Mentd.** Zick *v.* London United Tramways, [1908] 1 K. B. 611.

See, further, CHOSES IN ACTION.

637. Assignment of damages to be recovered—Pending action of tort.]—An assignment for valuable consideration by pltf. in a pending action of tort to one of his creditors of the sum of money to which he may become entitled by virtue of the action, as it is not an assignment of a mere right of action, but of property to come into existence in the future, is not invalid as savouring of champerty or maintenance

A wife in debt to her husband for a large advance executed a deed of assignment by which she assigned to him the sum of money to which she might become entitled by virtue of a pending action of slander in which she was pltf. Her husband then made her a further advance to enable her to prosecute the action. The wife subsequently recovered a verdict in the action for damages. A judgment creditor of the wife thereupon served a garnishee order *nisi* attaching the damages which she had recovered:—*Held:* (1) the deed of assignment was not invalid either for want of consideration or as savouring of champerty, or under 13 Eliz. c. 5; (2) the husband, as assignee under the deed, was entitled to the damages recovered by the wife as against the execution creditor.—GLEGG *v.* BROMLEY, [1912] 3 K. B. 474; 81 L. J. K. B. 1081; 106 L. T. 825, C. A.

For full anns., *see* FRAUDULENT & VOIDABLE CONVEYANCES.

SECT. 3.—COMMON INTEREST.

SUB-SECT. 1.—IN GENERAL.

638. Where maintenance lawful.]—Where a man has a grant or sufficient pretext, he may maintain an action rightly enough. A master may maintain his servant, or a landlord his tenant: one may maintain one's own blood or one who is of one's alliance: one may give gold or silver to a poor man for the purpose of maintaining his plea if he himself of his poverty cannot do so; & this is not maintenance against law (MARTIN, J.)—ROTHEWEL (ROTHWELL) *v.* PEWER (POWER) (1431), Y. B. 9 Hen. 6, p. 64, pl. 713. S. C. Nos. 546, 548, *ante*; Nos. 649, 650, 654, 667, *post.*

Annotations:—**Apprvd.** Harris *v.* Brisco (1886), 17 Q. B. D. 504, C. A. **Mentd.** Phillips *v.* Robinson (1827), 5 L. J. O. S. C. P. 111.

639. ——.]—H. brought an action for maintenance against F. He stated that F. had maintained an action between A. & B. (administrators of one Francis), pltfs., & H., deft., for £100. It appeared that H. owed £100 to Francis under bond, that Francis was also indebted in the same sum to F., wherefore Francis assigned the suit to F. & delivered him the bond, to which H. agreed, & Francis empowered F., in case H. did not pay him, to sue in his, Francis's, name. Afterwards Francis died intestate, and administration was committed to A. & B. F. sued on the bond in the name of the administrators, A. & B.:—*Held:* not maintenance.

Every one who has reason to meddle may well justify maintenance of the action. Suppose divers men are enfeoffed in lands to my use, & I sell the lands to a stranger, & we are agreed, & at accord, that the first feoffees were before seised of the same

PART VIII. SECT. 2, SUB-SECT. 5.

m. *Assignment of judgment.*]—Defts., assignees of three judgments recovered by D., received payment of & discharged one judgment & afterwards by deed assigned to F. the several judgments, covenanting that they had received no payment thereon & had not released any part thereof. F. assigned the judgments to M., & M., by deed indorsed on the assignment to himself, assigned them to pltf.:—*Held:* there was clearly no champerty or maintenance in the assignment from F. to M. or from M. to pltf.—COLE *v.* BANK OF MONTREAL (1876), 39 U. C. R. 54.—**CAN.**

n. —— *Against mortgagor.*]—Deft. sold land mtged. to him, satisfied his claim out of the proceeds & handed the balance to the person entitled to the equity of redemption. A certain firm had obtained a judgment against the mtgor., & execution against his lands was in the sheriff's hands at time of sale. Pltf. had obtained an assignment of the judgment for $60 & given a note in payment. He now sought to make deft. his trustee as regards the balance of proceeds of sale:—*Held:* defts. could not establish a defence of champerty & maintenance, as pltf. had obtained an assignment of a judgment with the rights upon it. That was not merely a right to litigate, but a chose in action, a thing assignable under the statute, enabling the assignor to sue in his own name in respect of it. Such transaction was not bad as contravening the law respecting champerty & maintenance.—HARPER *v.* CULBERT (1883), 5 O. R. 152.—**CAN.**

o. *Mortgage of proceeds of suit.*]—In consequence of litigation between the personal representatives of L., whose estate was being administered, & those of M., L.'s representatives were recommended by their attorney to apply to pltf. for the necessary funds, & a so-called deed of mtge. was executed by which defts. mtged. to pltf. everything which they might be entitled to recover by suit. Defts. succeeded in their suit. In a suit brought by pltf. against them, they pleaded that the agreement was void for champerty & maintenance:—*Held:* by the law of England, which prevailed in the present suit, the contract was clearly void, being contrary to the plain provision of the common & statute law against maintenance.—MULLA JAFFARJI TYEB ALI *v.* YACALI KADAR BI (1872), 7 Mad. 128.—**IND.**

PART VIII. SECT. 3, SUB-SECT. 1.

638 i. *Where maintenance lawful.*]—Advancing money to support & carry on another's suit, except by a father, son or heir apparent to the party, or the husband of such an heiress, is maintenance.—BURKE *v.* GREENE, No. 610 *v*, *ante.*—**IR.**

638 ii. ——.]—Maintenance & champerty are different. The common title of tenants in common, or the relation of heir presumptive, justifies maintenance. The principle is, that the one may aid the other's suit in consideration of his own derivative interest, as the heir may aid the ancestor by reason of his chance of taking by descent. But it is different where the party comes in order to obtain the benefit directly for himself.—BYRNE *v.* FRERE (1828), 2 Moll. 157.—**IR.**

638 iii. ——.]—Champerty implies a bargain of some sort between pltf. or deft. in a cause & another person who has no interest in the subject in dispute to divide the property sued for between them if they prevail, in consideration of that other person carrying on the suit at his own expense. The above rule does not apply when the person maintaining the action has an interest in the thing at variance.—HAYES *v.* LEVINSON (1890), 16 V. L. R. 305.—**AUS.**

638 iv. —— *Interest not established.*]—A will purporting to convey testator's estate to his wife was attacked for uncertainty by persons claiming under alleged heirs-at-law of testator & through conveyances from them to persons abroad:—*Held:* as the evidence of the relationship of the alleged grantors to the deceased was only hearsay & the best evidence had not been adduced, & the persons claiming under the will had no information as to the identity of the parties in interest who were represented in the transactions by men of straw, & there was strong suspicion of the existence of champerty or maintenance on the part of the persons attacking the will, the latter had failed to establish the title of the persons under whom they claimed.—MAY *v.* LOGIE (1897), 27 S. C. R. 443.—**CAN**

Sect. 3.—*Common Interest: Sub-sects.* 1 & 2.]

lands to the use of the stranger, in this case, if the feoffees should be impleaded, it is lawful for the stranger to intervene in his own interests; & so here (PRISCOT, J.).—HORN *v.* FOSTER (1455), Y. B. 34 Hen. 6, p. 30, pl. 15.

640. ——.]—A common interest is constituted by an actual valuable interest in the result of the suit itself, either present, contingent, or future; or the interest which consanguinity or affinity to the suitor gives to the man who aids him; or the interest arising from the connection of the parties, *e.g.*, as master & servant; or the interest which charity & compassion give a man in behalf of a poor man who, but for the aid of his rich helper, could not assert his rights, or would be oppressed & overdone in his endeavour to maintain them (LORD COLERIDGE, C.J.).—BRADLAUGH *v.* NEWDEGATE, Nos. 557, 569, *ante;* No. 722, *post.*

Annotations:—**Apprvd.** Alabaster *v.* Harness, [1895] 1 Q. B. 339, C. A. **Refd.** Harris *v.* Briscoe (1886), 17 Q. B. D. 504, C. A.; Holden *v.* Thompson, [1907] 2 K. B. 489.
For full anns., *see* S. C. No. 569, *ante.*

641. ——.]—In order to justify maintenance by one person of the suit of another there must either be a common interest recognised by the law in a matter at issue in the suit, or the case must fall within one of the specific exceptions from the law against maintenance established by the authorities.—ALABASTER *v.* HARNESS, Nos. 642, 645, 665, 666, 681, 724, *post.*

Annotation:—**Apld.** Neville *v.* London Express Newspapers, [1917] 2 K. B. 564, C. A. **Refd.** [1917] 1 K. B. 402.
For full anns., *see* S. C. No. 681, *post.*

642. Maintenance originally unlawful—Becoming lawful by reason of issue raised.]—The common interest of a maintainer need not exist when the action is commenced; though when the suit was commenced the maintainer might have no common interest, yet in the course of his pleadings an issue might be raised in the determination of which he might have clearly a common interest to support or otherwise. Thus, A. sues B. for a common assault. If B. pleads simply not guilty, C. would not be justified in maintaining A.'s action, because he would have no common interest in it. But if B., instead of simply pleading not guilty, pleaded a justification that A. was trespassing on his land & refused to go off it, & so he laid hands on him & put him off, & to this plea A. replied that he was on B.'s land exercising a right of way common to himself & C., & issue was joined on this reply, this would be a "thing in variance," & C. would, from the moment that issue was raised, clearly be justified in maintaining A.'s right as being one in which he & A. had a common interest (HAWKINS, J.).—ALABASTER *v.* HARNESS, No. 641, *ante;* Nos. 645, 665, 666, 681, 724, *post.*

Annotation:—**Refd.** Neville *v.* London Express Newspapers, [1917] 2 K. B. 564, C. A
For full anns., *see* S. C. No. 681, *post.*

643. Effect of common interest.]—An agreement to purchase of a party to a pending sale all his interest in the suit, although it contain an indemnity by the purchaser to the seller against all costs that have been or may be incurred in the prosecution of the suit, is not open to objection on the ground of champerty where the purchaser has a common interest with the seller in the object of the suit.—HUNTER *v.* DANIEL (1845), 4 Hare, 420; 1 New Pract. Cas. 167; 14 L. J. Ch. 194; 4 L. T. O. S. 473; 9 Jur. 526; 67 E. R. 712. S. C. No. 624, *ante;* No. 663, *post.*

Annotations:—**Refd.** Knight *v.* Bowyer (1858), 2 De G. & J. 421; Hutley *v.* Hutley (1873), L. R. 8 Q. B. 112.

644. —— **Bonâ fide belief sufficient.**]—The essence of the common law offence of maintenance consists in the criminal intention with which the act is done; so that when several persons, against all of whom a general claim is put forward by a third party, enter into an agreement to uphold each other in resisting that claim, it is not an act of maintenance if they do so under the *bonâ fide*, though erroneous, belief that they are uniting in the defence of a common interest.—FINDON *v.* PARKER, No. 549, *ante;* Nos. 655, 661, 669, 692, *post.*

Annotations:—**Apld.** Hunter *v.* Daniel (1845), 4 Hare, 420. **Distd.** Hutley *v.* Hutley (1873), L. R. 8 Q. B. 112.
For full anns., *see* S. C. No. 661, *post.*

645. —— ——.]—It is not necessary to establish that a joint interest in the action actually existed, it being sufficient to justify the maintainer if, on reasonable grounds, he *bonâ fide* believed that he had such interest—that is, that he reasonably believed in the existence of a state of things which, if true, would in law have justified him in maintaining the action. His erroneous belief as to what in law would justify him & his *bonâ fide* belief in a state of things which would support his erroneous view of the law would amount to nothing (HAWKINS, J.). —ALABASTER *v.* HARNESS, Nos. 641, 642, *ante;* Nos. 665, 666, 681, 724, *post.*

Annotation:—**Refd.** Neville *v.* London Express Newspapers, [1917] 2 K. B. 564, C. A.
For full anns., *see* S. C. No. 681, *post.*

646. Motive not equivalent to interest.]—Whether an act is one of maintenance or not depends on its own character & not on the character of the maintainer. It is immaterial whether the maintainer was actuated by honourable motives or otherwise (LORD SUMNER).—ORAM *v.* HUTT, Nos. 559, 570, *ante;* No. 683, *post.*

For full anns., *see* S. C. No. 559; *ante.*

647. Limitation on rule.]—Persons having a common interest may agree to unite in a defence, but the agreement must not go beyond the common object.—STONE *v.* YEA (1822), Jac. 426; 37 E. R. 911. S. C. No. 662, *post.*

Annotations:—**Refd.** *Re* Cambrian Mining Co. (1882), 48 L. T. 114; Alabaster *v.* Harness, [1894] 2 Q. B. 897.

648. Champerty—Collateral interest not sufficient.]—H., a brother of deft. & a cousin of pltf., died leaving real & personal property, deft. being his heir-at-law & one of his next-of-kin. The deceased left a will whereby his property, real & personal, was left to persons other than pltf. & deft., & pltf. believed that such will revoked a former will by which testator had bequeathed certain property to pltf. In consideration that pltf. would take the necessary steps to contest the will & would advance money & obtain evidence for such purpose & instruct an attorney, deft. promised to share with pltf. half the real & personal property which might come to deft. by reason of such proceedings:—*Held:* (1) the agreement amounted to champerty;

643 i. *Effect of common interest.*]—Where the purchaser of a share of land joins his vendor in a suit to recover his own property, his action cannot be termed "champerty."—MUNIRAKHUN SINGH *v.* BHODOY SINGH (1869), 12 W. R. 133.—**IND**

648 i. *Champerty—Collateral interest not sufficient.*]—Maintenance is in general excused if the parties are blood relations, but that excuse is not available in the case of maintenance amounting to champerty; & in order that a champertous agreement may be excused on the ground of common interest there must be more than a mere belief in an interest, & the interest must not be merely collateral.

Where resp., applt.'s father, commenced an action against a neighbour for damages occasioned by a fire, which destroyed a stable & its contents, which contents had been sold by resp. to applt., but had not been paid for; & applt. agreed to pay half the costs incurred by resp. in the action in consideration of resp. agreeing to share the judgment with applt.:—*Held:* (1) the agreement was champertous, & was not excused because of the parties being blood relations; (2) applt. had no direct pecuniary interest in the result of the action, & the mere fact that a question of fact would arise in the determination of which applt. had an interest did not constitute a common interest sufficient to justify maintenance.—DUTHIE *v.* DUTHIE (1915), 34 N. Z. L. R. 897.—**N.Z.**

(2) the fact that pltf. was a relation of deft. & had some collateral interest in the suit did not prevent the agreement being champerty.—HUTLEY *v.* HUTLEY (1873), L. R. 8 Q. B. 112 ; 42 L. J. Q. B. 52 ; 28 L. T. 63 ; 37 J. P. 518 ; 21 W. R. 479. S. C. Nos. 591, 596, *ante* ; No. 734, *post*.

Annotations :—**Folld.** Ball *v.* Warwick (1881), 50 L. J. Q. B. 382. **Apld.** Bradlaugh *v.* Newdegate (1883), 11 Q. B. D. 1. **Distd.** Guy *v.* Churchill (1888), 40 Ch. D. 481. **Folld.** Rees *v.* De Bernardy, [1896] 2 Ch. 437. **Distd.** Cole *v.* Booker (1913), 29 T. L. R. 295. **Refd.** James *v.* Kerr (1889), 40 Ch. D. 449.

SUB-SECT. 2.—FACTS CONSTITUTING COMMON INTEREST.

649. Grantor & grantee of rentcharge.]—R., parson of a church, brought an action for maintenance against P., alleging that P. had maintained H. in an action of detinue brought against R. for a box containing charters & muniments. P. objected that the action did not lie. H. & his ancestors were seised of a rentcharge in fee, to which the charters & muniments related ; the rentcharge was granted to P. in fee ; the tenant attorned & further granted to P. that he should have the box & charters concerning the rentcharge of which R. was in possession, if H. could recover them, whereupon P. maintained H. in the action :—*Held* : P. not guilty of maintenance.—ROTHEWEL *v.* PEWER, Nos. 546, 548, 638, *ante* ; Nos. 650, 654, 666, *post*.

For full anns., *see* S. C. No. 638, *ante*.

650. Kinship.]—ROTHEWEL *v.* PEWER, Nos. 546, 548, 638, 649, *ante* ; Nos. 654, 667, *post*.

For full anns., *see* S. C. No. 638, *ante*.

651. ——.]—To an action of maintenance against me for maintaining B. it is a good bar to say I was his ally or his kinsman (PASTON, J.).—POMEROY *v.* BUCKFAST, Nos. 547, 579, *ante* ; Nos. 652, 668, 674, *post*.

For full anns., *see* S. C. No. 668, *post*.

652. —— **Parent & child.**] If my father, I being his heir, be impleaded concerning his lands, & I furnish money & sound advice to assist my father in the litigation, this will be no maintenance ; & yet I am a stranger to his proceedings, having neither right nor interest in the land whilst my father is alive (AYSCOGHE, J.).—POMEROY *v.* BUCKFAST, Nos. 547, 579, 651, *ante* ; Nos. 668, 674, *post*.

For full anns., *see* S. C. No. 668, *post*.

653. —— —— **Putative father.**]—A. provided a fund for defraying the expenses of obtaining an Act of Parliament to dissolve the marriage of B. & C., A.'s illegitimate daughter :—*Held* : the transaction was not illegal.—MOORE *v.* USHER (1835), 7 Sim. 383 ; 4 L. J. Ch. 205 ; 58 E. R. 884.

654. Landlord & tenant.]—ROTHEWEL *v.* PEWER, Nos. 546, 548, 638, 649, 650, *ante* ; No. 667, *post*.

For full anns., *see* S. C. No. 638, *ante*.

655. ——.]—A landlord may assist his tenant in resisting a claim of tithes in kind without rendering himself guilty of maintenance (ROLFE, B.).—FINDON *v.* PARKER, Nos. 549, 644, *ante* ; Nos. 661, 669, 692, *post*.

For full anns., *see* S. C. No. 661, *post*.

656. ——.]—Where applts. had furtively for a series of years taken resps.' coal by means of a wilful & secret underground trespass :—*Held* : an agreement between resps. & their lessees (under a lease executed before discovery of the trespass), by which the former were indemnified against costs of proceedings against applts. on terms of paying to the lessees 92½ per cent. of the amount recovered, was not champertous.—BULLI COAL MINING CO. *v.* OSBORNE, [1899] A. C. 351 ; 68 L. J. P. C. 49 ; 80 L. T. 430 ; 47 W. R. 545 ; 15 T. L. R. 257, P. C.

657. Limited owners—Remaindermen—Reversioners.]—Where a tenant in tail or for life is impleaded, the remainderman or reversioner may maintain & give of his proper money to maintain for safeguard of his interest : for he who has an interest in the land may maintain to save it.—ANON. (1547), Bro. N. C. 132 ; 73 E. R. 904.

658. Mortgagor & mortgagee.]—W. made a deed of gift of sheep to D. in consideration that D. was bound to others for W.'s debts. D. brought an action against S. for taking the sheep. W. maintained the action, the day not having arrived for satisfying the debt, & D. being in no way damnified for W.'s debts :—*Held* : the maintenance was justifiable, in respect of the reverting trust reposed in D. by W. to make a reassurance of the goods if he was not damnified for the debts.—STEPNEY *v.* WOLFE (1600-1), Moore, K. B. 620 ; Noy, 100 ; 72 E. R. 797.

659. Copyholders—Custom of manor.]—Where a bill was brought by tenants of a manor against the lord to settle the customs of the manor as to fines upon deaths & alienations, & an issue was directed to be tried at law :—*Held* : it was no maintenance for all the tenants to contribute, for it was the case of all.—BROWN *v.* HOWARD (1701), 1 Eq. Cas. Abr. 163 ; 21 E. R. 960.

For full anns., *see* ESTOPPEL.

660. Interest in sum of money.]—Declaration that Y. had deposited with pltf. a sum of money, which pltf., at deft.'s request, had delivered to deft., that Y. had threatened to bring an action against pltf. to recover the money, & that thereupon pltf. at deft.'s request, & upon deft.'s undertaking to indemnify, defended the action :—*Semble* : the above did not disclose a contract void on account of maintenance.—WILLIAMSON *v.* HENLEY (1829), 6 Bing. 299 ; 130 E. R. 1295.

For full anns., *see* CONTRACT.

661. Claim for tithes.]—The lands in the parish of T. consisted of old & new inclosures, the former of which, from the time of living memory, had been exempted from payment of tithes in kind, there being paid instead a certain sum, varying in amount for each farm. In 1832, the master & fellows of a college, the lessees of the tithes, having given notice to the tenants & proprietors of the old inclosures to set out their tithes in kind, a meeting of the proprietors took place, when it was resolved " that the proprietors do resist the claim of the college & support the present moduses ; & that the expenses incurred in such proceedings shall be borne & paid by the proprietors in proportion to the value of their estates, & that F. (pltf.) & W. be requested to take such steps as may be considered necessary." This resolution was signed by deft. & six other landowners in the parish of T. At this time it was uncertain whether the college would proceed by one or several bills in equity ; but nine bills were subsequently filed, and seven issues directed to be tried. In an action against one of the proprietors, brought by his attorney, for his bill in respect of these proceedings :—*Held* : the agreement of the proprietors

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PART VIII. SECT. 3, SUB-SECT. 2.

657 i. *Limited owners—Remainderman parting with interest.*]—A remainderman, divesting himself of interest in the property, cannot sue for a cause of action which arose after his interest was divested.—KNAPP *v.* KING (1874), 15 N. B. R. (2 Pug.) 309.—CAN.

658 i. *Mortgagor & mortgagee.*]—An agreement between pltf. & deft. (mtgee. & mtgor.) in an equity suit that the latter should render every assistance in his power to facilitate the progress of the suit, & should abstain from throwing any obstacle in the way of the suit, is not void for champerty, or as being against public policy, when it is not alleged that a fraud is thereby practised upon either the ct. or third parties.—

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was not illegal as amounting to maintenance, since, at the time of making it, the proprietors had reasonable ground for believing they had a common interest in proving the lands to be ancient inclosures.—FINDON (FINDEN) *v.* PARKER (1843), 11 M. & W. 675 ; 12 L. J. Ex. 444 ; 1 L. T. O. S. 289 ; 7 J. P. 385 ; 7 Jur. 903 ; 152 E. R. 976. S. C. Nos. 549, 644, 655, *ante ;* Nos. 669, 692, *post.*

Annotations :—**Folld.** Hunter *v.* Daniel (1845), 4 Hare, 420. **Distd.** Hutley *v.* Hutley (1873), L. R. 8 Q. B. 112 ; *Re* Cambrian Mining Co. (1882), 48 L. T. 114 ; Bradlaugh *v.* Newdegate (1883), 11 Q. B. D. 1 ; Alabaster *v.* Harness, [1894] 2 Q. B. 897. **Apld.** British Cash & Parcel Conveyors *v.* Lamson Store Service Co., [1908] 1 K. B. 1006, C. A.

662. —— Unless agreement goes beyond common object.]—*Semble :* an agreement by several owners & occupiers of land in a parish to concur in defending any suits that may be commenced against any of them by the present or any future rector for the tithes of articles covered by certain specified moduses, or any other moduses, binding themselves not to compromise or settle, & not limited to their continuance in the parish or to any particular time, is illegal as going beyond the common object.—STONE *v.* YEA, No. 647, *ante.*

For full anns., *see* S. C. No. 647, *ante.*

663. First & second mortgagees.]—Several suits at law & in equity to determine the title to certain lands were pending between persons claiming to be mtgees. of such lands & one who claimed the same lands in fee by title under a settlement paramount to the mtge. Pltf., claiming to be a subsequent mtgee. of the same lands, contracted to purchase the interests of the prior mtgees. in their principal moneys, arrears of interest & securities, & to pay the purchase-moneys at certain stipulated times, all of which (except an annuity) were to be paid in 1843, & to pay & indemnify the prior mtgees. against the past & future costs of the suits & proceedings ; & time was to be of the essence of the contract. Pltf. did not pay the instalments until a considerable time after the stipulated period, but such later payments were accepted by the vendors. The bill, filed in 1845 (when some of the payments still remained to be paid), alleged that defts. refused to perform the agreement, & prayed specific performance. On demurrer :—*Held :* pltf. being interested, as second mtgee., in the subject of the suits, the contract was not to be deemed champerty. —HUNTER *v.* DANIEL, Nos. 624, 643, *ante.*

Annotations :—**Refd.** Knight *v.* Bowyer (1858), 2 De G. & J. 421 ; Hutley *v.* Hutley (1873), L. R. 8 Q. B. 112.

664. Principal & agent.]—An assignment by the representative of an agent to the principal for the purpose of enabling such principal to maintain a suit is not champerty.—FISCHER *v.* NAICKER (1860), 8 Moo. Ind. App. 170 ; 2 L. T. 94 ; 8 W. R. 655 ; 19 E. R. 495, P. C. S. C. No. 736, *post.*

Annotations :—**Mentd.** Coondoo *v.* Mookerjee (1876), 2 App. Cas. 186, P. C. ; *Re* Cambrian Mining Co. (1882), 48 L. T. 114 ; Bradlaugh *v.* Newdegate (1883), 11 Q. B. D. 1 ; British Cash & Parcel Conveyors *v.* Lamson Store Service Co., [1908] 1 K. B. 1006, C. A.

665. Heir-at-law maintaining person in possession.]—An heir-at-law may lawfully maintain the title of the person in possession, although, if such person has no title, his heir would have no legal interest, but only a *spes successionis* (RIGBY, L.J.). —ALABASTER *v.* HARNESS, Nos. 641, 642, 645, *ante ;* Nos. 666, 681, 724, *post.*

For full anns., *see* S. C. No. 681, *post.*

666. Joint owners of right of way.]—ALABASTER *v.* HARNESS, Nos. 641, 642, 645, 665, *ante ;* Nos. 681, 724, *post.*

For full anns., *see* S. C. No. 681, *post.*

SUB-SECT. 3.—CHARITY.

667. Maintenance — Excused by charitable motive.]—ROTHEWEL *v.* PEWER, Nos. 546, 548, 638, 649, 650, 654, *ante.*

For full anns., *see* S. C. No. 638, *ante.*

668. —— ——.]—If I, of my charity, give a sum of money to a poor man who is carrying on a lawsuit in order to assist him therein, this will not be maintenance (PASTON, J.).—POMEROY *v.* BUCKFAST (ABBOT) (1443), Y. B. 22 Hen. 6, 5, pl. 7 ; (1442), Y. B. 21 Hen. 6, p. 15, pl. 30. S. C. Nos. 547, 579, 651, 652, *ante ;* No. 674, *post.*

Annotations :—**Apprvd.** Harris *v.* Brisco (1886), 17 Q. B. D. 504, C. A. **Mentd.** Bulwer's Case (1598), 7 Co. Rep. 1a.

669. —— ——.]—If a man were to see a poor person in the street oppressed & abused, & without means of obtaining redress, & furnished him with money or employed an attorney to obtain redress for his wrongs, it would require a very strong argument to convince me that that man could be said to be stirring up litigation & strife, & to be guilty of the crime of maintenance. I am not prepared to say that, in modern times, cts. of justice ought to come to that conclusion. However, I give no opinion upon that point (LORD ABINGER, C.B.). —FINDON *v.* PARKER, Nos. 549, 644, 655, 661, *ante ;* No. 692, *post.*

Annotation :—**Refd.** Alabaster *v.* Harness, [1894] 2 Q. B. 897.

For full anns., *see* S. C. No. 661, *ante.*

670. —— —— Religious sympathy sufficient.]—A charitable motive induced by sympathy with the religious views of another person is none the less such a charitable motive as comes within the recognised exceptions to the law against maintenance forbidding one person to support that other in his lawsuit.

A solr. was employed by defts., the committee of a religious society, to act for the relatives of certain children in proceedings taken in Ch. by a religious institution to recover custody of the children. The relatives, who were not persons of means, had removed the children from the institution, as they disapproved of the religious instruction given there. The solr. sued defts. for his costs :—*Held :* (1) defts. acted from charitable motives although they were induced to act through religious sympathy ; (2) the contract with the solr. was not void on the ground of maintenance.—HOLDEN *v.* THOMPSON, [1907] 2 K. B. 489 ; 76 L. J. K. B. 889 ; 97 L. T. 138 ; 23 T. L. R. 529. S. C. No. 555, *ante.*

Annotation :—**Apprvd.** British Cash & Parcel Conveyors *v.* Lamson Store Service Co., [1908] 1 K. B. 1006, C. A.

671. —— —— Bonâ fide belief—No necessity for inquiry.]—To an action for maintenance it is a good defence that deft. assisted a third person in legal proceedings from charitable motives believing he was a poor man oppressed by a rich man. It is not necessary deft. should have acted after full inquiry into the circumstances, but the defence will be equally available even if deft., if he had made full inquiry, would have ascertained that there was no reasonable or probable ground for the proceedings which he assisted.—HARRIS *v.* BRISCO (1886) 17 Q. B. D. 504 ; 55 L. J. Q. B. 423 ; 55 L. T. 14 ;

BODKIN *v.* O'KELLY (1855), 5 I. C. L. R. 287 ; 8 Ir. Jur. (1 Ir. Jur. N.S.) 98.—**IR.**

664 i. *Principal & agent.*]—Where A. sues in respect of his own interest for the violation of a contract made for him by B. as agent only, the assignment of B.'s interest in the agreement, in order to enable A. to bring his suit, is not champerty or maintenance.—JUGMOHUN LAL *v.* BUDDUN KOER (1867), 9 W. R. 243.—**IND.**

p. *Shareholders—Action to set aside forfeiture.*]—In a suit by pltf. to set aside a forfeiture of his shares in a mining co. other persons whose shares had been similarly forfeited contributed to pltf.'s costs of suit, but without any agreement to share in the immediate result of the suit :—*Held :* their identity of interest warranted them in so contributing, & this did not amount to champerty or maintenance.—WOOD *v.* FREEHOLD UNITED QUARTZ MINING CO. (1870), 1 V. R. 168.—**AUS.**

51 J. P. 37 ; 34 W. R. 729 ; 22 T. L. R. 709, C. A. S. C. No. 716, *post.*

Annotations :—**Refd.** Bloxham *v.* Medical Defence Union (1894), 10 T. L. R. 307 ; Alabaster *v.* Harness, [1894] 2 Q. B. 897. **Mentd.** Scott *v.* N. S. P. C. C. & Parr (1909), 25 T. L. R. 789.

672. Champerty—Legacy for protection of animals.]—A legacy was left to trustees on trust to promote therewith prosecutions for cruelty to animals :—*Held :* not void on the ground of champerty.—*Re* VALLANCE (1876), 2 Seton, Judgments & Orders, 7th ed., p. 1304.

Annotation :—**Refd.** *Re* Wedgwood, Allen *v.* Wedgwood, [1915] 1 Ch. 113, C. A.

See, further, CHARITIES.

673. —— Not excused by charitable motive.]—Charity may be indiscreet, but cannot be mercenary, & a bargain to assist another in litigation in return for part of the proceeds amounts in law to champerty, although assistance would not have been rendered to a stranger or to any one but a friend in needy circumstances.

Pltf., from charitable motives, lent deft. a sum of money to enable him to bring an action, deft. promising, in the event of success, to repay the loan, together with a bonus, out of any damages recovered. Deft., after succeeding in the action, repaid a portion of loan, but refused to pay the balance of the loan or the bonus :—*Held :* pltf. entitled to recover the balance of the loan, but not the bonus.—COLE *v.* BOOKER (1913), 29 T. L. R. 295. S. C. No. 742, *post.*

SUB-SECT. 4.—MASTER AND SERVANT.

674. Right of master to maintain servant—Embracery excepted.]—Pltf. sued out a writ of maintenance against deft., alleging he had maintained P. in an appeal of mayhem brought by P. against pltf. P. at the time held the office of gentleman carver to deft. :—*Held :* deft. not guilty of maintenance.

A master may lawfully maintain his servant, accompany him to the bar of the ct., stand there with him & give him advice, & may bring his own counsel to advise his servant. Just as it is lawful for a master to advise his servant or bring his own counsel to do so, so may he lawfully give his own money to a barrister to advise him. But it is otherwise where a master gives money on account of his servant to one of the jury in order to secure his verdict. Although the master himself pay counsel & the ct. fees for the servant, or discharge him of his own counsel, or pay other people for the servant to the servant's advantage, or otherwise give or lend him money to maintain & aid him in the action, yet in all these cases it shall not be said to be any maintenance in the master (NEWTON, C.J., & PASTON, J.).—POMEROY *v.* BUCKFAST, Nos. 547, 579, 651, 652, 668, *ante.*

For full anns., *see* S. C. No. 668, *ante.*

675. —.]—It is not maintenance for a master to expend his own money in defence of his servant's cause where there is a danger of losing his services. —ANON., No. 562, *ante ;* No. 718, *post.*

676. ——.]—No action lies for maintenance merely because a master assists his servant.

A.'s servant was impleaded. A. went to counsel for advice on behalf of his servant. In an action of maintenance against A., judgment was given in his favour.—ANON. (1456), Jenk. 2, 92 ; 145 E. R. 65.

677. ——.]—It is maintenance for a master to retain counsel for his servant or give money to counsel, but he may give them any wages due to such servant.—ANON. (1550), Moore, K. B. 6 (20) ; 72 E. R. 401.

678. ——.]—*Semble :* where proceedings are taken against a servant in respect of a ministerial act, something done by him in, or arising out of, his character of servant, it is not maintenance for his master to support him (JAMES, V.-C.)—ELBOROUGH *v.* AYRES (1870), L. R. 10 Eq. 367 ; 39 L. J. Ch. 601 ; 23 L. T. 68 ; 18 W. R. 913. S. C. No. 755, *post.*

679. —— Action not brought in servant's interest.]—An inspector employed by defts. was maintained by defts. in an action for slander. The action was not brought to retain the inspector's services, or from motives of charity or sympathy, but solely for defts.' purposes, being the inspector's action merely in name. Defts. at first *bonâ fide* believed the imputation on the inspector's character to be false, but after issue of the writ they discovered he was unfit to be an inspector. Defts. had also instructed their solr. to appeal against a bastardy order made against the inspector on the application of pltf. :—*Held :* (1) defts. were guilty of maintenance ; (2) the fact that the inspector was their servant was immaterial, since the action was not maintained because the inspector was their servant ; (3) pltf. was entitled to recover costs as between solr. & client both of the action of slander & of the bastardy appeal.—SCOTT *v.* NATIONAL SOC. FOR PREVENTION OF CRUELTY TO CHILDREN & PARR (1909), 25 T. L. R. 789. S. C. No. 558, *ante ;* Nos. 684, 723, *post.*

Annotation :—**Refd.** Neville *v.* London Express Newspapers, [1917] 1 K. B. 402.

SUB-SECT. 5.—TRADE INTEREST.

680. Resisting claim to patent—Appeal for subscriptions & evidence.]—Where a number of persons have a common interest in the subject-matter of a litigation, it is no offence on the part of the litigants to solicit subscriptions to assist them in prosecuting the litigation.

An injunction having been granted to restrain defts. from infringing a patent for nickel-plating, they gave notice of appeal & published in a newspaper an advertisement inviting the trade to subscribe towards the expenses of the appeal, & also an advertisement offering a reward of £100 to any one who could produce documentary evidence that nickel-plating was done before 1869. Pltfs. moved to commit the publishers of the newspaper for contempt of ct. in publishing these advertisements, as being an interference with the course of justice, stating at the same time that they did not press for a committal, but would be satisfied with an expression of regret & an undertaking not to repeat the advertisements :—*Held :* (1) as all persons engaged in the trade of plating had a common interest in resisting the claims of pltfs., an advertisement asking them to contribute to the expenses of defending the proceedings was open to no objection ; (2) the advertisement offering a reward for documentary evidence was free from objection.—PLATING CO. *v.* FARQUHARSON (1881), 17 Ch. D. 49 ; 50 L. J. Ch. 406 ; 44 L. T. 389 ; 45 J. P. 568 ; 29 W. R. 510, C. A.

Annotations :—**Refd.** Butler *v.* Butler (1888), 57 L. J. P. 42 ; British Cash & Parcel Conveyors *v.* Lamson Store Service Co., [1908] 1 K. B. 1006, C. A. **Mentd.** Metropolitan Music Hall *v.* Lake (1889), 58 L. J. Ch. 513 ; Hunt *v.* Clarke (1889), 58 L. J. Q. B. 490, C. A. ; *Re* Crown Bank, *Re* O'Malley (1890), 59 L. J. Ch. 767 ; Bromilow *v.* Phillips (1891), 36 Sol. Jo. 124 ; *Re* Martindale, [1894] 3 Ch. 193 ; R. *v.* Payne (1896), 65 L. J. Q. B. 426 ; *Re* New Gold Coast Exploration, [1901] 1 Ch. 860 ; Lee *v.* Aylesbury U. D. C. (1902), 19 T. L. R. 106 ; Scott *v.* Scott, [1912] P. 241, C. A.

681. Defamation—Maintainer's character incidentally affected.]—Pltfs. published an article containing libellous imputations upon T. & H. in connection with medical appliances manufactured by H. & reported on by T., a medical man. In respect of this article, so far as it reflected upon his character, T. brought an action against pltfs. H. maintained T. in his action. The libels upon H. contained in the article did not form any part of T.'s cause of

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action, nor was any issue raised as to H.'s character. The action resulted in a verdict for pltfs., & T. was unable to pay their costs:—*Held:* (1) although in T.'s action questions might incidentally arise affecting H.'s character, he had no common interest in the action; (2) an action for maintenance would lie at the suit of pltfs. against H. for the amount of the taxed costs of their defence to T.'s action.—ALABASTER *v.* HARNESS, [1895] 1 Q. B. 339; 64 L. J. Q. B. 76: 71 L. T. 740: 43 W. R. 196: 11 T. L. R. 96; 14 R. 54, C. A. S. C. Nos. 641, 642, 645, 665, 666, *ante*; No. 724, *post.*

Annotations:—**Apld.** Greig *v.* Nat. Amal. Union of Shop Assistants (1906), 22 T. L. R. 274. **Folld.** Oram *v.* Hutt, [1914] 1 Ch. 98, C. A. **Refd.** Holden *v.* Thompson, [1907] 2 K. B. 489; British Cash & Parcels Conveyors *v.* Lamson Store Service Co., [1908] 1 K. B. 1006, C. A.; Scott *v.* N. S. P. C. C. & Parr (1909), 25 T. L. R. 789. **Mentd.** Neville *v.* London Express Newspapers, [1917] 2 K. B. 564, C. A.

682. —— Trade union—Instigating action.]—The employer of a member of a trade union dismissed him without notice, stating, in answer to an inquiry by the secretary of his union, that he did so on the ground of dishonesty, but subsequently, on proceedings being taken by his union on behalf of the member, paid him a week's wages in lieu of notice. Subsequently an action for libel, based on the letter written to the secretary by his employer, was commenced against the employer by the union, with the member's consent, the union instructing & paying its own solr. The action having been dismissed with costs, the employer sued the union for maintenance:—*Held:* (1) the union had instigated its member to bring the action without reasonable or probable cause; (2) there was no common interest; (3) defts. were guilty of maintenance. *Semble:* the union was not guilty of maintenance in assisting its member to recover his wages.—GREIG *v.* NATIONAL AMALGAMATED UNION OF SHOP ASSISTANTS, WAREHOUSEMEN, & CLERKS (1906), 22 T. L. R. 274.

Annotation:—**Folld.** Oram *v.* Hutt, [1913] 1 Ch. 259.

683. —— ——.]—A trade union has no legal common interest in a slander action brought by one of its officers, although that officer is slandered by way of his office as well as personally & the union is thereby adversely affected. Payment of the officer's costs out of the funds of the union in pursuance of an indemnity given by the union before action is obnoxious to the law of maintenance & *ultra vires.*—ORAM *v.* HUTT, [1914] 1 Ch. 98; 83 L. J. Ch. 161; 110 L. T. 187; 78 J. P. 51; 30 T. L. R. 55, C. A. S. C. Nos. 559, 570, 646, *ante.*

For full anns., *see* S. C. No. 559, *ante.*

684. —— Master & servant.]—SCOTT *v.* NATIONAL SOC. FOR PREVENTION OF CRUELTY TO CHILDREN & PARR, Nos. 558, 679, *ante*; No. 723, *post.*

For full anns., *see* S. C. No. 679, *ante.*

685. Defending customers against trade rivals.]—It is not maintenance to uphold a party in litigation in the result of which the party accused of maintenance has a real & *bonâ fide* interest.

Pltfs. & defts. were trade rivals, each dealing in a special apparatus used for carrying cash in retail shops. Defts. obtained orders for their apparatus from certain persons who had at some time used pltfs.' apparatus & discontinued such use, & agreed to indemnify such persons in any action brought against them by pltfs. They in fact paid certain damages & costs recovered by pltfs. against such persons. Pltfs. brought an action against defts. for damages for maintenance:—*Held:* (1) defts. had a pecuniary & commercial interest in the protection of their customers which justified the contracts of indemnity given by them; (2) they had not been guilty of maintenance.—BRITISH CASH & PARCEL CONVEYORS, LTD. *v.* LAMSON STORE SERVICE CO., LTD., [1908] 1 K. B. 1006; 77 L. J. K. B. 649; 98 L. T. 875, C. A.

Annotation:—**Refd.** Scott *v.* N. S. P. C. C. & Parr (1909), 25 T. L. R. 789.

SECT. 4.—POSITION OF BARRISTERS AND SOLICITORS.

See, further, BARRISTERS; SOLICITORS.

SUB-SECT. 1.—MAINTENANCE.

686. Privilege of legal profession.]—An attorney or a counsellor who has a profession towards the law may solicit any suit in any ct., and it is not maintenance; but another person cannot.—WILSON *v.* PECK (1628), Het. 129; 124 E. R. 397.

687. ——.]—In debt on a bond with condition to pay pltf. all moneys which he had spent or should spend in a suit *inter alios* wherein he was attorney:—*Held:* (1) unlawful maintenance must be specially pleaded, & cannot be objected to on oyer & demurrer; (2) performance should be pleaded to the first part of the condition, for it is lawful for an attorney to take security from a stranger for past expenses.—PIERSON *v.* HUGHES (1673), 1 Freem. K. B. 71, 81; 89 E. R. 53, 60. S. C. No. 735, *post.*

Annotations:—**Refd.** Wallis *v.* Portland (1797), 3 Ves. 494; Booth *v.* Creswicke (1844), 13 L. J. Ch. 217.

688. ——.]—In an action upon an agreement by deft. to pay to pltf. the sum of £50 towards the expenses incurred by him in conducting a petition against the return of certain persons to serve as members of Parliament, in consideration of pltf. continuing to pursue the petition:—*Held:* the agreement was not void on the ground of maintenance.—STEVENS *v.* MACGUIRE (1843), 2 L. T. O. S. 151.

689. —— Limits of—Agreement to save harmless from costs.]—*Qu.:* if it is not maintenance for an attorney to agree to save his client harmless from costs.—HARPOOL *v.* MILLER (1599), Cro. Eliz. 731; 78 E. R. 965.

690. Commission on business introduced—Not barratry.]—An agreement by an attorney with a certificated conveyancer that in case the conveyancer should introduce to the attorney any matters of professional business, for which the attorney would have a claim for costs, he would pay to the conveyancer certain sums as commission, would not subject the parties to penalties for common barratry.—SCOTT *v.* MILLER (1859), John. 220; 28 L. J. Ch. 584; 5 Jur. N. S. 858; 7 W. R. 470; 70 E. R. 404.

For full anns., *see* SOLICITORS.

691. Solicitor's bill—Maintenance no defence to —Action on.]—In *assumpsit* by an attorney to recover his bill of costs for preparing a deed, & also costs of an action instituted in pursuance of that deed, in which action his client had failed in consequence of the deed having been held void on the ground of maintenance:—*Held:* deft. could not set up the illegality of the contract in answer to the action under a plea of *non assumpsit.*—POTTS *v.* SPARROW (1835), 1 Bing. N. C. 594; 3 Dowl. 630; 1 Hodg. 135; 1 Scott, 578; 4 L. J. C. P. 201; 131 E. R. 1246.

Annotations:—**Apld.** Martin *v.* Smith (1838), 6 Scott, 268. **Refd.** Sharpe *v.* Wagstaffe (1838), 1 Horn. & H. 164; Hemming *v.* Trenery (1839), 9 Ad. & El. 926.

692. —— —— ——.]—*Semble:* it is no answer to an action on an attorney's bill to show that the business was done in circumstances which rendered deft. guilty of an act of maintenance in employing pltf.—FINDON *v.* PARKER, Nos. 549, 644, 655, 661, 669, *ante.*

For full anns., *see* S. C. No. 661, *ante.*

693. —— —— **Summons for delivery of—Claim for repayment—Lapse of time.**]—Where a client has voluntarily paid money to his attorney, pursuant to an agreement in itself void for champerty, the ct. will not, after a lapse of 13 years, interfere to compel the attorney to refund or deliver his bill unless sufficient reason is shown for not making an earlier application.—*Ex p.* YEATMAN (1835), 4 Dowl. 304; 1 Har. & W. 510.

Annotation:—**Distd.** *Ex p.* Sharpe (1837), 5 Dowl. 717.

694. —— —— ——.]—Money was subscribed by strangers for the maintenance of litigation for the recovery of property, to be repaid out of the property if recovered. This money was entrusted to J., who, by authority of claimant, retained a solr. to conduct the litigation on behalf of claimant, & paid him large sums out of the funds subscribed. The litigation was unsuccessful. J. then took out a summons against the solr. for delivery & taxation of his bill of costs & an account of the money paid to him:—*Held:* the solr. could not resist taxation or the account on the ground that the employment for which he was retained & for which the money was paid was illegal.—*Re* THOMAS, JAQUESS *v.* THOMAS, [1894] 1 Q. B. 747; 63 L. J. Q. B. 572; 10 T. L. R. 367; 38 Sol. Jo. 340; 9 R. 299, C. A.

SUB-SECT. 2.—CHAMPERTY.

A. Sharing Moneys recovered.

Agreements between solicitors & clients generally: *see* SOLICITORS.

695. Agreement invalid — Sharing estate — Actual expenses recoverable.]—A lawyer took a bond from his client to convey one half of his estate to him for recovering the other half. This bond was set aside.—SKAPHOLME *v.* HART (1680), cas. *temp.* Finch, 477; 1 Eq. Cas. Abr. 86; 23 E. R. 257. S. C. No. 739, *post.*

696. —— —— —— **Effect of confirmation.**]—Beneficial contracts & conveyances obtained by a solr. from his client during their relation as such, & connected with the subject of the suit, being also liable to the charge of champerty, were decreed to stand as security only for what was actually due; & purchases by the solr. declared a trust. A subsequent deed, not a separate independent, voluntary transaction, but under the same pressure, & called for under the covenant for farther assurance:—*Held:* no confirmation.—WOOD *v.* DOWNES (1811), 18 Ves. 120; 34 E. R. 263.

Annotations:—**Apld.** Prosser *v.* Edmonds (1835), 1 Y. & C. Ex. 481. **Distd.** Booth *v.* Creswicke (1844), 13 L. J. Ch. 217; Hunter *v.* Daniel (1845), 4 Hare, 420. **Extd.** Holman *v.* Loynes (1854), 4 De G. M. & G. 270. **Foll.** Simpson *v.* Lamb (1857), 7 E. & B. 84. **Distd.** Knight *v.* Bowyer (1858), 2 De G. & J. 421. **Apld.** Anderson *v.* Radcliffe (1858), E. B. & E. 806. **Consd.** James *v.* Kerr (1889), 40 Ch. D. 449. **Refd.** Hartley *v.* Russell (1825), 2 Sim. & St. 244; Stanley *v.* Jones (1831), 7 Bing. 369; Harrington *v.* Long (1833), 2 My. & K. 590; Jones *v.* Thomas (1837), 2 Y. & C. Ex. 498; Richardson *v.* Bank of England (1838), 4 My. & Cr. 165; Edwards *v.* Meyrick (1842), 2 Hare, 60; Roberts *v.* Tunstall (1845), 4 Hare, 257; Tomson *v.* Judge (1855), 3 Drew. 306; Lloyd *v.* Attwood (1859), 3 De G. & J. 614; Ormes *v.* Beadel (1860), 2 De G. F. & J. 333; Bradlaugh *v.* Newdegate (1883), 11 Q. B. D. 1; Fitzroy *v.* Cave, [1905] 2 K. B. 364, C. A.

697. —— —— ——.]—T., being rightful heir to lands, employed L. to be his attorney in prosecuting his claims on the terms that L. should have in lieu of all claims for costs, etc., one-third of the estate which might be recovered. The proceedings being successful, L. in 1852 entered, as agent of T., into possession of the rents & profits of the estate. In 1854, L. pressing for a settlement of his claims, T. required an advance by way of mtge., & applied to L. for it. L. refused to advance any money himself, but procured G. to advance the necessary amount for payment of his own claim & a further advance to T. A regular mtge. was executed by T. to G., with power of sale. Immediately after the mtge. L. procured from T. an authority to pay £120 for the purpose of obtaining the title deeds, which had up to this time been in the possession of the solr. to the wrongful heir, who claimed a lien thereon for £120 for costs. Very shortly after this notice was given by G. calling in the mtge. money, &, default being made, the power of sale was put in exercise & the lands advertised for sale by auction. It turned out that G. was merely a nominee for L. & had advanced no moneys of his own, & that L. had concealed this fact, & also the fact that the original retainer was void for champerty, from the knowledge of pltf.:—*Held:* (1) the agreement and retainer were void; (2) the mtge. must be cut down & stand as a security for so much only as was justly due from pltf. to deft.— THOMAS *v.* LLOYD (1857), 3 Jur. N. S. 288. S. C. No. 740, *post.*

698. —— —— ——.]—By agreement in writing between a solr. and his client it was stipulated that the former should have £5 per cent. commission on the gross amount of property recovered by him for the latter, in addition to his costs:—*Held:* (1) the stipulation was contrary to the policy of the law; (2) the solr. must refund the amount received by him for commission, though included in a settled account.—PINCE *v.* BEATTIE (1863), 32 L. J. Ch. 734; 9 L. T. 315; 27 J. P. 804; 9 Jur. N. S. 1119; 11 W. R. 979.

699. —— —— —— **Conflict of laws.**] — An agreement to be carried into effect in this country, which would be void on the ground of champerty if made here, is not the less void because made in a foreign country where such a contract would be legal.

An attorney entered into an agreement in France with L., a French subject, to sue for a debt due to L. from a person residing here, whereby the attorney was to receive by way of recompense a moiety of the amount recovered:—*Held:* (1) the agreement was void for champerty; (2) the attorney was remitted to his ordinary retainer as an attorney; (3) the work having been done, & L. having received the benefit of it, the attorney was entitled to his costs as between attorney & client.—GRELL *v.* LEVY (1864), 16 C. B. N. S. 73; 9 L. T. 721; 10 Jur. N. S. 210; 12 W. R. 378; 143 E. R. 1052.

Annotations:—**Foll.** *Re* Thomas, Jaquess *v.* Thomas, [1894

PART VIII. SECT. 4, SUB-SECT. 2.—A.

695 i. *Agreement invalid—Sharing estate.*]—A suit was instituted by nine pltfs. against defts., alleged to be in illegal occupation. Pltfs. had no title but their miners' rights. Pltfs.' solr. had paid the expenses of the suit & was to have half of each of pltfs.' interest in the land when recovered:—*Held:* the claim was in its inception & concoction based upon champerty & maintenance. —COLLINS *v.* HAYES (1869), 6 W. W. & a'B. M. 5.—**AUS.**

695 ii. *Sharing proceeds—Partnership in litigation.*]—Pltf. desired to take action against one or more newspapers which had published charges against him, & consulted one of defts., a solr. This solr. conferred with another solr., the other deft., & negotiations took place between the two defts. & pltf., & a verbal agreement was come to between the three. One of defts. was to act as solr. on the record in the actions, the other assisting; the two defts. were together to find all necessary disbursements; pltf. was not to be called upon to pay any expenses whatever except out of moneys which might be recovered, but out of such moneys defts. were to be entitled first to be repaid their disbursements & then to receive two-thirds of the remainder, the other third to go to pltf. In one action damages & costs were recovered; in another pltf. was unsuccessful. Defts. refused to allow the costs awarded against pltf. in the latter action to be paid out of the amount recovered in the first action, & pltf. had to pay them himself. He then sued defts., upon the agreement, to recover the sum so paid:—*Held:* the agreement was illegal on the ground of champerty & maintenance, & pltf. could not recover.

Whatever effect Supreme Court Act, 1882, s. 33, may possibly have had in making legal some agreements which previously might have been held void as savouring of champerty, it cannot justify an agreement for a partnership in litigation of such nature as that above set out.—MILLS *v.* ROGERS (1899), 18 L. R. 291, C. A.—**N.Z.**

Sect. 4.—Position of Barristers & Solicitors: Subsect. 2, A. B. & C.]

1 Q. B. 747, C. A. **Distd.** Kaufman *v.* Gerson, [1903] 2 K. B. 114.

700. —— Proportion commensurate with work done & benefit received.]—A contract whereby an attorney stipulates with a client to receive, in consideration of the large advances requisite to the conducting the proceedings to a successful issue, over & above his legal costs & charges, a sum which should be commensurate with his outlay & exertions, & with the benefit resulting to the client, is void on the ground of maintenance.—EARLE *v.* HOPWOOD (1861), 9 C. B. N. S. 566; 30 L. J. C. P. 217; 3 L. T. 670; 7 Jur. N. S. 775; 9 W. R. 272; 142 E. R. 222. S. C. No. 733, *post.*

Annotation :—**Distd.** Hilton *v.* Woods (1867), L. R. 4 Eq. 432.

701. —— Percentage.]—Pltf. (an attorney) entered into an agreement in writing with his client (deft.), who claimed to be entitled to a fund in ct., by which agreement, in consideration of pltf. obtaining sureties to join in certain administration bonds, & in order to indemnify these sureties, deft. agreed to allow pltf. to retain for 6 years a specified portion of the fund to be recovered, &, further, as a bonus or consideration for expenses incurred by, & the professional labour of, pltf., to pay him £10 per cent. on the sum recovered, exclusive of law charges. To a bill filed by pltf. for the specific performance of this agreement deft. filed a general demurrer :—*Held :* the demurrer must be allowed.—STRANGE *v.* BRENNAN (1846), 2 Coop. *temp.* Cott. 1; 15 L. J. Ch. 389; 10 Jur. 649; 47 E. R. 1018, C. A. S. C. No. 730, *post.*

Annotation :—**Refd.** Rees *v.* De Bernardy, [1896] 2 Ch. 437.

702. —— ——.]—By an agreement between clients & solrs. it was agreed that in the event of the solrs. succeeding in recovering certain property for the clients they should receive 10 per cent. on the value of the property. *Semble :* the agreement was champertous & invalid under Attorneys & Solicitors Act, 1870 (c. 28), s. 11.—*Re* ATTORNEYS & SOLICITORS ACT, 1870 (1875), 1 Ch. D. 573; 45 L. J. Ch. 47; 24 W. R. 38.

Annotation :—**Folld.** *Re* A Solicitor, *Ex p.* Law Soc., [1912] 1 K. B. 302.

703. —— —— Unless non-contentious proceedings.]—An agreement between a client & solr. whereby the solr. is to be remunerated by a percentage of a sum to be recovered in a matter that is not a suit, action, or contentious proceeding, though not champertous, will be strictly regarded by the ct., which, in considering its propriety, will have regard to whether the client had independent advice & fully understood the purport of the agreement.—*Re* HOGGART'S SETTLEMENT (1912), 56 Sol. Jo. 415.

B. Indemnity against Costs.

704. Payment by result—Share of sum recovered—No costs if unsuccessful.]—An attorney agreed to save a party harmless from all costs of some suits on his being allowed to retain half of whatever sums were recovered :—*Held :* such an agreement amounted to maintenance & was illegal.—*Re* MASTERS (1835), 1 Har. & W. 348.

705. —— —— ——.]—Where a pltf. has an original & good title to property, he does not become disqualified to sue for it by having entered into an improper bargain with his solr. as to the mode of remunerating him for his professional services in the suit.

Pltf. agreed to pay his solr., upon being indemnified against costs, a portion of the profits arising from his successful prosecution of a suit to establish his claim to certain coal mines :—*Held :* (1) the agreement amounted to champerty & maintenance; (2) pltf. was not disqualified from suing, since his title was vested in him before he entered into the illegal contract; (3) he must be deprived of costs.

If the solr. had been pltf. suing by virtue of a title derived under the agreement with his client, the bill would have been dismissed (MALINS, V.-C.).—HILTON *v.* WOODS (1867), L. R. 4 Eq. 432; 36 L. J. Ch. 491; 16 L. T. 736; 31 J. P. 788; 15 W. R. 1105. S. C. No. 752, *post.*

For full anns., *see* MINES, MINERALS & QUARRIES.

706. —— —— —— Implied agreement.]—An agreement provided that the solr. conducting the action should receive a percentage on the sums recovered. Nothing was said about remuneration in the event of the action being unsuccessful :—*Held :* (1) on the consideration of the agreement,

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701 i. —— *Percentage.*]—An administratrix employed solrs. in an action for the recovery of a sum of money. She obtained a verdict, but the solrs. handed to her a part only of the money recovered. In an action for the balance, deft. solrs. pleaded full payment after deduction of fees, setting up a written agreement fixing their charges. Under the agreement the solrs. took an assignment of the claim, stipulating that they would prosecute the suit at their own expense, & if they prevailed, the property recovered was to be divided—one-fourth to themselves & three-fourths to pltf. :—*Held :* the agreement stipulating for a share of the money to be recovered as remuneration for carrying on the proceedings was clearly champertous; defts. were entitled to some remuneration, & as there was no tariff as between solr. & client in the Exchequer Ct., the amount must be ascertained as upon a "*quantum meruit.*" — O'CONNOR *v.* GEMMILL (1899), 29 O. R. 47; 26 A. R. 27.—**CAN.**

701 ii. —— ——.]—A solr. & his client embarked in a joint speculation to be prosecuted in ct. for their joint advantage—the client bringing in a claim for injuries & the lawyer contributing his skill & services. The action was successfully brought & judgment obtained for $2,000. The solr. took all the fruits of the judgment, retaining two large sums for costs which on taxation were allowed. The client appealed, & the claims were disallowed.

The confidential relation between lawyer & client forbids any bargain being made by which the practitioner shall draw a larger return out of litigation than is sanctioned by the tariff & the practice of the cts. Especially does the law forbid any agreement by the lawyer to take a percentage of the proceeds of a litigated claim as compensation for his services. Such transaction is in contravention of the statute relating to champerty.—*Re* SOLICITOR (1907), 10 O. W. R. 226.—**CAN.**

701 iii. —— —— *Lump sum.*]—Pltfs., advocates in the Yukon, sued deft. for a lump sum for professional services in obtaining a judgment against H., it being alleged by pltfs. that they were to charge $600 if the amount was collected, & by deft. that they were to get 10 per cent. if collected by them :—*Held :* by Yukon law, an advocate could not legally obtain a lump sum for professional services except under r. 534 of North-West Territories Judicature Ordinance of 1893.—ROBERTSON *v.* BOSSUYT (1900), 8 B. C. R. 301.—**CAN.**

701 iv. —— *Sum depending on result of suit.*]—A solr. agreed with his client to get $2,000 & taxed costs if the action were successful, if not he was to get $500 :—*Held :* the agreement was champertous, but the solr. had his lien for costs. WILLIAMS *v.* MCDOUGALL (1909), 12 W. L. R. 381.—**CAN.**

q. *Agreement not invalid—Sharing estate—Manitoba Statute.*]—Law Society Act, R. S. M. 1902, c. 95, s. 65, permits a solr. to contract with any person as to the remuneration to be paid him for services, & to receive a portion of the proceeds of the subject-matter of the action in which he is employed. Judgment was given in favour of pltfs., solrs., in an action to recover a portion of the amount received by deft. as the fruits of litigation carried on by pltfs. for deft., pursuant to a contract for payment of half the amount recovered. —THOMSON *v.* WISHART (1910), 13 W. L. R. 445.—**CAN.**

r. —— *Agreement by solicitor to get costs out of other side.*]—In an action on a bill of costs incurred in respect of an action brought by pltf. as solr. for deft., the bill not having been taxed because negotiations were pending for settlement, deft. alleged that pltf. "took up the case on condition that he was to get his costs out of defts.; that if they failed all he would have to pay was defts.' costs ":—*Held :* the agreement alleged was not champertous, nor in any way within the prohibition against maintenance. "It was never doubted that a solr. might lay out his own moneys as disbursements on his client's account, & a solr. can conduct a case gratuitously out of charity or friendship towards his client."—*Re* SOLICITOR, CLARK *v.* LEE (1905), 5 O. W. R. 631; 9 O. L. R. 708.—**CAN.**

nothing was payable if nothing was recovered; (2) the agreement was champertous.—*Re* STEEL *v.* F. (1895), 39 Sol. Jo. 710.

707. —— —— ——.]—A solr. who was party to the formation of a debt-collecting co. financed it & controlled its affairs with a view to its employment by him as an adjunct to his business as solr. By the agency of the co. he systematically solicited debt-collecting business without disclosing his connection with the co. & with a view to procuring for himself the business of recovering the debts. The terms upon which he, by the agency of the co., solicited debt-collecting business, & upon which he was proved to have conducted the proceedings in two actions, were that he charged a certain commission on the amount recovered only in addition to out-of-pocket expenses sanctioned by the members of the co. & not recovered from the debtor. In unsuccessful cases no charge was made either by the co. or the solr. except for actual out-of-pocket expenses: —*Held:* the terms upon which he conducted the actions amounted in law to champerty.—*Re* A SOLICITOR, *Ex p.* LAW SOCIETY, [1912] 1 K. B. 302; 81 L. J. K. B. 245; 105 L. T. 874; 28 T. L. R. 50; *sub nom. Re* G. (A SOLICITOR), *Ex p.* LAW SOCIETY, 56 Sol. Jo. 92. S. C. No. 743, *post.*

708. —— —— ——.]—A solr. agreed to act for a client in an action on the terms of receiving a percentage of any sum recovered, such percentage to cover his costs & expenses, & no charge to be made in the event of failure. Shortly after the issue of the writ the solr. discovered that there was no substance in the action:—*Held:* (1) the agreement was champertous; (2) judgment having been given for defts. in the action with costs, the solr. was personally liable to pay them.—DANZEY *v.* METROPOLITAN BANK OF ENGLAND & WALES (1912), 28 T. L. R. 327. S. C. No. 753, *post.*

C. Transfer of Subject-matter of Action.

709. Gift to counsel after successful litigation.]—Where a litigant recovered land & part of the land was conveyed to his counsel for his wages:—*Held:* the taking of the land for his wages after the recovery was not champerty, there being no allegation of a covenant or promise by the litigant before the proceedings to convey the land after the recovery thereof.—PENROS' CASE (1412), 2 Co. Inst. 564.

Annotation:—**Refd.** Anderson *v.* Radcliffe (1858), E. B. & E. 806.

710. ——.]—Pltf. had been engaged in legal proceedings in establishing her title to an estate of considerable value, & in Mar., 1859, her title to the estate was established. Deft. was pltf.'s adviser & advocate in the contest, which had endured some years. In May, 1859, pltf. executed a deed whereby pltf., in consideration of the services rendered to her by deft. & also in consideration of her esteem & friendship for him, conveyed to him the reversion of the estate subject to her own life interest therein & chargeable as thereinafter appeared. *Semble:* the deed was void for maintenance & champerty.—BROUN *v.* KENNEDY (1864), 4 De G. J. & Sm. 217; 33 L. J. Ch. 342; 9 L. T. 736; 10 Jur. N. S. 141; 12 W. R. 360; 46 E. R. 901.

Annotation:—**Apld.** Robertson *v.* McDonough (1880), 14 Cox, C. C. 469.

711. Purchase by solicitor—Void.]—Upon the principles of policy no attorney shall be permitted to purchase anything in litigation, of which litigation he has the management.—HALL *v.* HALLETT (1784), 1 Cox, Eq. Cas. 134; 29 E. R. 1096.

Annotations:—**Consd.** Simpson *v.* Lamb (1857), 7 E. & B. 84; Nant-y-Glo & Blaina Ironworks *v.* Grove (1878), 12 Ch. D. 738. **Distd.** *Re* Postlethwaite, Postlethwaite *v.* Rickman (1888), 59 L. T. 58. **Consd.** *Re* Stevens, Cooke *v.* Stevens, [1898] 1 Ch. 162, C. A. **Mentd.** Raphael *v.* Boehm (1805), 11 Ves. 92.

712. —— ——.]—Agreements entered into between a solr. & his client for the purchase by the solr. at an under-price of estates to which the client had good title, but of which he was not in possession, set aside for fraud & maintenance. —JONES *v.* THOMAS (1837), 2 Y. & C. Ex. 498; 3 Per. & Dav. 91; 160 E. R. 493.

Annotations:—**Refd.** Edwards *v.* Meyrick (1842), 2 Hare, 60; Holman *v.* Loynes (1854), 4 De G. M. & G. 270.

713. —— —— **Though bonâ fide.**]—An attorney conducting a cause for pltf., though not the attorney on the record, after verdict, but before judgment, *bonâ fide* purchased from his client the benefit of the verdict & gave notice of this to deft.: —*Held:* (1) the transaction, being the purchase of the subject-matter of a suit by the attorney, was void as against the policy of the law; (2) it made no difference that the purchaser was not attorney on the record. *Qu.:* whether such a purchase by a stranger would have been valid.—SIMPSON *v.* LAMB (1857), 7 E. & B. 84; 26 L. J. Q. B. 121; 28 L. T. O. S. 123, 245; 3 Jur. N. S. 412; 119 E. R. 1179.

Annotations:—**Distd.** Knight *v.* Bowyer (1858), 2 De G. & J. 421; Radcliffe *v.* Anderson (1860), E. B. & E. 819: Anderson *v.* Radcliffe (1860), 29 L. J. Q. B. 128, Ex. Ch.; Davis *v.* Freethy (1890), 24 Q. B. D. 519, C. A. **Apld.** Pittman *v.* Prudential Deposit Bank (1896), 13 T. L. R. 110, C. A. **Refd.** Smith *v.* Selwyn (1857), 5 W. R. 682; Hilton *v.* Woods (1867), L. R. 4 Eq. 432.

714. —— **When valid—Before relation of solicitor & client constituted.**]—Pltf., a solr., was the assignee of the amount of a verdict recovered in the Mayor's Ct., London, & the deed of assignment contained a covenant for further assurance of the amount of the verdict or other the sum or sums of money which might become payable in the action to the assignor. A new trial was obtained, & present pltf. became the solr. in that action, which terminated in a verdict for pltf. for the same amount as before. The present deft., who was a judgment creditor of pltf. in the action in the Mayor's Ct., obtained a garnishee order attaching the amount recovered in that action. In an interpleader to determine whether pltf. as assignee or deft. as garnishee was entitled to the fruits of the judgment:—*Held:* (1) the rule that a solr. conducting an action cannot purchase the subject-matter of the suit did not apply, as the assignment preceded the employment as solr.; (2) whether the assignment of the first verdict covered the amount of the second verdict or not, the intention of the assignment & covenant was to secure to pltf. the fruits of the litigation; (3) pltf. in that action could not deal with the amount recovered without violating the rights of his assignee, & the assignment took priority over the garnishee order.—DAVIS *v.* FREETHY (1890), 24 Q. B. D. 519; 59 L. J. Q. B. 318, C. A.

Annotations:—**Refd.** Glegg *v.* Bromley, [1912] 3 K. B. 474, C. A. **Mentd.** *Re* Anglesey, De Galve *v.* Gardner, [1903] 2 Ch. 727; Vacuum Oil Co. *v.* Ellis, [1914] 1 K. B. 693, C. A.

715. Assignment by way of security—Valid.]—After verdict, & before judgment, pltf. in eject-

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PART VIII. SECT. 4, SUB-SECT. 2.—C.

709 i. *Gift to counsel after successful litigation.*]—Giving part of the land recovered to counsel is not champerty, if it appear that the land was recovered *bonâ fide*, without any promise or previous agreement; but it seems dangerous to meddle with such gift, since it cannot but carry with it a strong presumption of champerty.—KENNEY *v.* BROWNE (1796), 3 Ridgw. Parl. Rep. 462, 498, 500, 501.—IR.

711 i. *Purchase by solicitor—Void.*]—A party sold a debt which he had purchased to his own attorney, upon the condition of the latter prosecuting the action thereon at his own expense: —*Held:* the attorney's purchase was void.—ROCHE *v.* PURCELL (1828), 1 Ir. L. Rec. (1st Ser.) 454.—IR.

715 i. *Assignment by way of security—Valid.*]—In ejectment pltf. claimed under a sealed instrument executed in his favour by M., witnessing that in con-

Sect. 4.—Position of Barristers & Solicitors : Sub-sect. 2, C. Sect. 5 : Sub-sects. 1 & 2, A. & B.]

ment assigned the subject-matter of the suit to his attorney in the suit as security for money advanced by the attorney for carrying on the suit & other purposes, & for the amount due to him for his professional services :—*Held :* the assignment was not void as against public policy, or by reason of any of the statutes against champerty & maintenance, being only a security & not an absolute purchase.—RADCLIFFE *v.* ANDERSON (1860), E. B. & E. 819 ; 1 L. T. 487 ; 6 Jur. N. S. 578 ; 8 W. R. 283 ; 120 E. R. 715 ; *sub nom.* ANDERSON *v.* RADCLIFFE & WALKER, 29 L. J. Q. B. 128, Ex. Ch. S. C. No. 581, *ante*.

Annotations :—**Refd.** Guy *v.* Churchill (1888), 40 Ch. D. 481 ; Alabaster *v.* Harness, [1895] 1 Q. B. 339, C. A. **Mentd.** Dunlop *v.* Macedo (1891), 8 T. L. R. 43 ; Ocean Accident & Guarantee Corpn. *v.* Ilford Gas Co. (1905), 74 L. J. K. B. 799, C. A.

SECT. 5.—REMEDIES.

SUB-SECT. 1.—MAINTENANCE.

716. Common law action.]—An action for maintenance lies at common law.—HARRIS *v.* BRISCO, No. 671, *ante*.

Annotation :—**Refd.** Scott *v.* N. S. P. C. C. & Parr (1909), 25 T. L. R. 789.

For full anns., *see* S. C. No. 671, *ante*.

717. ——.]—THURSTON *v.* UMMONS, No. 564, *ante*.

718. ——.]—ANON., Nos. 562, 675, *ante*.

719. ——.]—A declaration in case for maintenance need not charge the maintenance to have been committed *contra formam statuti ;* it being a wrongful act at common law, and the statutes relating to maintenance being only declaratory of the common law, with additional penalties. Nor need the declaration allege that deft. was not interested in the action maintained ; if he was, that is a matter to be pleaded by him.—PECHELL *v.* WATSON (1841), 8 M. & W. 691 ; 11 L. J. Ex. 225 ; 151 E. R. 1217. S. C. No. 577, *ante ;* No. 720, *post*.

Annotations :—**Consd.** Bradlaugh *v.* Newdegate (1883), 11 Q. B. D. 1. The case is an express authority in favour of this kind of action. I think Mr. Bradlaugh is entitled to an indemnity at Mr. Newdegate's hands for everything which Mr. Newdegate's maintenance of Mr. Clarke has caused him (Lord COLERIDGE, C.J.). **Refd.** Collins *v.* Cave (1860), 6 H. & N. 131, Ex. Ch. ; Ram Coomar Coondoo *v.* Chunder Canto Mookerjee (1876), 2 App. Cas. 186, P. C. ; Harris *v.* Brisco (1886), 17 Q. B. D. 504, C. A. ; Neville *v.* London Express Newspapers, [1917] 1 K. B. 402. **Mentd.** Flight *v.* Leman (1843), 4 Q. B. 883 ; Cotterell *v.* Jones (1851), 11 C. B. 713 ; Oram *v.* Hutt, [1914] 1 Ch. 98, C. A.

720. Joint action—Where joint damage.]—Where two persons sued jointly in case for injury sustained by unlawful maintenance of an action of trespass brought against them, & which they defended by one attorney, & the jury found for pltfs., confining the damages to the amount of the attorney's bill in the former action :—*Held :* the costs & expenses incurred by pltfs. in their defence in the former action constituted a joint damage for which they might jointly sue.—PECHELL *v.* WATSON, Nos. 577, 719, *ante*.

Annotation :—**Refd.** Neville *v.* London Express Newspapers, [1917] 1 K. B. 402.

For full anns., *see* S. C. No. 719, *ante*.

721. Maintainer ordered to pay costs—In original action.]—An action was brought in the cty. ct. for the recovery of a tenement. Deft., having no interest, defended the action at the request of H., who was interested in keeping pltf. out of the property. Judgment passed for pltf., who, in consequence of deft.'s poverty, applied to the superior ct. for a rule to compel H. to pay costs :—*Held :* the rule must be made absolute.—THORNTON *v.* WILKINSON (1863), 2 New Rep. 173 ; 8 L. T. 507 ; 9 Jur. N. S. 606 ; 11 W. R. 916.

722. Measure of damages—Indemnity against costs of original action.]—BRADLAUGH *v.* NEWDEGATE, Nos. 557, 569, 640, *ante*.

For full anns., *see* S. C. No. 569, *ante*.

723. —— ——.]—SCOTT *v.* NATIONAL SOC. FOR PREVENTION OF CRUELTY TO CHILDREN AND PARR, Nos. 558, 679, 684, *ante*.

For full anns., *see* S. C. No. 679, *ante*.

724. —— —— **Taxed costs only claimed.**]—ALABASTER *v.* HARNESS, Nos. 641, 642, 645, 665, 666, 681, *ante*.

For full anns., *see* S. C. No. 681, *ante*.

725. —— —— **Including costs paid to successful party.**]—Where the maintained action has been decided in favour of pltf., the damages recoverable in the action for maintenance will be the costs ordered to be paid by deft. to pltf. in the maintained action, & the costs, as between solr. & client, incurred by deft. in defending that action.—NEVILLE *v.* LONDON EXPRESS NEWSPAPERS, Nos. 556, 560, *ante*.

726. Discovery—Privilege—Indictable offence.]—Maintenance is an indictable offence at common

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sideration of prior indebtedness for professional services, & to secure pltf. for future services, etc., M. covenanted, granted, & agreed that he would stand seised & possessed of the land in question to the use of pltf., his heirs & assigns, by way of charge, security, & mtge. on the land for the money & costs ; & when pltf.'s costs were taxed, he might hold the instrument as & by way of charge, mtge., & security upon the land for the amount, or M. would, on demand, execute a good & sufficient mtge. in law ; — *Semble :* the instrument was not void for champerty or maintenance.—MILLER *v.* STITT (1867), 17 C. P. 559.—**CAN.**

s. *Grant to solicitor—Void.*]—A fee-farm grant obtained by a solr. from his client of part of an estate, subject of a suit, declared fraudulent.—KENNEY *v.* BROWNE, No. 709 i., *ante*.

PART VIII. SECT. 5, SUB-SECT. 1.

719 i. *Common law action—Pleading.*]—Where a count complained that deft. unlawfully, maliciously, & without reasonable or probable cause, & without having any interest in the suit, did advise, procure, etc., B., a pauper, to prosecute an action for slander, in the Ct. of Q. B., against pltf., in which action the then pltf. did appear to defend :—*Held :* the count should be set aside, inasmuch as there was no averment of the termination of the action of slander before the bringing of the present action, or that same was brought without reasonable or probable cause.—POPE *v.* COATES (1863), 15 Ir. Jur. (8 Ir. Jur. N. S.) 398 (E.).—**IR.**

t. *Action on* 32 Hen. 8, *c.* 9*—Pleading.*]—In an action on the above Act against the buyer of a disputed title, the declaration will be bad in arrest of judgment, if it does not allege that the buyer knew that neither the seller nor any of his ancestors, nor any person by whom the seller claimed the estate, had been in possession, etc., or received the rents, etc., one whole year next before the bargain made.—BEASLEY q.t. *v.* CAHILL (1844), 2 U. C. R. 320.—**CAN.**

u. —— ——.]—Where a declaration in a *qui tam* action for a penalty, under the above Act, stated the facts which gave a claim to the penalty, & then averred the right to pltf. to sue for & have the penalty for himself & her Majesty, to which deft. pleaded *nil debet :—Held :* (1) the declaration sufficiently averred as a breach the non-payment by deft. of the penalty ; (2) a declaration not sufficiently describing the land bargained & sold was good after verdict.—BALDWIN q.t. *v.* HENDERSON (1846), 4 U. C. R. 361.—**CAN.**

w. —— *Questions for jury.*]—In debt for penalties under the above Act it must be distinctly left to the jury to say, not merely whether the right was a pretended right, but also whether the buyer knew that neither the seller nor those under whom he claimed had been in possession of the land, or receipt of the rents & profits, for a year next before the sale.—BALDWIN q.t. *v.* HENDERSON (1843), 2 U. C. R. 388.—**CAN.**

x. *Information under* 32 Hen. 8, *c.* 9*—Pleading.*]—The above Act is a public Act ; but if an informer recite it, & mistake the commencement or conclusion of the Parliament, it is a fatal error. An information on the stat. must aver that the seller had a pretended right. An information for buying a pretended title must state the value of the land at the time of the bargain.—R. *v.* HILL (1631), Cro. Car. 232 ; 79 E. R. 803.—**ENG.**

726 i. *Discovery — Privilege — Indictable offence.*]—A deft. is not bound to answer what tends to accuse him of buying pretended rights within Stat. Maintenance. — SHARP *v.* CARTER & EVANS, No. 727, *post*.—**ENG.**

law, & deft. in an action in which he is charged with supporting a previous pltf. in litigation in which he had no common interest is entitled to refuse to answer interrogatories on the ground that they may criminate him.—ALABASTER *v.* HARNESS (1894), 70 L. T. 375 ; 10 T. L. R. 233.

727. ——.]—A deft. is not bound to answer what tends to accuse him of maintenance.—SHARP *v.* CARTER & EVANS (1735), 3 P. Wms. 375 ; 24 E. R. 1108.

728. ——.]—WALLIS *v.* PORTLAND, No. 566, *ante*.

For full anns., *see* S. C. No. 566, *ante*.

Criminal prosecution.]—*See* CRIMINAL LAW & PROCEDURE.

SUB-SECT. 2.—CHAMPERTY.

A. Between Original Parties.

729. Specific performance of agreement refused.]—POWELL *v.* KNOWLER, No. 586, *ante*.

For full anns., see S. C. No. 586, *ante*.

730. ——.]—STRANGE *v.* BRENNAN, No. 701, *ante*.

For full anns., see S. C. No. 701, *ante*.

731. Defence to action for breach of agreement.]—Where pltf. enters into a champertous agreement with deft., purchasing an interest in the property in dispute, bargaining for litigation to recover it, & undertaking to maintain deft. in the suit, & deft. subsequently recovers the property, no action lies against deft. for breach of the agreement.—SPRYE *v.* PORTER, No. 590, *ante*.

Annotations :—**Distd.** Hilton *v.* Woods (1867), L. R. 4 Eq. 432. **Folld.** Hutley *v.* Hutley (1873), L. R. 8 Q. B. 112. **Apld.** Bradlaugh *v.* Newdegate (1883), 11 Q. B. D. 1. **Folld.** James *v.* Kerr (1889), 40 Ch. D. 449 ; Rees *v.* De Bernardy, [1896] 2 Ch. 437. **Reid.** Earle *v.* Hopwood (1861), 9 C. B. N. S. 566 ; Ball *v.* Warwick (1881), 50 L. J. Q. B. 382 ; Savill *v.* Langman (1898), 79 L. T. 44, C. A. ; Glegg *v.* Bromley, [1912] 3 K. B. 474, C. A.

732. ——.]—STANLEY *v.* JONES, Nos. 582, 587, *ante*.

For full anns., *see* S. C. No. 587, *ante*.

733. ——.]—EARLE *v.* HOPWOOD, No. 700, *ante*.

For full anns., *see* S. C. No. 700, *ante*.

734. ——.]—HUTLEY *v.* HUTLEY, Nos. 591, 596, 648, *ante*.

For full anns., *see* S. C. No. 648, *ante*.

735. —— **To be specially pleaded.**]—PIERSON *v.* HUGHES, No. 687, *ante*.

For full anns., *see* S. C. No. 687, *ante*.

736. ——.]—Champerty should not be noticed by the ct. unless it is moved on the pleadings.—FISCHER *v.* NAICKER, No. 664, *ante*.

For full anns., *see* S. C. No. 664, *ante*.

737. Agreement rescinded.] — STRACHAN *v.* BRANDER, No. 594, *ante*.

For full anns., *see* S. C. No. 594, *ante*.

738. ——.]—REES *v.* DE BERNARDY, Nos. 585, 592, *ante*.

For full anns., *see* S. C. No. 592, *ante*.

739. Severance of illegal part of agreement.]—SKAPHOLME *v.* HART, No. 695, *ante*.

740. ——.]—THOMAS *v.* LLOYD, No. 697, *ante*.

741. ——.]—JAMES *v.* KERR, No. 598, *ante*.

For full anns., *see* S. C. No. 598, *ante*.

742. ——.]—COLE *v.* BOOKER, No. 673, *ante*.

743. Summary jurisdiction—Solicitor.]—*Re* A SOLICITOR, *Ex p.* LAW SOC., No. 707, *ante*.

See, further, SOLICITORS.

B. As regards Third Parties.

744. Defence to action based on agreement—Claim for rescission.]—PROSSER *v.* EDMONDS, No. 601, *ante*.

For full anns., *see* S. C. No. 601, *ante*.

745. ——.]—DE HOGHTON *v.* MONEY, No. 614, *ante*.

746. —— **Claim for breach of trust.**]—HILL *v.* BOYLE, No. 615, *ante*.

747. Ejectment.]—DOE *d.* WILLIAMS *v.* EVANS, No. 610, *ante*.

For full anns., *see* S. C. No. 610, *ante*.

748. Claim under agreement—Not available—Creditor's suit.]—HARRINGTON *v.* LONG, No. 623, *ante*.

For full anns., *see* S. C. No. 623, *ante*.

749. —— —— **Right to damages.**]—MAY *v.* LANE, No. 602, *ante*.

For full anns., *see* S. C. No. 602, *ante*.

750. —— —— **Garnishee proceedings.**]—BALL *v.* WARWICK, No. 597, *ante*.

751. —— —— **Prosecution of winding-up petition.**]—*Re* PARIS SKATING RINK CO., No. 605, *ante*.

752. Where agreement collateral—Successful party deprived of costs.]—HILTON *v.* WOODS, No. 705, *ante*.

753. —— **Solicitor ordered to pay costs.**]—DANZEY *v.* METROPOLITAN BANK OF ENGLAND & WALES, No. 708, *ante*.

754. Res judicata.]—An allegation in a bill that a deft. had entered into an agreement savouring of champerty will, on demurrer, be disregarded when it appears by other statements in the bill that same deft. had, on the foundation of the same impeached agreement, obtained a decree in a hostile suit, that decree not being impeached by the bill.—BAINBRIGGE *v.* MOSS (1856), 3 Jur. N. S. 58.

Annotation :—**Distd.** Smith *v.* Kay (1859), 7 H. L. Cas. 750.

755. Court of equity.]—A secretary of a co. was prosecuted by a shareholder for issuing, in his capacity as secretary, a false balance-sheet. The prosecution failed, & the secretary was maintained in an action for malicious prosecution against the shareholder (in which he obtained a verdict for £50 damages) by a resolution of the directors

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726 ii. ——.]—In an action by pltf. for damages for death of her husband through alleged negligence of defts., defts. made an application for further discovery from pltf. & answers relating to an alleged champertous agreement :—*Held :* pltf. had not trenched upon the limits marked out as reasonable in the judgment in *Ram Coomar Coondoo v. Chunder Canto Mookerjee* (1876), 2 App. Cas. 186, P. C., which states that a fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being, "*per se*," opposed to public policy. Although such a judgment might not apply precisely to Canada, it was an indication that the rigorous rules which obtained in earlier days in England are not to be imported into dependencies of England without modification. Discovery is not enforceable in equity in cases of champerty & maintenance, nor should it be under the equivalent remedies given by Jud. Act.—WELBOURNE *v.* CANADIAN PACIFIC RY. CO. (1894), 16 P. R. 343.—**CAN.**

726 iii. ——.]—Maintenance is an indictable offence in Ontario ; & in an action to recover damages for maintenance, pltf. is not entitled to obtain from deft. upon examination for discovery such answers as would tend to subject to criminal proceedings. As discovery could not be had which would not involve defts. in matters leading up to the offence, the examination should not be allowed to take place at all.—HOPKINS *v.* SMITH (1901), 21 C. L. T. 377.—**CAN.**

Sect. 5.—Remedies: Sub-sect. 2, B., & sub-sect. 3.]

authorising the secretary to instruct the co.'s solrs. to take such proceedings at the co.'s expense with reference to the prosecution as they might be advised. On a bill filed by the shareholder to restrain the taxation of costs & subsequent proceedings in the action:—*Held:* (1) a ct. of equity had no jurisdiction to deal with the costs of the common law action; (2) the question of maintenance was a legal matter, maintenance being a common law or statutable offence & not an equitable offence.—ELBOROUGH *v.* AYRES, No. 678, *ante*.

SUB-SECT. 3.—BARRATRY AND EMBRACERY.

756. Barratry—Indictment.]—Barratry being an offence at common law, an indictment for it is good though it concludes against the statutes.

An indictment for common barratry should state where the suits were stirred up.—CHAPMAN'S CASE (1634), Cro. Car. 340; 79 E. R. 898.

757. Embracery—Action.]—An action on the case lies for embracery although no special damage be averred by pltf.—LEWIS *v.* LEWIS (1729), 1 Barn. K. B. 221, 230, 384; Fitz-G. 43, 98, 173; 94 E. R. 83, 151, 223, 258.

ADEMPTION.

See WILLS.

ADJOINING OWNERS.

See BOUNDARIES, FENCES AND PARTY WALLS; EASEMENTS AND PROFITS À PRENDRE; HIGHWAYS, STREETS AND BRIDGES; MINES, MINERALS AND QUARRIES; WATERS AND WATERCOURSES.

ADMINISTRATION OF ASSETS.

See BANKRUPTCY AND INSOLVENCY; COMPANIES; EXECUTORS AND ADMINISTRATORS.

ADMINISTRATION OF ESTATES OF DECEASED PERSONS.

See EXECUTORS AND ADMINISTRATORS.

ADMIRALTY.

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Part I.—Origin and General Characteristics of the Jurisdiction of the Admiralty Division of the High Court of Justice.

SECT. 1.—JURISDICTION OF ANCIENT COURT OF LORD HIGH ADMIRAL.

SUB-SECT. 1.—NATURE OF JURISDICTION.

1. Jurisdiction of Lord High Admiral.]—The office of Lord High Admiral is in part executive, & in part judicial. His judicial duties are to be executed by his lieutenant, as judge of the ct., who has jurisdiction over all matters arising upon the high seas. "Admlty. causes" must be causes arising wholly upon the sea & not within the precincts of any county; for 13 Ric. 2, c. 5, directs that the admiral & his deputy shall not meddle with any thing but only things done upon the sea; & 15 Ric. 2, c. 3, declares that the ct. of the admiral has no manner of cognizance of any other thing done within the body of any county either by land or by water. The Admlty. Ct. has jurisdiction to determine all maritime causes arising wholly upon the sea out of the jurisdiction of a county. A judgment of a thing done upon land is void. It is no part of the sea where one may see what is done on one side of the water & the other. Below the low-water mark the admiral has sole & absolute jurisdiction, but between high-water & low-water mark the common law & the admiral have jurisdiction by turns, one upon the water, the other upon the land, but if the water is within a county the common law claims jurisdiction. R. *v.* FORTY-NINE CASKS OF BRANDY (1836), 3 Hag. Adm. 257. S. C. Nos. 615, 622, *post.*

Annotations:—**Consd.** R. *v.* Keyn (1876), 2 Ex. D. 63, C. C. R.; The Olympic, [1913] P. 92, C. A. **Refd.** R. *v.* Two Casks of Tallow (1837), 3 Hag. Adm. 294; R. *v.* Le Pauline (1845), 3 Notes of Cases, 616.

2. —— Things done upon the sea.]—The admiral has jurisdiction of things done upon the sea; if part of the matter be done upon the sea, & part in a county, the common law shall have all the jurisdiction; if the sea be within any county, the common law shall have jurisdiction; or if a thing be done upon the sea, *hors del county*, the party may plead to the jurisdiction of the ct. Where a man may see that which was done of one part & the other of the water, etc., the county may have cognizance, & it may be tried by a jury, & where the matter may be tried by the common law, the admiral has no jurisdiction.—ADMIRALTY CASE (1611), 12 Co. Rep. 79; 77 E. R. 1357.

Annotation:—**Consd.** R. *v.* Keyn (1876), 2 Ex. D. 63, C. C. R.

3. —— Between high & low water mark.]—Below low-water mark the admiral has the sole jurisdiction; between the high-water & low-water mark the common law & the admiral have *divisum imperium*, the common law when the sea is ebbed, the admiral *ad plenitudinem maris*.—CONSTABLE'S CASE, Nos. 614 623, *post.*

Annotations:—**Distd.** Pridea IX *v.* Warne (1673), Freem K. B. 355. **Consd.** Dunwich Corpn. *v.* Sterry (1831), 1 B. & Ad. 831; R. *v.* Wood (1849), 3 Cox, C. C. 453, C. C. R.; The Schiller (1877), 2 P. D. 145, C. A. **Refd.** R. & Waller *v.* Hanger (1615), 3 Bulst. 1; R. *v.* Forty-nine Casks of Brandy (1836), 3 Hag. Adm. 257; R. *v.* Two Casks of Tallow (1837), 3 Hag. Adm. 294; R. *v.* G. W. Ry. Co. (1842), 3 Q. B. 333; R. *v.* Thurborn (1848), 2 Car. & Kir. 831; Beaufort *v.* Swansea Corpn. (1849), 3 Exch. 413; The Gas Float Whitton No. 2, [1896] P. 42, C. A.; The Olympic, [1913] P. 92, C. A.
For full anns., *see* S. C. No. 614, *post.*

SUB-SECT. 2.—LIMITED POWERS OF COURT.

4. Not court of record.]—The Admlty. Ct. is not a ct. of record.—THOMLINSON'S CASE (1605), 12 Co. Rep. 104; 77 E. R. 1379.

5. Contempt of Court.]—A person who had resisted the process of the Admlty Ct. with regard to a ship was punished & applied for a prohibition on the ground that the ship being *extra corpus comitatus* the ct. had no jurisdiction:—*Held:* although the Admlty. Ct. was not a Ct. of Record, it could punish for contempt.

Sect. 1.—Jurisdiction of ancient Court of Lord High Admiral: Sub-sect. 2. Sect. 2: Sub-sects. 1 & 2.]

It being subsequently alleged that the original process was grounded on a matter of which the Admlty Ct. had no cognizance:—*Held:* a prohibition would lie on these facts.—SPARKS *v.* MARTYN (1860), 1 Vent. 1.

6. Rescue of ship.]—If a ship be arrested by process out of the Admlty. Ct., for a matter arising within its jurisdiction, though she be rescued at land, the conusance of the rescue belongs to the Admlty.; otherwise not.—RIGDON *v.* HEDGES, No. 7, *post.*

For full anns., see S. C. No. 7.

7. Rescue of goods.]—If goods be arrested in the Thames by process from the Admlty., & rescued, the Admlty. Ct. may grant a warrant against the rescuer for a contempt of the process; but it should appear by the process that they had jurisdiction, & if it only say "*in causâ maritimâ*," the party may plead it below, & if the plea be refused a prohibition lies.—RIGDON *v.* HEDGES (1698), 12 Mod. Rep. 246; 88 E. R. 1295; (1699) 1 Ld. Raym. 446. S. C. No. 6, *ante.*

Annotation:—**Apld.** Chapman *v.* Mattison (1738), Andr. 191.

SECT. 2.—LIMITATIONS OF THE ADMIRALTY DIVISION AND CONTROL OF THE HIGH COURT OF ADMIRALTY BY OTHER COURTS BEFORE THE JUDICATURE ACTS.

SUB-SECT. 1.—LIMITATIONS OF THE ADMIRALTY DIVISION.

8. Winding up — Right in rem enforceable in winding up—Not by action in rem—Effect of arrest.]—The proper mode of enforcing a maritime lien on a vessel belonging to a co. which has been ordered to be wound up, is by a proceeding in the winding up & not by a proceeding *in rem* in the Admlty. Ct. The arrest of a vessel by the Admlty. Ct. is a "sequestration" within Cos. Act, 1862 (c. 89), s. 163. —*Re* AUSTRALIAN DIRECT STEAM NAVIGATION Co., *Ex p.* BAKER (1875), L. R. 20 Eq. 325; 44 L. J. Ch. 676.

Annotation:—**Distd.** *Re* Rio Grande do Sul S.S. Co. (1877), 5 Ch. D. 282, C. A.

9. —— Leave to proceed in Admiralty — Against mortgagees.]—T., master of a ship belonging to a co., drew a bill on the co. for necessaries supplied to the ship, which bill was accepted, but was dishonoured at maturity. T. paid the bill, & claimed repayment from mtgees. who had taken possession of the ship. On the following day an order was made for winding up the co. T. then applied in the winding up for leave to take proceedings in the Admlty. Ct., & obtained an order giving him leave. The liquidator applied to discharge this order, & an order was made for the liquidator to pay into ct. to a separate account to meet T.'s claim of £150, which exceeded the principal & interest, T. undertaking not to proceed in the Admlty. Ct.; payment to be without prejudice to any application by T. to increase the amount. The £150 was paid in, & T. applied to increase the amount so as to cover the costs of defending an action brought against T. by the holder of the bill, & the costs of T. of the application in the winding up: —*Held:* (1) though if there had not been mtgees. in possession of the ship the proper mode of enforcing T.'s lien on the ship would have been by application in the winding up, the order giving leave to proceed in the Admlty. Ct. was a proper order, the mtgees. not being parties to the winding up; (2) T. was entitled to all his costs before the V.-C. as costs properly incurred by a mtgee. in enforcing his security.—*Re* RIO GRANDE DO SUL S.S. Co. (1877), 5 Ch. D. 282; 46 L. J. Ch. 277; 36 L. T. 603; 25 W. R. 328; 3 Asp. M. L. C. 424, C. A.

For full anns., *see* COMPANIES.

SUB-SECT. 2.—CONTROL OF THE HIGH COURT OF ADMIRALTY BY OTHER COURTS BEFORE THE JUDICATURE ACTS.

10. Court liable to prohibition—Or to injunction.]—If the Admlty. Ct. has no jurisdiction in a case, a prohibition may be obtained in a ct. of common law; or if the Admlty. Ct. does not satisfy the principles of equity, an injunction may be obtained. —THE TECUMSEH (No. 1) (1848), 3 Wm. Rob. 109; 6 Notes of Cases, 533; 12 Jur. 985. S. C. No. 370, *post.*

11. —— Where no jurisdiction.]—If it appear the Admlty. Ct. is proceeding in a question over which it has no jurisdiction, a ct. of common law will grant a prohibition, without imposing any terms on the party applying for it.—VELTHASEN *v.* ORMSLEY (1789), 3 Term Rep. 315; 100 E. R. 596

Annotations:—**Refd.** The Eliza Jane (1836), 3 Hag. Adm. 335; London Corpn. *v.* Cox (1867), L. R. 2 H. L. 239; The Charkieh (1873), 42 L. J. Q. B. 75.

12. —— ——.]—Whenever a ct. usurps a jurisdiction that does not belong to it, a prohibition is grantable *ex debito justitiæ*, & for the very purpose of correcting such usurpation & preserving the subject cts. within their proper limits.—THE ATLAS Nos. 55, 267, 283, *post.*

For full anns., *see* S. C. No. 267, *post.*

13. Prohibition—Not granted after sentence—Unless want of jurisdiction shown.]—The ct. will

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PART I. SECT. 2, SUB-SECT. 1.

a. *Order for interpleader issue—Receiver of equipment of ship—Seizure by sheriff.*]—Property alleged to be part of the equipment of a ship in the possession of a receiver, appointed in an action *in rem* in the Exch. Ct. to enforce a mtge. of the ship, cannot be seized by a sheriff under a writ of *fi. fa.* issued on a judgment against the registered owner of the ship in the Supreme Ct.; & the Supreme Ct. has no jurisdiction on the application of the sheriff to grant an order directing the trial of an interpleader issue between the mtgees. & the judgment creditors.—WILLIAMSON *v.* BANK OF MONTREAL (1899), 6 B. C. R. 486.—**CAN.**

8 i. *Winding-up—Right in rem enforceable in winding-up—Not by action in rem.*]—Where all the parties are before the ct. the proper mode of enforcing a lien for damages by collision on a vessel belonging to a co. which has been ordered to be wound up is by proceeding in the winding-up ct., & not by a proceeding *in rem* in the Admlty. Ct., even if the winding-up ct. has ordered that proceedings should be taken before the Exch. Ct. *Re Australian Direct Steam Navigation Co.* (1875), 20 Eq. 325; *Re Rio Grande S.S. Co.* (1877), 5 Ch. D. 282, refd.—RICHELIEU & ONTARIO NAVIGATION Co. *v.* THE IMPERIAL (1908), 35 Q. S. C. 312; 10 Q. P. R. 167; 5 E. L. R. 64.—**CAN.**

9 i. —— *Leave to proceed in Admiralty.*]—After a winding-up order had been made against a co. but before the permanent liquidator had been appointed, through error a writ of summons in the Admlty. Ct. was issued against a ship belonging to the co. without leave of the Supreme Ct. of B. C. in which the winding-up proceedings were being taken. The writ was served & the ship seized:—*Held:* pltf. might proceed with the action.—*Re* BRITISH COLUMBIA TIE & TIMBER Co., COLAN *v.* THE RUSTLER (1909), 10 W. L. R. 370.—**CAN.**

PART I. SECT. 2, SUB-SECT. 2.

13 i. *Prohibition—Judge of Admiralty Court—Pleas.*]—The ct. gave leave to the judge of the Admlty. Ct. to plead three pleas to a prohibition which issued against him, as judge of the Admlty. Ct., viz., that he had jurisdiction of the cause (1) under a patent; (2) under an Act of Parliament; (3) by prescription. —LALOR *v.* BARRINGTON, Rowe, 395 (K. B.).—**IR.**

not grant a prohibition to the Admlty. Ct. after sentence, upon surmise that the matter was done *infra corpus comitatus*, unless it can be made to appear by good matter that it was done upon the land.—ADMIRALTY CASE (1611), 12 Co. Rep. 77; 77 E. R. 1355.

Annotations:—**Consd.** Morton's Case (1661), 1 Sid. 65. **Distd.** Combe *v.* De La Bere (1882), 22 Ch. D. 316, C. A. **Refd.** London Corpn. *v.* Cox (1867), L. R. 2 H. L. 239.

14. *S. P.* SHERMOULIN *v.* SANDS (1694), 1 Ld. Raym. 271; 91 E. R. 1078; *sub nom.* THERMOLIN *v.* SANDS, Carth. 423.

15. *S. P.* SOMERSET *v.* MARKHAM (1597), Cro. Eliz. 595; 78 E. R. 838.

16. *S. P.* TOURSON *v.* TOURSON (1614), 1 Roll. Rep. 80; 81 E. R. 342.

17. *S. P.* WALKER *v.* ADAMS (1667), 1 Sid. 331; 2 Keb. 200, 722; 82 E. R. 1139.

18. *S. P.* BARBER (BARKER) *v.* WHARTON (1726), 1 Barn. K. B. 2; 2 Ld. Raym. 1452; 92 E. R. 445.

19. —— —— **Where appeal proper remedy.**]—Where on the action to a writ of *habeas corpus* in respect of a person in execution upon a sentence given against him by the Admlty. Ct. it does not appear that the Admlty. had not jurisdiction of the cause, but only that they had proceeded to a sentence against the rule of their own ct., the Ct. of K. B. will not interfere, for he ought to have appealed.—ANON. (1648), Sty. 129; 82 E. R. 585.

Annotation:—**Mentd.** Howard *v.* Gossett (1845), 5 L. T. O. S. 144.

20. —— **Not granted before appearance.**] — A prohibition shall not be granted on the merits until deft. below has appeared, & pltf. has exhibited his libel. Nor shall it be granted until that time on account of illegality of the process if the process would in any case be within the jurisdiction of the ct.—*Qu.:* whether it shall ever be granted on account of the illegality of the process.—TRANTER *v.* WATSON (1703), 2 Ld. Raym. 931; 92 E. R. 122; *sub nom.* TRANSER *v.* WATSON (1703), 1 Salk. 35.

Annotations:—**Distd.** Pole *v.* Fitzgerald (1750), Willes, 641; Yates *v.* Hall (1785), 1 Term Rep. 73; The Gratitudine (1801), 3 Ch. Rob. 240.

21. *S. P.* WHARTON *v.* PITS (1692), 2 Salk. 548; 91 E. R. 463.

Annotations:—**Dbtd.** Velthasen *v.* Ormsley (1789), 3 Term Rep. 315; London Corpn. *v.* Cox (1867), L. R. 2 H. L. 239.

22. —— **Death of defendant before sentence—Position of sureties.**]—*Qu.:* whether prohibition lies, if principal deft. dies before sentence & the Admlty. Ct. proceeds against the sureties.—BETTS *v.* HANCOCK (1701), 1 Salk. 33; 91 E. R. 35.

23. —— **Since Judicial Committee Act, 1871 (c. 91).**]—Despite Admlty. Ct. Act, 1861 (c. 10), & Judicial Committee Act, 1871, the Admlty. Ct. of England remains a ct. with a limited jurisdiction, to which writs of prohibition may issue from the superior cts.—JAMES *v.* L. & S. W. RY. CO., Nos. 94, 573, *post.*

Annotation:—**Consd.** The Franconia (1877), 2 P. D. 163, C. A.

See, generally, CROWN PRACTICE.

24. **Injunction — Where fraud alleged.**] — An equity ct. possesses, & will exercise, jurisdiction over a bottomry bond in a case of fraud; & will, for that purpose, restrain proceedings upon the bond in the Admlty. Ct. by injunction.—GLASCOTT *v.* LANG (1838), 3 My. & Cr. 451; (1837) 8 Sim. 358; 2 Jur. 909; 40 E. R. 1000.

Annotation:—**Distd.** Barnard *v.* Hunter (1856), 5 W. R. 92, C. A.

25. *S. P.* THE LORD COCHRANE (1841), 3 Beav. 409; 10 L. J. Ch. 335; 3 L. T. 58, 824; 5 Jur. 262; 49 E. R. 161.

Annotations:—**Refd.** The Don Francisco (1861), Lush. 468; The Ollivier (1862), 6 L. T. 259.

26. —— **Fresh evidence not admissible in Admiralty.**]—An injunction was granted to stay proceedings upon a sentence in the Admlty. Ct., new evidence having been discovered at a period when, according to the practice of that ct., it could not be received.—JARVIS *v.* CHANDLER (1823), Turn. & R. 319; 37 E. R. 1123.

27. —— **Where powers of Admiralty Court insufficient.**]—*Semble:* although the Admlty. Ct. has jurisdiction to require security for the return of a ship, a ct. of equity will interfere where the powers of the Admlty. Ct. may be defective; it is sufficient that the sailing of the ship is so mixed up with the taking the account of profits of previous mtgees. as to render such injunction necessary.—CASTELLI *v.* COOK (1849), 7 Hare, 89; 18 L. J. Ch. 148; 13 L. T. O. S. 524; 13 Jur. 675; 68 E. R. 36.

For full anns., *see* INJUNCTION.

28. —— **Where Admiralty Court declines to interfere.**]—A ct. of equity will not interfere by injunction to restrain a part-owner of a ship from retaining part of the machinery of the ship, unless the Admlty. Ct. has been previously applied to & refused to interfere.—BRENAN (BRENNAN) *v.* PRESTON (1852), 2 De G. M. & G. 813; 1 W. R. 69, 86, 112, 172; 42 E. R. 1090; *affd.* (1853) 1 W. R. 115, C. A.

29. **Garnishee order — Binding on Admiralty Court.**]—In a suit for wages brought by the master a tender was made &, after some delay, accepted. The registrar, as usual, taxed the costs of the party suing, & his report of the taxation, although objected to, was confirmed. Proceedings were then taken in the Ct. of Exchequer, under C. L. P. Act, 1854 (c. 125), ss. 61, 65, to attach these costs in the hands of the party from whom they were due, & ultimately such party was compelled to & did pay them over to the judgment creditors of the master. The proctor for the master having received due notice of these proceedings, but having taken no steps to oppose them:—*Held:* the Admlty. Ct. was bound by the order of the Exchequer Ct. & could no longer enforce payment of the costs against a mtgee. in possession of the vessel, the party proceeded against.—THE OLIVE (1859), Sw. 423; 5 Jur. N. S. 445.

Annotations:—**Distd.** The Jeff Davis (1867), L. R. 2 A. & E. 1; The Leader (1868), L. R. 2 A. & E. 314.

30. **Stay of proceedings—Order of Admiralty Court not recognised.**]—The Admlty. Ct. having made an order under M. S. Act, 1854 (c. 104), s. 514, & Admlty. Ct. Act, 1861 (c. 10), s. 13, "that all actions pending in any other ct. in relation to the liability of the owners of the *N.* (which vessel, with her cargo, had been lost in a collision at sea) in respect of loss to goods be stopped," defts., owners of the *N.*, moved the Exchequer Ct. to stay an action, brought by pltf. to recover damages for loss of certain goods which defts. had contracted to carry from London to Guernsey:—*Held:* (1) C. L. P. Act, 1852 (c. 75), s. 226, only applied to the superior cts. of law & equity; (2) the rule must be refused.—MILBURN *v.* LONDON & SOUTH WESTERN RY. CO. (1870), L. R. 6 Exch. 4; 40 L. J. Ex. 1; 23 L. T. 418; 19 W. R. 105; 3 Mar. L. C. 491.

24 i. *Injunction—Arrest for master's wages—Insolvency of shipowner—Bankruptcy Court.*]—A master mariner, claiming a lien for wages & disbursements upon a vessel, the property of an insolvent, caused the vessel to be arrested under warrant of the Admlty. Ct.: the Bkpcy. Ct. declined to restrain the further action of the Admlty. Ct. in respect of the vessel, except upon the terms of lodging in ct. a sum sufficient to answer the claim & costs. —*Re* T. C. (1877), I. R. 11 Eq. 151.—**IR.**

SECT. 3.—EFFECT OF DECISIONS OF OTHER COURTS AND FORMER CONCURRENT JURISDICTIONS.

SUB-SECT. 1.—EFFECT OF DECISIONS OF OTHER COURTS.

A. Since the Judicature Acts.

31. Decision of House of Lords.]—A judgment of the House of Lords upon a proper maritime question, whether given in an English or in a Scottish appeal, must be of equal authority in all the Admlty. Cts. of the kingdom (LORD WATSON). —CURRIE *v.* M'KNIGHT, Nos. 54, 1793, *post.*

For full anns., *see* S. C. No. 1793, *post.*

32. Decision of Privy Council.]—*Semble:* a decision of the Privy Council, at a time when it was the final Ct. of Appeal in Admlty. matters, is formally & technically binding on the Ct. of Appeal in the same sense as a decision of the House of Lords. But even if this is not so, a decision of the Privy Council ought not to be departed from after a lapse of 40 years (COLLINS, M.R., COZENS-HARDY, L.J.).—THE CAYO BONITO, [1903] P. 203; 72 L. J. P. 70; 89 L. T. 260; 52 W. R. 133; 19 T. L. R. 609; 47 Sol. Jo. 671; 9 Asp. M. L. C. 445, C. A.

33. Practice—Chancery Division charging order —Solicitors Act, 1860 (c. 127).]—The ct., when sitting in Admlty., should follow the practice of the Chancery Div. in requiring notice to the parties affected, & unless circumstances are very exceptional, should not exercise, on an *ex p.* application, its discretionary power of making charging orders under the above Act.—THE BIRNAM WOOD, [1907] P. 1; 76 L. J. P. 1; 96 L. T. 140; 23 T. L. R. 58; 51 Sol. Jo. 51; 10 Asp. M. L. C. 325, C. A.

B. Before the Judicature Acts.

34. Decisions binding on Court.]—The Admlty. Ct. implicitly obeys the decisions of the House of Lords & Privy Council & it follows the cts. of common law as to the construction of Acts & it will decide in consonance with a series of decisions at common law.—THE MILAN, No. 481, *post.*

For full anns., *see* S. C. No. 481, *post.*

35. ——.]—The only decisions of legal tribunals by which the Admlty. Ct. is bound are those of the House of Lords, the Privy Council, & the cts. of common law in interpretation of an Act.—THE HELEN (1865), L. R. 1 A. & E. 1; 35 L. J. Adm. 2.

For full anns., *see* ALIENS.

36. —— **Duty to follow.**]—The Admlty. Ct. is bound to adhere without deviation to a course of precedents adopted by its predecessors, though not to a single decision. When that course has also been sanctioned by the ct., the Admlty. Ct. has no discretion at all; its sole duty is to obey. Wherever the Privy Council may have given a clear explanation of principles which ought to be adopted, or of the manner in which they ought to be brought to bear in practice, or of the extent to which they ought to be carried, whether such explanation be consistent with former practice or not, it becomes the duty of the Admlty. Ct., without any regard to its own opinion or any notion of its own, to regulate all its own proceedings by the judgment of that superior tribunal, & to the best of its ability, without regard to any other consideration, to give the fullest force & effect to the express directions of the superior authority.—THE LEUCADE (1855), Spinks, 217; 2 Ecc. & Ad. 228; 7 L. T. 101; 1 Jur. N. S. 554.

Annotations:—**Reid.** The Fortuna (1855), Spinks, 307; The Aline & Fanny (1856), Spinks, 322; The Stephen Hart (1864), 11 L. T. 52.

37. Decision of common law court—On construction of statute.]—In the construction of Acts of Parliament the ct. holds itself bound to adhere to the construction put upon any Act by cts. of common law. If a question upon construction of a particular Act comes under consideration of the ct., & that very question has already been decided by judgment of a ct. of common law, the ct. would yield to that judgment even if its own opinion did not coincide. But the judgment of the ct. is not bound down as to another Act on which a ct. of common law has said nothing. The ct. proceeds in interpretation of Acts of Parliament upon the same principle as cts. of common law; & if a case arise upon an Act where there has been no decision at common law, it will exercise its own discretion.—THE IRONSIDES (1862), 1 Lush. 458; 31 L. J. P. M. & A. 129; 6 L. T. 59; 1 Mar. L. C 200. S. C. Nos. 527, 528, 562, *post.*

Annotations:—**Refd.** The Langdale (1907), 76 L. J. P. 154. **Mentd.** The Danzig (1863), 2 New Rep. 526.

38 *S. P.* THE TEMORA (1860), Lush. 17; 1 L. T. 418.

For full anns., *see* SHIPPING & NAVIGATION.

39. *S. P.* THE EARL OF AUCKLAND (1861), Lush. 164, 387; 30 L. J. P. M. & A. 121; 3 L. T. 786; 1 Mar. L. C. 27.

For full anns., *see* SHIPPING & NAVIGATION.

40. —— ——.]—The Admlty. Ct. will not give a decision upon construction of an Act which would be in direct conflict with the decision of a ct. of common law, although not agreeing with that decision.—ARGOS, CARGO EX, THE HEWSONS (1872), L. R. 3 A. & E. 568; 41 L. J. Adm. 89; 27 L. T. 64; 1 Asp. M. L. C. 360. *Revsd.* on another point, L. R. 5 P. C. 134.

For full anns., *see* SHIPPING & NAVIGATION.

41. —— **Contributory negligence—Not followed.**] —According to the rule which prevails in the Admlty. Ct. in case of a collision, if both vessels are in fault, the loss is equally divided; but in a ct. of common law pltf. has no remedy if his negligence in any degree contributed to the accident (LORD CAMPBELL, C.J.)—DOWELL *v.* GENERAL STEAM NAVIGATION CO. (1855), 5 E. & B. 195; 26 L. J. Q. B. 59; 25 L. T. O. S. 158; 1 Jur. N. S. 800; 3 W. R. 492; 3 T. L. R. 1221; 119 E. R. 454.

Annotations:—**Refd.** The James (1856), Sw. 60; Lawson *v.* Carr (1856), 10 Moo. P. C. C. 162; Tuff *v.* Warman (1857), 2 C. B. N. S. 740; Tuff *v.* Warman (1858), 5 C. B. N. S. 573; Witherley *v.* Regent's Canal Co. (1862), 12 C. B. N. S. 2; The Vera Cruz (1884), 9 P. D. 88; The Bernina (1887), 12 P. D. 58, C. A.

42. *S. P.* WOOLLEY *v.* SINE (1850), 4 L. T. 774.

43. —— **& equity court—Bankruptcy questions.**] —The Admlty. Ct. being a ct. of law & equity, will follow the decisions of the cts. of law & equity in deciding questions under the bkpcy. law.—THE HEART OF OAK (1869), 39 L. J. Adm. 15; 21 L. T. 727; 3 Mar. L. C. 317.

Annotations:—**Apld.** The Mullingar (1872), 26 L. T. 326. **Refd.** Chapman *v.* Royal Netherlands Steam Navigation Co. (1879), 40 L. T. 433, C. A.

44. —— **Proof—Not followed.**]—THE PEERLESS, Nos. 62, 111, 1803, *post.*

For full anns., *see* S. C. No. 111, *post.*

45. Prerogative & Consistory Courts — Not followed.]—The practice in the Prerogative & Consistory Cts. forms no guide for practice in the Admlty. Ct.—THE CLARENCE, No. 917, *post.*

SUB-SECT. 2.—FORMER CONCURRENT JURISDICTIONS.

46. Common law courts.]—The cts. of common law have concurrent jurisdiction with the Admlty.

Cts. in murders committed in Milford Haven, & in all the other havens, creeks, & rivers in the United Kingdom.—R. *v.* BRUCE (1812), 2 Leach, 1093; Russ. & Ry. 243.

Annotations :—**Expld.** R. *v.* Mannion (1846), 2 Cox, C. C., 158, C. C. R. **Refd.** R. *v.* Keyn (1876), 2 Ex. D. 63, C. C. R.

47. —— Preferred to Admiralty.]—Where an action was brought against deft. for damages in the Admlty. Ct. & an action of debt was started against same deft. in the King's Bench Ct. :—*Held* : deft. should be brought up into the King's Bench Ct. & notice given to the Admlty. accordingly, as the Admlty. might continue its process *ad infinitum*—the cause of action being not clear—& thus pltf. in the King's Bench would be defeated of his debt.—ROTHERFORD *v.* SCOT (1732), Kel. W. 214; 25 E. R. 575; *sub nom.* RUTHERFORD *v.* SCOTT, 2 Str. 936.

48. —— Wages.]—*Qu.* : whether M. S. Act, 1854 (c.104), ousts the jurisdiction of the Supreme Cts. at Westminster in claims for wages earned on board a foreign ship ?—BURNS *v.* CHAPMAN (1858), 5 C. B. N. S. 481; 28 L. J. C. P. 6; 32 L. T. O. S. 128; 5 Jur. N. S. 19; 7 W. R. 89; 141 E. R. 195.

49. Court of Chancery.]—The Ct. of Chancery has Admlty. jurisdiction by virtue of 31 Hen. 6, c. 4.—R. *v.* CAREW (1682), 1 Vern. 54; 23 E. R. 306; 3 Swan. 669.

50. —— Maritime lien.]—In maritime lien equity has a concurrent jurisdiction with Admlty.—ALLPORT *v.* THOMAS (1725), Gilb. Ch. 227; 25 E. R. 158.

Expld. Hoare *v.* Contencin (1770), 1 Bro. C. C. 27.

SECT. 4.—PRINCIPLES OF LAW ADOPTED.

SUB-SECT. 1.—SINCE THE JUDICATURE ACTS.

51. "Rule in force in Admiralty."]—A decision of the Admlty. Ct. as to the amount recoverable by a cargo owner where both ships are in fault for a collision (*The Milan* (1861), Lush. 388) is a "rule in force in Admlty." within Jud. Act, 1873 (c. 66), s. 25 (9); & it is immaterial whether such decision is wrong in principle or not.—THE DRUMLANRIG, [1911] A. C. 16; 80 L. J. P. 9; *sub nom.* THE TONGARIRO (OWNERS) *v.* ASTRAL SHIPPING CO., 103 L. T. 773; *sub nom.* THE TONGARIRO (OWNERS) *v.* THE DRUMLANRIG (OWNERS), 27 T. L. R. 146; 11 Asp. M. L. C. 520; *sub nom.* ASTRAL SHIPPING CO., LTD. *v.* THE TONGARIRO (OWNERS), 55 Sol. Jo. 138, H. L.

Annotations :—**Consd.** The Seacombe, The Devonshire, [1912] P. 21, C. A. **Refd.** The Devonshire, [1912] A. C. 634, H. L. **Mentd.** The Umona, [1914] P. 141.

52. *S. P.* CHARTERED MERCANTILE BANK OF INDIA *v.* NETHERLANDS INDIA STEAM NAVIGATION CO. (1883), 10 Q. B. D. 521; 52 L. J. Q. B. 220; 48 L. T. 546; 47 J. P. 260; 31 W. R. 445; 5 Asp. M. L. C. 65, C. A.

Annotations :—**Foll.** The Drumlanrig, [1910] P. 249, C. A. **Refd.** The Drumlanrig, [1911] A. C. 16. **Mentd.** Woodley *v.* Michel (1883), 11 Q. B. D. 47, C. A.; Jacobs *v.* Crédit Lyonnais (1884), 12 Q. B. D. 589, C. A.; Wilson *v.* The Xantho (1887), 12 App. Cas. 503; Leduc *v.* Ward (1888), 20 Q. B. D. 475, C. A.; The August, [1891] P. 328; The Industrie, [1894] P. 58, C. A.; The Englishman & The Australia, [1894] P. 239; Davidsson *v.* Hill, [1901] 2 K. B. 606; British South Africa Co. *v.* De Beers Consolidated Mines, [1910] 1 Ch. 354.

53. Transferred actions—Where no original jurisdiction.]—If an action brought in the Admlty. Div. to recover damages for breach of the shipowner's contract of carriage is retained in that div., the damages proceeded for will, even although the action is one which could not have been brought in the Admlty. Ct. before Jud. Acts, be assessed, & interest on the amount found due be given, in the same manner & according to the same rules as if the Admlty. Ct. had jurisdiction over the suit under Admlty. Ct. Act, 1861 (c. 10). So, also, if an action brought in the Queen's Bench Div. to recover damages for negligently mooring a vessel is, after trial in that div., transferred to the Admlty. Div., the damages will be assessed, & interest given, in the same manner & according to the same rules as if the action was an action of damage within the inherent jurisdiction of the Admlty. Ct.—THE GERTRUDE, THE BARON ABERDARE (1888), 13 P. D. 105; 59 L. T. 251; 36 W. R. 616; 4 T. L. R. 431; 6 Asp. M. L. C. 315, C. A.

Annotation :—**Distd.** The Orwell (1888), 13 P. D. 80.

54. British Law—Not English or Scottish.] —CURRIE *v.* M'KNIGHT, No. 31, *ante*; No. 1793, *post*.

For full anns., *see* S. C. No. 1793, *post*.

SUB-SECT. 2.—BEFORE THE JUDICATURE ACTS.

55. An original jurisdiction.]—The Admlty. Ct., except upon the subject of prize, exercises an original jurisdiction only on the grounds of recognised usage & established authority (LORD STOWELL).—THE ATLAS No. 12, *ante*; Nos. 267, 283, *post*.

For full anns., *see* S. C. No. 267, *post*.

56. Law administered in Admiralty.]—It is not competent to the Admlty. Ct. & it has not jurisdiction to administer any other law than its own. Generally the Admlty. Ct. is governed by the civil law, the law maritime, & law merchant, unless where those laws are controlled by stat. law of the realm or by the authority of the municipal cts., which unquestionably possess a superintending power, & might restrain the Admlty. Ct. should it overstep the just limits of its jurisdiction. If in any matter the municipal cts. have prohibited the Admlty. Ct., it is bound to acquiesce not only in that individual case, but in all others where the same point arises; & thenceforward the civil & maritime law, so controlled, becomes the law governing the decisions of the ct.—THE NEPTUNE (1834), 3 Hag. Adm. 129; *revsd.* on other grounds, 3 Knapp, 94. S. C. Nos. 58, 243, 728, *post*.

Annotations :—**Mentd.** The New Eagle (1846), 4 Notes of Cases, 426; The Dowse (1870), L. R. 3 A. & E. 135; The Two Ellens (1872), 26 L. T. 1, P. C.; The Riga (1872), 26 L. T. 202; Allen *v.* Garbutt (1880), 6 Q. B. D. 165; The Petone, [1917] P. 198.

57. Jurisdiction confined to established cases.]—It is the duty of the ct. to consider the question of jurisdiction with great caution, as well on account of the parties as of itself. If the ct. should exceed its just authority, it might endanger the jurisdiction hitherto retained over cases not opposed, & ultimately involve the parties in fruitless litigation. It cannot attend to arguments founded merely on suggestions of general equity, unless its jurisdiction is clearly established.—THE MAITLAND (1829), 2 Hag. Adm. 253.

Annotation :—**Apld.** The Neptune (1835), 3 Knapp, 94.

PART I. SECT. 4, SUB-SECT. 1.

a. *Computation of time.*]—In the service of process, as well as in its sittings & in the public hours of its registry, the ct. will be guided by the civic time in use in the town where the ct. sits, unless such time is in fact incorrect.—VERMONT S.S. CO. *v.* ABBY PALMER (No. 2) (1904), 10 B. C. R. 381.—**CAN.**

PART I. SECT. 4, SUB-SECT. 2.

b. *Proof must correspond to pleading.*]—It is the rule of the Admlty. Ct., as it is of all other cts., that a party can only recover *secundum allegata et probata*.—THE ALMA (1862), 1 Old. 789.—**CAN.**

Sect. 4.—Principles of law adopted: Sub-sect. 2. Sects. 5 & 6: Sub-sect. 1, A.]

58. ——.]—THE NEPTUNE, No. 56, *ante*; Nos. 243, 728, *post.*

For full anns., *see* S. C. No. 56, *ante.*

59. Jurisdiction to be exercised equitably.]—The ct. is bound to exercise the jurisdiction conferred upon it by Admlty. Ct. Act, 1840 (c. 65), s. 6, equitably, & in so doing it will protect the interests of all persons having a *bonâ fide* lien upon the property, as for instance, subsequent purchasers without notice. —THE ALEXANDER LARSEN (1841), 1 Notes of Cases, 185; 1 Wm. Rob. 288, 340; 5 Jur. 1066. S. C. No. 351, *post.*

Annotations:—**Apld.** Giovanni Dapneto *v.* Wyllie (1874), L. R. 5 P. C. 482. **Consd.** Laws *v.* Smith (1884), 9 App. Cas. 356, P. C.; The Heinrich Bjorn (1885), 10 P. D. 44, C. A. **Dbtd.** Northcote *v.* The Heinrich Bjorn (1886), 11 App. Cas. 270. **Apld.** The Cella (1888), 36 W. R. 540, C. A. **Reid.** The Ella A. Clarke, now The Golden Age (1863), 32 L. J. P. M. & A. 211; The Two Ellens (1871), L. R. 3 A. & E. 345. **Mentd.** Gunn *v.* Roberts (1874), 22 W. R. 652.

60. —— **Subject to limitations—Court not court of equity.**]—The Admlty. Ct., although influenced by equitable considerations, is not a ct. of equity so as to allow matters foreign to the issue to be introduced in order that complete justice may be done between the parties: it follows rather, in pleadings & practice, the cts. of common law.—THE DON FRANCISCO, Nos. 666, 978, *post.*

Annotation:—**Apld.** Dakin *v.* Oxley (1864), 15 C. B. N. S. 646.

61. —— —— ——.]—THE SARACEN, Nos. 650, 1227, 1491, *post.*

For full anns., *see* S. C. No. 650, *post.*

62. Evidence — Colonial & foreign law.] — The Admlty. Ct. does not require the same strict proof of colonial (&, *semble*, of foreign) law as a ct. of common law. Though the ct. observes the great principles which govern the law of evidence in cts. of common law & equity, yet, in matters of merely technical proof, the ct. exercises a discretion, in accordance with the practice of its predecessors, & the great distinction between the description of causes which come under the cognisance of the Admlty. Ct. & those in other cts. An Indian Act is sufficiently proved by a clerk of the India House producing a copy of the Act officially forwarded by the Indian Govt. to the India House. An order of the Lieutenant-Governor of Bengal, which, by law, must be published in the official gazette, or, if there is no official gazette, in some other public manner, & a copy exhibited in a conspicuous place in the office of the conservator of each port to which such order relates, is not proved by a clerk of the India House only saying from a letter not produced that there was such an order, no copy of the gazette or any other documentary evidence being forthcoming. To prove that a person was a duly licensed pilot of the port of Calcutta it is sufficient to give in evidence that his conduct was the subject of inquiry before the Marine Committee at Fort William, which showed that he must have been a licensed pilot to be subject to their jurisdiction, & that his name was in the Pilots' Lists at Calcutta, although there were no certificate from the pilot authorities & no certified copy of the licence.—THE PEERLESS, No. 44, *ante*; Nos. 111, 1803, *post.*

For full anns., *see* S. C. No. 111, *post.*

63. De minimis non curat lex.]—The Admlty. Ct. cannot take on itself legislative functions; it must administer the law as it stands, with such qualifications as the law permits. The ct. is not bound to a strictness at once harsh & pedantic in application of Acts. The law permits the qualification implied in the ancient maxim *De minimis non curat lex.*—THE REWARD (1818), 2 Dods. 265.

SECT. 5.—JURISDICTION IN REM AND IN PERSONAM.

64. Distinction one of procedure.]—Where the Admlty. Ct. has jurisdiction, it may exercise it either by action *in rem* or *in personam.* Given the jurisdiction, the question whether the action is to be *in rem* or *in personam* is one of mere procedure (LORD ESHER, M.R.).—R. *v.* CITY OF LONDON COURT JUDGE, Nos. 74, 76, *post.*

Annotations:—**Expld.** Pugsley *v.* Ropkins, [1892] 2 Q. B. 184, C. A.; Turner *v.* Mersey Docks & Harbour Board, [1892] P. 285, C. A.; Delobbel Flipo *v.* Varty (1893), 62 L. J. Q. B. 398. **Apprvd.** Mersey Docks & Harbour Board *v.* Turner, [1893] A. C. 468. **Distd.** Dierken *v.* Philpot, [1901] 2 K. B. 380. **Refd.** Guilford *v.* Lambeth, [1894] 2 Q. B. 832; The Normandy, [1904] P. 187.

65. Origin of distinction—Arrest of property or person.]—The jurisdiction of the Admlty. Ct. is to be exercised either by an arrest of the person of deft., if within the realm, or by the arrest of any personal property of deft. within the realm, whether the ship in question or any other chattel, or by proceedings against the real property of deft. within the realm (FRY, L.J.).—THE HEINRICH (HENRICH) BJORN (1885), 10 P. D. 44; 54 L. J. P. 33; 52 L. T. 560; 33 W. R. 719; 1 T. L. R. 266; 5 Asp. M. L. C. 391, C. A.; *affd.* (1886), 11 App. Cas. 270, H. L.

Annotations:—**Consd. & Expld.** The Ringdove (1886), 11 P. D. 120; The Sara (1887), 12 P. D. 158, C. A. **Consd.** The Cella (1888), 13 P. D. 82, C. A. **Consd & Expld.** Westrup *v.* Gt. Yarmouth Steam Carrying Co. (1889), 43 Ch. D. 241. **Consd.** The Dictator, [1892] P. 304. **Consd. & Expld.** The Africano, [1894] P. 141. **Consd.** Moran Galloway *v.* Uzielli, [1905] 2 K. B. 555; Foong Tai *v.* Buchheister, [1908] A. C. 458, P. C. **Refd.** The Beeswing (1885), 53 L. T. 554, C. A.; The Lyons (1887), 57 L. T. 818; The Orienta [1894] P. 271; The Mecca, [1895] P. 95, C. A.; The Veritas, [1901] P. 304. **Mentd.** The André Theodore (1904), 93 L. T. 184.

66. —— ——.]—Under the earlier practice the distinction between actions *in personam* & actions *in rem* depended upon whether the person or property of deft. was arrested in the first instance, & if deft. appeared to an action *in rem*, the procedure & effect of the action *in rem* became those of an action *in personam.* Actions beginning with arrest of the person became obsolete in practice in the 18th century, & arrest of property merely to enforce appearance became rare or obsolete, though in theory such arrest of the person or property would seem still to be permissible. On the other hand, arrest of property over which a lien could be asserted became more common as the idea of a pre-existing maritime lien developed. The result was that arrest became the distinctive feature of the action *in rem*, such arrest having primarily for its object the satisfaction of the creditor out of the property seized (JEUNE, J.).—THE DICTATOR, Nos. 75, 1499, *post.*

Annotations:—**Consd.** The Ripon City, [1897] P. 226; The Port Victor, [1901] P. 243, C. A.; The Burns, [1907] P. 137, C. A. **Refd.** The Veritas, [1901] P. 304; The Broadmayne, [1916] P. 64, C. A.

For full anns., *see* S. C. No. 1499, *post.*

67. Action in rem—Effect on owner of res.]—An action *in rem* is not a legal procedure only &

67 i. *Action in rem—Effect on owner of res.*]—The *M. S.* was hired to tow the *N.*, & in consequence of the negligence of the master of the *M. S.* whilst so employed, & of his wilful disobedience to the order of the pilot on the *N.*, the latter ran foul of the *S. F.*, considerable damage being done to both. The *S. F.* took proceedings against the *N.* for the damage sustained, & an action *in rem* was brought (pending the proceedings taken by the *S. F.*) by the *N.* against the *M. S.* to recover damages, including any damages that the *N.* might have to pay to the owners of the *S. F.* The towage contract of the *M. S.* was that her proprietors should not be responsible in any circumstances for damage to any vessel whilst being towed,

solely against the property, but it is a procedure indirectly, if not directly, impleading the owner of the property to answer to the judgment of the ct. to the extent of his interest in the property (BRETT, L.J.).—THE PARLEMENT BELGE, No. 140, *post.*

Annotations :—**Consd. & Apld.** Strousberg *v.* Costa Rica Republic (1880), 44 L. T. 199, C. A. **Consd.** The Newbattle (1885), 10 P. D. 33, C. A.; The Longford (1889), 14 P. D. 34, C. A. **Expld.** The Dictator, [1892] P. 304. **Consd.** S.S. Utopia *v.* S.S. Primula, [1893] A. C. 492, P. C. **Consd. & Apld.** Mighell *v.* Johore, [1894] 1 Q. B. 149, C. A. **Consd.** Musurus Bey *v.* Gadban, [1894] 2 Q. B. 352, C. A. **Apld.** The Jassy, [1906] P. 270. **Consd.** The Burns, [1907] P. 137, C. A. **Apld.** The Broadmayne, [1916] P. 64, C. A. **Refd.** Morgan *v.* Castlegate S.S. Co., [1893] A. C. 38; The Ripon City, [1897] P. 226; South African Republic *v.* La Compagnie Franco-Belge du Chemin de Fer du Nord, [1898] 1 Ch. 190; *Re* Republic of Bolivia Exploration Syndicate, [1914] 1 Ch. 139.

For full anns., *see* S. C. No. 140, *post.*

68. —— Effect of appearance.]—THE DICTATOR, No. 1368, *post.*

69. —— ——.]—An action commenced as an action *in rem* continues throughout as an action *in rem* unless its character is altered by amendment or order of the ct. or under the Rules of Ct. I do not think it becomes an action *in personam* when the owner of the *res* appears & gives bail (BANKES, L.J.) —THE BROADMAYNE, Nos. 131, 705, 1262, *post.*

For full anns., *see* S. C. No. 131, *post.*

70. —— To enforce maritime lien.]—The right to enforce a maritime lien for damage is different from the ancient right of arrest to compel appearance & security in this, that it is confined to the property by means of which the damage is caused, & may be enforced against that property in the hands of an innocent purchaser (GORELL BARNES, J.).—THE RIPON CITY, [1897] P. 226; 66 L. J. P. 110; 77 L. T. 98; 13 T. L. R. 378; 8 Asp. M. L. C. 304.

Annotations :—**Refd.** The Hopper No. 66, [1906] P. 34; The Marie Glaeser, [1914] P. 218; The Sarpen, [1916] P. 306, C. A. **Mentd.** The Snark, [1899] P. 74; The Elmville, [1904] P. 319.

71. —— —— Not within Public Authorities Protection Act, 1893 (c. 61).]—An action *in rem* to enforce a maritime lien for damage caused by collision is not an action against any person within the above Act, & such action will lie although commenced more than six months after the date of the negligence causing the collision.—THE BURNS, [1907] P. 137; 76 L. J. P. 41; 96 L. T. 684; 71 J. P. 193; 23 T. L. R. 323; 51 Sol. Jo. 276; 5 L. G. R. 676; 10 Asp. M. L. C. 424, C. A.

72. —— —— Not within private Act requiring notice of action.]—By 6 & 7 Will. 4, c. 100, s. 8, no action was to be brought in which the City of Dublin Steam Packet Co. should be liable for any damage to any ship against such co., unless a month's notice in writing should have been given to the co. :—*Held :* the word "action" in the above sect. did not apply to an action *in rem*.—THE LONGFORD (1889), 14 P. D. 34; 58 L. J. P. 33; 60 L. T. 373; 37 W. R. 372; 5 T. L. R. 256; 6 Asp. M. L. C. 371, C. A.

Annotation :—**Foll'd.** The Burns, [1907] P. 137, C. A.

73. *S. P.* THE MULLINGAR (1872), 26 L. T. 326; 1 Asp. M. L. C. 253.

Annotation :—**Apprvd.** The Longford (1889), 14 P. D. 34, C. A.

74. Action in personam—Personal jurisdiction.]—There is considerable authority for holding that the Admlty. Ct. did exercise a jurisdiction *in personam* in certain cases. It did so whenever there was a remedy by proceeding *in rem ;* but then it limited the damages recoverable to the value of the *res*. It exercised a personal jurisdiction in the nature of a disciplinary authority, as for assaults by the officers of a ship upon the high seas, where there was no jurisdiction *in rem* (KAY, L.J.).—R. *v.* CITY OF LONDON COURT JUDGE, [1892] 1 Q. B. 273, C. A. S. C. No. 64, *ante ;* No. 76, *post.*

Annotations :—**Expld.** Pugsley *v.* Ropkins, [1892] 2 Q. B. 184, C. A.; Turner *v.* Mersey Docks & Harbour Board, [1892] P. 285, C. A.; Delobbel Flipo *v.* Varty (1893), 62 L. J. Q. B. 398. **Apprvd.** Mersey Docks & Harbour Board *v.* Turner, [1893] A. C. 468. **Distd.** Dierken *v.* Philpott, [1901] 2 K. B. 380. **Refd.** Guilford *v.* Lambeth, [1894] 2 Q. B. 832; The Normandy, [1904] P. 187.

75. —— Limits of jurisdiction.]—The cts. of common law always clearly drew the distinction between the case of the Admlty. Ct. having jurisdiction by reason of hypothecation or lien, or other reason, over a *res*, & that ct. seeking to exercise jurisdiction against individuals personally, with regard to whom no such jurisdiction in the view of the cts. of common law existed, & while they allowed the action to proceed in regard to the former matter, prohibited it as to the latter (JEUNE, J.). —THE DICTATOR, No. 66, *ante ;* No. 1499, *post.*

For full anns., *see* S. C. No. 1499, *post.*

SECT. 6.—DEVELOPMENT OF THREE CONDITIONS OF JURISDICTION.

See also under PART II., *post.*

SUB-SECT. 1.—THINGS SUBJECT TO JURISDICTION.

A. In General.

76. Three conditions to be considered.]—In determining whether the Admlty. Ct. has jurisdiction, three things have to be considered—the locality, the subject-matter of complaint, & the person with regard to whom the complaint is made. If any of the three is wanting, the Admlty. Ct. may not have jurisdiction (LORD ESHER, M.R.).—R. *v.* CITY OF LONDON COURT JUDGE, Nos. 64, 74, *ante.*

Annotations :—**Expld.** Pugsley *v.* Ropkins, [1892] 2 Q. B. 184, C. A.; Turner *v.* Mersey Docks & Harbour Board, [1892] P. 285, C. A.; Delobbel Flipo *v.* Varty (1893), 62 L. J. Q. B. 398. **Apprvd.** Mersey Docks & Harbour Board *v.* Turner, [1893] A. C. 468. **Distd.** Dierken *v.* Philpott, [1901] 2 K. B. 380. **Refd.** Guilford *v.* Lambeth, [1894] 2 Q. B. 832; The Normandy, [1904] P. 187.

77. Things arising upon high seas.] — The Admlty. Ct. has no power over any cause at land, for both by the nature of the ct. & by the Act, it is only to meddle with things arising upon the high seas. Further, these things at the sea done must be also of the same nature & respect; & if a man should make an obligation at sea for security of a debt growing before at land, or should make a promise to pay same, this cannot be sued in the Admlty. Ct., but it is otherwise in the

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whether same should have happened through default of the master or other sailors, etc., of the *M. S.*, or through the incompetence of the pilot in charge : —*Held :* the clause was a sufficient answer to the suit; for, although in every case of a proceeding *in rem* the suit is directly against the ship itself, still the owner of the ship must always be considered as indirectly impleaded.—THE MARY STUART *v.* THE NEVADA (1884), I. L. R. 10 Calc. 866.—**IND.**

71 i. —— *Not within Act limiting time for proceeding against municipality.*]—The statutory provision limiting to one year the bringing of actions against a municipality does not apply to actions *in rem* in the Admlty. Ct.—KENNEDY *v.* THE SURREY (1905), 11 B. C. R. 499.—**CAN.**

74 i. *Action in personam—Non-payment of freight—Monition against consignee.*]—A monition was granted against a consignee, to compel his appearance in a case of breach of charterparty by non-payment of freight. —THE CONSUL (1860), 3 L. T. 58.—**IR.**

74 ii. *S. P.* THE CATHERINE & ALICE (1860), 3 L. T. 58.—**IR.**

Sect. 6.—Development of three conditions of jurisdiction : Sub-sect. 1, *A. B. C. ; Sub-sect.* 2, *A.*]

case of a pledge by the master for necessaries.—BRIDGEMAN'S CASE (1614), Hob. 11 ; 80 E. R. 162 ; *sub nom.* BARNARD *v.* BRIDGEMAN, Moore, K. B. 918.

Annotations :—**Expld.** Manby *v.* Scott (1662), O. Bridg. 229. **Refd.** Johnson *v.* Shippin (1703), 1 Salk. 35 ; Yates *v.* Hall (1785), 1 Term Rep. 73.

B. Things done upon the Seas.

(a) Contracts.

78. Contracts made at sea.]—If a ship lies at anchor & wants victuals & sends to land to S. to bring them, & thus the contract is made on the ship, then the contract is made at sea, & the Admlty. Ct. has jurisdiction ; but it is otherwise if the contract was made entirely on land & the victuals afterwards sent to the ship.—GODFREY'S CASE (1625), Lat. 11 ; 82 E. R. 249.

Annotation :—**Refd.** London Corpn. *v.* Cox (1867), L. R. 2 H. L. 239.

79. —— Release on land.]—If a suit be in the Admlty. Ct. upon a contract made at sea, & deft. plead a release, or a gift after the coming to land, that ct. may inquire & try this issue.—ANON. (1598), Gouldsb. 114 ; 75 E. R. 1032.

80. Contracts made on land.]—The master of a ship entered into a contract with merchants to supply provisions & provide mariners for a voyage. On their refusal to pay what they had agreed to pay he sued them in the Admlty. Ct., & defts. moved for a prohibition on the ground that the contract being made on land, the Admlty. Ct. had no jurisdiction : —*Held :* (1) a prohibition would lie ; (2) prohibitions were not discretionary but were grantable *ex debito justitiæ*.—WOODWARD *v.* BONITHAN (1661), T. Raym. 3 ; 83 E. R. 2.

Annotation —**Apprvd.** Martin *v.* Mackonochie (1879), 49 L. J. Q. B. 9, C. A.

81. Contracts made on land abroad—Necessaries—Hypothecation bond.]—If the master of a ship take up moneys during the voyage at any place abroad for necessaries wanted *super altum mare*, & hypothecate the ship, the pawnee may sue on the hypothecation bond in the Admlty. Ct., although it was given at land.—COSSART *v.* LAWDLEY (1688), 3 Mod. Rep. 244 ; 87 E. R. 159.

Annotation :—**Expld. & Folld.** Johnson *v.* Shippen (1703), 2 Ld. Raym. 982.

(b) Torts.

82. Torts committed on high seas.] — The Admlty. Ct. has original jurisdiction over torts committed on the high seas.—THE SARAH, No. 83, *post*.

Annotations :—**Apld.** Purkis *v.* Flower (1873), L. R. 9 Q. B. 114. **Consd.** R. *v.* City of London Court Judge, [1892] 1 Q. B. 273, C. A. ; Turner *v.* Mersey Docks & Harbour Board, [1892] P. 285, C. A. ; Mersey Docks & Harbour Board *v.* Turner, [1893] A. C. 468 ; Davidsson *v.* Hill, [1901] 2 K. B. 606. **Refd.** The Englishman & The Australia, [1894] P. 239 ; The Veritas, [1901] P. 304.

83. —— Damage done.]—The Admlty. Ct. has original jurisdiction over a collision on the high seas where the vessel doing the damage was a keel, or vessel without masts, usually propelled by a pole.

The ct. has original jurisdiction, because the matter complained of is a tort committed on the high seas. It is not necessary to refer to any stat. ; it is immaterial whether the vessel doing the damage was a sea-going vessel, or by what means it was navigated (Dr. LUSHINGTON).—THE SARAH (1862), Lush. 549. S. C. No. 82, *ante*.

Annotations :—**Apld.** Purkis *v.* Flower (1873), L. R. 9 Q. B. 114. **Consd.** R. *v.* City of London Court Judge, [1892] 1 Q. B. 273, C. A. ; Turner *v.* Mersy Docks & Harbour Board, [1892] P. 285, C. A. ; Mersey Docks & Harbour Board *v.* Turner, [1893] A. C. 468 ; Davidsson *v.* Hill, [1901] 2 K. B. 606. **Refd.** The Englishman & The Australia, [1894] P. 239 ; The Veritas, [1901] P. 304.

84. —— Assault.]—In a civil suit on the part of a passenger against the master for assaulting him on the high seas during a passage from the West Indies to England :—*Held :* (1) the injury was done on the high seas ; (2) the Admlty. Ct. had jurisdiction to entertain the suit.—THE RUCKERS (1801), 4 Ch. Rob. 73.

Annotations :—**Consd.** The Sylph (1867), L. R. 2 A. & E. 24 ; R. *v.* City of London Court Judge, [1892] 1 Q. B. 273, C. A. ; Mersey Docks & Harbour Board *v.* Turner, [1893] A. C. 468 ; Davidsson *v.* Hill, [1901] 2 K. B. 606. **Refd.** The Franconia (1877), 2 P. D. 163, C. A.

C. Ships and certain other Property.

85. Barge.]—THE BILBAO, Nos. 475, 507, 724, 771, *post*.

86.——.]—In a jury trial for loss by the sinking of a barge from a vessel listing over upon her through carelessness, one of the jury thought it a case more fit to be tried by the Admlty. Ct., in which opinion Lord Campbell joined, & expressed a hope that the jurisdiction of that ct. would be extended to all barges.—STORKS *v.* FORREST (1851), 3 L. T. 58, *Shipping Gazette*, Apr. 11.

87. ——.]—THE MALVINA, Nos. 476, 487, *post*.

For full anns., *see* S. C. No. 487, *post*.

88. Hulk—Floating warehouse.]—A hulk retaining the general appointment of a ship registered as a British ship & hoisting the British ensign, although only used as a floating warehouse, is *primâ facie* sufficiently a British ship to be within M.S. Act, 1854 (c. 104), s. 267, & a crime committed thereon is within the jurisdiction of the Admlty.—R. *v.* ARMSTRONG (1875), 13 Cox, C. C. 184.

Annotation :—**Refd.** R. *v.* Keyn (1876), 2 Ex. D. 63, C. C. R.

89. Hopper barge.]—JJ. awarded salvage in respect of services rendered to a hopper barge, which had been found adrift, without any person on board of her, in the Wash about 3 miles from Boston. The barge was not furnished with any means by which she could be propelled, & was used for dredging purposes :—*Held :* (1) the barge was a " ship in distress on the shore of a sea or tidal water " within M. S. Act, 1854 (c. 104) s. 458 ; (2) the JJ. had jurisdiction to award salvage.—THE MAC (1882), 7 P. D. 126 ; 51 L. J. P. 81 ; 46 L. T. 907 ; 4 Asp. M. L. C. 585, C. A.

Annotations :—**Consd.** The Gas Float Whitton (No. 2), [1896] P. 42, C. A. ; The Fulham (1899), 81 L. T. 19, C. A. ; Poole Harbour Commrs. *v.* Pike (1901), 17 T. L. R. 251. **Folld.** The Mudlark, [1911] P. 116. **Refd.** Corbett *v.* Pearce, [1904] 2 K. B. 422.

90. Gas float.]—The jurisdiction of the Admlty. over salvage does not extend to all property exposed to perils of the sea & used to assist navigation.

A gas float, shaped like a boat, but neither intended nor fitted to be navigated, was moored in tidal waters to give light to vessels & went adrift in a storm :—*Held :* not being a ship or part of a ship or of her apparel or cargo the structure was not the subject of a claim for salvage within Admlty. jurisdiction.—WELLS *v.* GAS FLOAT WHITTON (NO. 2) (OWNERS), [1897] A. C. 337 ; 66 L. J. P. 99 ; 76 L. T. 663 ; 13 T. L. R. 422 ; 8 Asp. M. L. C. 272, H. L. S. C. No. 1743, *post*.

Annotations :—**Consd.** The Craighall, [1910] P. 207, C. A. ; The Upcerne, [1912] P. 160.

91. Wreck.]—Where any portions of a wrecked vessel have been recovered, the mariners are entitled to sue against the proceeds for their wages, though no freight has been earned ; & their title is not divested by the circumstance that the portions of the ship which have been preserved were pre-

served not by the exertions of the crew, but by third persons.—THE RELIANCE (1843), 2 Wm. Rob. 119; 2 Notes of Cases, 347; 7 Jur. 542: *sub nom.* THE ALLIANCE (1843), 10 L. T. 913. S. C. No. 424, *post.*

92. Raft of timber.]—On a motion for a monition calling upon the owner of a raft of timber which was found flotsam in Yarmouth harbour to show cause why salvage should not be awarded for the rescue & preservation of same:—*Held:* the ct. did not possess jurisdiction over the subject-matter under Admlty. Ct. Act, 1840 (c. 65), s. 6.—THE LARGE RAFT OF TIMBER (1844), 2 Wm. Rob. 251; 8 Jur. 154.

Annotations:—**Distd.** The Mac (1882), 46 L. T. 907, C. A. **Apld.** The Gas Float Whitton (No. 2), [1896] P. 42 C. A. **Refd.** The Gas Float Whitton (No. 2), [1895] P. 301.

93. Timber broken loose.]—Timber which has broken loose from its fastenings in a harbour, & found floating upon the sea 3 miles distant by persons who do not know whence it came, is not "flotsam" so as to entitle the finders to salvage under M. S. Act, 1854 (c. 104), & an order made by JJ. awarding salvage will be made without jurisdiction.—PALMER *v.* ROUSE (1858), 3 H. & N. 505; 27 L. J. Ex. 437; 31 L. T. O. S. 220; 22 J. P. 773; 6 W. R. 674.

Annotation:—**Refd.** The Gas Float Whitton (No. 2), [1896] P. 42, C. A.

94. Payment in lieu of bail—Not proceeds of ship.]—In order that the Admlty. Ct. may entertain a suit of limited liability under the powers of M. S. Act, 1854 (c. 104), s. 514, & Admlty. Ct. Act, 1861 (c. 10), s. 13, the ship or proceeds thereof must, at commencement of the suit, be under arrest & under the control of the Admlty. Ct. Payment into the registry of a sum in lieu of bail in a cause of damage cannot be taken to represent the ship or proceeds within the Act of 1861. The term "proceeds of a ship" is, in the practice of the Admlty. Ct., a technical expression, meaning the fund arising from the sale of a ship.—JAMES *v.* LONDON & SOUTH WESTERN RY. CO. (1872), L. R. 7 Ex. 287; 41 L. J. Ex. 186; 27 L. T. 382; 21 W. R. 25; 1 Asp. M. L. C. 428. S. C. No. 23, *ante;* No. 573, *post.*

Annotation:—**Consd.** The Franconia (1877), 2 P. D. 163, C. A.

95. Ship's stores sold privately—Proceeds of sale.]—THE OPTIMA, No. 1709, *post.*

For full anns., *see* S. C. No. 1709, *post.*

SUB-SECT. 2.—LIMITS OF LOCALITY.

A. British Dominions.

96. Not within body of county.]—The authority of the admiral is limited to the high seas. The vice-admiral of York has no jurisdiction to cause people to appear before him for things done in the body of the county, as for not repairing the banks of a river which is within the body of a county.—EMPRINGHAM'S CASE (1611), 12 Co. Rep. 84; 77 E. R. 1361.

97. ——.]—H. & others were sued in the Admlty. Ct.; they were owners of a ship & sent it to the Indies to trade, & the mariners upon the high seas committed piracy, & when the ship returned the admiral seized it in the Thames. Prohibition was prayed, & was granted because the seizure was within the body of a county.—HILDEBRAND'S CASE (1615), 1 Roll. Rep. 285; 81 E. R. 488.

Annotation:—**Refd.** London Corpn. *v.* Cox (1867), L. R. 2 H. L. 239.

98. ——.]—A Dutch ship was wrecked in a creek of the sea within the body of the county of Dorset; the sailors claiming that the goods on the ship were perishable obtained a commission of sale from the Admlty. Ct. to sell them, & the real owners brought *supersedeas* to prevent such sale & prayed prohibition. This was granted because the cause of action accrued within the body of the county & the Admlty. Ct. had no jurisdiction therein. The sale of the goods was proper as they were about to perish.—CULLIVER *v.* BRAND (1658), 2 Sid. 81; 82 E. R. 1268.

99. ——.]—Prohibition was granted against the Admlty. Ct. on the suggestion that a wreck derelict near a harbour in Norfolk was within the body of a county.—ADMIRAL *v.* LINSTED (1664), 1 Sid. 178; 82 E. R. 1042.

100. ——.]—The Admlty. Ct. cannot exercise jurisdiction in civil cases, on causes of action arising *infra corpus comitatus.*

In a cause of collision happening in the Humber, 20 miles from the main sea, but within the flux & reflux of the tide, & at about three-fourths flood, the protest of defts. to the jurisdiction of the ct. was sustained upon proof that the site was *infra corpus comitatus.*—THE PUBLIC OPINION (1832), 2 Hag. Adm. 398.

Annotation:—**Distd.** The Raft of Timber (1844), 2 Wm. Rob. 251.

101. In river.]—A ship anchored at Limehouse is not within the Admlty. jurisdiction.—THE VIOLET (VIOLETT) *v.* BLAGUE (BLAKE) (1618), Cro. Jac. 514; 2 Roll. Rep. 49; 79 E. R. 439.

102. ——.]—Chapel Sand was held to be in the river, & not within the jurisdiction of the Admlty. Ct. Cases of collision occurring there ought to be tried by a common law ct. within the county of Essex.—THE ELIZA JANE, No. 103, *post.*

Annotation:—**Consd.** The Bilbao (1860), Lush. 149.

103. —— **Below bridges.**]—The Admlty. Ct. has *primâ facie* a general jurisdiction from the lowest bridges down to the sea, though there possibly may be a concurrency of jurisdiction or even an exclusive jurisdiction of the Ct. of Conservancy, which may oust the Admlty. jurisdiction, but until that is clearly made out the ct. will not sustain a protest to the jurisdiction of the Admlty. Ct. on the ground that the collision (the subject-matter of the cause) took place as was admitted within the jurisdiction of the Ct. of Conservancy.—THE ELIZA JANE (1836), 3 Hag. Adm. 335. S. C. No. 102, *ante.*

Annotation:—**Consd.** The Bilbao (1860), Lush 149.

104. *S. P.* THE ELLEANOR (1805), 6 Ch. Rob. 39.

Annotations:—**Consd.** The Eliza Jane (1836), 3 Hag. Adm. 335. **Mentd.** The Repeater *v.* The Braga, of Krageroe (1866), 14 L. T. 258.

105. Between high & low water mark.]—A. sued B. in the Admlty. Ct. for the taking *vi et armis* of three ships of his in the haven of Bristol. The taking was alleged to be upon the high seas, within the admiral's jurisdiction, but was in fact *inter fluxem et refluxum aquæ.* A. having obtained £700 damages:—*Held:* he must repay the damages to B., A.'s remedy being at common law, and not

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PART I. SECT. 6, SUB-SECT. 2.—A.

a. *Canadian lakes.*]—The Admlty. jurisdiction includes the Great Lakes of Canada.—R. *v.* SHARP (1869), 5 P. R. 135.—**CAN.**

b. ——.]—Canadian Admiralty Cts., having the same jurisdiction over the like places, persons, matters, & things as the High Ct. of Admlty. in England, have jurisdiction to try a maritime question of collision between foreign ships on the Great Lakes.—THE D. C. WHITNEY *v.* ST. CLAIR NAVIGATION CO. (1907), 38 S. C. R. 303; 27 C. L. T. 224; 10 Ex. C. R. 1; 6 O. W. R. 302.—**CAN.**

Sect. 6.—Development of three conditions of jurisdiction: Sub-sect. 2, A. B. C.; Sub-sect. 3, A.]

in the Admlty. Ct.—BURTON *v.* PUT (1428), 4 Co. Inst. 138.

Annotation:—**Refd.** Morgan *v.* Crawshay (1871), L. R. 5 H. L. 304, H. L.

106. ——.]—The space between high & low water marks is *divisum imperium;* when the tide covers it, it is sea; when it recedes, it is again land & within the jurisdiction of the manor.—R. *v.* Two CASKS OF TALLOW, Nos. 616, 624, *post.*

Annotations:—**Consd. & Distd.** The Pauline (1845), 2 Wm. Rob. 358; **Consd.** The Olympic, [1913] P. 92, C. A.

107. ——.]—*Semble:* the jurisdiction of the Admlty. subsists at the time when the shore is covered with water; the jurisdiction of the common law when the land is left dry.—THE PAULINE, No. 625, *post.*

108. ——]—The part of the seashore comprised between high & low-water mark forms part of the body of the adjoining county, the JJ. of which, & not the Admlty., have jurisdiction to take cognisance of offences there committed, whether or not committed when the shore is covered with water.—EMBLETON *v.* BROWN (1860), 3 E. & E. 234; 30 L. J. M. C. 1; 6 Jur. N. S. 1298; 121 E. R. 429.

109. Strait between lands of same county—Solent.]—A steamship was charged with damage to a vessel by collision in the Solent. Prohibition was awarded to the Admlty. Ct.—THE LORD OF THE ISLES (undated), cited in 2 Hag. Adm. 402.

Annotation:—**Refd.** The Public Opinion (1832), 2 Hag. Adm. 398.

110. —— ——.]—Water running between two lands belonging to the same county, as in the case of the Solent, may still be considered as the high seas.—THE SAXONIA, THE ECLIPSE (1861), 1 Lush. 410; 15 Moo. P. C. C. 262; 31 L. J. P. M. & A. 201; 6 L. T. 6; 8 Jur. N. S. 315; 10 W. R. 431; 1 Mar. L. C. 192; 15 E. R. 493, P. C.

Annotations:—**Consd.** The Wild Ranger (1862), Lush. 553; R. *v.* Keyn (1876), 2 Ex. D. 63, C. C. R.; **Mentd.** The Amalia (1863), Brown. & Lush. 151, P. C.; The Scotia (1869), 20 L. T. 375; The Industrie (1871), L. R. 3 A. & E. 303; The Fanny M. Carvill (1885), 13 App. Cas. 455, n., P. C.

111. Places within British dominions abroad.]—Upon the arrest of a ship within the Admlty. Ct.'s jurisdiction, the power of that ct. extends to acts done on the high seas, & to places within the British dominions abroad.—THE PEERLESS (1860), Lush. 30; 29 L. J. P. M. & A. 49; 2 L. T. 25; *affd.* Lush. 103, P. C. S. C. Nos. 44, 62, *ante;* No. 1803, *post.*

Annotations:—**Mentd.** The Tactician (1907), 76 L. J. P. 80, C. A.; The Ape, [1916] P. 303, C. A.

112. Ouster of Jurisdiction—Onus of proof.]—Where the ancient jurisdiction of the ct. is restricted by Act of Parliament, the burden is on those who wish to avail themselves of the restriction to give full proof of the circumstances (*e.g.*, the distance of 3 miles from the shore) which lay the ground for the restriction, & in case of doubt the ct. will not consider its jurisdiction ousted.—THE ARGO (1856), Sw. 112.

Annotations:—**Apld.** General Iron Screw Collier Co. *v.* Schurmanns (1860), 29 L. J. Ch. 877. **Refd.** The Empire Queen (1869), 20 L. T. 88.

113. ——.]—To oust the ct. of its municipal jurisdiction, it lies upon deft. to prove the vessel was at a distance from shore to which the powers of the ct. do not extend.—THE GERTRUDE (1861), 30 L. J. P. M. & A. 130.

B. Foreign Roads, Rivers, and Lands.

114. Foreign roads.]—Goods were seized on board a ship lying at anchor off an African port. On pltf. suing in Admlty. deft. moved for a prohibition on the ground that the ship was in a port, & every port is in the *corpus* of the land & not on the salt sea:—*Held:* the prohibition must be denied, as there was no port, but only roads, which are not on the body of the land, but in the sea.—WILLETS *v.* NEWPORT (1615), 1 Roll. Rep. 250; 81 E. R. 467.

115. Foreign tidal river—Below bridges—British ships.]—The Admlty. jurisdiction of England extends over British vessels, not only when they are sailing on the high seas, but also when they are in the rivers of a foreign territory at a place below bridges, where the tide ebbs & flows, & where great ships go.

A ship in the Garonne, within French territory at a place below bridges, where the tide ebbed & flowed & great ships went:—*Held:* within Admlty. jurisdiction.—R. *v.* ANDERSON (1868), L. R. 1 C. C. R. 161; 38 L. J. M. C. 12; 19 L. T. 400; 33 J. P. 100; 11 Cox, C. C. 198.

Annotations:—**Apld.** The M. Moxham (1875), 1 P. D. 43. **Distd.** The M. Moxham (1876), 1 P. D. 107, C. A. **Apld.** R. *v.* Keyn (1876), 2 Ex. D. 63, C. C. R.; R. *v.* Carr (1882), 10 Q. B. D. 76; The Mecca [1895] P. 95, C. A. **Mentd.** The Princess Royal (1870), L. R. 1 A. & E. 41; Bolivia Republic *v.* Indemnity Mutual Marine Assce., [1909] 1 K. B. 785, C. A.; Brown *v.* Burt (1911), 81 L. J. K. B. 17, C. A.

116. —— —— ——.]—A British ocean-going merchant ship was lying afloat in the ordinary course of her trading, in the river at Rotterdam in Holland, moored to the quay. The place where the ship was lying was in the open river 16 or 18 miles from the sea, but within the ebb & flow of the tide. There were no bridges between the ship & the sea, & the place where she lay was one where large vessels usually lay. Certain securities having been stolen from the ship:—*Held:* the larceny took place within the jurisdiction of the Admlty. of England.—R. *v.* CARR & WILSON (1882), 10 Q. B. D. 76; 52 L. J. M. C. 12; 47 L. T. 450; 47 J. P. 38; 31 W. R. 121; 4 Asp. M. L. C. 604; 15 Cox, C. C. 129, C. C. R. S. C. No. 123, *post.*

Annotation:—**Apld.** The Mecca, [1895] P. 95, C. A.

117. Foreign river—Foreign parties.]—*Semble:* the ct. has no jurisdiction in a foreign river, the cause being between foreigners.—THE IDA, Nos. 1597, 1607, *post.*

118. Cause of action arising on foreign land.]—The Spanish ambassador libelled deft. in the Admlty. Ct. because he cut certain wood in Spain & brought it to England:—*Held:* (1) the cause of action was not within the jurisdiction of the admiral; (2) prohibition must be granted; (3) the ambassador might sue in K. B.—SPAIN (AMBASSADOR) *v.* POUNTES (1614), 1 Roll. Rep. 133; 81 E. R. 381.

Annotation:—**Consd.** Spain *v.* Hullett (1828), 2 State Tr. N. S. 305.

119. ——.]—An action for suing in Admlty. where the cause arises upon land may be brought by bill, notwithstanding 18 Eliz. c. 5; but it must be stated *in partibus transmarinis.*—BALL *v.* TRELAWNY (1641), Cro. Car. 603; 79 E. R. 1119.

C. Former Criminal Jurisdiction.

See, generally, CRIMINAL LAW & PROCEDURE.

120. Not crime within realm.]—The admiral ought not to meddle with anything done within the realm, but only with things done upon the sea. If a man be killed or slain within the arms of the sea where a man may see from one part of the land to the other, the coroner shall inquire of it, & not the admiral.—ADMIRALTY CASE (1609), 13 Co. Rep. 51; 77 E. R. 1461. S. C. No. 161, *post.*

121. Not crime within body of county.]—The

Admlty. Ct. has no jurisdiction in case of robberies on the Thames, this being within the body of a county.—R. *v.* MARSH (1615), 3 Bulst. 27; 81 E. R. 23. S. C. No. 639, *post.*

122. Crime—Ship on high seas.]—A ship was lying off Wampa, which was on a river 20 or 30 miles from the sea. No evidence was given as to the tide flowing there or not. Goods having been stolen from the ship:—*Held:* there was sufficient evidence that the ship was on the high seas to give the Central Criminal Ct. jurisdiction.—R. *v.* ALLEN (1837), 7 C. & P. 664; 1 Mood. C. C. 494.

Annotations:—**Distd.** R. *v.* Hughes (1857), 7 Cox, C. C. 301, C. C. R. **Apld.** R. *v.* Anderson (1868), L. R. 1 C. C. R. 161. **Mentd.** R. *v.* Carr (1882), 10 Q. B. D. 76.

123. —— British ship—Foreign tidal river—Below bridges.]—R. *v.* CARR & WILSON, No. 116, *ante.*

124. —— Not British ship—On high seas.]—A murder was committed on the high seas, the ship being foreign-built, & the crew foreign. The murderer being brought to England & indicted, the ship's register was produced, which stated that the owner resided in London. But it was proved he was an alien born, & no naturalisation or denization was proved:—*Held:* (1) the *primâ facie* evidence contained in the register was rebutted; (2) the ship not being shown to be a British ship, the ct. had no jurisdiction to try the prisoner.—R. *v.* BJORNSEN (1865), Le. & Ca. 545; 6 New Rep. 179; 34 L. J. M. C. 180; 12 L. T. 473; 29 J. P. 373; 11 Jur. N. S. 589; 13 W. R. 664; 10 Cox, C. C. 74; 2 Mar. L. C. 210, C. C. R.

125. —— —— Within three miles of shore—Foreigner.]—The prisoner was indicted at the Central Criminal Ct. for manslaughter. He was a foreigner & in command of a foreign ship, passing within 3 miles of the shore of England on a voyage to a foreign port; & whilst within that distance his ship ran into a British ship & sank her, whereby a passenger on board the latter ship was drowned. The facts of the case were such as to amount to manslaughter by English law:—*Held:* the Central Criminal Ct. had no jurisdiction to try prisoner for the offence charged, on the grounds (1) that prior to 28 Hen. 8, c. 15, the admiral had no jurisdiction to try offences by foreigners on board foreign ships, whether within or without the limit of 3 miles from the shore of England; that that & the subsequent Acts only transferred to the common law cts. & the Central Criminal Ct. the jurisdiction formerly possessed by the admiral; (2) that by the principles of international law, the power of a nation over the sea within 3 miles of its coast is only for certain limited purposes; & that Parliament could not, consistently with those principles, apply English criminal law within those limits.—R. *v.* KEYN (1876), 2 Ex. D. 63; 46 L. J. M. C. 17; 41 J. P. 517; 13 Cox, C. C. 403, C. C. R.

Annotations:—**Apld.** Harris *v.* The Franconia (1877), 2 C. P. D. 173. **Distd. & Dbtd.** R. *v.* Dudley (1884), 14 Q. B. D. 273. **Dbtd.** The Mecca (1894), 11 R. 742. **Consd. & Dbtd.** Carr *v.* Fracis Times, [1902] A. C. 176. **Consd.** Secretary of State for India *v.* Sri Rajah Chelikani Rama Ras (1916), 85 L. J. P. C. 222. **Reid.** Blackpool Pier Co. & South Blackpool Jetty Co. *v.* Flyde Union Assmt. Com. (1877), 41 J. P. 344; Direct United States Cable Co. *v.* Anglo-American Telegraph Co. (1877), 2 App. Cas. 394, P. C.; Chartered Mercantile Bank of India, London & China *v.* Netherlands Steam Navigation Co. (1883), 10 Q. B. D. 521, C. A.; Badische Anilin und Soda Fabrik *v.* Johnson & Basle Chemical Works, Bindschedler, [1897] 2 Ch. 322, C. A.; Davidsson *v.* Hill, [1901] 2 K. B. 606; Denaby & Cadeby Urban Collieries *v.* Anson, [1911] 1 K. B. 171, C. A.; A.-G. for British Columbia *v.* A.-G. for Canada, [1914] A. C. 153, P. C. **Mentd.** R. *v.* Fletcher, *Ex p.* Birnie (1876), 35 L. T. 538, C. A.; West Rand Central Gold Mining Co. *v.* R., [1905] 2 K. B. 391.

126. *S. P.* HARRIS *v.* THE FRANCONIA, No 842, *post.*

Annotation:—**Reid.** The Duc D'Aumale (1902), 87 L. T. 674, C. A.

See, now, TERRITORIAL WATERS JURISDICTION ACT, 1878 (c. 73).

SUB-SECT. 3.—PERSONS SUBJECT TO JURISDICTION.

A. The Crown.

(a) King's Ships.

127. No suit for salvage.]—The Admlty. Ct. declines to entertain suits for salvage in respect of vessels of war belonging to His Majesty.—THE COMUS (1816), cited 2 Dods. 464.

Annotations:—**Consd.** The Resolute (1859), 33 L. T. O. S. 80, **Reid.** The Athol (1842), 6 Jur. 376; The Thomas A. Scott (1864), 10 L. T. 726; The Charkieh (1873), L. R. 4 A. & E. 59.

128. —— Ex gratiâ payment.]—THE SIMLA (1906) (unreported), cited in Kennedy, Civil Salvage, 2nd ed., p. 70 n.

129. —— —— —.]—THE MARQUIS OF HUNTLEY (1835), 3 Hag. Adm. 246.

Annotations:—**Consd.** The Thomas A. Scott (1864), 10 L. T. 726. **Reid.** The Parlement Belge (1880), 5 P. D. 197, C. A.

130. Colonial Government's ship.]—An action *in rem* is a method of impleading the owners of a vessel, &, if the owner is the King, the action cannot be maintained.

A vessel which is the property of a colonial Govt., although built to be used as a ferry boat for the purpose of carrying passengers & merchandise for hire between one part of a ry. owned by the Govt. & another, enjoys the same immunity from arrest as the property of the Crown, & is not liable to an action for salvage.—YOUNG *v.* THE SCOTIA, [1903] A. C. 501; 72 L. J. P. C. 115; 89 L. T. 374; 9 Asp. M. L. C. 485, P. C.

(b) Ships in Government Service.

131. Requisitioned ship.]—A ship which has been requisitioned by the Crown is exempt from arrest so long as she remains under requisition in the service of the Crown, & this exemption extends as well to claims of salvage as to claims of collision or other claims.—THE BROADMAYNE, [1916] P. 64; 85 L. J. P. 153; 114 L. T. 891; 32 T. L. R. 304;

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130 i. *Colonial Government's ship—Trading vessel.*]—An action was brought in the Admlty. jurisdiction of the Supreme Ct. for damages arising through the collision of plffs.' steamer with a trading vessel belonging to the Govt. A nominal deft. was appointed & the writ issued against him, which was set aside on the ground that there was no jurisdiction by virtue of Claims against Govt. & Crown Suits Act, 1912 (No. 2), to bring the action under Colonial Cts. of Admlty. Act, 1890 (c. 27). On appeal:—*Held:* the writ was properly issued.—SOUTH COAST ROAD METAL QUARRIES *v.* WHITFIELD (1914), 14 S. R. N. S. W. 300; N. S. W. W. N. —**AUS.**

130 ii. —— *Pilot brig—Arrest.*]—A Govt. brig employed in supplying pilots to vessels was arrested under a proceeding *in rem*:—*Held:* the brig, by 21 & 22 Vict. c. 126, had become the property of the Crown, & was entitled to the same exemption from arrest as all other Queen's ships, & the proceeding *in rem* was illegal.—BROWN *v.* THE PILOT BRIG KEDGEREE (1863), 1 Hyde, 253.—**IND.**

a. *Troopship.*]—A troopship will be discharged from arrest without bail upon an affidavit showing that she is Crown property & employed in the public service. In such cases the proceedings may proceed against the owner or master of the impugnant ship personally; & when such proceedings are instituted, it is the practice of the Lords of the Admlty. to direct an appearance to be given for defence of the action, in order that the ct. may adjudicate upon it.—THE RESOLUTE (1859), 4 Ir. Jur. N. S. 123 (Adm.); 33 L. T. O. S. 80.—**IR.**

Sect. 6.—Development of three conditions of jurisdiction: Sub-sect. 3, A. B. C.]

60 Sol. Jo. 367; 13 Asp. M. L. C. 356, C. A. S. C. No. 69, *ante;* Nos. 705, 1262, *post.*

Annotations:—**Consd.** The Messicano (1916), 32 T. L. R. 519. **Refd.** The Sarpen, [1916] P. 306, C. A.

132. Hired transport in Government service—Hypothecation.]—The hypothecation of a hired transport in the service of the Govt. is not contrary to public policy.—THE JANE (1814), 1 Dods. 461.

For full anns., *see* SHIPPING & NAVIGATION.

133. Vessel under contract to carry mails — Mariner's wages.]—A post-office packet may be arrested in a suit for mariner's wages.—THE LORD HOBART (1815), 2 Dods. 100.

134. Government stores — Chartered ship — Salvage.]—Where Govt. stores are being carried at the risk of charterers, & such stores are salved from a danger for which the charterers are responsible, the charterers are liable to pay salvage. —THE PORT VICTOR, Nos. 149, 611, *post.*

B. Foreign Sovereigns.

135. Foreign ship of war.]—*Qu.:* whether a foreign ship of war lying in an English port is liable to the civil process of the Admlty. Ct. in a cause of salvage at the suit of British subjects.—THE PRINS FREDERIK (1820), 2 Dods. 451. S. C. No. 146, *post.*

Annotations:—**Refd.** The Charkieh (1873), L. R. 8 Q. B. 197; The Parlement Belge (1880), 5 P. D. 197, C. A.; The Broadmayne, [1916] P. 64, C. A. **Mentd.** The Athol (1842), 6 Jur. 376; The Resolute (1859), 33 L. T. O. S. 80; The Thomas A. Scott (1864), 10 L. T. 726.

136. —— Submission to jurisdiction.]—THE LORD BYRON (1879), cited in 1 Maude & Pollock, Law of Merchant Shipping, 4th ed., p. 607, note (*k*); Halsbury's Laws of England, Vol. 26, p. 408.

137. —— Application of statute.]—The question whether M. S. Act, 1894 (c. 60), s. 419 (4), applied to a vessel of war of the King of Denmark was raised but not decided.—THE ASTRAKHAN (1909), *Shipping Gazette*, Nov. 4.

138. ——Cargo.]—A ship of war belonging to & duly commissioned by a foreign Govt. is not within the jurisdiction of a British municipal tribunal, & a warrant of arrest in an action of salvage *in rem* cannot be issued against such ship out of the Admlty. Div., nor against the cargo on board, even though it is the property of private persons, if the goods in question are under the charge of the Govt. for public purposes.—THE CONSTITUTION (1879), 4 P. D. 39; 48 L. J. P. 13; 40 L. T. 219; 27 W. R. 739; 4 Asp. M. L. C. 79.

Annotation:—**Refd.** The Parlement Belge (1879), 4 P. D. 129.

139. Foreign Government transport.]—Where a libel was filed to recover compensation for salvage services rendered to a vessel which, though not commissioned in the navy of the United States of America, was owned, manned, supplied & armed by that country, & used in the transport service:—*Held:* the ct. had no jurisdiction over the vessel in question—THE THOMAS A. SCOTT (1864), 10 L. T. 726; 2 Mar. L. C. 43.

Annotation:—**Consd.** The Parlement Belge (1880), 5 P. D. 197, C. A.

140. Mail boat of foreign sovereign state.]—An unarmed vessel belonging to a foreign sovereign state, & employed in what is considered by that state to be a national service, is entitled to the privilege of a vessel of war as to freedom from arrest in a suit *in rem*. Such immunity is not forfeited by the partial employment of the vessel in carrying merchandise & passengers where her substantial employment is of a national character. *Semble*, any property of a foreign sovereign or state used for public purposes is exempt from the jurisdiction of any tribunal in England.

A suit *in rem*, though primarily a proceeding against the ship or *res*, is indirectly a process compelling the appearance of the owner to defend his property, & is not applicable where the ship or *res* is the property of a foreign sovereign or sovereign state against whom an action will not lie by reason of international law or the comity of nations.—THE PARLEMENT BELGE (1880), 5 P. D. 197; 42 L. T. 273; 28 W. R. 642; 4 Asp. M. L. C. 234, C. A. S. C. No. 67, *ante.*

Annotations:—**Consd. & Apld.** Strousberg *v.* Costa Rica Republic (1880), 44 L. T. 199, C. A. **Consd.** The Newbattle (1885), 10 P. D. 33, C. A.; The Longford (1889), 14 P. D. 34, C. A. **Expld.** The Dictator, [1892] P. 304. **Consd.** S.S. Utopia *v.* S.S. Primula, [1893] A. C. 492, P. C. **Consd. & Apld.** Mighell *v.* Johore, [1894] 1 Q. B. 149, C. A. **Consd.** Musurus Bey *v.* Gadban, [1894] 2 Q. B. 352, C. A. **Apld.** The Jassy, [1906] P. 270. **Consd.** The Burns, [1907] P. 137, C. A. **Apld.** The Broadmayne, [1916] P. 64, C. A. **Refd.** Morgan *v.* Castlegate S.S. Co., [1893] A. C. 38; The Ripon City, [1897] P. 226; South African Republic *v.* La Compagnie Franco-Belge Du Chemin De Fer Du Nord, [1898] 1 Ch. 190; *Re* Republic of Bolivia Exploration Syndicate, [1914] 1 Ch. 139; *Re* Suarez, Suarez *v.* Suarez (1917), 86 L. J. Ch. 673. **Mentd.** Chalmers *v.* Scopenich (1892), 66 L. T. 348.

141. Ship requisitioned by foreign Government.]—A ship requisitioned by the Govt. of a state, one of Great Britan's allies in the European war:—*Held:* entitled to a similar privilege from arrest by British pltfs. while under requisition in the service of that Govt. as a ship requisitioned by the British Govt.—THE MESSICANO, No. 706, *post.*

142. Vessel of foreign sovereign — Trading.]—In a cause of damage instituted by the owners, master, & crew of the *B.* against the *C.* & her freight, an appearance under protest was entered on behalf of the Khedive of Egypt & his Minister of Marine:—*Held:* the Khedive was not entitled to the privilege of a sovereign prince.

A suit *in rem* to enforce a damage lien may be entertained without any violation of international law, though the owner of the *res* be the sovereign of a foreign state, & such a suit may possibly be entertained even against property connected with the *jus coronæ*. If a sovereign assumes the character of a trader, & sends a vessel belonging to him to this country to trade here, he must be considered to have waived any privilege which might otherwise attach to the vessel as the property of a sovereign (SIR R. PHILLIMORE). —THE CHARKIEH (1873), L. R. 4 A. & E. 59; 42 L. J. Adm. 17; 28 L. T. 513; 1 Asp. M. L. C. 581. S. C. No. 145, *post.*

Annotations:—**Distd.** The Constitution (1879), 4 P. D. 39. **Consd.** The Parlement Belge (1880), 5 P. D. 197, C. A. **Refd.** The Heinrich Bjorn (1888), 10 P. D. 44, C. A.; Foster *v.* Globe Venture Syndicate (1900), 82 L. T. 253. **Mentd.** Mighell *v.* Johore, [1894] 1 Q. B. 149, C. A.

143. —— Determination of immunity—Jurisdiction of Admiralty Court.]—The *C.* was a vessel belonging to the Khedive of Egypt, & had come to England to be repaired, with a cargo on board. She was not a man-of-war. Upon her trial trip she came into collision with & sank the *B.*; the owners of the *B.* caused her to be arrested by a warrant of the Admlty. Ct. An application having been made for a prohibition:—*Held:* (1) the

b. *Public vessel of foreign sovereign state—Immunity of officer in charge.*]—The immunity of a vessel, the property of a foreign sovereign state, & in its public use, from proceedings for damages arising out of a collision alleged to have been caused by the negligent navigation of the vessel extends to the officer in charge of her, & all proceedings against him in an action *in personam* will be stayed at the request of such state. *Semble:* the immunity cannot be claimed by the officer himself. *The Constitution* (1879), 4 P. D. 39; *The Parlement Belge* (1880), 5 P. D. 197; *The Prinz Frederick* (1820), 2 Dods. 451; *New Chile Gold Mining Co. v. Blanco* (1888), 4 T. L. R. 346, cited.—TUNG OC TAI, ETC. *v.* GOVE, THE ALEXANDER (1906), 1 Hong Kong, 122. — **HONG KONG.**

Admlty. Ct. was the proper tribunal to determine whether the *C.* was entitled to the immunity allowed to the vessels of a sovereign state; (2) a prohibition ought not to issue.—THE CHARKIEH (1873), L. R. 8 Q. B. 197; 42 L. J. Q. B. 75; 28 L. T. 190; 21 W. R. 437; 1 Asp. M. L. C. 533.

144. —— Waiver of immunity.]—A vessel, the property of a foreign sovereign, was arrested in an action for damage by collision. Thereupon the local agent for the vessel in England, without the knowledge or authority of the foreign sovereign, instructed solrs., who procured the vessel's release by giving an undertaking to put in bail, & also entered an appearance in the action unconditionally. Pltfs., on being informed of the facts, refused to allow the action to be dismissed:—*Held:* (1) the action must be dismissed with costs, as no action *in rem* lay against a vessel owned by a foreign sovereign & intended for public service; (2) the giving of bail to procure the vessel's release & the entry of appearance were not a waiver of the privilege of freedom from arrest.—THE JASSY, [1906] P. 270; 75 L. J. P. 93; 95 L. T. 363; 10 Asp. M. L. C. 278.

Annotation:—**Consd.** *Re* Republic of Bolivia Exploration Syndicate, [1914] 1 Ch. 139.

145. Public ship—Within ebb & flow of sea.]—*Semble:* within the ebb & flow of the sea, in the case of salvage the *obligatio ex quasi contractu* attaches *jure gentium* upon the ship to which the service has been rendered, & in the case of collision the *obligatio ex quasi delicto* attaches *jure gentium* upon the ship which is the wrongdoer, whatever be her character, public or private (SIR R. PHILLIMORE).—THE CHARKIEH, No. 142, *ante*.

For full anns., *see* S. C. No. 142, *ante*.

146. *S. P.* THE PRINS FREDERIK, No. 135, *ante*.

For full anns., *see* S. C. No. 135, *ante*.

C. Private Persons.

147. Salvage—Owners liable though property in vessel transferred.]—An action *in personam* lies against the owners of a vessel which has been saved, even though the property has been transferred to others & the lien lost.

Pltfs., the owners of a steam tug, entered into a contract with defts., who were in possession of five steel barges, by which the tug was to tow the barges from C. to P. for an ascertained sum. The tug & barges during the progress of the towage were twice obliged to seek shelter, & the barges twice broke adrift & had to be saved by the tug, & on one of these occasions the tug saved the lives of some of the bargemen. At the end of the towage, two of the barges were given up to the Govt., with whom defts. were under contract to build & deliver the barges. An action of salvage was brought *in personam* against defts. in respect of alleged salvage services to these two barges & *in rem* against the remaining three barges:—*Held:* (1) pltfs. entitled to salvage; (2) an action *in personam* lay against defts.—FIVE STEEL BARGES (1890), 15 P. D. 142; 59 L. J. P. 77; 63 L. T. 499; 39 W. R. 127; 6 Asp. M. L. C. 580. S. C. Nos. 148, 603, 606, 613, *post*.

Annotations:—**Apprvd.** The Port Victor, [1901] P. 243, C. A. **Refd.** The Dictator, [1892] P. 304; The Veritas, [1901] P. 304; The Leon Blum, [1915] P. 90.

148. —— Liability of persons interested.]—An action *in personam* for salvage lies against any person who is interested in the property saved, & whose interest has been saved by the fact that the property has been brought into a position of safety (HANNEN, P.).—FIVE STEEL BARGES, No. 147, *ante*; Nos. 603, 606, 613, *post*.

Annotations:—**Apprvd.** The Port Victor, [1901] P. 243, C. A.; The Veritas, [1901] P. 304. **Refd.** The Leon Blum, [1915] P. 90.

For full anns., *see* S. C. No. 147, *ante*.

149. —— Government stores on chartered ship—Charterers liable.]—Govt. stores were shipped on a chartered vessel under bills of lading signed by the master by direction of the charterers not exempting the shipowner from negligence, & subject to the stipulations of a freight engagement entered into with the charterers by a Govt. department under which the owners (the term including the charterers) were responsible for the safe delivery of the stores. The vessel, through negligence of her master & crew, came into collision with another vessel & was so much damaged as to require salvage assistance in putting back to the port of shipment, where the s ores were returned to the Govt. department. In an action of salvage *in personam* by the salvors against the charterers:—*Held:* (1) as the charterers were directly interested in the preservation of the goods, the salvage service was a benefit to them; (2) the action lay.—THE PORT VICTOR, CARGO EX, [1901] P. 243; 70 L. J. P. 52; 84 L. T. 677; 49 W. R. 578; 17 T. L. R. 538; 9 Asp. M. L. C. 182, C. A. S. C. No. 134, *ante;* No. 611, *post*.

150. Damage by collision—Ship under charter—Ship liable in rem.]—A ship chartered by her owners, so that the whole control & management of ship & crew is vested in the charterers, still remains liable in a proceeding *in rem* for damage done to another ship by negligence of her crew, although they are the charterer's servants.—THE LEMINGTON (1874), 32 L. T. 69; 23 W. R. 421; 2 Asp. M. L. C. 475. S. C., No. 495, *post*.

Annotations:—**Consd.** The Hopper No. 66, [1906] P. 34. **Refd.** The Tasmania (1888), 13 P. D. 110; The Jacob Christensen, [1895] P. 281; The Ripon City, [1897] P. 226. **Mentd.** The Sarpen, [1916] P. 306, C. A.

151. —— Foreign ship—Action by British subject.]—THE GRIEFSWALD, No. 474, *post*.

For full anns., *see* S. C. No. 474, *post*.

152. Foreign owners of both vessels—Collision.]—A protest against the jurisdiction of the ct. in a cause of collision, upon the ground that both the vessels were the property of foreign owners, & the collision occurred whilst they were in the prosecution of their respective voyages upon the high seas, was overruled. Where both the parties in the suit are foreigners, the important consideration is whether the case be *communis juris* or not.—THE JOHANN FRIEDERICH (1839), 1 Wm. Rob. 35.

Annotations:—**Consd.** Harmer *v.* Bell (1850-1), 7 Moo. P. C. C. 267. **Consd. & Apld.** The Russia (1869), 21 L. T. 440. **Apprvd.** The Leon (1881), 6 P. D. 148. **Refd.** Chartered Mercantile Bank of India, London & China *v.* Netherlands India Steam Navigation Co. (1883), 10 Q. B. D. 521, C. A. **Mentd.** The Clara (1855), 2 Jur. N. S. 46; The Dictator, [1892] P. 304.

153. —— Consent.]—THE SEE REUTER, No. 170, *post*.

For full anns., *see* S. C. No. 170, *post*.

Foreign shipowners—Actions for wages.]—*See* pp. 137, 139, *post*.

154. —— Collision—Statutory jurisdiction.]—Under 1 & 2 Geo. 4, c. 75, the Admlty. Ct. is authorised not only to arrest a foreign ship, but to proceed to judgment in a case of collision. A duly qualified pilot being intrusted with the navigation of the vessel, the owner is exonerated under 6 Geo. 4, c. 125, s. 55, which applies equally to foreign as to British ships.—THE CHRISTIANA (1828), 2 Hag. Adm. 183.

Annotations:—**Consd. & Folld.** The Girolamo (1834), 3 Hag. Adm. 169. **Folld.** The Protector (1839), 1 Wm. Rob. 45.

155. —— —— ——.]—THE TAGUS, Nos. 434, 460, *post*.

156. —— —— ——.]—THE INDIA, Nos. 324, 327, 340, *post*.

For full anns., *see* S. C. No. 324, *post*.

Sect. 6.—Development of three conditions of jurisdiction. Sects. 6 & 7. Part II. Sect. 1: Sub-sects. 1 & 2.]

157. —— —— —— Presumption of fault.]—In a case of collision outside the territorial waters of the United Kingdom, a point raised on behalf of defts. that the statutory presumption of fault created by M. S. Act, 1894 (c. 60), s. 419 (4), did not apply in the case of a foreign ship, & that such ship could not be held to blame for a breach of art. 16, unless the ct. should be of opinion that the breach of the regulation in fact contributed to the collision, was not decided, defts.' ship being found to blame upon the facts.—THE KONING WILLEM I., [1903] P. 114; 72 L. J. P. 28; 88 L. T. 807; 9 Asp. M. L. C. 423.

SECT. 7.—INCIDENTAL JURISDICTION.

SUB-SECT. 1.—LIS ALIBI PENDENS.

See CONFLICT OF LAWS.

SUB-SECT. 2.—FORMER INCIDENTAL JURISDICTION.

158. Collateral matters.]—Where the Admlty. Ct. has jurisdiction of the principal matter, it has jurisdiction of everything else dependent upon it.—RADLEY *v.* EGGLESFIELD, No. 637, *post.*

Annotations:—**Distd.** Shermoulin *v.* Sands (1696), 1 Ld. Raym. 271. **Apld.** R. *v.* Broom (1697), 12 Mod. Rep. 134; Rigdon *v.* Hedges (1698), 12 Mod. Rep. 246; Le Caux *v.* Eden (1781), 2 Doug. K. B. 594; The Hercules (1819), 2 Dods. 353. **Distd.** The Telegrafo or Restauracion (1871), L. R. 3 P. C. 673, C. A.

159. Services on land—Salvage services.]—Where a vessel took fire at sea & salvors went to her assistance & conducted her into a harbour where her cargo was unladen:—*Held:* the objection that the unloading of the cargo was not a salvage service, but a service on shore, over which the Admlty. Ct. had no jurisdiction, could not be allowed.—THE ROSALIE (1853), 1 Ecc. & Ad. 188; 18 Jur. 337.

160. Fraud.]—Where a deed comes in by incident, the Admlty. may try whether it was fraudulent.—BUCK *v.* ATWOOD (1727), 2 Stra. 761; 93 E. R. 832.

161. Execution.]—The Acts concerning the jurisdiction of the Admlty. are to be intended of a power to hold plea, & not of a power to award execution; for, notwithstanding the Acts, the judge of the Admlty. may do execution within the body of the county. He may make execution for an amercement of deft. of his goods *in corpore comitatus;* & if he have none may arrest him within the county. —ADMIRALTY CASE, No. 120, *ante.*

Part II.—Jurisdiction in Particular Cases.

SECT. 1.—POSSESSION.

SUB-SECT. 1.—LIMITS TO THE JURISDICTION.

A. Title in Question.

(*a*) *Before Admiralty Court Act*, 1840 (*c.* 65).

162. Jurisdiction limited—Title not in question.]—In respect of disputes of British subjects, the jurisdiction of the ct., as to questions of property, is extremely limited. It interposes to transfer possession, when no direct question of property is involved; but direct questions of property have been long withdrawn to other jurisdictions.—THE MARTIN OF NORFOLK (1802), 4 Ch. Rob. 293. S. C. No. 169, *post.*

163. Where title in dispute—No jurisdiction.]—Where the title to a ship is in dispute between the parties, the question must be determined in another ct., & not in the Admlty. Ct.—THE GUARDIAN (1800), 3 Ch. Rob. 93.

Annotations:—**Apld.** The Fruit Preserver (1828), 2 Hag. Adm. 181. **Refd.** Duncan *v.* M'Calmont (1841), 3 Beav. 409.

164. —— ——.]—The Admlty. Ct. is not permitted to entertain questions of disputed title, but still retains jurisdiction over causes of possession.—THE WARRIOR (1818), 2 Dods. 288.

Annotation:—**Apld.** The John (1830), 2 Hag. Adm. 305.

165. —— ——.]—The Admlty. Ct. does not interfere in cases of adverse title.—THE FRUIT PRESERVER (1828), 2 Hag. Adm. 181.

Annotation:—**Refd.** The John (1830), 2 Hag. Adm. 305.

166. —— ——.]—In a cause of possession the ct. will not examine the title of a person in *bonâ fide* possession of a vessel till it is impeached. Where the only title rests on a conditional assignment of a vessel as a security not reduced into possession, the Admlty. Ct. has not jurisdiction to disturb the person actually in possession under a subsequent sale; nor does it vary the case, because the question comes before it on appeal from a Vice-Admlty. Ct. which has exercised the jurisdiction, more especially as the merits disclosed do not appear to warrant the decision.—THE JOHN (1830), 2 Hag. Adm. 305.

(*b*) *Under Admiralty Court Act*, 1840 (*c.* 65).

167. Jurisdiction—Title in question.]—In a cause of possession the Admlty. Ct. has jurisdiction to try the question of title.—THE MARGARET MITCHELL (1858), Sw. 382; 7 L. T. 803; 4 Jur. N. S. 1193.

168. —— Limits.]—The province of the Admlty. Ct. is merely to determine that the property in the vessel is in the registered owner, but not the terms on which it is so.

A vessel had been purchased by a person who paid his deposit. By agreement he was to pay the residue to P., the vendor's solr., on a certain day. On that day the greater portion of the money was paid over to P. & the vessel delivered to the purchaser; but the bill of sale not being handed over to him, at his request a small portion of the purchase-money was left unpaid. The vessel having been arrested in the Admlty. Ct. by assignees, who refused to recognise the transaction, upon a bill filed for an injunction & specific performance:—*Held:* it was a proper case for interference of the ct.—HUGHES *v.* MORRIS (1849), 14 L. T. O. S. 306; 13 Jur. 1065.

B. Foreign Ships.

169. Consent of parties.]—The Admlty. Ct. may entertain a cause of possession respecting a foreign ship by consent of the parties, where both are foreigners.—THE MARTIN OF NORFOLK, No. 162, *ante.*

170. —— Or of representative of foreign state—Sentence of foreign court.]—The ct. in general declines to interfere in a cause of possession between foreigners, without consent of the parties or sanction of the representative of the foreign state. The sentence of a foreign ct. is an equivalent.—THE SEE REUTER (1811), 1 Dods. 22. S. C. No. 153, *ante.*

Annotation:—**Apld.** The Evangelistria (1876), 2 P. D. 241.

171. —— ——.]—The Admlty. Div. will exercise jurisdiction, in a cause of possession relating to

a foreign ship, between two foreigners so far as to inquire into the position of the respective claimants, provided that the parties consent or the representative of the foreign state intervenes.

In pursuance of the decree of a Greek ct. the Greek consular authorities, on arrival of a ship in England, dismissed defts. & put the ship in possession of a master appointed by pltf. Defts. forcibly ejected the master & took possession of the ship. At the hearing the Greek Consul, acting on behalf of the Greek Govt., expressed the desire that the ct. should exercise jurisdiction :—*Held :* the Admlty. Div. had jurisdiction to examine into the claims of the parties.—THE EVANGELISTRIA (1876), 2 P. D. 241 ; 46 L. J. P. 1 ; 35 L. T. 410 ; 25 W. R. 255 ; 3 Asp. M. L. C. 264. S. C. Nos. 764, 783, *post.*

Annotations :—**Folld.** The Vivar (1876), 2 P. D. 29, C. A **Distd.** The Agincourt (1877), 2 P. D. 239.

172. Claim by British subject.]—The Admlty. Ct. has power to inquire into the title in cases in which British subjects lay claim to a ship coming to England in possession & as property of foreigners. —THE EXPERIMENTO (1815), 2 Dods. 38.

SUB-SECT. 2.—EXERCISE OF JURISDICTION.

173. Claim by majority of interests.]—The power of the Admlty. Ct. to interpose for the purpose of altering possession of a vessel is confined to cases where the majority of interests is with the party invoking the ct.'s interference. A motion to change possession at petition of a moiety of the interests was rejected.—THE ELIZABETH & JANE (1841), 1 Wm. Rob. 278 ; 1 Notes of Cases, 177.

174. —— Claim by moiety not sufficient—Remedy.]—A motion to decree possession to the sole extrix. of L. deceased, who was whilst living the true & lawful owner of one half part or share of a ship, was refused, but the ct. will in such case grant a monition calling upon the other interests to appear & show cause.—THE EGYPTIENNE (1825), 1 Hag. Adm. 346 n.

Annotation :—**Expld.** The Elizabeth & Jane (1841), 1 Wm. Rob. 278.

175. Legal title recognised.]—C. brought a cause of possession against T., the asserted owner in possession, under a transfer from M., for whom it was suggested that C. had made the original purchase. C. was in possession of the bill of sale :—*Held :* (1) whether C. purchased as trustee for another, or under a private understanding, it was unnecessary to inquire, because the legal interest, established before the ct., on his part, excluded all considerations of other equitable titles, which, if they existed, must be left to be enforced in other cts. ; (2) he was the legal proprietor under the bill of sale that had been executed to him.—THE SISTERS (1804), 5 Ch. Rob. 155. S. C. on previous proceedings (1801), 3 Ch. Rob. 214 ; (1802), 4 Ch. Rob. 276.

Annotations :—**Distd.** The John (1830), 2 Hag. Adm. 305· **Consd.** Chasteauneuf *v.* Capeyron (1882), 7 App. Cas. 127. P. C. **Reid.** The Fruit Preserver (1828), 2 Hag. Adm, 181 ; The Valiant (1839), 1 Wm. Rob. 64 ; The Stephen Hart (1864), 11 L. T. 52.

176. ——.]—In cases of possession, the ct. looks to the legal estate, & not to a beneficial or equitable interest in asserted part-owners.—THE VALIANT (1839), 1 Wm. Rob. 64 ; 7 L. T. 442, 803.

177. —— Unless disputed.]—In a cause of possession the ct. will not decline to interfere unless it appears that a question of property is involved. It is for the party proceeded against to set out the grounds upon which he resists the demand of a party claiming as owner.—THE SISTERS (1801), 3 Ch. Rob. 214 ; S. C. on further proceedings (1802), 4 Ch. Rob. 276 ; (1804), 5 Ch. Rob. 155.

Annotations :—**Consd.** The Fruit Preserver (1828), 2 Hag. Adm. 181. **Mentd.** The John (1830), 2 Hag. Adm. 305 ; The Valiant (1839), 1 Wm. Rob. 64 ; The Stephen Hart (1864), 11 L. T. 52 ; Chasteauneuf *v.* Capeyron (1882), 7 App. Cas. 127, P. C.

178. Derivative title—When valid.]—The ct. is disposed to pay particular respect to derivative titles, when fairly possessed ; there must be a sequel of transactions, continued in a course of time, which shall be held conclusive, to cure antecedent defects, & to give security to the title of a *bonâ fide* purchaser.

A British ship had been taken on a voyage from Saffee to Lisbon, by an Algerine corsair, & sold by the Dey of Algiers to a merchant of Minorca, & by him sold, on surrender of Minorca to British arms, to the present owner, a merchant of London. On coming into the port of London, a warrant had been applied for to arrest on the part of the former British owner ; but the ct. refused a warrant, & directed a monition to issue calling on the possessor to show cause why she should not be restored to the former British owner :—*Held :* (1) as the Dey had intervened to guarantee transfer of the ship to the Spanish purchaser he had legalised the act ; (2) it was now much too late for the ct. to interfere for the purpose of annulling the transfer, which had been made with perfect good faith on the part of purchaser, & for an equivalent consideration ; (3) this was not the case of a purchaser from a piratical captor.—THE HELENA (1801), 4 Ch. Rob. 3.

Annotations :—**Consd.** The Harmony (1815), Coop. G. 325. **Reid.** The Telegrafo (1871), 20 W. R. 242, P. C. ; The Charkieh (1873), L. R. 4 A. & E. 59.

179. Equitable rights—How far recognised.]—The Admlty. Ct. will not interfere to dispossess the *bonâ fide* owner of a moiety of a vessel. When the ct. is applied to, at the instance of a legal owner, to exercise its jurisdiction in a cause of possession, it will have due consideration for all equitable claims, although it may not have jurisdiction to enforce equitable rights at the instance of those claiming such rights.

P., master of a ship in possession, was the registered owner of twenty-eight shares only ; R. was registered owner of the remaining thirty-two. It was proved, to the satisfaction of the ct., that R. held four of his shares as trustee for P. :—*Held :* P. entitled to retain possession.—THE VICTORIA (1859), Sw. 408 ; 5 Jur. N. S. 204 ; 7 W. R. 330.

180. —— ——.]—A transfer of shares in a ship by sale at auction was not legally completed as required by Registry Act, 1845 (c. 89), though the purchaser had paid a large sum of money. The vendors proceeding against purchaser, in a cause of possession, were not allowed their costs. In a case of palpable injustice, the ct. would hold its hand, unless compelled by a superior ct. to proceed.—THE VIRTUE (1853), 1 Ecc. & Ad. 77 ; 17 Jur. 843.

181. Conditions in which jurisdiction exercised.]—The ct. is in the habit of transferring possession from the actual holder, by its own movement, or at the instance of other cts. which have no direct power for that purpose ; but it is bound to consider itself as moving within very narrow limits, if it proceeds at all originally upon a question of title. It must be in cases extremely simple that it acts on a merely preferable title to be reached by its own judgment. Where possession is gained by force & violence, or by fraud manifest upon the face of the transaction ; or where the party in possession is avowedly entitled only as a minor owner in opposition to the majority of interests, the ct. feels no hesitation ; but where a course of transactions in-

Sect. 1.—*Possession : Sub-sect.* 2. *Sect.* 2 : *Sub-sect.* 1, *A. & B.*

volving fraud is objected, it declines entering into the question, & leaves it to be determined by inquiry of cts. which have ampler means of arriving at the truth, & the real justice of the case. It is only in simple cases that it can act with effect ; but in those which, being complex, require long & minute investigation, it cannot proceed with safety.

Where an extremely old ship, very much worn, both by time & tempest, sustained such damage in a storm as occasioned her detention at a foreign port for a considerable time to receive repairs, & the ship was sold by the master, without any authority (as alleged) from the registered owners, to W., who repaired the vessel, which was arrested at Liverpool :—*Held :* the ct. would not interfere because (1) it only interfered in cases which were very simple, & in this case the transaction impeached as fraudulent (which was strongly denied) rested on a series of events & on a multitude of documents ; (2) on the facts there was nothing that impeached the title of W. as it appeared that there was ample authority given to the master to sell, both by the conduct of the parties at home, & by the circumstances in which the property was placed, & that in the sale all due caution was used, & attention shown to the interests of former owners, & the previous authority of the master had been confirmed by subsequent recognitions & approvals. —THE PITT (1824), 1 Hag. Adm. 240.

Annotations :—**Apld.** The John (1830), 2 Hag. Adm. 305 ; The Beatrice, otherwise the Rappahannock (1866), 36 L. J. Adm. 9.

182. Wrongdoer.]—The Admlty. Ct. has, in a cause of possession jurisdiction to take a vessel from a wrongdoer & to deliver it to the rightful owner.

Where it appeared upon a rule *nisi* for a prohibition to restrain the Admlty. Ct. from proceeding in a cause of possession that the proctor for defts. had merely asserted them to be owners generally, & the other party had put in an allegation, by which it appeared he was the registered owner, & the vessel had wrongfully come into defts.' possession, & the latter had not pleaded any title, the ct. discharged the rule for a prohibition.—*Re* BLANSHARD (1823), 2 B. & C. 244 ; *sub nom.* BAXTER *v.* BLANCHARD, 3 Dow. & Ry. K. B. 177 ; 107 E. R. 374.

183. ——.]—The Admlty. Ct. had, even when its jurisdiction was more restricted, authority to decree possession of a vessel to the owner, who had been deprived of it by force, violence or fraud.—THE BEATRICE (otherwise THE RAPPAHANNOCK) (1866), 36 L. J. Adm. 9. S. C. No. 185, *post.*

184. Purchaser—Sale without authority.]—The possession of a ship, time having been allowed for an appearance by the purchaser, was decreed *in pœnam* to the former owners, upon affidavits that the ship, having been abandoned by the master, was sold without their concurrence or consent.—THE LAGAN (1838), 3 Hag. Adm. 418.

185. —— **Vendor's lien.**]—The American Govt. was held not entitled to possession of a vessel partly purchased by the late Govt. of the Confederate States without satisfying the vendors' lien for the unpaid portion of the purchase-money.—THE BEATRICE (OTHERWISE THE RAPPAHANNOCK) No. 183, *ante.*

186. —— **Rectification of register—Mistake.**]—A British ship was mtged. by an instrument in the form prescribed by M. S. Act, 1854 (c. 104), which was duly registered. The mtgor. died intestate, & the mtgee. sold the ship under his power of sale & executed a bill of sale to the purchaser. By mistake, a receipt for payment of the mtge. money was indorsed on the mtge. & signed by mtgee. & produced to the registrar of shipping, who recorded same. Afterwards the bill of sale was produced to the registrar, who refused to register it on the ground that the property in the ship had vested in the representative of mtgor. In order to complete purchaser's title a suit *in rem* was instituted on behalf of mtgee. & purchaser :—*Held :* the ct. had jurisdiction to grant a decree declaring that purchaser was entitled to possession of the ship.—THE ROSE (1873), L. R. 4 A. & E. 6 ; 42 L. J. Adm. 11 ; 28 L. T. 291 ; 21 W. R. 511 ; 1 Asp. M. L. C. 567. S. C. No. 256, *post.*

187. —— —— **Entry of invalid mortgage.**]—The purchaser of a ship mtged. it to the vendor to secure payment of the purchase-money. At the same time he signed a blank form of mtge., which he handed to deft., who had negotiated the purchase, for a special purpose. Deft. wrongfully filled up the blank form as a second mtge. to himself, to secure an alleged debt to himself, & procured it to be registered. The ct. having ordered the cancellation of the document as being invalid : —*Held :* the ct. had power, by virtue of its inherent jurisdiction, to rectify the register by ordering the entry of the invalid mtge. to be expunged.—BROND *v.* BROOMHALL, [1906] 1 K. B. 571 ; 75 L. J. K. B. 548.

188. Master—Extent of estoppel.]—A master of a vessel cannot in a cause of possession dispute the owner's title.

It is a matter of ordinary course in this ct., in causes of possession, where sole owners of a vessel, or the majority of persons who have a right or title, join in the suit, to displace the master who may have possession, & restore her to the owners : where questions have arisen of great difficulty as to complicated title, the ct. has declined to interfere. The only extent to which a master can allege the title to be in another person is where it is done for the purpose of inducing the ct. to give further time for the appearance of the assignee of the sole owner : the ct. would allow a master or other person to make such an application, & would grant further time if necessary (DR. LUSHINGTON). — THE WINDSOR CASTLE (1841), 1 Notes of Cases, 118 ; (1843), 2 Notes of Cases, liii. Supp.

Annotation :—**Distd.** The Alicia Annie & The Amirita v. The Scindia (1865), 2 Mar. L. C. 232.

189. —— **Removal—Though part-owner.**]—The majority of part-owners have a right to remove the captain though he is also a part-owner, & the ct. will decree an order to the marshal to deliver the ship & a monition against the captain to deliver up the register.—ADAMS *v.* CROUCH (1771), Burrell, 110. S. C. No. 200, *post.*

190. —— —— ——.]—The dispossession of a master is, in its nature, not an uncommon proceeding ; all that the ct. requires in cases where the master is not an owner is that the majority of the proprietors should declare their disinclination to continue him in possession. In the case of a master & part-owner, something more is required before the ct. will proceed to dispossess a person who is also a proprietor in the vessel, & whose possession the common law is, upon general principles, inclined to maintain. It is not, however, by any means unprecedented for the ct. to proceed even to that extent ; but some special reason is commonly stated to induce the ct. to interpose. "That the master is irregular in his accounts with his owners"

189 i. *Master — Removal — Though part-owner—Balance due as defence to suit for possession.*]—The fact of an outstanding balance being due to the captain of a vessel as part-owner is not a defence to a suit for possession ; & the ct. will, notwithstanding, make a decree of possession, with costs.—THE ARGONAUT (1850), 5 Ir. Jur. O. S. 251 (Adm.).—**IR.**

is a good reason.—THE NEW DRAPER (1802), 4 Ch. Rob. 287.

Annotations :—**Consd.** The Windsor Castle (1841), 7 L. T. 225. **Foll.** The Kent (1862), Lush. 495.

191. —— —— ——.]—In a cause of possession brought by the owner of the greater part of a vessel, the master, owning the remaining part, is not entitled to retain possession of the vessel upon an offer of security to the amount of his co-owner's interest.—THE KENT (1862), Lush. 495.

192. —— —— **Ground for removal.**]—An attempt by the master of a ship to defraud constitutes a sufficient necessity for removal to induce the ct. to act under M. S. Act, 1854 (c. 104), s. 240. The power of the ct. acting under s. 240 is not limited to the class of cases enumerated in s. 239.—THE ROYALIST (1863), Brown. & Lush. 46 ; 32 L. J. P. M. & A. 105 ; 9 Jur. N. S. 852.

193. —— **Ship's papers—Lien.**]—The Admlty. Div. has power, upon application of a ship's owners, to order a master who has been dismissed from their employment to deliver up the certificate of registry & other papers & property belonging to the ship where he refused to surrender them. *Semble :* a master, whether co-owner or not, can have no lien upon a certificate of registry or ship's papers in case of wrongful dismissal by the managing owners. —THE ST. OLAF (1876), 35 L. T. 428 ; 3 Asp. M. L. C. 268.

194. Cargo.]—THE LEIFDE & JACOBINE (1805), 6 Ch. Rob. 93.

SECT. 2.—CO-OWNERSHIP AND RESTRAINT.

SUB-SECT. 1.—NATURE OF JURISDICTION.

A. At Common Law.

195. Disputes between co-owners—Arrest till security given.]—If one of several part-owners of a ship objects to a voyage the others propose making, he may by process out of the Admlty. arrest the ship, & stop her until the other part-owners give security for her safe return.—BLACKET *v.* ANSLEY (1697), 1 Ld. Raym. 235 ; 91 E. R. 1053.

Annotations :—**Consd.** Brymer *v.* Atkins (1789), 1 Hy. Bl. 164. **Refd.** Adams *v.* Crouch (1771), Burrell, 110.

196. *S. P.* LAMBERT *v.* AERETREE (1697), 1 Ld. Raym. 223 ; 91 E. R. 1045.

Annotations :—**Consd.** Brymer *v.* Atkins (1789), 1 Hy. Bl. 164 ; The Cawdor (1900), 48 W. R. 293, C. A.

197. —— ——.]—Part-owners of a ship dissenting from the voyage may arrest the ship in the Admlty. & oblige the assenting owners to give security.—MORE *v.* ROWBOTHAM (1704), 6 Mod. Rep. 162 ; 87 E. R. 919.

198. —— ——.]—A prohibition was moved for to the Admlty. in a suit brought by one part-owner against the other who would go to sea with the ship in order to oblige him to give security :—*Held :* if security was offered & refused a prohibition would be granted, but not before.—ANON. (1730), 1 Barn. K. B. 410 ; *sub nom.* DYMOCK (DIMMOCK) *v.* CHANDLER (1730), 1 Barn. K. B 415 ; Fitz-G. 197 ; 2 Stra. 890 ; 94 E. R. 276, 280.

199. —— ——.]—Where there are several part-owners of a ship, owners of the less shares may arrest the ship in the Admlty., & compel a security to be given by the others before they be permitted to leave port.—OUSTON *v.* HEBDEN (1745), 1 Wils. 101 ; 95 E. R. 515.

200. —— ——.]—A suit may be maintained in the Admlty. by one part-owner against another who would take the ship to sea to oblige him to give security.—ADAMS *v.* CROUCH, No. 189, *ante*.

201. —— ——.]—The Admlty. Ct. alone has jurisdiction to decide in a summary way between part-owners as to who should have control of the vessel.—THE MARY & ANNE (1771), cited Burrell, 148.

202. —— ——.]—The Admlty. Ct. has authority to arrest & detain a ship, upon application of a part-owner who dissents from her intended employment, until security be given by the other part-owners to the full value of his share.—THE APOLLO (1824), 1 Hag. Adm. 306. S. C. Nos. 225, 233, 1239, *post*.

203. —— —— **Enforcement of security.**]—If one of several part-owners of a ship object to a voyage he can compel them to enter into a stipulation in the Admlty. Ct. for her safe return. *Qu. :* whether he can maintain a suit in the Admlty. upon such stipulation.—DEGRAVE *v.* HEDGES (1707), 2 Ld. Raym. 1285 ; 92 E. R. 343 ; *sub nom.* GRAVE *v.* HEDGES, Holt K. B. 470.

Annotations :—**Consd.** Brymer *v.* Atkins (1789), 1 Hy. Bl. 164 ; Smart *v.* Wolff (1789), 3 Term Rep 323.

204. —— **Possession decreed — Subsequent detention.**]—In a dispute between co-owners of a ship with reference to its possession, F. was holder of two eighth shares, & the ship was in his dock for repairs. W., to whom possession had been decreed, was owner of five eighth shares. F., under an order of the ct., had delivered up the ship's register. W. was put in possession, & accepted the shipkeeper recommended by F., & had access to the vessel, but it was unable to be taken from dock owing to another vessel being in the way, which vessel would be there for some months. A motion to attach F. to enforce due execution of the decree for possession was refused.

The ct. has gone as far as it can, it has restored possession to the owner of a majority of interests & he is in possession, & if the vessel is detained the remedy must be sought elsewhere to divest possession out of the hands of an unlawful detainer (LORD STOWELL).—THE JOHN OF LONDON (1825), 1 Hag. Adm. 342.

B. Under Admiralty Court Act, 1861 (*c.* 10).

205. Extent of jurisdiction.)—The above Act, by s. 8, confers upon the Admlty. Ct. full power to deal with questions between co-owners which come under the categories of ownership, possession, employment, & earnings, & to settle accounts relating thereto.

Defts., part-owners of a vessel, in a suit for sale brought against them by their co-owners, set up in their answer a claim for damages alleged to have been occasioned by negligence or other wrongful act of such co-owners. Pltfs. in their reply denied the jurisdiction of the ct. On demurrer to the reply :—*Held :* the Admlty. Ct. had jurisdiction to entertain such claim.—THE CEYLON (1868), 18 L. T. 417 ; 3 Mar. L. C. 96. S. C. No. 222, *post*.

206. Share of Ship—Transfer—Right of Transferor.]—Pltf. & deft. were co-owners of a ship.

PART II. SECT. 2, SUB-SECT. 1.—B.

205 i. *Extent of jurisdiction—Colonial Courts of Admiralty Act*, 1890 (*c.* 27).]—Pltfs., part-owners of the *S.*, sued defts., part-owners thereof, for money paid & disbursements made by pltfs. for defts. Defts. sought to set aside the writ on the grounds that the ct. had no jurisdiction ; that the co-owners could not come to ct. for an account, or recover an amount where they kept the accounts themselves ; also that there was no dispute as to the amount :—*Held :* (1) by Admlty. Ct. Act, 1861 (c. 10), s. 8, the High Ct. had jurisdiction to decide all questions between co-owners, & such jurisdiction might be exercised in Canada under s. 2 (2) of the Act of 1890 ; (2) the action was properly brought, & defts.' application must be dismissed.—HALL *v.* THE SEAWARD (1892), 3 Ex. C. R. 268.—**CAN.**

205 ii. *S. P.* COPE *v.* RAVEN, No. 223 i, *post*.—**CAN.**

Sect. 2.—*Co-ownership & restraint: Sub-sect.* 1, *B.*; *sub-sect.* 2, *A. B. & C.*; *sub-sect.* 3.]

Pltf. sold his share in the ship to a third person, & afterwards instituted a suit *in rem* in the Admlty. Ct. to have an account taken between himself & deft. in relation to the employment & earnings of the ship during the time he & deft. were co-owners:—*Held:* as the suit related to questions which arose between pltf. & deft. while they were co-owners, the ct. had jurisdiction to entertain the suit, notwithstanding pltf. had ceased to be a co-owner at the time of institution of the suit.—THE LADY OF THE LAKE (1870), L. R. 3 A. & E. 29; 39 L. J. Adm. 40; 21 L. T. 683; 18 W. R. 528; 3 Mar. L. C. 317. S. C. No. 219, *post.*

207. —— —— Transferee for value without notice.]—An action of co-ownership was instituted on behalf of G. against a British vessel, & against H., deft. intervening. The statement of claim alleged, *inter alia*, that by bill of sale duly registered in 1867 deft., as sole owner of the vessel, transferred for valuable consideration a moiety of same to T., who, by a subsequent bill of sale duly registered in 1876, transferred the moiety of the vessel to pltf. for value. Deft., in his defence, denied that he had at any time signed a bill of sale transferring any shares in the vessel to T., & alleged, *inter alia*, that if any such bill of sale had been registered, same was made & registered fraudulently. At the hearing of the action the execution & registration of the bills of sale were proved. The ct. thereupon directed that the question whether the fraud alleged could affect the rights of pltf. should be raised on demurrer. Pltf. thereupon demurred to so much of the statement of defence as alleged fraud:—*Held:* the demurrer must be sustained on the ground that, the legal ownership in the moiety of the vessel having passed to pltf. for valuable consideration by the execution & registration of a bill of sale without notice of fraud, pltf. had thereby acquired a title to same as against deft.—THE HORLOCK (1877), 2 P. D. 243; 47 L. J. P. 5; 36 L. T. 622; 3 Asp. M. L. C. 421. S. C. No. 220, *post.*

208. —— Person agreeing to buy.]—The managing owners of the *B. K.* in 1882 agreed to sell deft. V. one sixty-fourth share in the *B. K.*, for which he gave a bill of exchange for £156, & received from them a receipt for same as "being one sixty-fourth share in the *B. K.*" In 1883 the managing owners sent V. £8 in respect of profits on his share, & sent him a statement of accounts. No bill of sale of the share was ever executed by the managing owners, & it appeared their shares in the *B. K.* were mtged. at the time of sale to V., & they never were in a position to redeem them. Certain owners having paid losses incidental to the working of the ship, now sued V. as a co-owner for his proportion of the losses:—*Held:* (1) notwithstanding the receipt by V. of the £8, he was not, either at law or in equity, a co-owner; (2) the managing owners had no authority to pledge his credit; (3) V. was not liable.—*Qu.*, whether s. 8 of the above Act, giving the Admlty. Ct. jurisdiction to decide questions between co-owners, is not confined to questions between registered co-owners.—THE BONNIE KATE (1887), 57 L. T. 203; 6 Asp. M. L. C. 149. S. C. No. 210, *post.*

Annotation:—**Consd. & Distd.** Von Freeden *v.* Hull (1906), 75 L. J. K. B. 359.

SUB-SECT. 2.—EXERCISE OF JURISDICTION.

A. Persons subject to Jurisdiction.

209. Co-owners—Of shares ascertained.]—The Admlty. Ct. is open all the year round to applications by part-owners to restrain the sailing of ships without their consent, until security is given to the amount of the respective shares. But where the shares are not ascertained, that ct. has no jurisdiction; & in such case the Ch. Ct. will exercise a concurrent jurisdiction, by injunction, to restrain the sailing of a ship until the share of the party complaining shall be ascertained, & security given to the amount of it.—HALY *v.* GOODSON (1816), 2 Mer. 77; 35 E. R. 870.

Annotation:—**Expld.** Castelli *v.* Cook (1849), 7 Hare, 89.

210. Purchaser of share — Not registered.]—THE BONNIE KATE, No. 208, *ante.*

211. Joint-tenants — No jurisdiction.]—The ct. has declined to interfere between joint-tenants in respect of possession of their ship.—THE MARGARET, Nos. 226, 231, 236, 797, *post.*

For full anns., *see* S. C. No. 226, *post.*

212. Managing owner—Added as defendant.]—Where an action is brought *in rem* against a ship by owners of certain shares therein claiming possession & an account against the managing owner, & the latter makes default in appearing, the ct. will order such managing owner to be joined as a deft., so that his accounts may be investigated, & will give possession to pltfs. if they hold a majority of shares; but will not order, before reference, a sale of deft.'s shares to satisfy pltf.'s costs & any sum found due at the reference.—THE NATIVE PEARL (1877), 37 L. T. 542; 3 Asp. M. L. C. 515.

213. Foreign ship — No jurisdiction.]—The ct. has no jurisdiction, in the case of a foreign ship, to entertain a cause of possession at the suit of the majority of co-owners against the master, who is a part-owner, all being foreigners.—THE JOHAN & SIEGMUND (1810), Edw. 241.

214. —— —— Though British part-owner.]—The ct. has no power, at the suit of a British part-owner of a foreign ship, to arrest her until bail is given for her safe return to her own port abroad.—THE GRAFF ARTHUR BERNSTORFF (1854), 2 Ecc. & Ad. 30.

215. —— —— Though ship registered in British possession.]—The Admlty. Div. has no jurisdiction to entertain an action *in rem*, instituted under Admlty. Ct. Act, 1861 (c. 10), s. 8, claiming an account of the earnings & sale of a ship when the ship is registered at the port of Guernsey, & not at any port in England or Wales.—THE ROBINSONS & THE SATELLITE (1884), 51 L. T. 905; 5 Asp. M. L. C. 338.

216. —— —— Unless foreign consul intervenes.]—In a suit by pltf., a foreigner, against a foreign vessel to enforce his right as part-owner for an account for possession, the ct., upon the foreign Consul refusing to interfere, declined to entertain the suit, which was dismissed with costs, but not damages.—THE AGINCOURT (1877), 2 P. D. 239; 47 L. J. P. 37.

B. Persons entitled to Benefit of Jurisdiction.

217. Part-owners—Minority—Manager appointed by all owners.]—The ct. has jurisdiction to arrest a vessel in an action of restraint at suit of a

PART II. SECT. 2, SUB-SECT. 2.—A.

c. *Vessel not registered in Ireland.*]—The Admlty. Ct. has jurisdiction in a cause of restraint though the vessel be not registered in Ireland.—THE LADY CLERMONT (1870), 4 I. L. T. Jo. 512; 23 L. T. 283.—**IR.**

PART II. SECT. 2, SUB-SECT. 2.—C.

223 i. *Accounts.*]—Under the joint effect of Admlty. Ct. Act, 1861 (c. 10), ss. 8, 35, Colonial Cts. of Admlty. Act, 1890 (c. 27), s. 2 (2), & Admlty. Act, 1891, ss. 3, 4, the Local Ct. in Admlty. has jurisdiction *in rem* in an action for an account between the co-owners of a ship. *The Idas* (1863), Brown. & Lush. 65, cited.—COPE *v.* RAVEN (1905), 11 B. C. R. 486.—**CAN.**

part-owner holding a minority of shares, notwithstanding the vessel is about to proceed on a voyage approved of by a majority of part-owners, & is being employed under a charter entered into by the ship's husband, appointed to act on behalf of all the owners.—THE TALCA (1880), 5 P. D. 169 ; 42 L. T. 61 ; 29 W. R. 123 ; 4 Asp. M. L. C. 226.

Annotation :—**Dbtd.** The Vindobala (1888), 58 L. T. 353.

218. —— —— ——.]—An agreement between the owners of a ship & two persons appointing them ship's husbands & managers, & empowering them to continue to act as such at all times thereafter for the owners, their exors., administrators, & assigns, & giving them entire management of the vessel, does not prevent a dissentient part-owner from instituting an action of restraint, & obtaining bail from his co-owners in the value of his shares.—THE ENGLAND (1886), 12 P. D. 32 ; 56 L. J. P. 115 ; 56 L. T. 896 ; 35 W. R. 367 ; 6 Asp. M. L. C. 140.

219. Transferor of share.]—THE LADY OF THE LAKE, No. 206, *ante*.

220. Transferee for value without notice.]—THE HORLOCK, No. 207, *ante*.

221. Mortgagee.]—THE EASTERN BELLE, No. 266, *post*.

C. Cases within Jurisdiction.

222. General principles—Damages for negligence.]—THE CEYLON, No. 205, *ante*.

223. Accounts.]—By Admlty. Ct. Act, 1861 (c. 10), s. 8, the Admlty. Ct. has jurisdiction—on a petition being filed by a part-owner of a British ship, alleging that his co-owner, the ship's husband, has rendered false accounts—to order an account to be taken of the earnings & disbursements of the ship, & of moneys received upon insurances of ship & freight. The sect. being remedial is retrospective, & gives the ct. jurisdiction, notwithstanding the ship has been lost before the date assigned for the Act to come into operation.—THE IDAS (1863), Brown. & Lush. 65 ; 2 New Rep. 45.

Annotation :—**Apld.** The Lady of the Lake (1870), L. R. 3 A. & E. 29.

224. —— **Stay of execution—Co-owners sued in Queen's Bench Division.**]—A managing owner, who had not delivered accounts for nine years, instituted a co-ownership action for settlement of accounts, & for payment of the balance found due to him, & claimed certain items in respect of materials supplied to the ship for which he had not paid, & for which defts. were being sued in Q. B. Div. The registrar in his report allowed pltf. these items. Upon application to confirm the report, & for judgment, the ct. decreed payment of the amount found due by the registrar, but stayed execution until defts. were protected against claims in the Q. B. Div., & refused pltf. costs of the action upon the ground of delay in rendering his accounts.—THE CHARLES JACKSON (1885), 52 L. T. 631 ; 5 Asp. M. L. C. 399.

225. —— **Former jurisdiction.**]—A co-partner could not originate a suit for accounts in the Admlty. Ct.—THE APOLLO, No. 202, *ante ;* Nos. 233, 1239, *post*.

SUB-SECT. 3.—REMEDIES.

226. Bond for safe return—Form of bond.]—A bond for the ship's safe return is a remedy for a minority of co-partners. *Semble :* bonds should be limited "to the safe return to any port of this country," since when a vessel is within the protection of the country to which she belongs, she is in her general home ; & the parties are restored, as to any legal remedies, to the situation in which they stood before departure of the vessel.

The ct. declined to pronounce forfeited a bond given for the safe return of a vessel to a particular port of the United Kingdom, the vessel having been carried in distress into another port, & there arrested in suits of salvage & of wages, holding that while the vessel was within the jurisdiction of the ct., safe & unsold, the application was premature.—THE MARGARET (1829), 2 Hag. Adm. 275. S. C. No. 211, *ante ;* Nos. 231, 236, 797, *post*.

Annotation :—**Consd.** The Cawdor, [1900] P. 47, C. A.

227. —— ——.]—In an action of restraint the proper form of bond is a bond for safe return, & not a bond to answer judgment in the action.—THE ROBERT DICKINSON, No. 784, *post*.

228. —— **Duration of bond—Second action.**]—Where minority owners have instituted an action of restraint claiming security for safe return of the ship to a named port within the jurisdiction & a bond is given by defts. for that purpose, such bond remains in force until the ship returns to that port, & pltfs. are not entitled to institute another action for further security upon the ship's return to another port within the jurisdiction. If such second action is instituted it will be dismissed with costs.—THE REGALIA (1884), 51 L. T. 904 ; 5 Asp. M. L. C. 338.

Annotation :—**Refd.** The Cawdor, [1900] P. 47, C. A.

229. —— —— **Changes in ownership.**]—In an action of restraint a bail bond was given for safe return of the ship "from as many voyages as she shall sail upon before notice shall have been given to defts. by pltfs. that they withdraw their claims for security." Two years after the bond had been given, the majority of shares owned by defts. having in the meantime been transferred to new owners, & the management of the ship having also passed into other hands, the sureties applied to be released from the bond :—*Held :* (1) it could not have been intended the sureties should remain bound for all time, notwithstanding the change of ownership ; (2) the bond must be cancelled.—THE VIVIENNE (1887), 12 P. D. 185 ; 56 L. J. P. 107 ; 57 L. T. 316 ; 36 W. R. 110 ; 6 Asp. M. L. C. 178.

Annotation :—**Refd.** The Cawdor, [1900] P. 47, C. A.

230. —— **"Safe return," what is.**]—A bond had been given "for the safe return of a ship to the port of Whitehaven, to which she belonged" :—*Held :* her arrival at Belfast within the specified time, & afterwards at Whitehaven, her proper port, satisfied the terms of the bond.—THE ANNE (1829), 2 Hag. Adm. 279 n.

Annotation :—**Refd.** The Cawdor, [1900] P. 47, C. A.

231. —— —— ——.]—THE MARGARET, Nos. 211, 226, *ante ;* Nos. 236, 797, *post*.

For full anns., *see* S. C. No. 226, *ante*.

232. —— —— ——.]— On an application to enforce a bond "for safe return of the vessel to the port of Hull" the majority of owners appeared. The vessel subsequently arrived, &, no further proceedings taking place, the ct. dismissed

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PART II. SECT. 2, SUB-SECT. 3.

226 i. *Bond for safe return—Form of bond.*]—Pltf. brought an action on a bond for $2,500, being the value of pltf.'s share in the ship, one of the conditions of which bond was that deft. would within six months bring the *A.* to a certain port in good condition & repair or pay pltf. $2,500. Objection was taken to the jurisdiction of the ct. on the ground that the bond was an ordinary common law bond, & that pltf. when he accepted the bond abandoned his remedy in the Admlty. Ct. :—*Held :* the objection was well founded, as the bond was made without reference or application to the ct. & differed in that respect from a bond executed in the ct. at the instance of minority owners by a majority intending to use the ship. In the latter case the bond or bail is not a contract between the parties, but a security given to the ct. which the ct. can enforce. *The Baynall*, 12 Jur. 1008, refd.—HEATER *v.* ANDERSON (1910), 13 Ex. C. R. 417.—CAN.

Sect. 2.—Co-ownership & restraint: Sub-sect. 3. Sect. 3: Sub-sects. 1 & 2, A. & B.]

proceedings without costs on either side.—THE WATERHEN (1829), 2 Hag. Adm. 279 n.

233. —— Forfeiture—Acts amounting to.]—The bail bond looks only to the safe return of the ship or to payment of the stipulated sum, & upon loss of the ship immediate payment of the entire sum stipulated will be ordered.—THE APOLLO, Nos. 202, 225, *ante;* No. 1239, *post.*

234. —— —— ——.]—By a bail bond, in an action of restraint, the sureties submitted themselves to the jurisdiction of the ct. & consented " that if the (named vessel) shall not safely return to the port of Liverpool, & defts. (the owners of the vessel other than pltf.) shall not, in such case, pay to pltf. (the appraised value of his shares), execution may issue " against them. The vessel, which, at the time the bond was given, had been dispatched by defts. on a voyage from Hartlepool to Calcutta, arrived at Dundee in Scotland, & left again on a voyage to New York, there to load for Australian ports. On motion by pltf., Barnes, J. pronounced the bond forfeited, & ordered the amount to be paid into ct. with liberty to the sureties to show cause :—*Held :* (1) there was jurisdiction to make the order ; (2) assuming a discretion in the ct. in respect of enforcement of a security given to the ct., that discretion had been rightly exercised, as the condition of the bond for safe return was not limited to the vessel being lost, but was broken by the ship, instead of returning to Liverpool, being taken to a port out of the jurisdiction of the English Admlty. Ct., & sent on another voyage.—THE CAWDOR, [1900] P. 47 ; 69 L. J. P. 23 ; 81 L. T. 705 ; 48 W. R. 293 ; 6 Asp. M. L. C. 19, C. A.

235. —— Set aside—If action unfounded.]—In an action of restraint a bail bond, given by defts. before the trial, for safe return of a ship, is only an ordinary step in Admlty. litigation to prevent expense & possible loss arising from arrest, & the ct. will set it aside if at the hearing it appears that pltf. was not entitled to institute the action.—THE KEROULA, Nos. 253, 767, *post.*

236. Sale—Ship or shares.]—In cases of disagreement the ct. may compel a sale either of the ship or of the shares of the minority on application of a majority of owners.—THE MARGARET, Nos. 211, 226, 231, *ante ;* No. 797, *post.*

Annotation :—**Consd.** The Cawdor, [1900] P. 47, C. A.

237. —— Discretion — To be exercised with caution.] — The Admlty. Div. has power under Admlty. Ct. Act, 1861 (c. 10), s. 8, in a co-ownership action to order the sale of a ship on application of a minority of owners, but such power will always be exercised with great caution.—THE NELLY SCHNEIDER (1878), 3 P. D. 152 ; 39 L. T. 360 ; 27 W. R. 308 ; 4 Asp. M. L. C. 54.

Annotations :—**Folld.** The Hereward, [1895] P. 284. **Reid.** The Marion (1884), 33 W. R. 432.

238. —— —— When sale ordered.]—The majority of co-owners of a ship, by constituting themselves a limited liability co., made it impossible for the ship to be profitably employed in the general interests of owners, unless the dissenting minority of owners consented to come in to the co. On motion by the minority, in an action of restraint, for sale of the ship :—*Held :* (1) the majority of owners had no right to change the character of ownership without the consent of all persons concerned ; (2) the ct. would exercise its discretionary power under Admlty. Ct. Act, 1861 (c. 10), s. 8, & decree sale of the ship ; (3) the decree would be ordered to lie in the registry for four days to give the co. the opportunity of purchasing the shares of appcts.—THE HEREWARD, [1895] P. 284 ; 64 L. J. P. 87 ; 72 L. T. 903 ; 44 W. R. 288 ; 8 Asp. M. L. C. 22 ; 11 R. 798.

239. —— —— —— Ex parte application—Parties.]—Pltf. was owner of eight shares, & deft. of twenty-eight shares of the *A.* Pltf. filed his petition under Admlty. Ct. Act, 1861. On an *ex p.* motion P., on behalf of pltf. & upon consent of W., owner of eight shares, & H., who claimed to be equitably entitled to four shares of the *A.*, moved for an account of the earnings of the vessel since Nov. 1853, & for a sale. The ct. (deft. having had notice of the motion & not having appeared) granted the application.—THE ALBION (1862), 6 L. T. 164 ; 1 Mar. L. C. 206.

240. —— —— When sale refused.]—The owner of twenty-two sixty-fourth shares in a ship, being pltf. in an action of restraint, applied on motion before hearing of the action for sale of the vessel proceeded against, on the ground that pltf. & defts. could not agree as to management of the vessel :—*Held :* (1) no sufficient reason existed in fact for ordering a sale ; (2) whether or not the ct. had jurisdiction to order a sale, the motion must be refused. —THE MARION (1884), 10 P. D. 4 ; 54 L. J. P. 8 ; 51 L. T. 906 ; 33 W. R. 432 ; 5 Asp. M. L. C. 339.

241. Appointment of receiver.]—The ct. will appoint a receiver in a co-ownership suit where circumstances exist which in its opinion render such a course just & convenient.—THE AMPTHILL (1880), 5 P. D. 224 ; 29 W. R. 523.

242. Third parties—Monition to bring in freight.] —In a cause between co-owners, under Admlty. Ct. Act, 1861 (c. 10), s. 8, the ct. granted a citation *in personam* on deft., & a monition on London Dock Co. to bring in freight detained by them under a stop order from defts.—THE MEGGIE (1866), L. R. 1 A. & E. 77.

SECT. 3.—MORTGAGE.

SUB-SECT. 1.—JURISDICTION AT COMMON LAW.

243. No jurisdiction—When question of property involved.]—Upon questions of mtge. the Admlty. Ct. has no jurisdiction ; whether a mtge. is foreclosed, whether a mtgee. has a right to take possession of a chattel personal, whether he is the legal or only the equitable owner, whether a right of redemption means that a mtgee. is restrained from selling in repayment of his debt till after the time specified for redemption is past ; the decision of these questions is not within the jurisdiction or province of the Admlty. Ct., which never decides on questions of property between a mtgee. & owner.—THE NEPTUNE, Nos. 56, 58, *ante ;* No. 728, *post.*

For full anns., *see* S. C. No. 56, *ante.*

244. —— ——.]—Prior to Admlty. Ct. Act, 1840 (c. 65), s. 3, the Admlty. Ct. had no power to decide upon claims of mtgees. ; a ct. of equity must have been applied to.—THE PERCY (1837), 3 Hag. Adm. 402.

Annotations :—**Consd. & Dbtd.** The Dowthorpe (1843), 2 Wm. Rob. 73 ; The Fortitude (1843), 2 Wm. Rob. 217.

245. —— Mortgagee not recognised.]—A vessel being sold under a decree of the Admlty. Ct. in a suit of subtraction of wages, the ct., having no cognisance of mtgees., will not order the surplus of proceeds to be paid to a mtgee. to whom possession had never been given, but will direct such surplus to remain in the registry, subject to such order as may

come to the ct.—THE PORTSEA (1827), 2 Hag. Adm. 84.

Annotation :—**Distd.** The Fortitude (1843), 2 Notes of Cases, 515.

246. *S. P.* THE EXMOUTH (1828), 2 Hag. Adm. 88 n.

Annotation :—**Refd.** The Fortitude (1843), 8 Jur. 23.

SUB-SECT. 2.—STATUTORY JURISDICTION.

A In General.

247. Admiralty Court Act, 1840 (c. 65)—Limits of jurisdiction.]—The enabling power conferred upon the ct. by s. 3 of the above Act does not extend to all questions arising out of a deed of mtge., but is confined to the ship itself being mtged. Where a vessel is arrested at suit of mariners for wages, but not the freight (which was not in the hands of the ct.), the ct. will not exercise its ordinary jurisdiction, or that given by the above Act, at the instance of a mtgee., to adjudicate questions as to ownership of the freight.—THE FORTITUDE (1843), 2 Wm. Rob. 217 ; 2 Notes of Cases, 515 ; 2 L. T. O. S. 229 ; 8 Jur. 23. S. C. No. 1249, *post.*

Annotation :—**Refd.** Place *v.* Potts (1853), 1 C. L. R. 679.

248. —— Validity of mortgage—Not open to question.]—While a mtge. remains indorsed on the certificate of registry, the Admlty. Ct. must consider it a valid & subsisting mtge.—THE RINGDOVE, No. 787, *post.*

249. Merchant Shipping Act, 1854 (c. 104)—Merchant Shipping Act Amendment Act, 1862 (c. 63)—Real nature of transaction considered—Absolute transfer in form—Mortgage in intention.]—Under s. 66 of the former Act & s. 3 of the latter Act the ct. will look behind the register to the real character of transactions between co-owners, & treat as a mtge. that which is on the face of it an absolute transfer if it should appear such was the intention of the parties. *Semble :* the ct. would in some cases recognise an agreement by which a person might be for some purposes an absolute owner, & for others a mtgee., if such agreement were clearly proved & definite.—THE INNISFALLEN, No. 252, *post.*

Annotations :—**Consd.** The Keroula (1886), 11 P. D. 92. **Refd.** The Jane (1870), 23 L. T. 791 ; The Benwell Tower (1895), 72 L. T. 664.
For full anns., *see* S. C. No. 252, *post.*

250. Admiralty Court Act, 1861 (c. 10)—Equities—Whole transaction considered.]—Where an action has been brought in the Admlty. Ct. under s. 11 of the above Act by the registered transferee of a mtge. & the ship arrested, the ct. will, in conformity with M. S. Act Amendment Act, 1862 (c. 63), s. 3, enforce equities between owner & mtgee., & will, in estimating the right of mtgee., consider not only the registered documents, but all transactions between the parties relative to the mtge. loan.

Pltf. was the registered transferee of a mtge. expressed to be given as security for payment of an acceptance on a certain date, which date was passed before action brought ; but he had, by other arrangements, contemporaneous & subsequent to the transfer, agreed for postponing repayment, & by such arrangements repayment of no part of the money was due at the time of action brought ; & it was not proved that the owner had done anything impairing the security of the mtgee. The action was dismissed with costs. Pltf. was further condemned in damages, on the ground that with adequate knowledge of the circumstances he had arrested the ship when no money was due to him—after a decision of magistrates, adverse to his claim ; & that he had endeavoured to make good his claim by bringing charges of fraud, which he failed to sustain, against the owner.—THE CATHCART (1867), L. R. 1 A. & E. 314 ; 16 L. T. 211 ; 2 Mar. L. C. 500. S. C. No. 261, *post.*

Annotation :—**Refd.** The Benwell Tower (1895), 72 L. T. 664.

B. Action of Restraint.

251. Mortgagee not in possession.]—A mtgee. not in possession is not entitled to arrest a vessel for the purpose of enforcing bail for her safe return to England. A motion, on behalf of a mtgee., for a warrant of arrest, was refused in the circumstances of the case.—THE HIGHLANDER (1843), 2 Wm. Rob. 109 ; 2 Notes of Cases, 316.

Annotations :—**Refd.** The Innisfallen (1866), L. R. 1 A. & E 72 ; The Jane (1870), 23 L. T. 791.

252. —— Right of charterer.]—Under M. S. Act, 1854 (c. 104), s. 70, a mtgee. not in possession of the vessel cannot maintain an action of restraint.

A vessel having been arrested in a cause of restraint between co-owners, the ct., on motion by the charterer, to whom the vessel had been let for a voyage, ordered her release, it appearing that the alleged co-owner was only a mtgee.—THE INNISFALLEN (1866), L. R. 1 A. & E. 72 ; 35 L. J. Adm. 110 ; 16 L. T. 71 ; 12 Jur. N. S. 653 ; 2 Mar. L. C. 470. S. C. No. 249, *ante.*

Annotations :—**Consd.** The Keroula (1886), 11 P. D. 92. **Refd.** The Jane (1870), 23 L. T. 791 ; The Fanchon (1880), 42 L. T. 483 ; Von Freeden *v.* Hull (1906), 75 L. J. K. B. 359. **Mentd.** The Benwell Tower (1895), 72 L. T. 664.

253. —— Mortgagee in possession.]—A mtgee. not in possession cannot maintain an action of restraint. Where persons hold shares in a ship by way of security for a loan under an agreement, by which it is provided, *inter alia*, that in the event of the owners of shares failing to meet their acceptances or to pay interest the holders of the shares may realise them, calling on the owners to make good any loss arising therefrom, or paying them any balance left after repaying themselves the loan, they are merely mtgees. of such shares & do not become owners thereof on the acceptances being dishonoured, & hence, not having taken possession of the shares, they are not entitled to institute an action of restraint against the ship.—*Semble :* a mtgee. of shares in a ship, when in possession, may institute an action of restraint.—THE KEROULA (1886), 11 P. D. 92 ; 55 L. J. P. 45 ; 55 L. T. 61 ; 35 W. R. 60 ; 6 Asp. M. L. C. 23. S. C. No. 235, *ante ;* No. 767, *post.*

254. Action against mortgagee—Second mortgagee purchasing from first mortgagee—Notice of ship's engagements.]—A shipowner agreed with defts. to provide a ship which should be run & worked by them in their line under their control & discretion. The agreement was to continue in force for five years, & to be binding on the owners' exors. & administrators. The ship was completed & registered on Jan. 3, 1891. On Jan. 5 in the same year she was mtged. by the owner to a co. to secure an account current. The mtgees. had no notice of the engagements subsisting with defts. On Nov. 30, 1892, the owner gave a second mtge. on the ship to pltf. to secure an account current. Pltf. was aware of the existence of the contract with defts., & inferred that the terms were onerous. On Oct. 17, 1893, the owner died, & first mtgees. took possession of the ship, & transferred her by a bill of sale to pltf. At the time of sale pltf. knew the terms of the agreement under which the ship was being worked in defts.' line. Subsequently pltf. entered into a contract to sell the ship to a firm which knew the nature of the

Sect. 3.—*Mortgage: Sub-sect.* 2, *B. & C. Sect.* 4: *Sub-sect.* 1, *A. & B.* (*a*).]

contract with defts. Pltf. moved for an order that defts. should deliver up to him the certificate of registry of the ship. It was agreed to turn the motion into the trial of the action without pleadings, & that defts. should be taken to have applied for an injunction restraining pltf. from dealing with the ship in a manner contrary to the agreement:—*Held:* (1) pltf. entitled to have the certificate of registry delivered up to him; (2) defts.' application for an injunction must be refused upon the ground that first mtgees., who had no notice of the ship's engagements, were entitled to realise their security by selling the ship free of her engagements, & that pltf., although he had notice of her engagements, was entitled to the same rights as were possessed by his vendors, first mtgees.—THE CELTIC KING, [1894] P. 175; 63 L. J. P. 37; 70 L. T. 562; 7 Asp. M. L. C. 440; 6 R. 754. S. C. No. 257, *post*.

Annotations:—**Consd.** The Heather Bell, [1901] P. 143. **Refd.** Law Guarantee & Trust Soc. *v.* Russian Bank, [1905] 1 K. B. 815, C. A.

255. —— Prohibition of transfer—Persons interested.]—A limited co., builders of two ships, had taken bills of exchange for the cost of building, together with first mtges. on the ships; the first bill was about to fall due, the owners of ships who had accepted the bills of exchange were in financial difficulties, the building co. had gone into liquidation, & the liquidator had taken possession of one of the ships & was negotiating for her sale. On an *ex p.* application by certain bankers & others, who had discounted most of the bills of exchange & who on this account claimed benefit of the mtges. as holders in due course under Bills of Exchange Act, 1882 (c. 61), an order was made in Admlty. Div. under M. S. Act, 1894 (c. 60), s. 30, restraining the owners, mtgees., or any other persons from dealing with the ships until further order.—LA BLANCA & EL ARGENTINO (1908), 77 L. J. P. 91.

C. Action for Possession.

256. Jurisdiction—Sale by mortgagee.]—THE ROSE, No. 186, *ante*.

257. —— ——.]—THE CELTIC KING, No. 254, *ante*.

For full anns. *see* S. C., No. 254, *ante*.

258. Arrest—Withdrawal of action—Costs.]—The second mtgee. of thirty-two sixty-fourth shares of a vessel instituted a cause under Admlty. Ct. Act, 1861 (c. 10), s. 11, & arrested the ship. He afterwards withdrew the suit. The owner of the remaining share (who was not mtgor. to pltf.) applied to the ct. to condemn pltf. in costs & damages:—*Held:* he was entitled to his costs of suit, but not to any damages occasioned by arrest & detention of the vessel.—THE VOLANT (1864), Brown. & Lush. 321.

259. Wrongful arrest—Security not in jeopardy—Release.]—Where shares in a ship are mtged., possession being retained by mtgors., & the managing owner, duly appointed by all co-owners, including mtgors., charters the ship for a foreign voyage, & she loads & is about to proceed on the voyage, mtgee., even though he takes possession of his shares before the sailing of the ship but after the making of the charterparty, cannot arrest the ship or demand bail in an action brought by him to compel payment of his mtge. debt, provided the performance of the charterparty is not prejudicial to the security; & the ct. will, upon application of the co-owners, release a ship so arrested, & condemn mtgee. arresting in costs.—THE MAXIMA (1878), 39 L. T. 112; 4 Asp. M. L. C. 21.

260. —— —— ——.]—Where registered mtgees of a ship instituted an action *in rem* as mtgees. for possession, & the ship was arrested therein before the mtge. money became due, & without any default on the part of mtgor., the ct., being of opinion upon the facts that the ship was not being dealt with so as to impair mtgees.' security, ordered her release.—THE BLANCHE (1887), 58 L. T. 592; 6 Asp. M. L. C. 272.

261. —— —— Damages.] — THE CATHCART, No. 250, *ante*.

For full anns. *see* S. C. No. 250, *ante*.

262. Mortgagee taking possession—When allowable.]—A mtgee. of a ship is entitled to take possession of her, although there has been no actual default under the mtge., if mtgor. is working the ship in such a way as to impair materially the security of mtgee.—THE MANOR, [1907] P. 339; 77 L. J. P. 10; 96 L. T. 871; 10 Asp. M. L. C. 446, C. A.

263. —— Removal by master—Effect of.]—The taking by a master of a ship to sea, after possession has been taken by mtgees., against their wishes, is such misconduct, even when done by orders of mtgor., his original employer, as will disentitle him to recover in an action *in rem* as against mtgees. any compensation for dismissal by mtgees., upon their recovering possession of the vessel, before the term of his engagement has expired.—THE FAIRPORT (1884), 10 P. D. 13; 54 L. J. P. 3; 52 L. T. 62; 32 W. R. 448; 5 Asp. M. L. C. 348.

264 —— Possession wrongful — Damages — Wages paid by mortgagee.]—Where mtgor. of a vessel entered into a charter or agreement with a third party (pltf.) for use of the vessel whereby pltf. was to have possession of the ship for about six weeks & to run her on specified voyages between places in the United Kingdom & finance the vessel, being granted the highest charge & lien on the vessel mtgor. could grant to secure any sums he might so disburse:—*Held:* (1) such charter or agreement did not impair the value of mtgee.'s urity; (2) mtgee. was liable in damages to pltf., the charterer, for taking possession of the vessel under his mtge. after default had been made by mtgor.

Where a mtgee. wrongly took possession of the mtged. ship as against the charterer, & paid wages due to the crew from the charterer:—*Held:* in the circumstances the charterer was liable to mtgee. for wages so paid.—THE HEATHER BELL, [1901] P. 272; 70 L. J. P. 57; 84 L. T. 794; 49 W. R. 577; 17 T. L. R. 541; 9 Asp. M. L. C. 206, C. A.

Annotations:—**Refd.** Essarts *v.* Whinney (1903), 88 L. T. 191, C. A.; Law Guarantee & Trust Soc. *v.* Russian Bank for Foreign Trade, [1905] 1 K. B. 815, C. A. The Manor, [1907] P. 339, C. A.

265. —— Receiver & manager already appointed—Interference prohibited.]—Mtgee. of thirty-four sixty-fourth shares in a ship having given to the receiver & manager appointed by the ct. notice that he was a mtgee. & intended to take possession, was restrained by an order of the ct., made on Aug. 12, from interfering with the receiver & manager. During the vacation mtgee. applied to the ct. to discharge or vary the order, but the vacation judge adjourned the application till the first sittings of Admlty. Div.—THE EDDERSIDE, BELL *v.* EDDERSIDE SHIPOWNING CO., LTD. (1887), 31 Sol. Jo. 744.

266. Co-ownership action—Right of mortgagee to intervene.]—Where a part-owner of a ship institutes a suit against the ship claiming as against his co-owner an account & sale of the ship, a mtgee. holding a mtge., which could not be satisfied by sale of the ship, is entitled, on intervening in the suit, to a release of the ship & to his costs from the time of his claiming release.

A shipowner sold certain shares in a ship & the purchaser having neglected to register the sale, mtged. the whole ship to a third person, who had

no knowledge of the previous sale, to secure a balance exceeding the value of the ship. The purchaser registered his shares, & then finding the mtge. registered, instituted a suit against the ship claiming as against his co-owner an account & sale of the ship. Mtgee. intervened & claimed release of the ship & damages & costs for its detention :—*Held :* mtgee. entitled to release of the ship & to costs from the time pltf. became aware of mtgee.'s claim.—THE EASTERN BELLE (1875), 33 L. T. 214; 3 Asp. M. L. C. 19; S. C. No. 221, *ante*.

SECT. 4.—BOTTOMRY.

Meaning of bottomry & validity & enforcement of bottomry bonds, *see* SHIPPING & NAVIGATION.

SUB-SECT. 1. JURISDICTION.

A. Nature of Jurisdiction.

267. Bottomry—Maritime risk—Hypothecation—Pledge of ship.]—The Admlty. Ct. has undoubted jurisdiction over bottomry bonds, which are founded upon sea risks & defeasible by destruction of the ship in course of her voyage.

The Admlty. Ct. exercises an undisturbed jurisdiction over hypothecation bonds; a bond so denominated in the East Indies will not make it such, in the view of the ct., if it does not pledge the vessel herself for sole payment of the bond.—THE ATLAS (1827), 2 Hag. Adm. 48; S. C. Nos. 12, 55, *ante*; No. 283, *post*.

Annotations :—**Consd.** *Re* The Royal Arch (1857), 30 L. T. O. S. 198; Law *v.* Wallerstein (1870), 22 L. T. 376. **Refd.** Stainbank *v.* Fenning (1851), 11 C. B. 51; Stainbank *v.* Shepard (1853), 13 C. B. 418.

268. —— Jurisdiction founded on necessity.]—The jurisdiction of the Admlty. Ct. in cases of bottomry bonds is founded on the existence of necessity arising from want of personal credit.—THE PRINCE OF SAXE COBURG (1838), 3 Moo. P. C. C. 1; 13 E. R. 1; S. C. No. 292, *post*.

Annotation :—**Refd.** The Pontida (1884), 9 P. D. 177, C. A.

Circumstances in which a bottomry bond may be made, *see* SHIPPING & NAVIGATION.

269. Respondentia bond.]—A master has power to bind the cargo for repairs of the ship, in order to effect prosecution of the voyage, in such manner as to entitle the party who advances the money to sue for enforcement of his bond in the Admlty. Ct.; but the master can only bind the cargo in a case of severe necessity; nor will the cargo be bound if the lender has taken undue advantage of the master's distress.—THE GRATITUDINE (1801), 3 Ch. Rob. 240.

Annotations :—**Distd.** Freeman *v.* East India Co. (1822), 5 B. & Ald. 617. **Apld.** Morris *v.* Robinson (1824), 5 Dow. & Ry. K. B. 34; Rayne *v.* Benedict (1841), 5 Jur. 1176; Vlierboom *v.* Chapman (1844), 13 M. & W. 230; La Constancia (1845), 2 Wm. Rob. 404. **Consd.** Anon. (1846), 7 L. T. O. S. 451. **Expld.** Duncan *v.* Benson (1847), 1 Exch. 537; Benson *v.* Duncan (1849), 3 Exch. 644. **Consd.** The Bonaparte (1850), 3 Wm. Rob. 298; Wilkinson *v.* Wilson, The Bonaparte (1851-53), 8 Moo. P. C. C. 459. **Apld.** Cammell *v.* Sewell (1858), 3 H. & N. 617. **Expld.** The Jonathan Goodhoe (1858), Sw. 355. **Apld.** The Soblomsten (1866), L. R. 1 A. & E. 293. **Consd.** The Hamburg (1863); 2 New Rep. 136. **Consd. & Apld.** The Hamburg (1864), Brown. & Lush. 253, P. C. **Consd.** The Lizzie (1868), L. R. 2 A. & E. 254; *Re* The Karnak (1868), L. R. 2 A. & E. 289. **Apld.** The Onward (1873), L. R. 4 A. & E. 38; Gunn *v.* Roberts (1874), 43 L. J. C. P. 233. **Apprvd.** Metcalfe *v.* Britannia Ironworks Co. (1876), 1 Q. B. D. 613. **Refd.** Hussey *v.* Christie (1807), 13 Ves. 594; Idle *v.* Royal Exchange Assce. (1812), 8 Taunt. 755; Cannan *v.* Meaburn (1823), 1 Bing. 243; Robertson *v.* Clarke (1824), 1 Bing. 445; La Constancia (1846), 4 Notes of Cases, 512; The Osmanli (1850), 3 Wm. Rob. 198; Hallett *v.* Wigram (1850), 9 C. B. 580; Gibbs *v.* Gray, Gray *v.* Gibbs (1857), 26 L. J. Ex. 286; The Priscilla (1859), Lush. 1; Cammell *v.* Sewell (1860), 5 H. & N. 728; The Olivier (1862), Lush. 484; Duranty *v.* Hart (1863), 2 Moo. P. C. C. N. S. 289, P. C.; The James Seddon (1866), L. R. 1 A. & E. 62; Notara *v.* Henderson (1870), L. R. 5 Q. B. 346; *Re* The Patria (1871), L. R. 3 A. & E. 436; The Gaetano & Maria (1882), 7 P. D. 137, C. A.; The Pontida (1884), 9 P. D. 102.

270. —— Subject to same principles as bottomry bond.]—The Admlty. Ct. has jurisdiction over bonds of respondentia, as over bottomry bonds. The difference between them is one of fact; there is no distinction in principle.

The American ship *S.*, carrying cargo from New York, consigned to various owners in L. was stranded off Key West, in Florida, & unable to proceed on her voyage. The cargo was salved, & arrested in a suit by the salvors. The master resolved on his own authority to tranship, & to release the cargo, & borrowed money to pay the salvage award, upon agreement to give a respondentia bond on the whole cargo saved for the voyage home. A great portion of the cargo was then shipped on board a second vessel, which whilst loading caught fire, & a large part of the cargo was consumed & fresh salvage expenses incurred. A second salvage suit was brought, & the goods salved were sold & proceeds paid into ct. The rest of the *S.'s* cargo was then shipped on board a third vessel & brought safely to L. Before sailing the master of the *S.* gave a bottomry bond for the whole amount of the original agreement professing also to bind the goods or proceeds lying in possession of the ct. The ct. afterwards ordered that the proceeds should, on a day certain, be paid out to the bondholder, unless the owners of the cargo produced evidence that the bond had been fully satisfied in England. Upon an action brought upon the bond in the Admlty. Ct. in England, against the cargo brought to England, for the full amount :—*Held :* (1) the ct. had jurisdiction over the bond; (2) in the circumstances the master was entitled to make the agreement for the bond without communicating with the cargo-owners; (3) the bond was not wholly vitiated because professing to bind the cargo which was lying in possession of the ct., & not exposed to maritime risk; (4) the owners of the cargo brought to England should pay a proportional part of the bond only, namely, according to the proportion the value of their property bore to the total value of the cargo upon which the bond was agreed to be given, although the bondholder would be a loser, even if the whole proceeds lying in the Ct. of Florida were paid over to him.—THE SULTAN, CARGO EX (1859), Sw. 504; 5 Jur. N. S. 1060. S. C. No. 287, *post*.

B. Extent of Jurisdiction.

(a) Where Jurisdiction exists.

271. Bottomry bond—Validity in dispute.]—Where a bottomry bond is made on the high seas, the Admlty. Ct. has jurisdiction, & prohibition does not lie, though the validity of the bond is in dispute.—SCARBOROUGH *v.* LYRUS (1624), Lat. 252; 82 E. R. 371.

272. —— ——.]—Where a ship has been taken in execution by the sheriff, the holder of a bottomry bond on the ship need not take an issue under Interpleader Act, 1831 (c. 58), but may commence proceedings in Admlty.; & the proper course is for the execution creditor to contest validity of the

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PART II. SECT. 4, SUB-SECT. 1.—A.

267 i. *Bottomry—Repairs of ship—Hypothecation.*]—The Supreme Ct. will not prohibit the Vice-Admlty. Ct. from proceeding against a vessel for the recovery of money advanced for her repairs in a foreign port & secured by a hypothecation deed, for the reason that such hypothecation was a subject solely of Admlty. jurisdiction.—THE MARGARET & ISABELLA (1828), 1 Nfld. L. R. 475.—**NFLD.**

Sect. 4.—Bottomry: Sub-sect. 1, *B.* (*a*) & (*b*); *sub-sect.* 2.]

bond in the Admlty. Ct.—SNODEN *v.* RAMSEY (1856), 27 L. T. O. S. 185.

273. —— Though made on land.]—The master of a ship may hypothecate her for necessaries even upon land in course of the voyage. The Admlty. is the proper ct. in which to sue upon a hypothecation.—BENZEN *v.* JEFFRIES (1697), 1 Ld. Raym. 152; 91 E. R. 999.

274. —— ——.]—The Admlty. Ct. has jurisdiction in the case of a hypothecation bond given by the master of a ship for necessaries occasioned by distress at sea, although the contract was upon land. But the ship must be sued, & not the owners.—JONSON (JOHNSON) *v.* SHEPNEY (SHIPPEN, SHIPPIN), (1703), Holt K. B. 48; 11 Mod. Rep. 30; 2 Ld. Raym. 982; 1 Salk. 35; 87 E. R. 836. S. C. No. 294, *post.*

Annotations:—**Consd.** Menetone *v.* Gibbons (1789), 3 Term Rep. 267. **Refd.** Yates *v.* Hall (1785), 1 Term Rep. 73; Castrique *v.* Imrie (1870), L. R. 4 H. L. 414; The Dictator, [1892] P. 304. **Mentd.** Reid *v.* Darby (1808), 10 East, 143; The Rhadamanthe (1813), 1 Dods. 201; Idle *v.* Royal Exchange Assce. (1819), 8 Taunt. 755; Freeman *v.* East India Co. (1822), 5 B. & Ald. 617; Stainbank *v.* Shepard (1853), 13 C. B. 418.

275. —— —— Though under seal.]—Whether the Admlty. Ct. has or has not jurisdiction depends upon the subject-matter. It has cognisance of a hypothecation bond given in the course of a voyage, though it be executed on land & under seal.—MENETONE *v.* GIBBONS (1789), 3 Term Rep. 267; 100 E. R. 568.

Annotations:—**Consd.** The Catherine (1848), 6 Notes of Cases, Supp. 43. **Refd.** New England Mutual Marine Insce. *v.* Durham (1871), 24 L. T. 448. **Mentd.** The Mullingar (1872), 26 L. T. 326.

276. —— British ship abroad.]—The Admlty. Ct. has jurisdiction over a bottomry bond given, with consent of the owner, upon a British ship lying in a foreign port, where the usual circumstances which justify a bond exist.—THE ROYAL ARCH, Nos. 278, 288, 291, 1811, *post.*

For full anns., *see* S. C. No. 291, *post.*

277. —— —— Where maritime risk, etc.]—A British subject, having purchased a vessel at H., & being in want of funds for her outfit & to bring her to England, raised the money on bottomry:—*Held:* in such case, there being a necessity for borrowing money on bottomry, a maritime risk & a maritime premium, the Admlty. Ct. would entertain the case & give effect to the bond.—THE HELGOLAND (1859), Sw. 491; 5 Jur. N. S. 1179. S. C. Nos. 289, 300, *post.*

278. —— —— ——.]—Sea risk is essential to found the jurisdiction of the ct.—THE ROYAL ARCH, No. 276, *ante;* Nos. 288, 291, 1811, *post.*

For full anns., *see* S. C. No. 291, *post.*

279. —— Given before voyage begins—Agreement for bond.]—*Semble:* the Admlty. Ct. has jurisdiction where a bond has been granted, & the ship has never put to sea. Also, where a mere agreement for a bond has been entered into, but no bond actually given. Before the ct. will direct freight to be brought in, it must be satisfied that freight has actually been received.—THE ALINE (1839), 1 Wm. Rob. 111.

Annotations:—**Mentd.** The Benares (1850), 14 Jur. 581; The Grecia (1850), 7 Notes of Cases, 410; Harmer *v.* Bell (1850-51), 7 Moo. P. C. C. 267; Simpson *v.* Fogo (1860), 29 L. J. Ch. 657; The Halley (1867), L. R. 2 A. & E. 3; The Dictator, [1892] P. 304; The Ripon City, [1897] P. 226; The Veritas, [1901] P. 304; The Normandy (1904), 90 L. T. 351.

280. —— ——.]—*Qu.:* how far a bottomry bond given in port, before commencement of a voyage, is recoverable by proceedings in the Admlty. Ct.—THE JENNY (1843), 2 Wm. Rob. 5.

281. —— Given in England—By British owner.]—A bottomry bond made by the owner himself in England:—*Held:* a good bottomry bond.—THE PROVIDENCE (1783), Burrell, 330.

282. —— —— By British master.]—A bottomry bond, granted by the master of a British vessel in a port of England, was upheld. The authority of the ct. to take cognisance of such bonds does not depend upon the locality of the owner's residence, but upon the necessity of the case.—THE TRIDENT (1839), 1 Wm. Rob. 29.

Annotations:—**Distd.** The Priscilla (1859), Lush. 1. **Mentd.** Law *v.* Wallerstein (1870), 22 L. T. 376.

(b) Where no Jurisdiction exists.

283. Maritime risk excluded.]—*Semble:* a bond professing to be a bottomry bond, but excluding maritime risk, is not subject to Admlty. jurisdiction.—THE ATLAS (1827), 2 Hag. Adm. 48, Nos. 12, 55, 267, *ante.*

Annotations:—**Consd.** Stainbank *v.* Fenning (1851), 11 C. B. 51; *Re* The Royal Arch (1857), 30 L. T. O. S. 198. **Refd.** Law *v.* Wallerstein (1870), 22 L. T. 376.

For full anns., *see* S. C. No. 267, *ante.*

284. —— Pledge of personal credit.]—The master of a vessel has no authority to hypothecate for money borrowed at a foreign port for necessary repairs & disbursements, & by the same instrument pledge the personal credit of his owner for such advances, whether maritime interest be stipulated for or not. But a bottomry bond may be given at the same time with, & as a collateral security for, bills drawn on the owners for moneys so borrowed.

A vessel having put into a foreign port in a damaged state, the master borrowed money of a merchant there, for necessary repairs & disbursements; to secure which money he drew bills upon his owner, & also executed an instrument which purported to be a hypothecation of the ship, cargo & freight. By this instrument the merchant who advanced the money forbore all interest beyond the amount necessary to insure the ship to cover the advances; & the master took upon himself & his owner the risk of the voyage, making the money payable at all events, & subjecting the ship to seizure & sale by virtue of process "out of H. M.'s Admlty. Ct. of England, or any ct. of Vice-Admlty. possessing jurisdiction at the port at which the said vessel might at any time happen to be lying, or to be, according to the maritime law & custom of England," in the event of the bills being refused acceptance, or being dishonoured:—*Held:* (1) this was not such a hypothecation as could be enforced in the Admlty. Ct., payment of the money borrowed not being made to depend upon arrival of the vessel; (2) the merchant had no insurable interest in the ship.—STAINBANK *v.* SHEPARD (SHEPHERD) (1853), 13 C. B. 418; 1 C. L. R. 609; 22 L. J. Ex. 341; 22 L. T. O. S. 158; 17 Jur. 1032; 1 W. R. 505; 138 E. R. 1262, Ex. Ch.

Annotations:—**Expld. & Apld.** Willis *v.* Palmer (1859), 7 C. B. N. S. 340. **Refd.** Bristow *v.* Whitmore (1859), 4 De G. & J. 325; The Onward (1873), L. R. 4 A. & E. 38; Miedbrodt *v.* Fitzsimon (1875), 32 L. T. 579, P. C.

285. *S. P.* STAINBANK *v.* FENNING (1851), 11 C. B. 51; 20 L. J. C. P. 226; 17 L. T. O. S. 255; 15 Jur. 1082; 138 E. R. 389.

Annotations:—**Consd.** Moran *v.* Uzielli, [1905] 2 K. B. 555. **Refd.** Stainbank *v.* Shepard (1853), 13 C. B. 418; The Irma Bark (1873), 29 L. T. 549.

286. Maritime risk not referred to.]—A bill of exchange having been given as a collateral security along with a bottomry bond, in the event of the bill being paid, the bond to be void, but there being no mention in the bond of a maritime risk or words from which it could be inferred:—*Held:* on this last ground it could not be enforced in the Admlty. Ct. No costs were given, as the judge thought the omission was a mistake of the drawer of the

bond.—THE EMANCIPATION (1840), 1 Wm. Rob. 124.

Annotations :—**Consd.** Stainbank *v.* Fenning (1851), 11 C. B. 51. **Refd.** The Haabet, [1899] P. 295.

287. Property not exposed to maritime risk.]—A respondentia bond, covering in part property not exposed to maritime risk, is bad as to that part, but may be valid as to the residue.—THE SULTAN, No. 270, *ante*.

288. British ship—In British port.]—A bottomry bond, given by the master with the consent of the owner, upon a British ship lying in a British port cannot be sued upon in the Admlty. Ct.—THE ROYAL ARCH, Nos. 276, 278, *ante ;* Nos. 291, 1811, *post*.

For full anns., *see* S. C. No. 291, *post*.

289. —— ——.]—*Semble :* if a British owner raises money upon bottomry in England for any voyage whatever, though the transaction may be lawful, yet the Admlty. Ct. has no jurisdiction.—THE HELGOLAND, No. 277, *ante ;* No. 300, *post*.

290. Personal contract.]—Money advanced for a foreign ship, on bills upon the owner, afterwards covered by an assignment of freight :—*Held :* not recoverable under Admlty. Ct. Act, 1840 (c. 65), s. 6.—THE ARMADILLO (1841), 1 Wm. Rob. 251 ; 1 Notes of Cases, 75 ; 3 L. T. 824.

291. —— Though substituted for bond—Extension of time.]—A bottomry bond is entitled to priority of payment over a mtge. during the voyage for which the bond was executed, but when due, should be enforced within reasonable time ; & a voluntary agreement on the part of the holder to postpone payment under it alters its character totally, & substitutes a contract, over which the Admlty. Ct. has no jurisdiction.

A British ship, owned in Nova Scotia, terminated at New York a voyage from Glasgow ; being in need of repair her master, with the consent of her managing part-owner, gave a bottomry bond payable at New York on her return to a port of discharge in British North America. After termination of such contemplated voyage, the bondholder agreed with same managing part-owner to postpone payment of the bond till after conclusion of a subsequent voyage & her arrival at a port of discharge as before, the bond to remain a lien on the ship ; such voyage was performed, & on the ship reaching L. in England, in prosecution of a further voyage, she was arrested by warrant of the ct. ; the validity of the bond & agreement was contested by mtgees. of three-fourths & the owner of one-fourth of the ship :—*Held :* (1) the bond was originally good ; (2) the holder could not subsequently sue upon it in that ct., nor upon the agreement.—THE ROYAL ARCH (1857), Sw. 269 ; 30 L. T. O. S. 198 ; 6 W. R. 191. S. C. Nos. 276, 278, 288, *ante ;* No. 1811, *post*.

Annotations :—**Refd.** The Staffordshire (1871), 25 L. T. 137 ; London & Midland Bank *v.* Neilson (1895), 1 Com. Cas. 18.

SUB-SECT. 2.—EXERCISE OF JURISDICTION.

292. Parties—Master.]—*Semble :* the master, though the original hypothecator of the ship, & part-owner, is not precluded by practice of the Admlty. Ct. from joining his co-owners in impugning the bond.—THE PRINCE OF SAXE COBURG, No. 268, *ante*.

For full anns., *see* S. C. No. 268, *ante*.

293. —— Mortgagee.]—It is open to a mtgee. of a ship to appear & contest a bottomry bond, although the owner does not.—THE PANAMA (1870), 18 W. R. 1011, P. C.

For full anns., *see* SHIPPING & NAVIGATION.

294. —— Ship to be sued.]—JONSON *v.* SHEPNEY, No. 274, *ante*.

For full anns., *see* S. C. No. 274, *ante*.

295. Evidence—Production of bond.]—In actions of bottomry the original bond must be brought in before validity of the bond is pronounced for.—THE ROWENA (1877), 37 L. T. 366 ; 26 W. R. 82 ; 3 Asp. M. L. C. 506.

296. —— Notarial copy—When admissible.]—In a cause of bottomry instead of the bond itself being brought into ct., an official or notarial copy was produced. It appeared that the original bond was preserved in the registry of the Ct. of Commerce at Malta, & a " legalised copy " entered in the minutes of the Notary's Acts there :—*Held :* the ct. would not act upon the copy without a certificate & affidavit that no further copy had been or would be produced.—THE JEUNE NANETTE (1855), 3 L. T. 123 ; 4 W. R. 92.

297. Remedies.]—A hypothecation bond had been given in J. by the master, who was also owner of the vessel, for necessary repairs & outfit of the ship. The bond covenanted for payment of the money three months after date, on arrival of the ship in London, either by bills or good security. Pltfs. having applied without success for payment of the money or other security, a motion was granted for a warrant to arrest the ship in a case of bottomry, on a suggestion that the ship was on the eve of being transferred to other persons, & was preparing to proceed to sea. On a subsequent day when the marshal was proceeding to execute the decree for sale, the register was not forthcoming, but was detained in the possession of W. under a sale, pretended to have been made to him by the original owner, to defeat the effect of the bottomry bond ; a motion that a monition might issue against W. the asserted purchaser, to bring in the ship's register was granted.—THE BARBARA (1802), 4 Ch. Rob. 1.

Annotation :—**Consd.** The Duke of Bedford (1829), 2 Hag. Adm. 394.

298. —— Freight—Position of cargo-owner.]—The holder of a bottomry bond on ship, freight & cargo is, upon conclusion of proceedings by default against ship & freight, entitled as of course to have full freight due upon delivery of the cargo paid to him, to satisfy the sum secured by the bond with costs ; & the owner of the cargo who has paid the freight into ct. is not entitled to a reference of the amount due on the bond, notwithstanding that before execution of the bond part of his cargo was sold by the master, & the proceeds applied to the ship's expenses.—THE GEM OF THE NITH (1865), Brown. & Lush. 72.

299. Delay—Effect of.]—In questions of bottomry the ct. is bound to exert particular vigilance ; because, although bonds of this kind are to be supported with a high hand, when clear & simple, they are, in many respects, to be narrowly watched. Bottomry affords great opportunities of collusion ; & on the very account of the importance given to these bonds, they are to be pursued with exact attention & active diligence in order that the ct. may have the opportunity of considering them in their recent origin, & with a view to all the circumstances on which their honest validity may depend.

A bottomry bond, put in suit originally on the part of a French merchant in 1792, suspended during the war with France, not enforced during peace, but after twelve years attempted to be farther prosecuted on the part of the British merchant to whom it was indorsed, was not allowed to be put in execution under the original proceedings, the proceedings having been delayed too long even though there was no Stat. Limitations applying to such case. THE REBECCA (1804), 5 Ch. Rob. 102.

Annotation :—**Consd.** The Royal Arch (1857), Sw. 269.

300. —— ——.]—Where delay takes place in enforcing a bottomry bond, & no explanation is

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offered, suspicion is thrown upon the whole transaction, but such delay will not be fatal to the bond unless prejudicial to the interests of third persons, as if the vessel has changed hands in the meantime.—THE HELGOLAND, Nos. 277, 289, *ante*.

301. Pledge of ship & cargo—Priority.]—A bond was given upon a ship & cargo only, not mentioning the freight. The ship & cargo were arrested & the freight was paid over to other parties, before the suit commenced at the instance of the bondholder. The ship proved insufficient for discharge of the bond, but the cargo was ample for the purpose. The ct. decreed that the bondholder should be paid the balance of the proceeds of the ship, wages deducted, & should be put in possession of the cargo, so far as was necessary for full payment of the bond. The owner of the cargo prayed a monition against the owners of the freight. An act on petition was brought in & the owners of the freight rested their defence upon the ground that the freight was not bound, not being named in the bond, & that it had not been arrested at the suit of the bondholder, as he had not proceeded against the freight, but against the ship alone:—*Held:* (1) the bond should be pronounced for with interest & costs, the freight to be brought in & to be made subject to average; (2) the freight & ship must be exhausted before recourse could be had to the cargo.—THE PRINCE REGENT (1821), unreported, cited 2 Wm. Rob. 83.

Annotations:—**Consd.** The Fortitude (1843), 2 Notes of Cases, 515; The Dowthorpe (1843), 2 Wm. Rob. 73. **Distd.** The Mary Ann (1845), 9 Jur. 94. **Consd.** The Constancia (1846), 4 Notes of Cases, 512. **Expld.** The Priscilla (1859), Lush. 1. **Refd.** The Bonaparte (1850), 14 Jur. 605.

302. —— ——.]—Where a bottomry bond attaches upon a ship & cargo, the cargo cannot be made subject to payment of the bond until the proceeds of the ship & freight have been exhausted. The cargo may be arrested & bail taken, but the proceedings against the cargo should then be stayed till the ship is sold unless it is manifest that the produce will be insufficient to meet the bond.—THE BONAPARTE, No. 304, *post*.

Annotations:—**Consd.** The Olivier (1862), 31 L. J. P. M. & A. 137. **Refd.** The Onward (1873), 21 W. R. 601; Kleinwort v. Cassa Maritima of Genoa (1877), 36 L. T. 118, P. C.
For full anns., *see* S. C. No. 304, *post*.

303. —— —— Marshalling.]—The principle of marshalling the assets ought to prevail in the Admlty. Ct. whenever it can be carried into effect without violating other rules entitled to preferential observance. But cargo hypothecated cannot be resorted to for payment of any bottomry bond until ship & freight are exhausted. Where there are two bottomry bonds, the first in date on ship & freight only, the other or last bond on ship, freight & cargo, & the ship & freight are insufficient to discharge both bonds, the last bond, which is entitled to priority, must be paid out of ship & freight.—THE PRISCILLA (1859), Lush. 1; 1 L. T. 272; 5 Jur. N. S. 1421.

Annotations:—**Distd.** The Union (1860), Lush. 128. **Consd.** The Eduard Oliver (1867), L. R. 1 A. & E. 379.

SUB-SECT. 3.—LAW APPLICABLE.

304. Law maritime—How far applied.]—Where a bottomry bond granted at a foreign port is by the law of that port valid as affecting the ship & freight, its validity as regards cargo, in a question with subjects of another country before the Admlty. Ct., must be determined by general maritime law.—THE BONAPARTE (1850), 3 Wm. Rob. 298; 7 Notes of Cases, Supp. 55; 14 Jur. 605. S. C. No. 302, *ante*.

Annotations:—**Refd.** The Olivier (1862), 31 L. J. P. M. & A. 137; The Onward (1873), 21 W. R. 601; Kleinwort v. Cassa Maritima of Genoa (1877), 36 L. T. 118, P. C. **Mentd.** The Cynthia (1852), 16 Jur. 748.

305. —— ——.]—Where a bottomry bond is made payable upon arrival at the ship's port of destination in England, validity of the bond is triable by the general maritime law as administered in England, not by the law of the ship's flag, or the place where the bond was executed.—THE HAMBURG (1864), Brown. & Lush. 253; 2 Moo. P. C. C. N. S. 289; 33 L. J. P. M. & A. 116; 10 L. T. 206; 10 Jur. N. S. 600; 12 W. R. 628; 2 Mar. L. C. 1; 15 E. R. 911, P. C.

Annotations:—**Distd.** Lloyd v. Guibert (1865), 6 B. & S. 100. **Consd. & Distd.** The Gaetano & Maria (1882), 7 P. D. 137. **Mentd.** The Bahia (1864), Brown. & Lush. 292; The Lizzie (1868), L. R. 2 A. & E. 254; The Empire of Peace (1869), 39 L. J. Adm. 12; The Staffordshire (1871), 25 L. T. 137; Australasian Steam Navigation Co. v. Morse (1872), 27 L. T. 357; The San Roman (1872), L. R. 3 A. & E. 583; Kleinwort Cohen v. Cassa Maritima of Genoa (1877), 2 App. Cas. 156, P. C.; Acatos v. Burns (1878), 3 Ex. D. 282, C. A.

306. —— Principles of administering—Reduction of premium—Foreigners.]—The Admlty. Ct., if required to enforce bottomry contracts, must proceed on principles of equity. If foreign merchants require aid of the ct. to enforce contracts made intentionally to be enforced in England, such aid can only be afforded according to the principles which guide its proceedings, & without which it would be an instrument of fraud & rapine rather than dispenser of justice. A custom of a particular country has very little effect against foreigners, unless it is reasonable & just. Though the Admlty. Ct. has jurisdiction to reduce the premium on bottomry bonds, yet it must act, in the exercise of such power, with great caution, & take into consideration all the circumstances of each particular transaction.

The registrar's & merchants' report reducing the premium on a bond (given in France for a voyage to London) from 20 to 12½ per cent. was overruled, as money could not be obtained at a lower premium, owing to its scarcity in France & the disturbed state of the country & apprehension of hostilities between England & France, but was sustained where it disallowed a charge of commission for unshipping & care of the cargo, at 5 per cent., as unreasonable, though agreeable to the custom of the place.—THE COGNAC (1832), 2 Hag. Adm. 377.

Annotations:—**Consd.** The Heart of Oak (1841), 1 Wm. Rob. 204. **Refd.** The Glenmanna (1860), Lush. 115; Law v. Wallerstein (1870), 22 L. T. 376.

PART II. SECT. 4, SUB-SECT. 2.

301 i. *Pledge of ship & cargo—Priority.*]—In making its decree in favour of the holders of bottomry bonds on ship, freight, & cargo the Admlty. Ct. will generally direct the ship to be sold in the first instance, & reserve the question as to liability of the freight & cargo until after return of the commission of sale. If the sum realised by sale of the ship is not sufficient to satisfy the bond or bonds, & the cost of suit, the ct. will resort to freight, &, if necessary, to the cargo.—THE ROMOLO (1854), 1 Ir. Jur. N. S. 462 (Adm.).—**IR.**

303 i. —— —— *Marshalling.*]—The Admlty. Ct. in bottomry suits gives priority to the last dated bond; but will render every facility to the prior bondholder to realise the amount of his security, & will order the consignees to lodge in the registry a certified statement of the value of the cargo, & to enter into a stipulation for such amount as may be reasonable, to abide the result of the two suits; & it will order the certified amount of the freight to be lodged in ct. to the credit of both suits.—THE FORTUNA (1860), 5 Ir. Jur. N. S. 375 (Adm.).—**IR.**

a. *Decree—Scrutiny of accounts—Ship-agent's charges—Reduction of bond.*]—The Admlty. Ct., in making a decree in favour of the bottomry bond, will carefully scrutinise all accounts, & reduce an unreasonable or exorbitant charge.

When a ship-agent charges a commission for his general superintendence upon the entire value of the ship & cargo, & upon advances alleged to have been made by him, without stating to what amount, or at what rate of interest, the ct. will consider the several claims, & award a specific sum for his services & advances, & reduce the amount of the bond accordingly.—THE FORTUNA (1861), 6 Ir. Jur. N. S. 272 (Adm.).—**IR.**

307. —— Hypothecation implied.] — By the maritime law every contract of the master implies a hypothecation, by the common law not without express agreement.—JUSTIN *v.* BALLAM (1702), 1 Salk. 34; 2 Ld. Raym. 805; 91 E. R. 36.

Annotations:—**Consd.** The Rhadamanthe (1813), 1 Dods. 201; The Neptune (1834), 3 Hag. Adm. 129. **Reid.** The Gratitudine (1801), 3 Ch. Rob. 240; Cannan *v.* Meaburn (1823), 1 Bing. 243. **Mentd.** The Gustaf (1862), 1 M. L. C. 230.

308. —— ——.]—In absence of evidence to the contrary, it is presumed a foreign lender makes advances in contemplation of bottomry; this presumption is increased where the *lex loci* empowers the lender to arrest the ship in satisfaction.—THE KARNAK (1868), L. R. 2 A. & E. 289; 37 L. J. Adm. 41; 17 W. R. 56; 3 Mar. L. C. 103; *varied* on other points, THE KARNAK, L. R. 2 P. C. 505, S. C. No. 310, *post*.

Annotations:—**Consd.** The Ida (1872), L. R. 3 A. & E. 542. **Apld.** The Dora Forster, [1900] P. 241. **Reid.** The Empire of Peace (1869), 39 L. J. Adm. 12. **Mentd.** Currie *v.* Bombay Native Insce. (1869), L. R. 3 P. C. 72, C. A.; The Staffordshire (1871), 25 L. T. 137; Miedbrodt *v.* Fitzsimon (1875), 32 L. T. 579, P. C.

309. Lex loci—Liability to arrest by—Bond valid.] —A cargo the property of a British merchant, however valuable, may be made the subject of bottomry for any debts due by the owner of the vessel where, by law, the power of arresting the ship exists.—THE OSMANLI (1850), 3 Wm. Rob. 198; 7 Notes of Cases, 322; 14 Jur. 93.

Annotations:—**Consd.** The Edmond (1860), Lush. 57; The North Star (1860), 29 L. J. P. M. & A. 73. **Distd.** The Edmond (1861), Lush. 211. **Consd.** The Karnak (1868), L. R. 2 A. & E. 289.

310. —— —— ——.]—THE KARNAK, No. 308, *ante*.

For full anns., *see* S. C. No. 308, *ante*.

311. —— Lien given by—Bond valid.]—The fact of a lien on the ship existing by the law of the country in which the bond is given is an important ingredient, & furnishes a presumption in favour of a loan on bottomry, & not on personal credit.—THE VIBILIA (1838), 1 Wm. Rob. 1.

Annotations:—**Consd.** The Lochiel (1843), 2 Wm. Rob. 34; The Mary Ann (1846), 4 Notes of Cases, 376; Duncan *v.* Benson (1847), 1 Exch. 537. **Reid.** The Trident (1839), 1 Wm. Rob. 29; *Re* The Royal Arch (1857), Sw. 269; The Laurel (1863), Brown. & Lush. 191; The Karnak (1868), L. R. 2 A. & E. 289. **Mentd.** The Staffordshire (1871), 23 L. T. 137.

312. —— —— ——.]—Where an advance is made for repairs of a vessel, & at the time of such advance no stipulation is made by the lender for a bottomry bond, nor any agreement by him to make advances on personal security, if the *lex loci* confers a right to arrest the vessel & make her answerable for the repairs, the lender has a right to demand, & the master to execute, a bottomry bond to cover such advances.—THE LAUREL (1864), Brown. & Lush. 317; 5 New Rep. 219; 11 Jur. N. S. 46; 13 W. R. 352.

For full anns., *see* SHIPPING & NAVIGATION.

313. —— —— —— Unless transaction on personal credit.]—A lien on the ship & freight, existing by local law, for advances & commissions, cannot convert a transaction on personal credit into a bottomry transaction, so as to render valid a bond subsequently given, or prevent ordinary reference of fairness of the commissions to the registrar & merchants. Existence of such local law may be properly pleaded as material evidence to support an allegation that the agreement was to make advances on the credit of ship & freight, & that the commissions were customary. The existence of such law will be assumed by the ct. unless contradicted by plea. If contradicted, either party may produce evidence, the party failing in the particular issue to pay the costs of it.—THE LAUREL (1863), Brown. & Lush. 191; 3 New Rep. 48; 33 L. J. P. M. & A. 17; 9 L. T. 457; 1 Mar. L. C. 405.

Annotation:—**Consd.** The Karnak (1868), L. R. 2 A. & E. 289.

314. —— —— ——.]—*Semble:* a lien for general average contribution, given by the law of the port where a bottomry bond is given, is sufficient to support the bond, provided the ct. is satisfied such is the law of the port.—THE NORTH STAR, Nos. 656, 1253, *post*.

Annotations:—**Consd.** The Galam (1863), Brown. & Lush. 167. **Reid.** The Daring (1868), L. R. 2 A. & E. 260.
For full anns., *see* S. C. No. 1253, *post*.

315. Law of flag—Extent of liability fixed by.]—The rights of parties to a contract are to be judged of by that law by which they intended, or rather by which they may justly be presumed, to have bound themselves. A party who relies upon a right or an exemption by foreign law is bound to bring that law properly before the ct., & to establish it in proof, otherwise the ct., not being authorised to notice such law without judicial proof, must proceed according to the law of England. Where a contract of affreightment does not provide otherwise, there, as between the parties to such contract, in respect of sea damage & its incidents, the law of the ship should govern.

Pltf., a British subject at a Danish West India island, chartered a ship belonging to defts., who were French, for a voyage from S., in Haiti, to Havre, London, or Liverpool, at the charterer's option, he knowing the ship was French. The charterparty was entered into by the master in pursuance of his general authority as such, & not by any special authority from the owners. Pltf. shipped a cargo at S. for Liverpool. On her voyage the ship sustained damage from a storm, which compelled her to put into a Portuguese port. There the master properly borrowed money upon bottomry of the ship, freight, & cargo, & repaired her, & she proceeded with the cargo, & arrived safely at Liverpool. The bondholder proceeded in the Admlty. Ct. against the ship, freight, & cargo, which being insufficient to satisfy the bond, he sued defts. as shipowners to indemnify him for the deficiency. Defts. abandoned the ship & freight in such manner as by the French law absolved them from liability:—*Held:* pltf. not entitled to recover, because the French law, as being that of the ship, governed the case.—LLOYD *v.* GUIBERT (1865), 6 B. & S. 100; L. R. 1 Q. B. 115; 35 L. J. Q. B. 74; 13 L. T. 602; 2 Mar. L. C. 283; 122 E. R. 1134, Exch.

Annotations:—**Consd.** The Karnak (1869), L. R. 2 P. C. 505, P. C. **Distd.** Ellis *v.* M'Henry (1871), L. R. 6 C. P. 228; The Patria (1871), L. R. 3 A. & E. 436. **Expld.** Cohen *v.* S. E. Ry. Co. (1877), 25 W. R. 475, C. A. **Consd. & Apld.** The Gaetano & Maria (1882), 7 P. D. 137, C. A. **Apld.** Chartered Mercantile Bank of India, London & China *v.* Netherlands India Steam Navigation Co. (1883), 10 Q. B. D. 521, C. A. **Foild.** De Cleremont *v.* Brasch (1885), 1 T. L. R. 370. **Consd.** The August, [1891] P. 328; The Industrie, [1894] P. 58, C. A.; Krell *v.* Henry, [1903] 2 K. B. 740, C. A. **Apld.** Shrichand *v.* Lacon (1906), 22 T. L. R. 245. **Expld.** British South Africa Co. *v.* De Beers Consolidated Mines, [1910] 2 Ch. 502, C. A. **Reid.** The Bahia (1864), Brown. & Lush. 292; The Lina (1867), 17 L. T. 391; James *v.* S. W. Ry. Co. (1872), L. R. 7 Exch. 287; The San Roman (1872), L. R. 3 A. & E. 533; Nugent *v.* Smith (1875), 1 C. P. D. 19; The M. Moxham (1876), 46 L. J. P. 17, C. A.; Moore *v.* Harris (1876), 1 App. Cas. 318, P. C.; Chamberlain *v.* Napier (1880), 15 Ch. D. 614; Jacobs *v.* Credit Lyonnais (1884), 12 Q. B. D. 589, C. A.; *Re* Missouri S.S. Co. (1889), 42 Ch. D. 321, C. A.; Abdul Aziz Khan Sahib *v.* Commercial Bank of India (1903), 20 T. L. R. 46, P. C. **Mentd.** The Empire of Peace (1869), 39 L. J. Adm. 12; Nouvelle Banque de l'Union *v.* Ayton (1891), 7 T. L. R. 377, C. A.

316. —— ——.]—The extent of the authority conferred on the master to bind the owners of either the ship or the cargo by hypothecation is derived from, & governed by, the law of his flag.—THE KARNAK (1869), L. R. 2 P. C. 505; 6 Moo. P. C. C.

Sect. 4—Bottomry : Sub-sect. 3. Sect. 5 : Sub-sect. 1, A.]

N. S. 136 ; 38 L. J. Adm. 57 ; 21 L. T. 159 ; 17 W. R. 1028 ; 3 Mar. L. C. 276 ; 16 E. R. 677, P. C., *varying S. C.*, L. R. 2 A. & E. 289.

Annotations :—**Mentd.** Currie *v.* Bombay Native Insce. (1869), L. R. 3 P. C. 72, C. A. ; The Empire of Peace (1869), 39 L. J. Adm. 12 ; The Staffordshire (1871), 25 L. T. 137 ; The Ida (1872), L. R. 3 A. & E. 542 ; The Energie (1875), 32 L. T. 579, P. C. ; The Dora Forster, [1900] P. 241.

317. —— ——.]—Defts., in pursuance of a charterparty made in London, shipped goods abroad on an Italian ship for delivery in London. The ship being in distress, put into a Portuguese port, where the master executed a bottomry bond purporting to bind ship, freight, & cargo, but without communicating with the cargo-owner, as he might reasonably have done. The bond was duly executed according to Italian law, by which no such communication was required :—*Held :* (1) defts. must be taken to have shipped the cargo subject to its being dealt with by the master according to the law of the flag, there being no provision to the contrary in the contract of shipment ; (2) the bond was enforceable in the English Admlty. Ct.—THE GAETANO & MARIA (1882), 7 P. D. 137 ; 51 L. J. P. 67 ; 46 L. T. 835 ; 30 W. R. 766 ; 4 Asp. M. L. C. 535, C. A.

Annotations :—**Consd. & Folld.** The August, [1891] P. 328. **Apld.** The Industrie, [1894] P. 58, C. A. **Refd.** The Gas Float Whitton, No. 2, [1896] P. 42, C. A.

SECT. 5.—NECESSARIES.

SUB-SECT. 1.—JURISDICTION.

A. Extent of Jurisdiction.

318. Common law jurisdiction—Proceeds in registry—Limits of jurisdiction.]—An American ship had been proceeded against on the part of mariners on a demand for wages & sold under a decree of the ct. The wages had been paid out, & there remained a surplus of about £700 in the registry of the ct. A motion on the part of material men who had supplied arms & stores to the ship, on a voyage from London to Venice, to be permitted to arrest the proceeds remaining in the registry, was granted, as it was the practice of the ct. to allow material men to sue against remaining proceeds in the registry, notwithstanding prohibitions had been obtained on original suits instituted by them. A second warrant, prayed against the remaining proceeds at the suit of a general creditor of the ship by reason of money expended by him on insurances, etc., was rejected, as the account was of too general & unsettled a nature to entitle the party to this remedy, & the case was more fit for the Ch. Ct. The Admlty. Ct. will not attempt to interfere where the demand itself is the subject of a dispute which the powers of an Eq. Ct. are alone competent to settle.—THE JOHN (1801), 3 Ch. Rob. 288.

Annotations :—**Consd.** The Maitland (1829), 2 Hag. Adm. 253. **Mentd.** The Neptune (1834), 3 Hag. Adm. 129.

319. Statutory jurisdiction.]—The Admlty. Ct. has no jurisdiction in claims for necessaries, except where it has been given expressly by stat. This has been given only where the owner is beyond the jurisdiction, either under Admlty. Ct. Act, 1840 (c. 65), s. 6, impliedly from the vessel being foreign-owned, or, under Admlty. Ct. Act, 1861 (c. 10), s. 5, expressly from the facts of the vessel being out of her own port & the owner's domicil being out of England & Wales.—THE PACIFIC (1864), Brown. & Lush. 243 ; 3 New Rep. 709 ; 33 L. J. P. M. & A. 120 ; 10 L. T. 541 ; 10 Jur. N. S. 1110 ; 2 Mar. L. C. 21. S. C. No. 345, *post.*

Annotations :—**Consd.** The Troubadour (1866), L. R. 1 A. & E. 302. **Folld.** The Harriet (1868), 18 L. T. 804. **Distd.** The Lion (1870), 26 L. T. 716. **Consd.** The Two Ellens (1871), L. R. 3 A. & E. 345. **Apprvd.** Johnson *v.* Black (1872), L. R. 4 P. C. 161. **Consd.** The Heinrich Bjorn (1885), 10 P. D. 44, C. A. ; Hamilton *v.* Baker (1889), 14 App. Cas. 209. **Apld.** The Mecca, [1895] P. 95, C. A. **Refd.** The Mary Ann (1865), L. R. 1 A. & E. 8 ; The Scio (1867), L. R. 1 A. & E. 353 ; Simpson *v.* Blues (1872), L. R. 7 C. P. 290 ; Giovanni Dapueto *v.* Wyllie (1874), L. R. 5 P. C. 482 ; Allen *v.* Garbutt (1880), 6 Q. B. D. 165 ; Laws *v.* Smith (1884), 9 App. Cas. 356, P. C. ; The Cella (1888), 36 W. R. 540, C. A.

320. Admiralty Court Act, 1840 (c. 65), s. 6—Foreign vessel—In British port—Necessaries—Jury.]—The jurisdiction possessed by the Admlty. Ct. in all cases relative to necessaries supplied to a foreign ship under the above Act applies to a foreign steamship carrying a foreign flag, & trading between Belgium & London, & whatever is required to put the machinery in working order (as supplying a new screw propeller to replace a disabled one) is a necessary within the Act. The Admlty. Ct. has power to send the case to be tried by a jury before a ct. of common law, but should exercise this power only in important cases.—THE FLECHA (1854), 1 Ecc. & Ad. 438. S. C. No. 1104, *post.*

Annotations :—**Consd.** The Heinrich Bjorn (1886), 11 App. Cas. 270, H. L. **Refd.** The Mecca, [1895] P. 95, C. A. **Mentd.** The Heinrich Bjorn (1885), 10 P. D. 44, C. A.

321. —— —— **In colonial port.**]—An American ship supplied with necessaries at Cape of Good Hope by an English firm having an establishment there on her arrival in London was arrested at the suit of the merchant who supplied the necessaries, &, with the owner's consent, sold. Payment to the merchant out of the proceeds being opposed by mtgees. of the vessel :—*Held :* under the above sect. the ct. had jurisdiction on a claim for necessaries supplied to a foreign vessel in colonial as well as in British ports.—THE WATAGA (1856), Sw. 165 ; 28 L. T. O. S. 192 ; 5 W. R. 155.

Annotations :—**Distd.** The India (1863), 2 New Rep. 42. **Folld.** The Anna (1876), 1 P. D. 253, P. C. **Refd.** The Feronia (1868), L. R. 2 A. & E. 65 ; The Heinrich Bjorn (1885), 10 P. D. 44, C. A. ; The Mecca, [1895] P. 95, C. A.

322. —— —— ——.]—The master of a foreign vessel lying in the port of Quebec, being without funds or credit, by means of a bill of exchange drawn upon a firm of shipbrokers in London, procured the advance of a sum of money for necessaries. The bill of exchange was accepted & paid, but the acceptors, not having received the amount of the bill from the shipowners, instituted an action against the ship for the amount of the bill :—*Held :* the ct. had jurisdiction under the above sect. to entertain the action.—THE ANNA (1876), 1 P. D. 253 ; 46 L. J. P. 15 ; 34 L. T. 895 ; 3 Asp. M. L. C. 237, C. A.

Annotation :—**Consd.** The Mecca, [1895] P. 95, C. A.

323. —— —— **Not in foreign port.**]—The above sect. refers exclusively to foreign vessels. To found the jurisdiction of the Admlty. Ct. under the second branch of this sect., the articles must have

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PART II. SECT. 5, SUB-SECT. 1.—A.

321 i. *Admiralty Court Act, 1840 (c. 65), s. 6—Foreign vessel—In colonial port—High Court of Bombay.*]—When a suit is brought by material men for necessaries supplied to a foreign ship against the surplus proceeds of such ship lying in the registry of the ct., & there is no opposition on the part of the owners of these proceeds, the ct. has a discretionary power to allow the claim of the material men to be paid out of such unclaimed proceeds. Under s. 6 of the above Act the High Ct. of Bombay has no jurisdiction on its Admlty. side to entertain causes for necessaries supplied to foreign ships, that stat. not extending to India.—*Re* THE ASIA PROCEEDS, *Exp.* HORMASJI (1868), 5 Bom. O. C. 64.—**IND.**

been furnished to a foreign ship within the body of a county, or upon the neighbouring high seas in cases of exigency & necessity arising ; & a claim for payment of the value of goods supplied to a foreign ship building in a foreign port by a British manufacturer cannot be supported, but will be dismissed with costs.—THE OCEAN (1845), 2 Wm. Rob. 368 ; 4 Notes of Cases, 31 ; 7 L. T. 340 ; 9 Jur. 381.

Annotations :—**Consd.** The Wataga (1856), Sw. 165. **Distd.** The West Friesland (1859), Sw. 454. **Consd.** The Heinrich Bjorn (1885), 10 P. D. 44, C. A. **Refd.** The India (1863), 32 L. J. P. M. & A. 185 ; The Feronia (1868), L. R. 2 A. & E. 65 ; The Mecca, [1895] P. 95, C. A.

324. —— —— ——.]—No jurisdiction has been conferred on the Admlty. Ct. by the above sect. to entertain a claim for necessaries supplied to a foreign ship in a foreign port.—THE INDIA (1863), 2 New Rep. 42 ; 32 L. J. P. M. & A. 185 ; 9 L. T. 234 ; 9 Jur. N. S. 417 ; 11 W. R. 536 ; 1 Mar. L. C. 390. S. C. No. 156, *ante* ; Nos. 327, 340, *post.*

Annotation :—**N.F.** The Mecca, [1895] P. 95, C. A.

325. —— —— —— **Action by default.**]—THE AFINA VAN LINGE, Nos. 357, 1495, *post.*

326. —— **Colonial ship not subject to.**]—A motion under the above sect. to arrest a Nova Scotia vessel, the vessel having been built & registered at New Brunswick, was rejected, such vessel not being a foreign sea-going vessel within the sect.—THE OCEAN QUEEN (1842), 1 Wm. Rob. 457 ; 1 Notes of Cases, 271 ; 3 L. T. 341 ; 5 Jur. 1201.

Annotation :—**Refd.** Allen *v.* Garbutt (1880), 6 Q. B. D. 165.

327. Admiralty Court Act, 1861 (c. 10)—British ships.]—The provisions of ss. 4, 5, of the above Act apply only to British ships.—THE INDIA, Nos. 156, 324, *ante* ; No. 340, *post.*

For full anns., *see* S. C. No. 324, *ante.*

328. —— ——.]—THE ELLA A. CLARK, No. 349, *post.*

For full anns., *see* S. C. No. 349, *post.*

329. —— **Foreign ships—Foreign port.**]—Under s. 5 of the above Act the Admlty. Ct. has jurisdiction over a claim for necessaries supplied to a foreign ship in a foreign port (not being the port to which the ship belongs) even though the port is not upon the high seas, unless at the time of commencement of proceedings any owner or part-owner is domiciled in England or Wales. The expression "any ship" in the Act, when used without any qualification, applies to all ships, whether British, colonial, or foreign. *The India*, No. 327, *ante*, & *The Ella A. Clark*, No. 328, *ante*, overd.—THE MECCA, [1895] P. 95 ; 64 L. J. P. 40 ; 71 L. T. 711 ; 43 W. R. 209 ; 11 T. L. R. 139 ; 39 Sol. Jo. 132, C. A. ; 7 Asp. M. L. C. 529 ; 11 R. 742.

330. —— **Colonial ships—British port.**]—Money was advanced at a port in England to pay a debt already incurred for repairs there done to a colonial ship ; by the advance the ship was enabled to go to sea. The ship was afterwards arrested & its proceeds remained in the registry. In a cause of necessaries brought in the Admlty. Ct. :—*Held :* the ct. had jurisdiction under the above Act to entertain a claim for the advance.—THE ALBERT CROSBY (1870), L. R. 3 A. & E. 37 ; 18 W. R. 410.

Annotation :—**Folld.** The Tergeste (1902), 19 T. L. R. 91.

331. Necessaries—In common law sense.]—The term "necessaries," where used in the Act giving the Admlty. Ct. jurisdiction over such claims, has the same meaning as is given to it by the common law cts., & signifies whatever the owner of a vessel, as a prudent man, if present in circumstances in which his agent, in his absence, is called upon to act, would have ordered.—THE RIGA (1872), L. R. 3 A. & E. 516 ; 41 L. J. Adm. 39 ; 26 L. T. 202 ; 20 W. R. 927 ; 1 Asp. M. L. C. 246. S. C. No. 355, *post.*

Annotations :—**Distd.** The Marianne, [1891] P. 180. **Folld.** The Tergeste (1902), 19 T. L. R. 91. **Apld.** The Andr. Theodore (1904), 93 L. T. 184. **Approvd.** Foong Tai *v.* Buchheister, [1908] A. C. 458, P. C. **Refd.** The Jenny Lind (1872), L. R. 3 A. & E. 529.

—— **What are.**]—*See* SHIPPING & NAVIGATION.

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326 i. —— *Colonial ship not subject to.*]—A vessel built & registered in a British possession is not a foreign sea-going vessel within the above stat., & the Vice-Admlty. Ct. of Lower Canada cannot enforce the claims of material men for repair to such ships, their lien being possessory only.—THE MARY JANE (1848), 7 L. T. 258 ; 3 Rgv. de V. 436.—**CAN.**

327 i. *Admiralty Court Act*, 1861 (*c.* 10) *Ship "under arrest."*]—At the date of the institution of pltf.'s action for equipping the *A.* with an engine, the vessel was under arrest of the ct. in an action by a seaman for wages under £50. Deft. contended that under M. S. Act, 1894 (c. 60), s. 165, the seaman could not maintain an action, & that the vessel was not legally under arrest :—*Held :* once the fact of the arrest by the ct. was established, that of itself conferred jurisdiction under s. 4 of the above Act, as it was the present fact of the arrest, & not the future result of the action, that determined the question of jurisdiction.—MOMSEN *v.* THE AURORA (1913), 18 B. C. R. 353 ; 25 W. L. R. 241.—**CAN.**

327 ii. —— "*Equipping*" *any ship—Supply of water.*]—Water supplied to a ship for the use of her engines & crew is not "equipping" a ship within s. 4 of the above Act.—JUDGE & SONS *v.* THE JOHN IRWINS (1911), 14 Ex. C. R. 20.—**CAN.**

329 i. —— *Foreign ships—Foreign port.*]—An action *in rem* was brought in the Exch. Ct. of Canada by foreigners residing at M., Ohio, for necessaries supplied at that place to a ship registered in the United States, her owners not being domiciled in Canada. Defts. moved to set aside the arrest of the vessel & have the action dismissed for want of jurisdiction :—*Held :* under s. 5 of the above Act the Exch. Ct. of Canada had jurisdiction, & defts.' motion must be dismissed. *The India* (1863), 32 L. J. P. M. & A. 185, not folld. ; *The Mecca*, [1895] P. 95, folld.—COOKTY *v.* THE GEORGE L. COLWELL (1898), 6 Ex. C. R. 196.—**CAN.**

a. —— "*Owner domiciled*" *in Canada.*] A., the owner, resident in Ontario, chartered a ship for a season to P., who undertook to return her free of any lien. Pltfs. brought an action *in rem* for necessaries supplied to her whilst chartered to P. On motion by A. to set aside the writ of summons & all proceedings for want of jurisdiction :—*Held :* (1) the word "owner" used in s. 5 of the above Act meant "registered owner," not a *pro hâc vice* owner, & the word "domiciled" must be understood in its ordinary legal sense, & the Act expressly gave the ct. jurisdiction to try actions *in rem* unless it were shown that at the time of the writ issued an owner or part-owner of the ship was domiciled in Canada ; (2) the owner being domiciled in Ontario, pltfs.' writ & the service thereof must be set aside. *The Ripon City*, [1897] P. 226 ; *The Druid* (1842), 1 Wm. Rob. 391 ; *The Orient* (1871), L. R. 3 P. C. 696 ; *The Ida* (1860), Lush. 6 ; *The Turgot* (1886), 11 P. D. 21 ; *The Castlegate*, [1893] A. C. 38, refd.—ROCHESTER *v.* THE GARDEN CITY (1901), 7 Ex. C. R. 34 ; 21 C. L. T. 283.—**CAN.**

b. *English ship—Irish port.*] — A warrant will not issue in a suit for materials if the party who supplied them & the owner of the vessel, both live in Ireland ; but if the former resides in Ireland, & the latter in England, the ct. may grant a warrant, & arrest the ship in an Irish port.—THE SHANNON (1852), 6 Ir. Jur. O. S. 82 (Adm.).—**IR.**

331 i. *Necessaries.*]—The *E.*, owned in N. B., being out of repair in N. S., pltf. furnished supplies, which were accepted by the workmen in payment of their wages, & the repairs were effected. Subsequently, pltf. arrested the vessel for necessaries supplied, no owner being domiciled within the province :—*Held :* he was entitled to recover the amount of his claim.—THE EMMA (1880), Y. A. D. 282.—**CAN.**

c. —— "*Owner domiciled within Canada.*"]—A co., whose head office is in England & which is licensed & registered to carry on business in B. C., is not an "owner domiciled within Canada" within r. 37 (*b*) of the procedure in Admlty. cases. A pltf. who has supplied necessaries in B. C. to a ship which is away from its home port & has no owner domiciled in B. C., has acquired a statutory lien for such necessaries when the ship is arrested under the warrant of the ct., & the lien may be enforced either upon the trial or on a subsequent motion.—VICTORIA MACHINERY DEPOT CO., LTD. *v.* THE CANADA & THE TRIUMPH (1913), 18 B. C. R. 511.—**CAN.**

d. —— *Power to arrest.*]—The High Ct. of Bengal has no power in its Vice-Admlty. jurisdiction to arrest a British-owned ship for repairs.—HOWRAH DOCKING CO. *v.* THE JEAN LOUIS (1864), Cor. 113 ; 2 Hyde, 255.—**IND.**

Sect. 5.—*Necessaries: Sub-sect*, 1, *A. & B.; sub-sect.* 2.]

332. —— Within Admiralty Court Act, 1840 (c. 65)—Not mere debt.]—Under the above Act the Admlty. Ct. exercises an equitable jurisdiction with regard to necessaries supplied to owners of a foreign vessel, but only to the extent of making them liable for the supply of articles for which they would be responsible at common law if resident in England. The proof lies upon the material man to show that the supplies were necessary at the time. The ct. has no jurisdiction to make the ship responsible for the mere debt of the owner.—THE SOPHIE (1842), 1 Wm. Rob. 368; 1 Notes of Cases, 393; 6 Jur. 351.

Annotations:—**Distd.** The N. R. Gosfabrick (1858), Sw. 344. **Apld.** The Masonic (1861), 5 L. T. 460. **Folld.** The Albert Crosby (1870), 18 W. R. 410. **Consd.** The Riga (1872), L. R. 3 A. & E. 516. **Refd.** The Maitland (1869), 21 L. T. 798.

333. *S. P.* THE ALEXANDER (1842), 1 Wm. Rob. 346; 1 Notes of Cases, 380; 6 Jur. 241.

Annotations:—**Apld.** The Heinrich Bjorn (1883), 8 P. D. 151. **Consd.** The Heinrich Bjorn (1885), 10 P. D. 44, C. A. **Refd.** The Sophie (1842), 1 Wm. Rob. 368; The Riga (1872), L. R. 3 A. & E. 516; Gunn *v.* Roberts (1874), 2 Asp. M. L. C. 250.

334. —— —— ——.]—A broker's commission on a charterparty for a future voyage effected while the ship is at sea under another charter is not a necessary within s. 6 of the above Act, & the Admlty. Ct. has no jurisdiction to entertain an action *in rem* in respect thereof.—THE MARIANNE, [1891] P. 180; 64 L. J. P. 39; 64 L. T. 539; 7 Asp. M. L. C. 34.

335. —— —— ——.]—Sums paid by a broker as insurance premiums for the purpose of effecting insurance on the hull & safe arrival of a vessel, or sums due to underwriters as premiums, cannot be recovered by the broker or underwriters as necessaries within s. 6 of the above Act, &, as such sums are not necessaries, the broker & underwriters have no right to proceed against the ship *in rem*.—THE ANDRE THEODORE (1904), 93 L. T. 184; 21 T. L. R. 158; 10 Asp. M. L. C. 94.

Annotation:—**Apld.** Moran Galloway *v.* Uzielli, [1905] 2 K. B. 555.

336. —— —— **Not matter of accounts—Appropriation.**]—A ship cannot be made liable to arrest for a general balance of account merely by appropriating the receipts & payments in such manner as to show a balance due for necessaries.—THE TWENTJE (1859), 13 Moo. P. C. C. 185; 2 L. T. 613; 8 W. R. 423; 15 E. R. 70, P. C. S. C. No. 1400, *post*.

Annotations:—**Distd.** The Underwriter (1868), 25 L. T. 279. **Consd.** The Henrich Bjorn (1885), 33 W. R. 719, C. A. **Expld.** Foong Tai *v.* Buchheister, [1908] A. C. 458, P. C. **Refd.** The El Salto (1908), 25 T. L. R. 99.

337. —— —— ——.]—The above Act, by s. 6, does not apply to ordinary mercantile accounts between shipowner & agent.

Pltfs. were agents for shipowners, & also brokers to the vessel, in which capacities they received the freights on cargo delivered in the port of London & paid the dock dues, pilotage, clearance & other charges connected with the vessel; they also paid £186 3*s.* for coals supplied to the vessel by direction of the master, to enable her to leave. Pltfs. prayed judgment for the payment of £81 15*s.* 10*d.*, the balance of their account against the ship:—*Held*: (1) this was an account between shipowner & agent; (2) all the business was done by pltfs. as agents; (3) the moneys were so advanced, & so received; (4) the moneys received were sufficient to pay all necessary expenses; (5) the arrest of the ship for payment of the balance of an account of this description was not contemplated by the Act.—THE COMTESSE DE FREGEVILLE (1861), Lush. 329; 4 L. T. 713; 1 Mar. L. C. 106.

Annotations:—**Distd.** The Underwriter (1868), 25 L. T. 279. **Consd.** The Riga (1872), L. R. 3 A. & E. 516. **Folld.** The El Salto (1908), 25 T. L. R. 99. **Refd.** The Panthea (1871), 25 L. T. 389.

338. —— —— ——.]—The ct. will not exercise the powers conferred upon it by the above Act & Admlty. Ct. Act, 1861 (c. 10), to enforce payment of a claim for necessaries where these are merely items forming part of a general mercantile account between a shipowner & agent.—THE EL SALTO (1908), 25 T. L. R. 99.

339. —— —— **Debt in respect of—Not sufficient.**]—A foreign ship cannot be sued under s. 6 of the above Act for money advanced to the master to enable him to come out of gaol, where he was imprisoned for a debt incurred for necessaries supplied to the ship.—THE N. R. GOSFABRICK (1858), Sw. 344; 31 L. T. O. S. 345; 6 W. R. 871. S. C. Nos. 350, 687, *post*.

Annotations:—**Consd.** The Panthea (1871), 25 L. T. 389; The Riga (1872), L. R. 3 A. & E. 516. **Refd.** The Albert Crosby (1870), 18 W. R. 410.

340. —— —— —— ——.]—A repayment of a debt due from the ship for supply of necessaries does not place the person making such repayment in the position of a person supplying the necessaries, even though such repayment was required by the law of the country where the supply was made, & the ship could not leave the port until such repayment had been made. THE INDIA, Nos. 156, 324, 327, *ante*.

For full anns., *see* S. C. No. 324, *ante*.

341. —— —— —— ——.]—A claim for money advanced to a master to pay averages was dismissed with costs, such advances not being "necessaries" within s. 6 of the above Act.—THE AALTJE WILLEMINA (1866), L. R. 1 A. & E. 107.

Annotation:—**Consd.** The Riga (1872), L. R. 3 A. & E. 516.

332 i. —— *Within Admiralty Court Act*, 1840 (*c.* 65)—*Corporation dues paid by master.*]—Corpn. dues paid on a ship in the port of Dublin are not such necessaries as create a lien in the Admlty. Ct. under s. 6 of the above Act.—THE BELVIDERE (1874), 8 I. L. T. 176.—**IR.**

e. —— *Within Admiralty Court Act*, 1861 (*c.* 10)—*Insurance.*]—The insurance of a ship is not a necessary within the above Act. *The Heinrich Bjorn* (1886), 8 P. D. 151, folld.—STOKES *v.* THE CONFERENCE (1887), 8 N. S. W. Adm. 10.—**AUS.**

f. *Vice-Admiralty Courts Act*, 1863 (*c.* 24)—*Port within British possession.*]—A Vice-Admlty. Ct. has no jurisdiction under the above Act to entertain a suit for necessaries supplied at a port out of the British possession in which the ct. is established; & where a master's suit is thus barred he will not be allowed in that ct. to set off the amount as against a debt due by him to the owner.—THE ALBION, No. 363 ii, *post*.—**AUS.**

g. —— ——.]—A Vice-Admlty. Ct. has no jurisdiction apart from stat. to enforce any claim by way of maritime lien on a ship itself for necessaries supplied. The provisions of s. 10 of the above Act do not create a maritime lien with respect to necessaries supplied within the possession in which the ct. is established.—THE RIO TINTO (1884), 9 App. Cas. 356; 53 L. J. (P. C.) 54; 50 L. T. 461, P. C.—**GIBRALTAR.**

h. —— *Foreign seaman in foreign ship—Necessaries supplied out of jurisdiction.*]—The promovent shipped on board a French vessel as steward & providore under an agreement by which he was to receive £6 a month as steward & be paid at a varying scale per diem for each of the passengers, officers, & crew as providore. The libel claimed wages & necessaries supplied both within & outside the jurisdiction. The responsive allegation stated that the vessel was the property of an insolvent French co. & had been sent to Sydney by orders of the syndic for sale, that the promovent was a French subject & shipped in the French dominions & was entered in the articles, & that by the French law the wages payable to any person on the articles of a French ship could not be received by him at any port outside the French dominions, but must be paid to the consul to be transmitted to the Ministry of Marine at Paris, in order that certain lawful deductions might be made, & that according to the law of France no creditor of an insolvent co. could pursue any remedy against its property, but could only recover his debt by suing the syndic:—*Held*: (1) he could only recover for provisions supplied by him as providore within the jurisdiction, & the payments to be made him as providore could not be considered as wages; (2) the statement as to French law was not material.—THE OCEAN QUEEN (1879), 1 N. S. W. 99.—**AUS.**

342. —— —— Cargo sold for—Not sufficient.]—A cargo of salt having been sold by the master, & the proceeds applied towards paying the expense of repairs at Inverness of a foreign ship bound from L. to S. :—*Held :* on the vessel's return to L., the Admlty. Ct. had not jurisdiction to arrest her at the instance of the shippers, as they were not to be considered in the light of material men, but must seek their remedy from the foreign shipowner in Prussia.—THE BRAVO (1853), 4 L. T. 621 ; *Shipping Gazette*, June 7.

B. Effect of Jurisdiction.

343. No maritime lien—Non-liability of purchaser.]—Admlty. Ct. Act, 1840 (c. 65), s. 6, does not give a maritime lien in respect of necessaries supplied to a foreign ship in an English port.

Pltfs. advanced to a part-owner of a foreign ship then at L. money for necessaries for the ship. The part-owner having sold his interest in the ship to defts., pltfs. brought an action *in rem* for the amount of the advances :—*Held :* the action could not be maintained.—THE HENRICH BJORN (1886), 11 App. Cas. 270 ; 55 L. J. P. 80 ; 55 L. T. 66 ; 6 Asp. M. L. C. 1, H. L.

Annotations :—**Consd.** The Ringdove (1886), 11 P. D. 120 ; The Sara (1887), 12 P. D. 158, C. A. ; Westrup *v.* Great Yarmouth Steam Carrying Co. (1889), 43 Ch. D. 241 ; The André Théodore (1904), 93 L. T. 184 ; Foong Tai *v.* Buchheister, [1908] A. C. 458, P. C. **Reid.** The Beeswing (1885), 53 L. T. 554, C. A. ; The Cella (1885), 13 P. D. 82, C. A. ; The Lyons (1887), 57 L. T. 818 ; The Dictator, [1892] P. 304 ; The Africano, [1894] P. 141 ; The Orienta, [1894] P. 271 ; The Mecca, [1895] P. 95, C. A. ; The Veritas, [1901] P. 304 ; Moran Galloway *v.* Uzielli, [1905] 2 K. B. 555.

344. —— ——.]—B. furnished necessaries to the *A.*, which was sold to persons who had notice of B.'s claim :—*Held :* B. could not after the sale arrest the ship in an action for necessaries.—THE ANEROID (1877), 2 P. D. 189 ; 47 L. J. P. 15 ; 36 L. T. 448 ; 3 Asp. M. L. C. 418.

Annotation :—**Distd.** Hamilton *v.* Harland (1880), 42 L. T. 264, C. A.

345. —— Position of mortgagee.]—The material man has no maritime lien, & his right to the *res* as a security only arises upon his instituting a suit ; any security he may thus obtain is subject to any then existing claims, & a registered mtge. takes precedence as an existing incumbrance over a claim for necessaries, though supplied previous to the register of the mtge.—THE PACIFIC, No. 319, *ante*.

Annotations :—**Consd.** The Troubadour (1866), L. R. 1 A. & E. 302. **Folld.** The Harriet (1868), 18 L. T. 804. **Distd.** The Lion (1870), 26 L. T. 716. **Consd.** The Two Ellens (1871), L. R. 3 A. & E. 345. **Apprvd.** Johnson *v.* Black (1872), L. R. 4 P. C. 161. **Consd.** The Heinrich Bjorn (1885), 10 P. D. 44, C. A. ; Hamilton *v.* Baker (1889), 14 App. Cas. 209. **Reid.** The Mary Ann (1865), L. R. 1 A. & E. 8 ; The Scio (1867), L. R. 1 A. & E. 353 ; Simpson *v.* Blues (1872), L. R. 7 C. P. 290 ; Laws *v.* Smith (1884), 9 App. Cas. 356, P. C.
For full anns., *see* S. C. No. 319, *ante*.

346. —— ——.]—Admlty. Ct. Act, 1861 (c. 10), s. 5, does not create a maritime lien for necessaries at the time the necessaries are supplied, & a ship does not become chargeable with a debt for necessaries until a suit is actually instituted. All valid charges on the ship to which any person other than the owner is liable are entitled to take precedence of such debt.—THE TWO ELLENS (1872), L. R. 4 P. C. 161 ; 8 Moo. P. C. C. N. S. 398 ; 41 L. J. Adm. 33 ; 26 L. T. 1 ; 20 W. R. 592 ; 1 Asp. M. L. C. 308 ; 17 E. R. 361—P. C., *affg.* S. C. (1871), L. R. 3 A. & E. 345.

Annotations :—**Apld.** Giovanni Dapueto *v.* Wyllie (1874), L. R. 5 P. C. 482 ; The Aneroid (1877), 2 P. D. 189. **Distd.** The Acacia (1879), 41 L. T. 564 ; Laws *v.* Smith (1884), 9 App. Cas. 356, P. C. **Consd.** The Heinrich Bjorn (1885), 10 P. D. 44, C. A. ; **Dbtd.** Northcote *v.* The Henrich Bjorn (1886), 11 App. Cas. 270. **Apld.** The Sara (1887), 12 P. D. 158, C. A. **Distd.** The Cella (1888), 13 P. D. 82, C. A. **Apld.** Hamilton *v.* Baker (1889), 14 App. Cas. 209. **Consd.** The Mecca, [1895] P. 95, C. A. ; The Veritas, [1901] P. 304. **Apld.** Von Freeden *v.* Hull (1906), 75 L. J. K. B. 359.

347. —— In master's favour.]—Admlty. Ct. Act, 1861 (c. 10), does not give the master a maritime lien on the ship for disbursements. *The Glentanner* (1859), Sw. 415 ; *The Mary Ann* (1865), L. R. 1 A. & E. 8 ; *The Feronia* (1868), L. R. 2 A. & E. 65 ; & *The Ringdove* (1886), 11 P. D. 120, overd.—THE SARA (1889), 14 App. Cas. 209 ; 58 L. J. P. 57 ; 61 L. T. 26 ; 38 W. R. 129 ; 5 T. L. R. 507 ; 6 Asp. M. L. C. 413, H. L.

Annotations :— **Consd.** The Castlegate, [1893] A. C. 38. **Refd.** The Orchis (1890), 59 L. J. P. 31, C. A. ; The Orienta, [1894] P. 271 ; The Mecca, [1895] P. 95, C. A. ; The Ripon City, [1897] P. 226 ; The Veritas (1901), 70 L. J. P. 75 ; The Tagus, [1903] P. 44. **Mentd.** Winstanley *v.* North Manchester Overseers, [1910] A. C. 7 ; West Kent Main Sewerage Board *v.* Dartford Assmt. Com., [1911] A. C. 177.

Priorities generally, *see* SHIPPING & NAVIGATION.

348. Maritime lien—Against purchaser.]—A vessel foreign-owned at the time when necessaries are supplied to her cannot by a subsequent sale change her legal position so as to deprive the person supplying the necessaries of the remedies given by Admlty. Ct. Act, 1840 (c. 65), s. 6.—THE PRINCESS CHARLOTTE (1864), 33 L. J. P. M. & A. 188.

349. —— ——.]—A claim for necessaries supplied to a foreign ship may be enforced by proceedings *in rem* under Admlty. Ct. Act, 1840 (c. 65), s. 6, notwithstanding a subsequent *bond fide* transfer to a British owner ; & this remedy is not taken away by Admlty. Ct. Act, 1861 (c. 10), s. 5, though the British owner be domiciled in England at the time of the institution of the cause. The provisions of s. 5 of the later Act do not apply to ships foreign-owned at the time when the necessaries are furnished. *Semble :* where Parliament has given the Admlty. Ct. jurisdiction to proceed *in rem* for certain claims, such claims are to be treated as maritime liens.—THE ELLA A. CLARK (now THE GOLDEN AGE) (1863), Brown. & Lush. 32 ; 1 New Rep. 525 ; 32 L. J. P. M. & A. 211 ; 8 L. T. 119 ; 9 Jur. N. S. 312 ; 11 W. R. 534 ; 1 Mar. L. C. 325. S. C. No. 328, *ante*.

Annotations :—**Consd.** The Two Ellens (1871), L. R. 3 A. & E. 345 ; Laws *v.* Smith (1884), 9 App. Cas. 356, P. C. ; The Heinrich Bjorn (1885), 10 P. D. 44, C. A. **Dbtd.** Northcote *v.* The Henrich Bjorn (1886), 11 App. Cas. 270, H. L. **Consd.** The Mecca, [1895] P. 95, C. A. **Reid.** Allen *v.* Garbutt (1880), 6 Q. B. D. 165. **Mentd.** The Anna (1876), 1 P. D. 253, C. A.

SUB-SECT. 2.—EXERCISE OF JURISDICTION.

350. In accordance with Admiralty Court Act, 1840 (c. 65), s. 6.]—The above sect. introduced a novel proceeding into the Admlty. Ct., which had formerly no jurisdiction in such cases, & the ct. cannot extend its construction.—THE N. R. GOSFABRICK, No. 339, *ante* ; No. 687, *post*.

For full anns., *see* S. C. No. 339, *ante*.

Sect. 5.—Necessaries : Sub-sect. 2. Secls. 6 & 7 : Sub-sect. 1, A. & B.]

351. —— Act retrospective.]—*Held :* The Admlty. Ct. had power, under the above sect., to entertain a suit for necessaries furnished to a foreign vessel in 1835, before the passing of the Act.—THE ALEXANDER LARSEN, No. 59, *ante.*

Annotations :—**Consd.** The Heinrich Bjorn (1885), 10 P. D. 44, C. A. **Refd.** Laws *v.* Smith (1884), 9 App. Cas. 356, P. C.

For full anns., *see* S. C. No. 59, *ante.*

352. Persons entitled—Ship's agent—Co-partner.]—The agents of a foreign ship in a British port, who have paid for necessaries supplied to her, or who have rendered themselves liable to pay for such necessaries, may sue the ship for such advances as were made on the ship's account, but not for the balance of a general account against her owners. A co-partner in a ship may sue the ship for such advances made by him. *Semble :* not if the co-partner is interested in the particular voyage for which the ship is supplied.—THE UNDERWRITER (1868), 25 L. T. 279 ; 1 Asp. M. L. C. 127.

Annotations :—**Apld.** The André Théodore (1904), 93 L. T. 184. **Distd.** Foong Tai *v.* Buchheister, [1908] A. C. 458, P. C. **Mentd.** The Riga (1872), L. R. 3 A. & E. 516 ; The El Salto (1908), 25 T. L. R. 99.

353. Breaking arrest—Order for trial.]—Where, on a claim for necessaries, the vessel was arrested, & the master, in contempt of the warrant, sailed out of the jurisdiction, the ct. allowed a cause for necessaries to be set down & pltf. to file proofs ; & upon such proof of the facts condemned the ship in the claim & costs.—THE LADY BLESSINGTON (1865), 34 L. J. P. M. & A. 73.

354. Release—Position of mortgagee.]—A mtgee., although entitled to intervene in a cause *in rem* for equipment & repair, is not entitled to obtain a release of the vessel upon giving bail only to pay the claim of the material men, in the event of its being held to have priority over the mtge.—THE ACACIA (1879), 41 L. T. 564 ; 4 Asp. M. L. C. 226.

355. Pleading—Sufficiency.]—Where a petition merely alleges that money was advanced for necessary expenses at the owner's request without stating what those necessary expenses were, such claim will be struck out on motion to reject or alter the petition.—THE RIGA, No. 331, *ante.*

For full anns., *see* S. C. No. 331, *ante.*

356. Inquiries ordered.]—Under Jud. Act, 1875 (c. 77), O. 33, in an action for necessaries, the ct. will, in its discretion, order a reference to be held, before the judgment is pronounced, to ascertain if any or what sum is due.—THE SULLY (1879), 48 L. J. P. 56.

357. Action by default—Payment out of court.]—In an action of necessaries, where necessary moneys were advanced by merchants in England to a foreign ship, partly when the ship was lying in a port of refit out of the jurisdiction of the ct., & partly upon her arrival in England, the action going by default, & the owners not appearing to oppose the motion to the ct. to order full payment out of the proceeds of the ship in the registry, the ct. will make the order.—THE AFINA VAN LINGE (1859), Sw. 514 ; 1 L. T. 339. S. C. No. 325, *ante ;* No. 1495, *post.*

SECT. 6.—TOWAGE.

See, generally, SHIPPING & NAVIGATION.

358. Extent of jurisdiction—Damage by negligence in towing—Taking ground.]—The Admlty. Ct. has not jurisdiction under Admlty. Ct. Act, 1840 (c. 65), s. 6, or Admlty. Ct. Act, 1861 (c. 10), s. 7, or otherwise, to entertain a claim against a steam-tug for damage occasioned to the vessel towed by negligence in towing, if damage arises not by collision but by the vessel taking ground.—THE ROBERT POW (1863), Brown. & Lush. 99 ; 2 New Rep. 527 ; 32 L. J. P. M. & A. 164 ; 9 L. T. 237 ; 1 Mar. L. C. 392.

Annotations :—**Distd.** The Uhla (1867), 37 L. J. Adm. 16. **Apld.** The Energy (1870), L. R. 3 A. & E. 48. **Consd.** Smith *v.* Brown (1871), L. R. 6 Q. B. 729. **Dbtd.** Mersey Docks & Harbour Board *v.* Turner, [1893] A. C. 468. **Distd.** The Mecca, [1895] P. 95, C. A. **Mentd.** Turner *v.* Mersey Docks & Harbour Board, [1892] P. 285, C. A.

359. —— —— Liability to third person.]—A suit was instituted in the Admlty. Ct. to recover damages for negligence of a tug employed to tow pltfs.' vessel, through which negligence it was alleged pltfs.' vessel was brought into collision with another vessel & loss occasioned to pltfs. :—*Held :* the Admlty. Ct. had jurisdiction notwithstanding the alleged damage was caused only by negligent performance of a contract to tow. *Semble :* the ct. had jurisdiction, though the damage caused to pltf. consisted only in rendering him liable in damages to a third person.—THE ENERGY (1870), L. R. 3 A. & E. 48 ; 39 L. J. Adm. 25 ; 23 L. T. 601 ; 18 W. R. 1009 ; 3 Mar. L. C. 503.

Annotations :—**Distd.** Spaight *v.* Tedcastle (1881), 44 L. T. 589, H. L. The Englishman & The Australia, [1894] P. 239. **Apld.** The Adam W. Spies (1901), 70 L. J. P. 25.

360. —— Contract not towage contract.]—The master of a vessel agreed with a tug for towage from Sea Reach in the Thames to a London wharf, & agreed to pay £6 & give an order upon the owner of the wharf for the amount usually allowed by him (under the name of towage) as a premium to vessels of the kind coming to his wharf. The service was performed by the tug, & the master paid the £6, but refused to give the order on the owner of the wharf. The amount actually paid by the owner of the wharf according to his practice was proved ; & it was also proved that if an order signed by the master of the vessel towed was presented by the master of the tug, the money would be (as a matter of practice) paid to him :—*Held :* (1) the master of the vessel had no authority to agree to transfer to the master of the tug an uncertain sum payable to owners of the vessel ; (2) the ct. had no authority to enforce such a contract or give damages for breach of it.—THE MARTHA (1861), Lush. 314.

361. —— ——.]—Under Admlty. Ct. Act, 1840 (c. 65), the Admlty. Ct. has jurisdiction in claims for steam towage, but not for a steam-tug bringing off passengers from the shore.—THE WALLACE *v.* THE JANE (1853), 9 L. T. 811.

362. —— Measure of damages—Remuneration for delay.]—A tug having entered into a contract to tow a ship from A. to B. for a specified sum, the ship, during performance of the agreed towage, was injured by collision, & the tug was detained nearly three days in attendance. In an action of towage instituted by the owner of the tug in a cty. ct., & transferred to the Admlty. Ct. :—*Held :* the ct. had no jurisdiction to award, in addition to the sum agreed to be paid for towage, any remuneration for delay.—THE HJEMMETT (1880), 5 P. D. 227 ; 49 L. J. P. 66 ; 42 L. T. 514 ; 4 Asp. M. L. C. 274.

SECT. 7.—WAGES, MASTER'S WAGES & DISBURSEMENTS.

Wages & disbursements generally, including forfeiture of wages, & maritime liens for wages & disbursements, *see* SHIPPING & NAVIGATION.

SUB-SECT. 1.—JURISDICTION IN THE CASE OF THE MASTER.

A. At Common Law.

363. No jurisdiction—Contract made on shore—Personal representatives.]—The master of a ship cannot sue in the Admlty. for wages on a contract made on shore; nor if he dies on the voyage can his personal representatives.—CLAY *v.* SNELGRAVE (SUDGRAVE) (1700), 1 Ld. Raym. 576; 12 Mod. Rep. 405; 1 Salk. 33; 91 E. R. 1285; *sub nom.* DAY *v.* SNELGROVE, 1 Com. 74; 92 E. R. 967. S. C. No. 368, *post.*

Annotations:—**Distd.** The Charkieh (1873), 28 L. T. 190; **Refd.** Hanson *v.* Royden (1867), 17 L. T. 214. **Mentd.** London Corpn. *v.* Cox (1867), L. R. 2 H. L. 239.

364. —— ——.]—The Admlty. Ct. has no jurisdiction to decree wages to a master of a ship, where the contract is upon land.—RAGG *v.* KING (1729), 1 Barn. K. B. 297; 2 Stra. 858; 94 E. R. 202. S. C. No. 421, *post.*

Annotation:—**Distd.** Hanson *v.* Royden (1867), L. R. 3 C. P. 47.

365. *S. P.* KING *v.* PLAYER (unreported), cited 1 Barn. K. B. 297.

Annotation:—**Folld.** Ragg *v.* King (1729), 1 Barn. K. B. 297.

366. Death of master—Mate becoming master.]—Where, on the master's death during the voyage, the mate becomes master & brings the ship home, he must sue for wages due to him as master in a ct. of common law, for a master cannot sue for wages in Admlty.—REED (READ) *v.* CHAPMAN (1732), 2 Barn. K. B. 160; Kel. W. 226; 2 Stra. 937; 94 E. R. 421. S. C. No. 426, *post.*

Annotations:—**Folld.** The Favourite (1799), 2 Ch. Rob. 232. **Distd.** Hanson *v.* Royden (1867), L. R. 3 C. P. 47.

367. *S. P.* THE FAVOURITE (1799), 2 Ch. Rob. 232. S. C. No. 427, *post.*

368. —— **Position of personal representatives.**]—CLAY *v.* SNELGRAVE, No. 363, *post.*

For full anns., *see* S. C. No. 363, *ante.*

B. Statutory Jurisdiction.

See, now, MERCHANT SHIPPING ACT, 1894 (c. 60), s. 167.

369. Merchant Seamen Act, 1844 (c. 112)—Insolvency of owner.]—The privilege of masters to sue for wages under the above Act is subject to the following conditions: (1) wages must be claimed to be due from a person who was owner of the ship at the time of the original contract; (2) such owner must be bkpt. or insolvent at the time when the claim is preferred. The master of a vessel is not debarred from suing under the Act upon the ground that he was a joint mtgee. of ship, & was cognisant of the sale of the vessel by the other mtgee. & did not dissent from such sale.—THE REPULSE (1845), 2 Wm. Rob. 398; 4 Notes of Cases, 166; 7 L. T. 225; 9 Jur. 738; S. C. on subsequent proceeding (1847), 11 Jur. 716.

Annotation:—**Folld.** The Tecumseh (1850), 3 Wm. Rob. 144.

370. *S. P.* THE TECUMSEH, No. 10, *ante.*

371. *S. P.* THE ALERT (1851), 7 L. T. 258.

372. *S. P.* THE ALBERT (1851), 10 L. T. 913.

373. *S. P.* THE JULINDUR (1853), 1 Ecc. & Ad. 71.

374. —— —— **Part-owner.**]—*Semble:* where the majority of interests in a vessel becomes bkpt. or insolvent the master may proceed against the ship for recovery of wages.—THE SIMLAH (1851), 18 L. T. O. S. 35; 15 Jur. 865.

For full anns., *see* SHIPPING & NAVIGATION.

375. —— —— **Meaning of "insolvency."**]—A master can sue the ship for his wages, under s. 16 of the above Act, only where the owner has become an insolvent debtor, in the legal sense of the term, the word "insolvency" not meaning a general inability to pay.—THE PRINCESS ROYAL (1845), 2 Wm Rob. 373; 4 Notes of Cases, 70; 7 L. T. 225; 9 Jur 119, 433. S. C. Nos. 540, 554, 1248, *post.*

Annotation:—**Apld.** The Great Northern (1846), 2 Wm. Rob 509.

376. —— —— **Allowances not included—Accounts.**]—A master suing *in rem*, the owner being bkpt., is not entitled to include in "wages" an allowance, by agreement, for cabin stores, which is of the nature of a special contract; but he may accommodate deductions in his schedule to the equity of the case, namely, that of allowing deductions on both sides.—THE TECUMSEH (1850), 3 Wm. Rob. 144; 6 Notes of Cases, 658; 13 L. T. O. S. 8; 13 Jur. 68, 131.

Annotation:—**Consd.** The Enterprise (1861), 5 L. T. 29.

377. Merchant Shipping Act, 1854 (c. 104).]—Where the owner's usual place of residence is more than twenty miles from the port of discharge, the master is precluded from suing for wages in the Admlty. Ct. by the fact that the owner regularly attends a market in the port of discharge & on such occasions frequents the house of his agent there.—THE BLAKENEY (1859), Sw. 428; 3 L. T. 123; 5 Jur. N. S. 418.

For full anns., *see* SHIPPING & NAVIGATION.

PART II. SECT. 7, SUB-SECT. 1.—A.

363 i. *No jurisdiction—Manitoba.*]—Pltf. sought to enforce a maritime lien in respect of wages earned in 1888, 1889, & 1890, as master of the *A.*, owned by a co. in Manitoba:—*Held:* until Colonial Cts. of Admlty. Act, 1890 (c. 27), & Admlty. Act, 1891 (c. 29), came into force on July 1 & Oct. 2, 1891, respectively, there being no ct. in Manitoba having Admlty. jurisdiction, the law of England respecting maritime liens was not applicable to that Province, & pltf. had no maritime lien. *The Rio Tinto* (1884), 9 App. Cas. 356; *The Heinrich Bjorn* (1886), 11 App. Cas. 270; *The Sara* (1889), 14 App. Cas. 209; *The Milford* (1858), Sw. 362; *The Jonathan Goodhue* (1859), Sw. 524; *The Lord Bishop of Natal* (1864), 3 Moo. P. C. N. S. 115, refd.—BERGMAN *v.* THE AURORA (1893), 3 Ex. L. R. 228.—**CAN.**

363 ii. —— *Disbursements before master registered as such—Master taking mortgage—Set-off.*]—A master can only claim against his ship for disbursements from the date on which he is placed on the ship's register as master, even though there was a previous arrangement between him & the owner that he should be master.

A master is not deprived of his lien for wages & disbursements by the fact that he has taken a mtge. on the ship for the balance of his wages & disbursements, more especially if the shipowner has concealed from him the fact that there was a prior mtge. *Semble:* only mutual debts can be set off under M. S. Act, 1854 (c. 104), to a counterclaim by resp. in a suit by a master to recover wages. *Qu.:* whether the above Act was repealed by Admlty. Ct. Act, 1861 (c. 10).—THE ALBION (1872), 27 L. T. 723; 3 V. R. Adm. 1.—**AUS.**

a. *Master part-owner.*]—The fact of a master being also a part-owner does not affect his right to recover against the vessel for wages due to him.—THE AURA (1870), Y. A. D. 54.—**CAN.**

PART II. SECT. 7, SUB-SECT. 1.—B.

369 i. *Merchant Seamen Act,* 1844 (c. 112)—*Insolvency of owner.*]—A suit for wages by the master of a vessel against the owner, who has become bkpt., may be maintained, under s. 16 of the above Act, even although the wages commenced to be earned before the commission of an act of bkptcy.—THE SIMON GLOVER (1848), 3 Ir. Jur. O. S. 284 (Adm.).—**IR.**

369 ii. *Con. Stat. N.Z.,* 1908 *No.* 178—*Insolvency of owner.*]—The Supreme Ct. of New Zealand under its Admlty. jurisdiction has power to entertain claims to enforce maritime liens by the master of a ship for wages due under £50 where the owner has become bkpt. Such jurisdiction is not excluded by Shipping & Seamen Act, 1903, ss. 84 (2), 85.—THE MULLOGH (1908), 28 N. Z. L. R. 109.—**N.Z.**

b. *Vice-Admiralty Courts Act,* 1863 (c. 24)—*Agreement—Duties not incident to situation of master.*]—In a suit by the master of a steam tug against the owner for wages & disbursements:—*Held:* a Vice-Admlty. Ct. had no jurisdiction under the above Act to give effect to an agreement between the owner & master of a vessel where the duties to be performed were miscellaneous & not incident to the situation of a master.—*Re* THE ROYAL (1883), 9 Q. L. R. 148.—**CAN.**

Sect. 7.—Wages, master's wages & disbursements: Sub-sect. 1, B. & C.; sub-sect. 2, A. (a).]

378. Admiralty Court Act, 1861 (c. 10)—Wages earned on board—Disbursements.]—A master is entitled to sue the ship for wages as "earned on board the ship" within s. 10 of the above Act if he performed the duties of master, although during his service he did not sleep on board ship, & many of his duties were performed on shore. He may also sue for disbursements made by him during such service on the ship's account.—THE CHIEFTAIN (1863), Brown. & Lush. 104; 2 New Rep. 528; 32 L. J. P. M. & A. 106; 8 L. T. 120; 9 Jur. N. S. 388; 11 W. R. 537; 1 Mar. L. C. 327. S. C. Nos. 382, 387, 822, *post*.

Annotations:—**Folld.** The Edwin (1864), 4 New Rep. 382. **Distd.** The Red Rose (1865), L. R. 2 A. & E. 80, n. **Consd.** The Feronia (1868), L. R. 2 A. & E. 65; The Fairport (1882), 8 P. D. 48. **Refd.** The Joseph Dexter (1869), 20 L. T. 820; The Orienta, [1894] P. 271; The Ruby [1898] P. 59.

379. —— —— —— Though master part-owner.]—When freight has been earned, the master of the ship, though also part-owner, may sue the ship and freight in the Admlty. Ct. to recover wages & disbursements.—THE FERONIA (1868), L. R. 2 A. & E. 65; 37 L. J. Adm. 60; 17 L. T. 619; 16 W. R. 585; 3 Mar. L. C. 54. S. C. No. 380, *post*.

Annotations:—**Distd.** The Jenny Lind (1872), L. R. 3 A. & E. 529. **Consd.** The Fairport (1882), 8 P. D. 48. **Expld.** Hamilton *v.* Baker (1889), 14 App. Cas. 209. **Apld.** The Elmville, [1904] P. 422. **Refd.** The Daring (1868), L. R. 2 A. & E. 260; The Marco Polo (1871), 24 L. T. 804; The Hope (1873), 28 L. T. 287; *Re* Rio Grande do Sul S.S. Co. (1877), 5 Ch. D. 282, C. A.; The Ringdove (1886), 11 P. D. 120; The Orienta, [1894] P. 271; The Ripon City, [1897] P. 226; The Marie Glaeser, [1914] P. 218; Glamorgan Coal Co. *v.* Glamorganshire Standing Joint Committee, Powell Duffryn Steam Coal Co. *v.* Same, [1916] 2 K. B. 206, C. A. **Mentd.** The Sara (1887), 12 P. D. 158, C. A.

380. —— —— —— Liabilities.]—Upon an appeal from the report of the registrar & merchants as to a master's claim for wages & disbursements, the following item, *inter alia*, was objected to: the amount of a dishonoured bill of exchange, drawn for ship's purposes by the master upon the managing owner; but it was doubtful whether the master had received notice of dishonour:—*Held:* (1) even if notice of dishonour had not been waived, the master had not claimed the benefit of the notice; (2) as he was liable for the amount, the item was properly allowed.—THE FERONIA, No. 379, *ante*.

Annotations:—**Refd.** *Re* Rio Grande do Sul S.S. Co. (1877), 5 Ch. D. 282, C. A.; The Orienta, [1894] P. 271.
For full anns., *see* S. C. No. 379, *ante*.

381. —— —— —— Laches.]—A master has, under s. 10 of the above Act, a maritime lien for his disbursements. A liability to pay a debt incurred for necessaries supplied to the ship confers the same rights on the master as an actual payment by him when the *res* is in the hands of the ct.

Bills were given by a master on Apr. 3 & May 4, 1880, & the drawees of such bills became insolvent. Judgment on the bills was obtained against the master in July, 1881, & he issued a writ against the ship on Nov. 23, 1881. The owners' solrs. then gave an undertaking to put in bail:—*Held:* there was no laches which would prevent pltf. from maintaining the action.—THE FAIRPORT (1882), 8 P. D. 48; 52 L. J. P. 21; 48 L. T. 536; 31 W. R. 616; 5 Asp. M. L. C. 62.

Annotations:—**Refd.** The Ringdove (1886), 11 P. D. 120. **Mentd.** The Sara (1887), 12 P. D. 158, C. A.; The Ripon City, [1897] P. 226.

382. —— No Jurisdiction — Liabilities.]—The Admlty. Ct. has not jurisdiction to entertain a claim by the master in consequence of his liability for wages due to the crew & for necessaries.—THE CHIEFTAIN, No. 378, *ante;* Nos. 387, 822, *post*.

Annotations:—**Distd.** The Red Rose (1865), L. R. 2 A. & E. 80, n. **Consd.** The Feronia (1868), L. R. 2 A. & E. 65; The Fairport (1882), 8 P. D. 48. **Refd.** The Joseph Dexter (1869), 20 L. T. 820.
For full anns., *see* S. C. No. 378, *ante*.

383. —— —— ——.]—Jurisdiction given to the Admlty. Ct. by s. 10 of the above Act in respect of masters' disbursements, does not extend to liabilities.—THE EDWIN (1864), Brown. & Lush. 281; 2 New Rep. 382; 33 L. J. P. M. & A. 197; 10 L. T. 658; 12 W. R. 992; 2 Mar. L. C. 36.

Annotations:—**Consd.** The Feronia (1868), L. R. 2 A. & E. 65; The Fairport (1882), 8 P. D. 48. **Refd.** The Sara (1887), 12 P. D. 158, C. A. **Mentd.** The Ripon City, [1897] P. 226.

384. Merchant Shipping Act, 1894 (c. 60), s. 167—Bonus.]—Where the master of a ship has earned a bonus which the owners arranged to pay if he remained in the ship & otherwise satisfied them, such bonus is "wages" or "emoluments" within ss. 167, 742 of the above Act, & the master has a maritime lien for recovery thereof.—THE ELMVILLE, No. 385, *post*.

385. —— Liabilities incurred—Costs of action on bill.]—Where the master of a ship had drawn a bill of exchange on his owners in payment for coals & ship's disbursements, & his owners had dishonoured the bill, & he had been sued as drawer, & at request of the owners had defended, but judgment had been recovered against him thereon with costs:—*Held:* (1) costs incurred by the master in the action on the bill of exchange were not "liabilities properly incurred by him on account of the ship" within s. 167 of the above Act; (2) they could not be recovered by him in an action *in rem* against the ship.—THE ELMVILLE, [1904] P. 422; 73 L. J. P. 120; 91 L. T. 330; 53 W. R. 287; 20 T. L. R. 783; 10 Asp. M. L. C. 23. S. C. No. 384, *ante*.

C. Exercise of Jurisdiction.

386. Proceeds in court—Seamen's action—Payment by master—Action by master against proceeds.]—A ship having been arrested on behalf of a sailor who sued for wages, she was sold & proceeds brought into ct., & the master paid the wages & brought a fresh action against proceeds:—*Held:* this action should proceed.—HOLLAND *v.* THE ROYAL CHARLOTTE (1767), Burrell, 62, 76.

PART II. SECT. 7, SUB-SECT. 1.—C.

386 i. *Proceeds in court—Seamen's wages preferent charge on proceeds.]*—The master of a ship is not entitled to share in the proceeds of the ship with the seamen, or wholly to absorb those proceeds, they being insufficient to meet either claim in full. But where the proceeds cannot meet both claims, the seamen have a right to be paid preferentially as far as the proceeds will extend to the exclusion of the master, even although the decree in favour of the latter was on a day prior to the decree in favour of the seamen, & his suit prior in date to theirs; & this rule applies even where part of the master's claim is for wages paid to seamen.—THE ANGLO INDIAN (1868), 8 N. S. W. S. C. R. 102.—**AUS.**

a. *Colonial ship—Owners not represented—Duty of court.]*—In an action for wages by the captain of a colonial ship, the Admlty. Ct. must exercise a jealous & scrutinising caution in the consideration of the case; if it appears that the owners are not represented, & that the claim can only be liquidated by sale of the vessel, & that the impugnant ship is under engagement by her charter-party & articles to return to her home port, the suit will be dismissed.—THE HEMISPHERE BOREALIS (1859), 5 Ir. Jur. N. S. 180 (Adm.).—**IR.**

b. *Master's disbursements—Payment of crew's wages by order of owners—Master's rights.]*—The master of a ship having paid off, in obedience to orders received from the agent of the owners, a portion of the crew, after his vessel was arrested by the Admlty. Ct. in a collision suit, will be entitled to get credit for such payments upon a settlement of his accounts, but will not, in a suit for wages in the names of such seamen, be permitted to recover such advances as charges against the ship.—THE DUNA (1861), 6 Ir. Jur. N. S. 358 (Adm.).—**IR.**

387. Mortgagee—Intervention by—Defence.]—In an action for wages, a mtgee. of the ship may intervene & defend his interest in the ship sued, but he can rely only on defences open to the owner.—THE CHIEFTAIN, Nos. 378, 382, *ante*; No. 822, *post*.

Annotation:—**Consd.** The Feronia (1868), L. R. 2 A. & E. 65.
For full anns., *see* S. C. No. 378, *ante*.

388. —— —— Counterclaim.]—In an action of master's wages, a mtgee. intervening & declaring to set up a right of set-off or counterclaim, but not filing any such counterclaim in the registry, only a statement that he "objected to all claims in the master's account, except those relating to payment of wages, & wages claimed," must submit to a settlement of all accounts between the master & the ship, exclusive of any private accounts between master & owner in respect of extraneous matters.—THE GLENTANNER (1859), Sw. 415.

Annotations:—**Distd.** The Chieftain (1863), Brown. & Lush. 104. **Apprvd.** The Sara (1887), 12 P. D. 158, C. A. **Overd.** Hamilton *v.* Baker (1889), 14 App. Cas. 209. **Refd.** The Mary Ann (1865), L. R. 1 A. & E. 8; The Feronia (1868), L. R. 2 A. & E. 65; The Daring (1868), L. R. 2 A. & E. 260.

SUB-SECT. 2.—JURISDICTION IN THE CASE OF SEAMEN ON BRITISH SHIPS.

A. Extent of Jurisdiction.

(a) Jurisdiction at Common Law.

389. In general.]—Suit for mariners' wages may be in the Admlty.—COKE *v.* CRETCHET (1682), 3 Lev. 60; 83 E. R. 576.

Annotations:—**Folld.** Osman *v.* Wells (1704), 11 Mod. Rep. 31. **Refd.** How *v.* Nappier (1766), 4 Burr. 1944; Buggin *v.* Bennett (1767), 4 Burr. 2035.

390. ——.]—The jurisdiction of the Admlty. Ct. is a concurrent jurisdiction, & prohibition will not be granted upon the suggestion that the ct. refused to receive deft.'s allegation that the place of arrival was not a port of delivery except upon payment of the demand intact. On such a matter the Admlty. Ct. is judge, & the proper remedy is appeal, not prohibition.—BROWN *v.* BENN (1706), 2 Ld. Raym. 1247; 92 E. R. 322.

391. —— .]—Where the proceeds of ship & freight are insufficient to pay the crew's wages & the amount of a bottomry bond, the Admlty. Ct. has no authority to restrain seamen from proceeding against the ship for wages and to order them to proceed against the solvent owner.—THE ARAB (1859), 5 Jur. N. S. 417.

Annotation:—**Consd.** Webb *v.* Smith (1885), 30 Ch. D. 192, C. A.

392. Contract by parol.]—Wages due to mariners by parol after the usual manner may be sued for in Admlty.—OPY *v.* ADISON, No. 402, *post*.

Annotation:—**Expld. & Folld.** Mills *v.* Long (1754), Say. 136.
For full anns., *see* S. C. No. 402, *post*.

393. Written Contract.]—Mariners may sue in the Admlty. for wages, although they are due by written contract.—MARINER'S CASE (1725), 8 Mod. Rep. 379; 88 E. R. 269.

394. —— Contract under seal.]—THE RIBY GROVE, Nos. 410, 441, *post*.

For full anns., *see* S. C. No. 410, *post*.

395. Contract made on land.]—One mariner alone may sue in the Admlty. for wages on a contract made on land.—HOOK *v.* MORETON (1698), 1 Ld. Raym. 397; 91 E. R. 1165.

Annotation:—**Apld.** Mills *v.* Long (1754), Say. 136.

396. ——.]—The fact that an agreement for wages is made & executed at a counting-house in London does not take it out of the Admlty. jurisdiction.—THE PRINCE GEORGE, Nos. 423, 432, *post*.

397. —— Written contract.]—Mariners may sue for wages in the Admlty. Ct. notwithstanding they let themselves by a written contract made on land.—BENS *v.* PARRE (1705), 2 Ld. Raym. 1206; 92 E. R. 296.

398. *S. P.* MILLS *v.* LONG, No. 435, *post*.

399. Voyage not begun.]—Seamen hired to fit a ship for sea & go a voyage in her, may sue in the Admlty. for the wages they earn in fitting her out though she does not proceed upon the voyage. Seamen may sue in the Admlty. for wages, though they were not hired by the owner, if he permit them to go on board.—WELLS *v.* OSMAN (OSMOND) (1704), 2 Ld. Raym. 1044; 6 Mod. Rep. 238; 92 E. R. 193; *sub nom.* OSMAN *v.* WELLS (1704), 11 Mod. Rep. 31; 88 E. R. 864. S. C. No. 413, *post*.

Annotations:—**Distd.** Ross *v.* Walker (1765), 2 Wils. 264; The Debreczia (1848), 6 Notes of Cases, 31. **Consd.** *Re* Great Eastern S.S. Co., Williams' Claim (1885), 53 L. T. 594. **Refd.** Mills *v.* Gregory (1754), Say. 127.

400. ——.]—Common sailors may join in a suit for wages, although the ship had not sailed out of the Thames when wages became due.—MILLS *v.* GREGORY (1754), Say. 127; 1 Keny. 134; 96 E. R. 826.

401. ——.]—Seamen engaged by owners or their agent for a voyage upon a foreign-going ship have a lien for wages upon the ship, & proceeds of sale thereof, although the engagement of the seamen has not been in writing, & the ship does not proceed upon her voyage. The words "at the end of his engagement" in Merchant Seamen Act, 1880 (c. 16), s. 4 (1), mean the time at which his actual service terminates, & include the natural effluxion of the agreement as well as discharge of the seamen in breach of contract. To entitle a seaman to wages to date of final settlement, it is not necessary the whole term of his engagement should have expired, but it is sufficient that his actual service on board ship should have ended.—*Re* GREAT EASTERN S.S. CO., WILLIAM'S CLAIM (1885), 53 L. T. 594; 5 Asp. M. L. C. 511; S. C. No. 416, *post*.

Annotations:—**Folld.** Connelly *v.* Sibery (1905), 69 J. P. 15. **Consd.** Palace Shipping Co. *v.* Caine, [1907] A. C. 386. **Refd.** R. *v.* City of London Court Judge (1890), 6 T. L. R. 364; Vickerson *v.* Crowe, [1914] 1 K. B. 462.

402. No Jurisdiction where special agreement.]—Proceedings cannot be taken in Admlty. to recover wages if payable by deed or special agreement.—OPY *v.* ADISON (1693), 12 Mod. Rep. 38; 88 E. R. 1149; *sub nom.* OPY *v.* CHILD, 1 Salk. 31. S. C. No. 392, *ante*.

Annotations:—**Folld.** Day *v.* Searl (1734), Cun. 32. **Distd.** Mills *v.* Long (1754), Say. 136. **Expld. & Distd.** Howe *v.* Nappier (1766), 4 Burr. 1944.

PART II. SECT. 7, SUB-SECT. 2.—A (a).

402 i. *No jurisdiction where special agreement.*]—A seaman on a whaler entered into a sealed contract, with respect to his remuneration, which provided that it should come out of the proceeds of the adventure, & which constituted a species of partnership:—*Held*: even if such contract was contrary to Merchant Seamen's Act, 1834 (c. 19), the seaman could not sue in the Admlty. Ct. for wages.—*Ex p.* HUNTER (1844), Res. & Eq. Judg. 8.—**AUS.**

402 ii. ——.]—THE SHAMROCK (1859), 5 Ir. Jur. N. S. 178 (Adm.).—**IR.**

402 iii. ——.] — Two promovents shipped at B. on board a blockade runner, for the voyage from B. to W., North Carolina, & thence to H., Nova Scotia; the third promovent shipped at W. No ship's articles were signed, but there was evidence to prove that the master had contracted to pay to each of the promovents a certain sum in three instalments, there being a condition that the third instalment was to be paid only if claimants' conduct were satisfactory:—*Held*: (1) this was not an ordinary engagement for seamen's wages, but a special contract; (2) previous to Admlty. Ct. Act, 1861 (c. 10), the Admlty. Ct. had no jurisdiction over such special contracts, & that Act did

Sect. 7.—Wages, master's wages & disbursements: Sub-sect. 2, A. (a) & (b) & B.]

403. *S. P.* HOWE *v.* NAPPIER (1766), 4 Burr. 1944 ; 98 E. R. 13.

Annotations :—**Distd.** Buggin *v.* Bennett (1767), 4 Burr. 2035. **Refd.** Jesse *v.* Roy (1835), 3 L. J. N. S. Ex. 268 ; Burder *v.* Neley (1841), Arn. & H. 175, 194 ; London Corpn. *v.* Cox (1867), L. R. 2 H. L. 239.

404. ——.]—If there is a contract by deed, with unusual covenants between masters & mariners respecting wages, they cannot be sued for in the Admlty.—DAY *v.* SEIRL (SEARL, SERLE, SEARLE) (1734), 2 Barn. K. B. 419 ; Cunn. 32 ; Ridg. *temp.* H. 53 ; 2 Stra. 968 ; 7 Mod. Rep. 206 ; 94 E. R. 592.

Annotation :—**Folld.** Howe *v.* Nappier (1766), 4 Burr. 1944.

405. ——.]—The Admlty. Ct. has not jurisdiction to adjudicate, when the claim for wages is founded not upon the usual mariners' contract, but upon a special agreement.—THE MONA (1840), 1 Wm. Rob. 137.

406. *S. P.* CAMPION *v.* NICHOLAS (1720), 1 Stra. 405 ; 93 E. R. 597.

407. *S. P.* THE SYDNEY COVE (1815), 2 Dods. 11.

Annotations :—**Folld.** The Mona (1840), 1 Wm. Rob. 137 ; The Riby Grove (1843), 2 Notes of Cases, 205.

408. —— **Though by parol.**]—The Admlty. Ct. has not jurisdiction over a contract for wages different from the ordinary mariner's contract.

Pltf. signed the ship's articles as mate at £5 10*s.* per month ; he also verbally agreed with the owner to act as purser, & superintend the ship's accounts for £4 10*s.* per month additional ; he served afterwards in both capacities, & finally claimed £63 :—*Held :* the parol agreement was, in the circumstances, a special agreement, which the ct. could not enforce.—THE HARRIET (1861), Lush. 285 ; 5 L. T. 210 ; 1 Mar. L. C. 152. S. C. No. 419, *post.*

409. —— **Payment by bill—Bill dishonoured.**]—A seaman who had elected to take at Calcutta a bill of exchange on the owners, instead of cash, in payment of wages, cannot sue the ship, on payment of such bill being refused, the owners having become bkpts.—THE WILLIAM MONEY (1827), 2 Hag. Adm. 136.

Annotations :—**Apld.** *Re* Clarke, *Ex p.* Snell (1867), 16 W. R. 307. **Consd.** The Albion (1872), 27 L. T. 723.

410. —— **Part payable under ordinary contract—Severance.**]—The Admlty. Ct., where the contract is in the usual terms, is entitled to exercise jurisdiction in the case, though the contract be in writing, & under seal ; but where it is special or if the contract for service be made upon terms & conditions differing from the general rules of law, the service alone cannot entitle a seaman to his wages ; his right to them must depend upon the performance of the stipulated terms. If a contract be a special contract, the ct. is debarred from any jurisdiction over it.

A whaler, having taken fish, was wholly lost, but part of the oil was saved ; a mariner had contracted to serve, on condition of receiving an allowance per ton of oil obtained, in addition to his monthly wages :—*Held :* (1) this was a special contract & of the nature of a partnership ; (2) it was not within the jurisdiction of the ct. *Semble :* if part of the voyage is upon an ordinary contract, the ct. will pronounce for that part of wages which is claimed under the ordinary contract.—THE RIBY GROVE (1843), 2 Wm. Rob. 52 ; 2 Notes of Cases, 205 ; 7 Jur. 586. S. C. No. 394, *ante ;* No. 441, *post.*

Annotation :—**Mentd.** The Kaleten (1914), 30 T. L. R. 572, P. C.

411. —— **Objection to be pleaded.**]—Prohibition will not be granted on the suggestion that the contract for wages was not in the common form, but was a special contract, if the matter of the suggestion was not pleaded by deft. in the Admlty. Ct.—COLEBY *v.* JENKINS (1733), 2 Barn. K. B. 401 ; 94 E. R. 580.

412. No jurisdiction where services rendered in river.]—Prohibition *nisi* cause was granted to the Admlty. Ct. for libelling there for seamen's wages ; it appearing on the libel that the service was all in the Thames.—BIDOLPH *v.* BRUCE (1698), 12 Mod. Rep. 230 ; 88 E. R. 1282.

413. Wrongful dismissal.]—WELLS *v.* OSMAN, No. 399, *ante.*

For full anns., *see* S. C. No. 399, *ante.*

414. ——.]—A mariner discharged from a vessel after the articles had been signed, but before commencement of the voyage, is entitled to proceed in the Admlty. Ct. in a suit for wages, the voyage for which he was engaged having been prosecuted. *Semble :* if the intended voyage be altogether abandoned by the owner, the seaman must seek his remedy at common law by an action on the case.—THE CITY OF LONDON (1839), 1 Wm. Rob. 88.

Annotation :—**Distd.** The Debrecsia (1848), 3 Wm. Rob. 33.

415. ——.]—The Admlty. Ct. has, as part of its ancient jurisdiction, power, in a cause of wages, to entertain a claim for compensation for wrongful discharge of a seaman, before termination of his engagement.—THE GREAT EASTERN (1867), L. R. 1 A. & E. 384 ; 36 L. J. Adm. 15 ; 17 L. T. 228 ; 2 Mar. L. C. 553.

Annotations :—**Refd.** The Blessing (1878), 3 P. D. 35 ; The Ferret (1883), 48 L. T. 915, P. C.

416. ——.]—*Re* GREAT EASTERN S.S. CO., WILLIAMS' CLAIM, No. 401, *ante.*

For full anns., *see* S. C. No. 401, *ante.*

417. —— **No Jurisdiction where special contract.**]—Where a mariner entered into a contract, not of an ordinary but very special character, by which a specific sum was to be paid as wages for the voyage, &, having gone on board the vessel, & remained on her, in the port of London for twenty-three days, was at the end of that period discharged, the voyage being abandoned :—*Held :* the contract being special, & having been broken, the question was one exclusively for a jury ; & the Admlty. Ct. had not jurisdiction.—THE DEBRECSIA (1848), 3 Wm. Rob. 33 ; 6 Notes of Cases, 31 ; 10 L. T. O. S. 501 ; 12 Jur. 143.

(b) Statutory Jurisdiction.

418. Merchant Shipping Act, 1854 (c. 104)—Exclusive jurisdiction.]—A seaman brought an action of assault, & declared also for damages for breach of contract in not providing a sufficient supply of

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not extend to Vice-Admlty. Cts., the provisions in s. 10 respecting special contracts not being extended to those cts. by Vice-Admlty. Cts. Act, 1863 (c. 24), s. 10 ; (3) the ct. had no jurisdiction in the case.—THE CITY OF PETERSBURG (1865), 1 Old. 814, Y. A. D. 1.—**CAN.**

413 i. *Wrongful dismissal.*]—Pltf. contracted to serve as steward, but the master, being dissatisfied, discharged him from this duty & employed him as cook & seaman :—*Held :* (1) there being no evidence of neglect or misconduct on pltf.'s part, his discharge from duty as a steward was a discharge from the ship ; (2) pltf. was entitled to his wages, & was not bound to remain with the ship after her arrival at first port of discharge ; (3) pltf. was entitled to the return of articles seized by the master, & to £10 damages for an assault by way of punishment.—THE SARAH (1836), 1 S. V. A. R. 87.—**CAN.**

418 i. *Merchant Shipping Act, 1854 (c. 104)—Subsisting voyage—Pleading.*]—In an action for wages brought by a seaman, on account of the return of the vessel to Quebec instead of continuing her voyage, a plea to the jurisdiction was filed, alleging a subsisting voyage under s. 149 of the above Act :—*Held :* the plea was bad.—*Re* THE LATONA (1874), 18 L. C. J. 185.—**CAN.**

good provisions, & also declared in an *indebitatus* count for wages due to him as a seaman. The ct. allowed a plea under the above Act to the jurisdiction of the ct., which plea had been struck out at chambers as vexatious, to be pleaded to the count for wages.—ROSSI *v.* GRANT (1859), 5 C. B. N. S. 699; 32 L. T. O. S. 257; 5 Jur. N. S. 895; 7 W. R. 203; 141 E. R. 281.

Annotation :—**Refd.** The Ferret (1883), 48 L. T. 915.

419. —— Limits of Jurisdiction.]—A seaman is barred by s. 189 of the above Act from recovering wages less than £50 in the Admlty. Ct., except in the contingencies therein specified.—THE HARRIET, No. 408, *ante*.

See, now, M. S. ACT, 1894 (c. 60), s. 165.

B. Persons entitled to sue.

420. Apprentice—Wages, not penalty.]—An apprentice is entitled to sue proceeds of the ship he has served in for wages due under a general apprenticeship to the owner, but not for the penalty contained in the indenture for breach of agreement.—THE ALBERT CROSBY (1860), Lush. 44.

421. Boatswain.]—A boatswain may sue in the Admlty. Ct. for wages.—RAGG *v.* KING, No. 364, *ante*.

Annotation :—**Distd.** Hanson *v.* Royden (1867), L. R. 3 C. P. 47.

422. Carpenter.]—A ship's carpenter may sue in the Admlty. for wages.—WHEELER *v.* THOMPSON (1726), 2 Stra. 707; 93 E. R. 798.

423. Deceased seaman—Administrator.]—*Semble :* a decree for wages, with costs, to a mariner may on his death be renewed to his administrator.—THE PRINCE GEORGE, No. 396, *ante*; No. 432, *post*.

424. —— ——.]—A summary petition, in a suit for wages, was admitted on behalf of the widow & administratrix of a deceased seaman, the whole crew, with one exception, having been lost.—THE RELIANCE, No. 91, *ante*.

425. Mate.]—The mate of a ship may sue for wages in the Admlty. Ct., though the contract was made on land, & although he was to succeed the master, if he died on the voyage.—BAILY (BAYLY) *v.* GRANT (1701), 1 Ld. Raym. 632; 1 Salk. 33; Holt K. B. 48; 91 E. R. 1322; *sub nom.* GRANT *v.* BAILY (1701), 12 Mod. Rep. 440; 88 E. R. 1436.

426. —— Becoming master during voyage—Severance.]—Where the master dies in the course of the voyage & is succeeded by the mate, the mate cannot sue for the whole of his wages in the Admlty. Ct., but may sue for wages accruing to him as mate.—REED *v.* CHAPMAN, No. 366, *ante*.

Annotations :—**Followed.** The Favourite (1799), 2 Ch. Rob. 232. **Distd.** Hanson *v.* Royden (1867), L. R. 3 C. P. 47.

427. *S. P.* THE FAVOURITE, No. 367, *ante*.

428. —— Extent of right—Disbursements not included.]—The Admlty. Ct. has no jurisdiction to adjudicate upon a mate's claim for wages paid to the crew, & necessary disbursements made by him in foreign ports.—THE VICTORIA (1867), 37 L. J. Adm. 12.

429. Pilot.]—A pilot is a mariner, but cannot sue in the Admlty. if his work be within the body of a county.—ROSS *v.* WALKER (1765), 2 Wils. 264; 95 E. R. 801.

430. —— Not where services illegal.]—In a suit for wages on the part of a British pilot, for conducting a ship, an American vessel, from the Downs to Flushing :—*Held :* no suit could be maintained on behalf of a British subject for services performed in aiding commerce & importation of the enemy.—THE BENJAMIN FRANKLIN (1806), 6 Ch. Rob. 350.

431. Purser.]—THE LADY CAMPBELL, No. 447, *post*.

For full anns., *see* S. C. No. 447, *post*.

432. ——.]—A purser, having entered into an agreement for wages, signed the usual articles, in which no rate of wages was specified for him. After completion of the outward voyage, he ceased, by the master's orders, to act as purser, but was not regularly suspended for neglect of duty :—*Held :* he was entitled to wages.—THE PRINCE GEORGE (1837), 3 Hag. Adm. 376. S. C. Nos. 396, 423, *ante*.

433. Ship's husband—Not entitled to sue.]—A ship's husband, not being a "seaman" claiming "wages earned by him on board the ship" within

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419 i. —— *Limits of jurisdiction.*]—Where several seamen unite in an action against a ship for wages, the ct. has jurisdiction to entertain the suit if the total amount of the wages due to the promoters exceeds £50, although the wages of every one individually are less than £50.

A resp. in a suit for wages is not by a plea of tender precluded from afterwards raising an objection to the jurisdiction if it ultimately appear that the amount actually due is less than £50.

The Vice-Admlty. Ct. has jurisdiction over a claim by seamen for compensation for wrongful discharge.

A seaman wrongfully discharged in the port of Melbourne is not entitled to receive as part of his compensation an allowance for *viaticum* to London, his port of engagement, if it be proved that he would have obtained employment on ships bound direct to London at higher wages than he was receiving when discharged. *Semble :* if seamen are *participes crimines* in an endeavour to steal their ship they are not entitled to recover either wages or compensation for alleged wrongful discharge.—THE FERRET (1881-2), 8 V. L. R. Adm. 1 (P. C.).—**AUS.**

419 ii. —— ——.]—The provisions of s. 189 of the above Act apply to foreign as well as British vessels, & a Vice-Admlty. Ct. cannot entertain a suit for seamen's wages, the demand being below £50, unless upon a reference as prescribed by that Act.—*Re* THE MONARK, *post*.—**CAN.**

419 iii. —— ——.]—Where an agreement with seamen was for a voyage from Shields to Barcelona, thence to Quebec & back to the United Kingdom :—*Held :* the Vice-Admlty. Ct. had not under the above Act jurisdiction to entertain a suit for wages of the mate.—THE BRITISH TAR, SMITH *v.* CHARLESEN (1858), 9 L. T. 88.—**CAN.**

a. *Admiralty Act*, 1891—*Limits of jurisdiction.*]—The engineer of a tug took proceedings on the Admlty. side of the Exch. Ct. on a claim for $136 wages, & arrested the ship :—*Held :* (1) the above Act conferred upon the Exch. Ct. all the jurisdiction possessed by the Admlty. Div. of the High Ct. in England as it stood on July 25, 1890, the date of the passing of Colonial Cts. of Admlty. Act, 1890 (c. 27), & the Admlty. Ct. in Canada could try any claim for seamen's wages, including claims below $200, & s. 34 of R. S. C., c. 75, was repealed by implication to the extent that it curtailed the jurisdiction of the Admlty. Ct. to entertain claims for seamen's wages below $200 in amount; (2) the costs of such action were in the discretion of the judge trying the cause under r. 132 of the Admlty. Rules of the Exch. Ct. of Canada. *Tenant* v. *Ellis* (1880), 6 Q. B. D. 46; *Rockett* v. *Clippingdale*, [1891] 2 Q. B. 293; *The Salthurn*, [1892] P. 333, refd.—THE W. J. AIKENS (1893), 4 Ex. C. R. 7.—**CAN.**

b. *Merchant Shipping Act*, 1894 (c. 60)—*Limits of jurisdiction.*]—The effect of s. 165 of the above Act is to debar a seaman suing in Admlty. from recovering anything, where, though suing to recover more than £50, he does not establish a claim to more than that amount.—COLEMAN *v.* SMITH HOWARD CO., LTD. (1912), 12 S. R. (N. S. W.) 208.—**AUS.**

c. *Merchant Seamen Act*, 1844 (c. 112) —*Limits of jurisdiction.*]—No seaman employed for a voyage or engagement which is to terminate in the United Kingdom can sue in a Colonial Vice-Admlty. Ct. for his wages, unless discharged as directed by the above Act.—DALE *v.* THE VELOCITY (1855), James, 390.—**CAN.**

d. —— ——.]—When the aggregate amount of the claims of a crew for wages exceeds £20, but the claim of each individual is less than £20, the petition of the seamen under s. 6 of the above Act will be rejected.—THE FAIRY QUEEN (1847), 3 Ir. Jur. O. S. 283 (Adm.).—**IR.**

PART II. SECT. 7, SUB-SECT. 2.—B.

e. *Musician.*] — Pltfs., musicians, claimed to recover for their services on a ship. They had arranged with the master to have meals, staterooms, & the right to collect gratuities for entertainments, but there was no evidence of a contract to pay wages :—*Held :* pltfs. were not seamen within Merchant Shipping Acts & not entitled to claim any sum for their services on the boat, nor entitled to set up a maritime lien.—MCELHANEY *v.* THE FLORA (1897), 6 Ex. C. R. 129.—**CAN.**

Sect. 7.—Wages, master's wages & disbursements: Sub-sect. 2, B. & C.; sub-sect. 3, A.]

Admlty. Ct. Act, 1861 (c. 10), s. 10, has no marine lien upon which he can found an action *in rem* for "wages" under Cty. Cts. Admlty. Jurisdiction Act, 1868 (c. 71), s. 2 (2).—THE RUBY, No. 1752, *post.*

434. Supercargo.]—THE TAGUS, No. 155, *ante*; No. 460, *post.*

435. Surgeon.]—A surgeon of a ship may sue in the Admlty. Ct. for wages.—MILLS *v.* LONG (1754), Say. 136; 96 E. R. 829. S. C. No. 398, *ante.*

436. ——.]—A prohibition was moved for to stay a suit in the Admlty. Ct. brought by a surgeon of a ship for his wages; the suggestion was, that all was paid to the master.

Payment to the master is not payment to the seamen, but the ship itself is liable for their wages; they would hear counsel (*per* CUR.).—MADDOX *v.* —— (1701), 12 Mod. Rep. 526; 88 E. R. 1495.

Annotation:—**Folld.** Mills *v.* Long (1754), Say. 136.

437. Woman.]—Upon a claim for man's work done by a female in two capacities, one as cook & steward, the other as keeper of the ship & her stores in harbour or dock:—*Held:* an objection on the ground of the sex of the person employed was not legally maintainable.—THE JANE & MATILDA (1823), 1 Hag. Adm. 187.

Annotation:—**Apld.** R. *v.* City of London Court Judge (1890), 25 Q. B. D. 339.

C. Exercise of Jurisdiction.

438. On equitable principles.]—The Admlty. Ct. may, as a Ct. of Eq., consider how far clauses in a ship's articles are reasonable & consistent with justice, bearing in mind the general ignorance & imprudence of seamen, & their inability to understand the meaning of a long & multifarious instrument.

Ship's articles are only conclusive as to the amount of wages & the voyage; on collateral points the Admlty. Ct. may consider how far they are reasonable & just; a clause providing that if contraband goods were found in the forecastle seamen living therein should forfeit their wages & £10 is not conclusive to work a forfeiture of wages against those not directly proved to be personally implicated in the offence, & the penalty cannot be enforced in the Admlty. Ct.—THE PRINCE FREDERICK (1832), 2 Hag. Adm. 394.

439. ——.]—Pltfs., seamen, engaged themselves at New York to serve on board a British vessel for wages to be paid in dollars. In the articles signed by pltfs. it was stated that wages would be paid in United States currency, or its equivalent. Pltfs. quitted the vessel at Liverpool, their period of service having expired. At this time the value of a dollar in United States currency was 2*s.* 1*d.*, the sterling value being 4*s.* 2*d.* Pltfs. brought an action to recover their wages at the rate of 4*s.* 2*d.* the dollar. It was proved the invariable custom in the ports of London & Liverpool, when seamen were engaged at dollar wages, was to pay them according to the sterling value of the dollar:—*Held:* (1) pltfs. entitled to be paid at the rate of 4*s.* 2*d.* the dollar; (2) an agreement to pay in currency was not consistent with justice & equity, & would not be held binding unless it had been completely & perfectly explained to the seamen before they entered into it. *Semble:* such agreement would not always be held binding, even when it had been fully explained to the seamen.

It is the principle of this ct. that the mariner shall not be subjected to any hardship of this kind where he has not understood what the consequence of the engagement he undertook would be. Seamen are a peculiar class of people entitled to special protection according to the doctrines of the Admlty. Ct. Their ignorance, haste, disregard of forms, & the fact that they are entirely unaccustomed to matters of this description, induce the ct. to guard them against their own want of care & caution (DR. LUSHINGTON).—THE ANNIE SHERWOOD (1865), 12 L. T. 582; 13 W. R. 641, 965; 2 Mar. L. C. 214.

440. Freighter not liable.]—A prohibition will issue to the Admlty. Ct. in a case where an action is brought by the master & mariners of a ship for wages wherein process (in the nature of foreign attachment) was prayed & issued against freighters to arrest freight due to the owners in their hands.—MECLANHAM *v.* FOLIAM (1713), Gilb. 9; 93 E. R. 244; *sub nom.* NECLANHAM *v.* FOLIAMB, 6 Vin. Abr. 538.

441. Cargo-owner not liable.]—A seaman can have no claim against cargo for wages where the cargo does not belong to the shipowner; but as against the cargo for freight earned & not paid, the case may be subject to very different considerations.—THE RIBY GROVE, Nos. 394, 410, *ante.*

For full anns., *see* S. C. No. 410, *ante.*

442. Defences—No agreement in fact.]—A man being entered in the articles as second mate, but with no rate of wages affixed:—*Held:* (1) such omission let in parol evidence of an agreement; (2) parol evidence establishing that the man was taken out of friendship to the father on a trial voyage, with certain indulgences & advantages amounting to a valuable consideration in lieu of wages, *e.g.*, sleeping & messing in the cabin, the master paying wages to other persons to act as private tutors to him, in the different stations to which he was appointed, but not so well qualified, personally, to discharge, a claim for wages was not sustainable, especially as the master had at all times denied any wages were due.—THE HARVEY (1827), 2 Hag. Adm. 79.

For full anns., *see* SHIPPING & NAVIGATION.

443. —— **Limitation Act, 1623 (c. 16)—Not applicable.**]—The above Act does not extend to suits in the Admlty. for seamen's wages.—ANON. (1702), 11 Mod. Rep. 6; 88 E. R. 849.

444. —— —— —— **Suit not barred.**] — The above Act is no bar to a suit *in rem* for wages, unless at any rate objection is taken *in limine.*—ELLIOTT *v.* LISTER (1756), Burrell, 320.

445. —— —— —— **Doubtful whether applicable.**]—*Qu.:* whether the above Act extends to suits in the Admlty. for seamen's wages.—EWER *v.* JONES (1703), 1 Com. 137; 2 Ld. Raym. 934; 6 Mod. Rep. 25; 3 Salk. 227; 92 E. R. 1001.

For full anns., *see* SHIPPING & NAVIGATION.

446. *S. P.*, HYDE (HIDE) *v.* PARTRIDGE (1705), 2 Ld. Raym. 1204; 11 Mod. Rep. 43; 2 Salk. 424; 92 E. R. 295.

Annotation:—**Refd.** Watlington *v.* Wilkinson, Watlington *v.* Brand (1729), 1 Barn. K. B. 270.

PART II. SECT. 7, SUB-SECT. 2.—C.

a. *Procuring petition for wages—Collusive sale—Abuse of process.*]—A schooner was in tow of a tug, & through the latter's fault collided with another vessel & was sunk. To defeat the lien for damage for which proceedings had been taken in a foreign ct., the owner of the tug allowed the engineer's wages to run in arrear, & procured a petition to be filed in the maritime ct. & the schooner to be sold to a nominal purchaser:—*Held:* (1) the proceedings were an abuse of the process of the ct.; (2) petition was the proper mode of proceeding.—THE JEROME, 6 Ch. T. 263.—**CAN.**

b. *Receiver—Injunction—Lien.*]—A seaman sued for wages & applied for a receiver & injunction & a declaration that he had a lien upon deft.'s ship:—*Held:* the Supreme Ct. of the North-West Territories had jurisdiction, & an order for a receiver must be granted.—KELLY *v.* ALASKA MINING & TRADING CO. (1899), 4 Terr. L. R. 18.—**CAN.**

447. —— Set-off—Not in respect of matter outside jurisdiction.]—On a claim by a purser for wages the owner pleaded, as set-off, that £183, a sum exceeding the amount claimed by the purser, was due to the owner for passage of the purser's wife:—*Held:* (1) the ct. had not jurisdiction to entertain a question of passage money, which must be claimed in another ct.; (2) the plea must be rejected.—THE LADY CAMPBELL (1826), 2 Hag. Adm. 5, No. 431, *ante*.

Annotation:—**Mentd.** The Macleod (1880), 5 P. D. 254.

448. —— —— Damages by negligence.]—Loss arising from gross negligence of a mariner, may be set off against a claim for wages.—THE NEW PHŒNIX (1832), 2 Hag. Adm. 420.

449. —— Effect of negligence—Priority defeated.]—In a suit for damage by collision where proceeds of the ship & freight are insufficient to pay damages, a claim made by the crew of the ship in fault, whether a British or foreign vessel, for wages to be paid out of proceeds is not admissible where the shipowner is not bkpt.; the crew without specific blame being imputed to any one of them might all be considered in the character of wrongdoers.—THE LINDA FLOR (1857), Sw. 309; 30 L. T. O. S. 234; 4 Jur. N. S. 172; 6 W. R. 197.

Annotations:—**Folld.** The Duna (1861), 5 L. T. 217; The Elin (1883), 8 P. D. 129, C. A. **Refd.** The Thuringia (1872), 41 L. J. Adm. 44.

SUB-SECT. 3.—JURISDICTION IN THE CASE OF SEAMEN ON FOREIGN SHIPS.

A. Nature of Jurisdiction.

450. Jurisdiction discretionary—Nationality of seaman immaterial.]—In a suit for wages by seamen on board a foreign vessel the Admlty. Ct. has jurisdiction, but will not exercise it without first giving notice in accordance with Admlty. Rules, 1859, r. 10, to the consul of the nation to which the foreign vessel belongs; if the consul, by protest, objects to the prosecution of the suit, the Admlty. Ct. will determine whether it is fit & proper the suit should proceed or be stayed. Such process does not, *ipso facto*, operate as a bar to prosecution of the suit, as the foreign consul has not power to put a veto on the exercise of jurisdiction by the ct. In such suit it makes no difference that pltf. is a British subject; it is the nationality of the vessel, not of the individual seaman suing for his wages, that regulates the course of procedure. Admlty. Ct. Act, 1861 (c. 10), s. 10, which gives jurisdiction to the Admlty. Ct. over any claim by a seaman of any ship (meaning thereby the ship of any nation) only extends previous jurisdiction in the ordinary case of wages, to wages under special contract, & disbursements on account of the ship, & does not abolish the practice enjoined by Admlty. Rules, 1859, r. 10.

A British subject having shipped as "piloto," or mate, in a Portuguese vessel, under a written instrument called a matricula or roll, which contained the terms of his engagement, instituted a suit & arrested the vessel on her arrival at her port of destination, on a claim for extra wages & disbursements. The owner resisted the claim, insisting the vessel was foreign, & the piloto & crew were engaged according to the law of Portugal, & had agreed by the matricula to submit to the Codigo Commercial of Portugal, which, by art. 1489, provided that in case of any dispute between him & the master, the Portuguese consul in or near the port at which the vessel might chance to be, should have exclusive jurisdiction to try & determine such dispute according to the law of Portugal; & he relied on the protest of the Portuguese consul & the law of Portugal, as stated by him on affidavit, as applicable to the case:—*Held:* though the Admlty. Ct. had a general discretionary authority to entertain such a suit, yet pltf. having by his agreement consented to be bound by Portuguese law, the ct. below rightly released the vessel from arrest, & determined the suit ought not to be proceeded with in that ct.—THE NINA (1867–8), L. R. 2 P. C. 38; 5 Moo. P. C. C. N. S. 51; 37 L. J. Adm. 17; 17 L. T. 585; 3 Mar. L. C. 47; 16 E. R. 434, P. C. S. C. No. 726, *post*.

Annotations:—**Folld.** The Oberburgomeister von Winter (1870), 18 W. R. 443, C. A.; The Leon XIII. (1883), 8 P. D. 121, C. A. **Refd.** The Becherdass Ambaidass (1871), 25 L. T. 395

451. —— —— Interference with discretion by Court of Appeal.]—In an action for wages & wrongful dismissal, brought by persons domiciled in England against a Spanish ship, in which they had served under articles signed in a Spanish port, in which action imprisonment, hardship, & ill-treatment were alleged, the ct. refused to exercise jurisdiction against the protest of the Spanish consul alleging that, by the law of Spain all disputes relating to the ship or claims against the owner or master were to be referred to & decided by tribunals or consuls of Spain. On appeal:—*Held:* (1) pltfs. must, in the circumstances, be considered subjects of the country to which the ship belonged; (2) although the jurisdiction of the Admlty. Ct. could not be ousted even by express agreement, yet the ct. had a discretion to exercise as to whether it would entertain the action or refer it to be tried before the Spanish consul; (3) as pltfs. had not shown that the judge of the Admlty. Ct. had wrongly exercised his discretion in dismissing the action, the C. A. saw no reason for interfering with his decision.—THE LEON XIII., WARDROP *v.* THE LEON XIII. (1883), 8 P. D. 121; 52 L. J. P. 58; 47 L. T. 659; 31 W. R. 882; 5 Asp. M. L. C. 73, C. A. S. C. No. 1656, *post*.

452. —— Conditions of exercise—Consent of foreign minister not essential — Notice.] — The Admlty. Ct. has jurisdiction to entertain suits for wages promoted by foreign seamen against foreign vessels. The consent of the foreign minister or consul is not essential to found the jurisdiction of the ct. in such suits. It is necessary that notice of intended proceedings should be given in the first instance to the representative of the Govt. to which the vessel proceeded against belongs.—THE GOLUBCHICK (1840), 1 Wm. Rob. 143. S. C. No. 452, *post*.

Annotations:—**Consd.** The Milford (1858), Sw. 362; The Octavie (1863), 9 L. T. 695. **Apprvd.** The Nina (1867), L. R. 2 P. C. 38 **Refd.** The Ida (1860), Lush. 6; The Herzogin Marie (1861), Lush. 292; The Becherdass Ambaidass (1871), 25 L. T. 395; The Leon XIII. (1883), 8 P. D. 121, C. A. **Mentd.** The Halley (1867), L. R. 2 A. & E. 3.

453. —— ——.]—Suits for wages of seamen of foreign vessels & of a surgeon not signing articles must be carried on before the Admlty. or Vice-Admlty. Ct.—THE ASA PACKER (1853), 6 L. T. 662; *Shipping Gazette*, April 14.

PART II. SECT. 7, SUB-SECT. 3.—A.

452 i. *Jurisdiction discretionary — Conditions of exercise — Consent of foreign minister not essential.*]—The consent of a foreign consul is not necessary to the institution of a suit for wages by foreign seamen; & foreign seamen instituting such suit, whose conduct has been good, will, upon substantiating their claims, be allowed a reasonable sum to support them, pending the proceedings, & to take them home to their own country.—THE ALEXANDRE (1849), 5 Ir. Jur. O. S. 379 (Adm.).—**IR.**

452 ii. —— —— ——.] — The Admlty. Ct. entertains proceedings for wages as due to foreign seamen by the general maritime law, with the consent of the foreign consul.—POPP *v.* THE HARRIETT & MOLLY (1857), 6 L. T. 662.—**IR.**

Sect. 7.—Wages, master's wages & disbursements: Sub-sect. 3. A. & B. Sect. 8: Sub-sect. 1, A.]

454. —— —— Protest of consul.]—The jurisdiction of the ct. is discretionary only, & the ct. requires as a condition that previous notice should be given to the consul or representative of the foreign state. Foreigners in England are bound to some extent by acts of their own Govt., & in shipping matters by the act of their consul. If the representative of the foreign state expresses his dissent to the suit, the ct., though not bound so to do, will incline to hold its hand & remit the foreign master to the remedy under the laws of his own country.

The master of a foreign ship instituted a cause against the ship for wages, & no notice of the institution of the cause was given by him to the consul of the foreign state. The owners appeared under protest; & the consul swearing an affidavit in the cause, protested as consul against the cause being allowed to proceed:—*Held:* (1) the jurisdiction of the Admlty. Ct. over causes of wages of foreign masters is discretionary only; (2) notice of institution of any such cause ought to be given to the consul of the state to which the ship belongs; (3) the protests of the consul was, in the circumstances, a bar to the cause proceeding.—THE HERZOGIN MARIE (1861), Lush. 292; 5 L. T. 88; 1 Mar. L. C. 144. S. C. No. 725, *post*.

Annotations:—**Consd.** The Bechercdass Ambaidass (1871), 25 L. T. 395. **Refd.** The Nina (1867), 17 L. T. 391.

455. —— —— ——.]—The protest by a foreign consul against the continuance of a wages cause against a foreign vessel does not deprive the ct. of jurisdiction; but the ct. will use its discretion whether or not to exercise its jurisdiction.

In a wages cause instituted by the master of a Belgian ship an appearance was entered on behalf of the ship by the owners' broker & agent, who also as Belgian vice-consul in Liverpool, protested against the cause being allowed to proceed. Subsequently the Belgian consul in London protested on the ground "that, in his opinion, the cause ought to be settled by the Belgian Cts. of Law":—*Held:* (1) in the above circumstances the protest of the vice-consul would not be sufficient to induce the ct. to hold its hand; (2) the ct. would act upon the interposition of the consul in London.—THE OCTAVIE (1863), Brown. & Lush. 215; 3 New Rep. 252; 33 L. J. P. M. & A. 115; 9 L. T. 695; 1 Mar. L. C. 420.

Annotation:—**Apprvd.** La Blache *v.* Rangel (1867), L. R. 2 P. C. 38. P. C.

456. —— —— —— Notice to court.]—When a foreign seaman sues in the Admlty. Ct. for wages, if the consul from his country objects to the proceedings, the ct. should have immediate notice of that fact, as usually it would not be disposed any longer to entertain the suit.—THE FRANZ ET ELIZE (1861), Lush. 377; 5 L. T. 290; 1 Mar. L. C. 155. S. C. Nos. 770, 1035, *post*.

Annotations:—**Distd.** The Nina (1867), L. R. 2 A. & E. 44. **Mentd.** The Zufall (1875), 44 L. J. Adm. 16; The Don Ricardo (1880), 5 P. D. 121.

457. Ouster of jurisdiction—Foreign sailors stipulating not to sue in England.]—If foreign sailors before the commencement of a voyage stipulate in their own country that they will not sue the captain for any money abroad, but be satisfied with what he may advance them in reduction of their wages till they return home, they cannot maintain an action against him for wages, in the cts. of England.—JOHNSON *v.* MACHIELSNE (1811), 3 Camp. 44.

B. Exercise of Jurisdiction.

458. Conflict of laws—Maritime law enforced—Not municipal regulations.]—As wages are due by general maritime law, however modified by particular regulations of different countries, the ct., in order to prevent a failure of justice has, with consent of the accredited agent of their own Govt., entertained proceedings for wages, at the suit of foreign seamen against foreign vessels in which they have served, such vessels being in English ports. It is otherwise where the claim does not arise out of general maritime law, but out of a municipal law of their country.

In an action for wages brought by American seamen, the claim included three months' pay, payable over & above wages due, under an Act of Congress, in consequence of their being discharged in England:—*Held:* (1) the ct. would entertain the claim for wages with consent of the representative of United States of America; (2) the ct. had no jurisdiction to enforce a municipal regulation of that country & could not entertain the claim for three months' pay. *Semble:* if the provisions of the Act of Congress had been embodied in the articles, so as to form part of the contract, the ct might be empowered to enforce them.—THE COURTNEY (1810), Edw. 239.

Annotations:—**Distd.** The Madonna d'Idra (1811), 1 Dods. 37; The Golubchick (1840), 1 Wm. Rob. 143.

459. —— Lex fori.]—M. sailed in a ship belonging to United States of America, as second mate,

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454 i. —— —— *Protest of consul.*]—The promoter & thirteen others shipped on board an American ship 1,600 tons at London for a voyage "from London to a port in the United States of America or to Cape Breton, & from thence on a general freighting voyage between the Columbia River North & Melbourne South." On arrival at Quebec they brought suit for wages. The United States consul, upon receiving notice of suit, requested that the case should not be entertained:—*Held:* the jurisdiction of the ct. over causes of wages of foreign seamen being discretionary, the ct. would not in the circumstances proceed with the suit.—*Re* THE BRIDGEWATER (1880), 7 Q.W. R. 346.—**CAN.**

454 ii. —— —— ——.]—In a suit for a seaman's wages against a foreign ship the consul for Sweden & Norway intervened & protested to the jurisdiction, contending that the ct. in its discretion ought not to hear the suit:—*Held:* the protest must be overruled.—*Re* THE MONARK (1883), 9 Q. L. R. 211.—**CAN.**

454 iii. —— —— ——.]—In an action by three seamen of an American vessel for wages, the consul of the United States addressed a protest to the ct., requesting that the matter in dispute should be left to be decided by the United States Consular Authorities. The seamen were engaged at Manilla, in the Philippine Islands, & within the Spanish Dominions. Their contract was made in the Spanish language & contained a stipulation that they should be sent back to their home in Manilla after the termination of the voyage for which they had engaged:—*Held:* though the ct. should not, as a general rule, interfere in disputes respecting the wages claimed by seamen of foreign vessels during the voyage, it should have jurisdiction & should exercise it where there appeared to be just cause for so doing.—*Re* THE MARY RUSSELL (1884), 10 Q. L. R. 265, V. A. C. 1884.—**CAN.**

454 iv. —— —— —— *Stay of proceedings.*]—Plffs., American citizens, shipped at New York as seamen for a voyage to Belfast, on board a North German ship belonging to Dantzig, & signed an agreement to be bound by shipping articles made in accordance with the Code of Commercial Law of Germany, which forbade a seaman to summon his captain before a foreign ct. of justice, but permitted him, in cases of immediate necessity, to appeal to the temporary decision of the National Consul. On the arrival of the vessel at Belfast plffs. caused her to be arrested, & instituted a cause for wages. Notice was given to the Prussian consul at Belfast, whereupon he entered a protest against the proceedings. On motion by deft., the master of the vessel, the ct. decreed the proceedings to be stayed, but made no order as to costs. *The Nina* (1867), L. R. 2 P. C. 38, apprvd.—THE OBERBURGERMEISTER VON WINTER (1869), 18 W. R. 357; 4 I. L. T. 20.—**IR.**

454 v. —— —— —— *Effect of absolute appearance.*]—The discretion vested in the Admlty. Ct. whether to proceed or not in a cause of wages instituted against a foreign ship against which the foreign consul has entered a protest is not ousted by an absolute appearance by deft., & may be exercised on the motion of deft.—THE OBERBURGOMEISTER VON WINTER (1870), 18 W. R. 443, C. A.—**IR.**

on a voyage from San Francisco to England. During the voyage, by the death of the original master & of the first mate, the command of the ship devolved upon M. On arrival of the ship in England, he proceeded against the freight for wages earned by him as master:—*Held:* (1) the right of M. to recover such wages by an action against the freight must be governed by the *lex fori* or law of England, & not by the *lex loci contractus*, or law of United States of America; (2) by M. S. Act, 1854 (c. 104), s. 191, M., though master of a foreign vessel, had a remedy against the ship & freight for wages earned by him as master.—THE MILFORD (1858), Sw. 362; 31 L. T. O. S. 42; 4 Jur. N. S. 417; 6 W. R. 554.

Annotations:—**Consd.** & **Folld.** The Jonathan Goodhue (1859), Sw. 524. **Dbtd.** The Halley (1867), L. R. 2 A. & E. 3. **Consd.** & **Expld.** Salt Union *v.* Wood (1893), 41 W. R. 301. **Consd.** R. *v.* Stewart, [1899] 1 Q. B. 964. **Expld.** & **Distd.** Poll *v.* Dambe, [1901] 2 K. B. 579. **Consd.** Davidsson *v.* Hill, [1901] 2 K. B. 606; The Tagus, [1903] P. 44. **Refd.** The Nina (1867), 17 L. T. 391; The Becherdass Ambaidass (1871), 25 L. T. 395.

460. —— ——.]—In proceedings *in rem* by the foreign master of an Argentine vessel in an English port, the claim of the master consisted of: (1) wages as supercargo, & afterwards as master; (2) disbursements whilst acting as supercargo, & afterwards as master. On the question of priority as against a mtgee. intervening:—*Held:* (1) though by the *lex loci* the master could only claim his wages & disbursements for the last voyage as a "privileged debt" in priority to mtgee., the question was one of remedy, & the *lex fori* applied; (2) by reason of the maritime lien conferred by M. S. Act, 1894 (c. 60), s. 167, he could claim, in priority, the whole of his wages & disbursements whilst master; (3) he was also entitled to add thereto his wages as a seaman whilst acting as supercargo, & such disbursements as he had then made by way of advances to the crew on account of their wages.—THE TAGUS, [1903] P. 44; 72 L. J. P. 4; 87 L. T. 598; 19 T. L. R. 82; 9 Asp. M. L. C. 371. S. C. Nos. 155, 434, *ante*.

Annotation:—**Consd.** The Petone, [1917] P. 198.

461. Alien enemy—Ship trading under licence.]—The ct. will entertain a suit for wages in the case of a foreign ship belonging to an alien enemy, & coming to ports of England under British licence.—THE VROW MINA (1813), 1 Dods. 234.

462. *S. P.* THE FREDERICK (1813), 1 Dods. 266.

463. Change of ownership.]—Foreign seamen may assert a claim for wages against a ship although she has changed owners, & her present owners must seek their remedy against the former owners.—THE MARGARET (1835), 3 Hag. Adm. 238.

464. Payment of wages—Payment to foreign consul.]—In a suit for wages by foreign seamen, if their consul intervenes & asks that payment of wages due to them be made to him on their behalf, the ct. usually grants the application.—THE TIMOR (1863), 9 L. T. 397; *sub nom.* THE TINIOR (1863), 12 W. R. 219.

465. —— —— **Not necessary—Waiver of proceedings.**]—Where a ship has been sold in a cause in which no appearance has been entered, & the proceeds remain in the registry, all preliminary proceedings in a cause of wages were waived, & money due paid out of ct. The ct. would not pay the money to a foreign consul at his request, but ordered the payment out of the amount of the claim on the solicitor of the parties undertaking to pay the consul the sums he had advanced.—THE JULINA (1876), 35 L. T. 410.

466. —— **Action for wages not necessary—Ship under arrest.**]—When a foreign ship is under arrest, & no appearance entered for her, the ct. will allow payment of wages & *viaticum* out of freight in the hands of pltf. in a bottomry suit, & order discharge of the crew, although no suit is instituted for their wages.—THE BRIDGWATER (1877), 37 L. T. 366; 3 Asp. M. L. C. 506.

Annotation:—**Refd.** The Petone, [1917] P. 198.

SECT. 8.—DAMAGE BY COLLISION, ETC.

See, generally, SHIPPING & NAVIGATION.

SUB-SECT. 1.—NATURE AND EXTENT OF JURISDICTION.

A. Conditions of Jurisdiction.

467. Cause of action—Damage, not contact.]—In cases of collision between ships a mere contact without damage gives no right of action; the cause of action is the damage sustained by one ship through negligence of those on board another.—THE MARGARET (1881), 6 P. D. 76; 50 L. J. P. 67; 44 L. T. 291; 29 W. R. 533; 4 Asp. M. L. C. 375, C. A.

Annotations:—**Apld.** The Dunstanborough, [1892] P. 363, n. **Consd.** The Monte Rosa, [1893] P. 23; The Kaiser Wilhelm II. (1915), 85 L. J. P. 26, C. A.

468. Collision not essential.]—If through negligence or misconduct of those on board a vessel another vessel receives or does damage, the owners of the wrong-doing vessel will be liable in the Admlty. Ct. for the damage, even though there was no collision between the two vessels.—THE INDUSTRIE (1871), L. R. 3 A. & E. 303; 40 L. J. Adm. 26; 24 L. T. 446; 19 W. R. 728; 1 Asp. M. L. C. 17. S. C. No. 473, *post*.

Annotations:—**Refd.** R. *v.* City of London Court Judge, [1892] 1 Q. B. 273, C. A.; The Normandy, [1904] P. 187.

469. —— **Collision caused by third vessel.**]—A collision between two vessels was caused by wrongful navigation of a third vessel:—*Held:* the damage sustained in the collision could be recovered in a cause of damage instituted in the Admlty. Ct. against the vessel so causing the collision.—THE SISTERS (1876), 1 P. D. 117; 45 L. J. P. 39; 34 L. T. 338; 24 W. R. 412; 3 Asp. M. L. C. 122, C. A. S. C. No. 1639, *post*.

Annotations:—**Expld.** The Englishman & The Australia, [1894] P. 239.

PART II. SECT. 8, SUB-SECT. 1.—A.

a. *Foreign ships.*]—Admlty. Cts. have jurisdiction *in rem* with respect to "claims for damage done by any ship," of whatever nationality. *The Clara Killam* (1873), L. R. 3 A. & E. 161, cited.—THE CZAR, p. 142, d, *post*. —CAN.

b. ——.]—In a case of collision where neither of the vessels was owned in the British possessions the ct. has jurisdiction.—THE CLEMENTINE (1875), Y. A. D. 186.—CAN.

c. ——.]—The High Ct. has jurisdiction, under the common maritime law of Bombay, to entertain a suit in respect of a collision upon the high seas between two foreign vessels, although that collision may not have occurred in British or Anglo-Indian waters, & notwithstanding the opposition of the consul of the state to which deft. belongs. *Qu.*: whether the High Ct. has a discretion to decline to entertain such suit. Even if there be such discretion, the ct. will ordinarily allow a suit of that nature to proceed.—BARDOT *v.* THE AUGUSTA (1873), 10 Bom. 110.—IND.

d. *Action by person residing out of jurisdiction — Liability to cross-action.*]—One who sues for damage caused by collision at sea out of the jurisdiction of the High Ct. subjects himself to a cross-suit for damages caused by same collision, though himself residing out of the jurisdiction of the ct.—BOMBAY COAST & RIVER STEAM NAVIGATION CO. *v.* HELEUX (1867), 4 Bom. O. C. 149.—IND.

Sect. 8.—Damage by Collision, etc.: Sub-sect. 1, A. B. & C.]

470. Personal liability of owner essential.]—A ship is not liable to be proceeded against *in rem* for damage unless her owners at the time of the accident are personally liable, & could be proceeded against *in personam* for damage.—THE TASMANIA (1888), 13 P. D. 110; 57 L. J. P. 49; 59 L. T. 263; 6 Asp. M. L. C. 305.

Annotations:—**Consd.** The Ripon City, [1897] P. 226; The Hopper No. 66, [1906] P. 34.

471. —— Wilful tort of master.]—A foreigner suing in the Admlty. Ct. for redress of a wrong inflicted within British jurisdiction must be ruled by the municipal law prevailing in the cts. of England.

Where a foreign vessel is wantonly injured by the master of a British steam tug, the owner of the British ship, not being in any way culpable, & not being responsible at common law, cannot be proceeded against in the Admlty. Ct., & proceedings cannot be instituted against the ship.—THE DRUID (1842), 1 Wm. Rob. 391; 1 Notes of Cases, 444; 6 Jur. 441. S. C. No. 1029, *post.*

Annotations:—**Consd.** The Bold Buccleugh (1850), 3 Wm. Rob. 220. **Distd.** The Seine (1859), Sw. 411. **Expld. & Distd.** The Ida (1860), Lush. 6. **Expld.** The James Seddon (1866), 35 L. J. Adm. 117. **Consd.** The Lemington (1874), 32 L. T. 69; The Tasmania (1888), 13 P. D. 110; The Ripon City, [1897] P. 226. **Refd.** The Charkieh (1873), L. R. 4 A. & E. 59; The Leon (1881), 6 P. D. 143; Morgan *v.* Castlegate S.S. Co., [1893] A. C. 38.

472. Existence of wrong-doing ship not essential.] —The existence of the ship doing damage is not necessary to found the jurisdiction of the ct.—THE VOLANT, Nos. 806, 816, 1032, 1503, *post.*

For full anns., *see* S. C. No. 1503, *post.*

B. Under Admiralty Court Act, 1840 (c. 65).

473. Ship receiving damage.—THE INDUSTRIE, No. 468, *ante.*

For full anns., *see* S. C. No. 468, *ante.*

474. Collision with foreign ship — In foreign waters.]—The ct. has jurisdiction over an action brought by a British subject against a foreign ship for a collision in foreign waters.—THE GRIEFSWALD (1859), Sw. 430. S. C. No. 151, *ante.*

Annotations:—**Refd.** The Mali Ivo (1869), L. R. 2 A. & E. 356; The Russia (1869), 21 L. T. 440.

475. Damage to barge—By foreign ship.]—Damage done by a foreign vessel to a barge in the Thames; arrest according to ordinary process; absolute appearance & release of vessel thereon; petition filed. Plea that the barge was not a sea-going vessel within s. 6 of the above Act & that the ct. had not jurisdiction:—*Held:* (1) the ct. had jurisdiction by M. S. Act, 1854 (c. 104), s. 527; (2) after absolute appearance defts. could not object that the arrest had not strictly followed the course prescribed in that sect.

The former Act does not give the ct. jurisdiction over damage done to a vessel not "a sea-going vessel" within the body of a county; but if the ship doing the injury is foreign, the ct. has jurisdiction by the latter Act, & any objection purely technical to the exercise of the jurisdiction cannot be allowed after absolute appearance.—THE BILBAO (1860), Lush. 149; 3 L. T. 338; 1 Mar. L. C. 5. S. C. No. 85, *ante;* Nos. 507, 724, 771, *post.*

Annotations:—**Consd.** Everard *v.* Kendall (1870), L. R. 5 C. P. 428; The Vera Cruz (1884), 9 P. D. 96, C. A. **Mentd.** The Cynthia (1876), 2 P. D. 52; The Mystery, [1902] P. 115.

476. ——.]—THE MALVINA, No. 87, *ante;* No. 187, *post.*

For full anns., *see* S. C. No. 487, *post.*

477. —— Action by bailees—Practice.]—In a cause of collision instituted by the bailees of a barge against a steamship:—*Held:* (1) pltfs. were competent to sue *in rem* in the Admlty. Ct.; (2) in order to protect defts. from the possibility of another suit by other parties interested in the same vessel, the money awarded as compensation for the damage should not be paid until it should be satisfactorily established that such payment would release defts. from all claims by the owners of the barge in respect of the collision.—THE MINNA (1868), L. R. 2 A. & E. 97.

Annotation:—**Refd.** The Duke of Buccleuch, [1892] P. 201. C. A.

478. Damage by barge — Within body of county.]—Damage was done to a ship by a barge within the body of a county:—*Held:* (1) the Admlty. Ct. would have had jurisdiction at common law in respect of such damage if done on the high seas; (2) by s. 6 of the above Act the ct. was given jurisdiction in respect of the same damage done within the body of a county, as it had before jurisdiction in respect of when done on the high seas.—PURKIS *v.* FLOWER (1873), L. R. 9 Q. B. 114; 43 L. J. Q. B. 33; 30 L. T. 40; 22 W. R. 239; 2 Asp. M. L. C. 226. S. C. Nos. 1370, 1723, *post.*

Annotations:—**Refd.** R. *v.* Kerr (1882), 30 W. R. 566; Turner *v.* Mersey Docks & Harbour Board (1892), 40 W. R. 535, C. A.

479. Tug & tow — Damage to tow — Negligence of tug.]—The Admlty. Ct. has jurisdiction over a claim for damage received through misconduct of a steam tug by a vessel in tow of the steam tug.—THE NIGHT WATCH (1862), Lush. 542; 32 L. J. P. M. & A. 47; 7 L. T. 396; 8 Jur. N. S. 1161; 11 W. R. 189; 1 Mar. L. C. 260.

Annotation:—**Consd.** The Energy (1870), L. R. 3 A. & E. 48.

480. Collision with pierhead.]—A ship was damaged by collision with a pierhead:—*Held:* (1) the jurisdiction of the ct. under s. 6, of the above Act, was not limited to damage received by collision with another ship; (2) the case fell within the statutory jurisdiction. *Semble:* the jurisdiction of the Admlty. Ct. at common law was not limited to cases of collision with another ship.—THE ZETA, Nos. 1377, 1728, *post.*

Annotations:—**Consd.** The Mecca, [1895] P. 95, C. A. **Apld.** Davidson *v.* Hill, [1901] 2 K. B. 606. **Consd.** The Veritas, [1901] P. 304; The Normandy, [1904] P. 187. **Refd.** The Englishman & The Australia, [1894] P. 239; The Theta, [1894] P. 280; The Upcerne, [1912] P. 160; The Devonshire *v.* The Leslie, [1912] A. C. 634.

481. Damage to cargo—Right of owner—Action in rem or in personam.]—In the Admlty. Ct. the owner of cargo has, equally with the damaged vessel, a distinct & separate remedy, either *in rem* or *in personam.*—THE MILAN (1861), Lush. 388; 31 L. J. P. M. & A. 105; 5 L. T. 590; 1 Mar. L. C. 185. S. C. No. 34, *ante.*

Annotations:—**Consd.** The Bernina (1887), 12 P. D. 58, C. A. **Apld.** Astral Shipping Co. *v.* The Tongariro (1910), 103 L. T. 359, C. A. **Refd.** Chartered Mercantile Bank of India, London & China *v.* Netherlands India Steam Navigation Co. (1883), 10 Q. B. D. 521, C. A.; The Vera Cruz (1884), 9 P. D. 88; The Karo (1887), 13 P. D. 24; Mills *v.* Armstrong (1888), 13 App. Cas. 1; The Englishman & The Australia, [1894] P. 239; The Frankland, [1901] P. 161; S.S. Tongariro *v.* S.S. Drumlanrig, [1911] A. C. 16. H. L.; The Devonshire *v.* The Leslie, [1912] A. C. 634; The Seacombe, The Devonshire, [1912] P. 21, C. A.; The Umona, [1914] P. 141. **Mentd.** Chapman *v.* Royal Netherlands Steam Navigation Co. (1879), 4 P. D. 157, C. A.; The City of Manchester (1880), 5 P. D. 221, C. A.; Chartered Mercantile Bank of India, London & China *v.* Netherlands India Steam Navigation Co. (1882), 9 Q. B. D. 118; The Circe, [1906] P. 1.

482. —— —— Right to bring separate action—Costs.]—Where the owners of a cargo & the owners

of a ship which is run down are different persons, the Admlty. Ct. has no authority to compel the owners of the cargo to proceed at the same time, or to say they are not entitled to proceed at a later period, if they think it their interest so to do, but the ct. would be sorry to see vexatious proceedings & double suits ; where it perceived parties, without just cause, resorting to such courses, it would not allow them the benefit of costs.—THE LITTLE HAMPTON (1842), 1 Notes of Cases, 358. S. C. No. 861, *post*.

483. —— Right of bailee.]—A collision occurred between the *M.* & the *W.*, in consequence of which the *M.*, which was carrying passengers & mails, sank, & the greater part of the mails was lost. The *W.* limited her liability under M. S. Act, 1894 (c. 60), s. 502. At the reference before the registrar & merchants the Postmaster-General claimed against the fund in ct., as bailee for senders of registered letters & parcels lost by the collision, the estimated value of same, although he was under no liability to the owners of them :—*Held :* as bailee in possession, he could recover damages for the loss of the goods irrespective of his liability to the bailors.—THE WINKFIELD, [1902] P. 42 ; 71 L. J. P. 21 ; 85 L. T. 668 ; 50 W. R. 246 ; 18 T. L. R. 178 ; 46 Sol. Jo. 163 ; 9 Asp. M. L. C. 259, C. A.

Annotations :—**Apld.** Plasycoed Collieries Co. *v.* Partridge Jones (1912), 81 L. J. K. B. 723. **Apprvd.** Eastern Construction Co. *v.* National Trust Co., [1914] A. C. 197, P. C. **Refd.** Glenwood Lumber Co. *v.* Phillips, [1904] A. C. 405, P. C.

C. Under Admiralty Court Act, 1861 (*c.* 10).

484. Ship doing damage—Collision in dock.]—A collision occurred between two ships in the basin of the Royal Albert Dock :—*Held :* the Admlty. Ct. had jurisdiction under s. 7 of the above Act, in an action for damages for such collision.—R. *v.* CITY OF LONDON COURT JUDGE, No. 1727, *post*.

485. —— Collision abroad—British ships.]—By s. 7 of the above Act the Admlty. Ct. has jurisdiction in a cause brought for a collision happening between two British ships in foreign inland waters. —THE DIANA (1862), Lush. 539 ; 32 L. J. P. M. & A. 57 ; 7 L. T. 397 ; 9 Jur. N. S. 26 ; 11 W. R. 189 ; 1 Mar. L. C. 261. S. C. No. 1251, *post*.

Annotations :—**Consd.** The Sylph (1867), L. R. 2 A. & E. 24. **Apld.** R. *v.* City of London Court Judge (1882), 8 Q. B. D. 609.

486. —— —— Foreign ships.]—By s. 7 of the above Act the Admlty. Ct. has jurisdiction over a cause instituted for a collision occurring between foreign vessels in foreign waters.—THE COURIER (1862), Lush. 541.

487. Damage to barge.]—In a cause brought in the Admlty. Ct. by the owner of a barge against a sea-going vessel, for damages occasioned by a collision within the body of a county :—*Held :* a barge propelled by oars, & not upon the high seas, was a ship within s. 7 of the above Act.—THE MALVINA (1863), 1 Moo. P. C. C. N. S. 357 ; Brown. & Lush. 57 ; 8 L. T. 403 ; 9 Jur. N. S. 527 ; 11 W. R. 576 ; 1 Mar. L. C. 341 ; 15 E. R. 736, P. C. S. C. Nos. 87, 476, *ante*.

Annotations :— **Consd.** Smith *v.* Brown (1871), L. R. 6 Q. B. 729 ; The Vera Cruz (1884), 9 P. D. 96, C. A. ; Turner *v.* Mersey Docks & Harbour Board, [1892] P. 285, C. A. **Refd.** The Sylph (1867), L. R. 2 A. & E. 24 ; R. *v.* City of London Court Judge (1882), 8 Q. B. D. 609 ; Mersey Docks & Harbour Board *v.* Turner, [1893] A. C. 468 ; The Veritas, [1901] P. 304. **Mentd.** *Re* Thames Steamer, *Ex p.* Ferguson (1871), 35 J. P. 468.

488. Damage to breakwater.]—The Admlty. Ct. has jurisdiction over every possible case of damage caused by collision with a ship.

Where a ship dragged her anchor & damaged a breakwater by coming in collision :—*Held :* the ct. had jurisdiction.—THE UHLA (1867), 37 L. J. Adm. 16 n. ; 19 L. T. 89 ; 3 Mar. L. C. 148.

Annotations :—**Apld.** The Sylph (1867), L. R. 2 A. & E. 24. **Distd.** Smith *v.* Brown (1871), L. R. 6 Q. B. 729. **Apld.** The Maid of the Mist (1873), 21 W. R. 310. **Apprvd.** The Zeta, [1893] A. C. 468. **Refd.** Turner *v.* Mersey Docks & Harbour Board, [1892] P. 285, C. A. ; The Veritas, [1901] P. 304 ; The Normandy, [1904] P. 187.

489. Damage to harbour works.]—There is a maritime lien under s. 7 of the above Act for damage done to the works of a harbour authority, although they may be within the body of a county. —THE VERITAS, [1901] P. 304 ; 70 L. J. P. 75 ; 85 L. T. 136 ; 50 W. R. 30 ; 17 T. L. R. 721 ; 45 Sol. Jo. 708 ; 9 Asp. M. L. C. 237.

490. Damage to oyster-beds & oysters.]—Pltfs., owners of oyster-beds at the mouth of a navigable river, brought an action *in rem* against a vessel of defts. which was so negligently navigated as to ground on pltfs.' property & thereby damage their oyster-beds & oysters :—*Held :* (1) the damage was "done by a ship" within s. 7 of the above Act ; (2) the action would lie.—THE SWIFT, [1901] P. 168 ; 70 L. J. P. 47 ; 85 L. T. 346 ; 17 T. L. R. 400 ; 9 Asp. M. L. C. 244.

491. Damage to pier.]—The owners of a pier, who are undertakers within Harbours, Docks, & Piers Clauses Act, 1847 (c. 27), acquire, under s. 74, a maritime lien in respect of any damage done to their pier by a ship, & may proceed *in rem* to recover that damage in the Admlty. Ct., & the shipowners are debarred by the above sect. from setting up the defence of inevitable accident.—THE MERLE (1874), 31 L. T. 447 ; 2 Asp. M. L. C. 402.

Annotations :—**Refd.** River Wear Comrs. *v.* Adamson (1877), 26 W. R. 217, H. L. ; The Veritas, [1901] P. 304.

492. Damage to piles & works — No direct impact.]—Pltfs. brought an action against the owners of the *V.* & the *A.* to recover damages occasioned by the *V.* colliding with certain piles & works, pltfs.' property. The *V.* admitted coming into contact with the pier, but alleged that she was forced so to do by the negligent navigation of the *A.* :—*Held :* the damage was due to negligence of the *A.*, whose owners were ordered to pay pltfs.' costs & those of the owners of the *V.*—GREEN & BURLEIGH *v.* GOODYEAR & GENERAL STEAM NAVIGATION CO. (1884), 6 Asp. M. L. C. 281 n.

493. Damage to submarine cable.]—A ship cast anchor near the South Foreland. Her anchor fouled a submarine telegraph cable. The crew heaved up the anchor to the water's edge, & the cable came up entangled with it. In order to free the anchor from the cable, the mate of the ship, acting under the master's direction, cut the cable in two with a hatchet. By exercise of ordinary nautical skill the anchor might have been freed from the cable by the crew without cutting the cable :—*Held :* (1) the ct. had jurisdiction to entertain an action instituted by the owners of the cable against the ship for damage done to the cable ; (2) the owners of the cable were entitled to judgment in the action.—THE CLARA KILLAM (1870), L. R. 3 A. & E. 161 ; 39 L. J. Adm. 50 ; 23 L. T. 27 ; 19 W. R. 25 ; 3 Mar. L. C. 463.

Annotations :—**Consd.** The Maid of the Mist (1873), 21 W. R. 310. **Refd.** The Zeta, [1892] P. 285, C. A. ; The Normandy, [1904] P. 187.

494. Chartered ship — Liable notwithstanding charter.]—By the maritime law there is a right of proceeding *in rem* against the vessel doing damage, which cannot be taken away by any voluntary contract of the owners with a third person.

The *T.* under charterparty to the French Govt. was towed by a steamer athwart the hawser of the *M.* The *T.* alleged that she was not liable for damage done, as her charterparty obliged her to obey orders & put herself in tow of the steamer :—*Held :* such obligation was no compulsion, so as to lay the ground for exemption from liability for damage done, as it arose from a voluntary stipu-

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lation entered into by the owners.—THE TICONDEROGA (1857), Sw. 215.

Annotations :—**Folld.** The Lemington (1874), 32 L. T. 69. **Consd.** The Mary, [1879] 5 P. D. 14. **Expld.** The Tasmania (1888), 13 P. D. 110. **Consd.** The Ripon City, [1897] P. 226. **Refd.** The Jacob Christensen, [1895] P. 281 ; The Hopper No. 66, [1906] P. 34 ; The Seacombe, The Devonshire, [1912] P. 21, C. A. **Mentd.** The Penrith Castle, [1917] P. 209.

495. Charterparty by demise.]—THE LEMINGTON, No. 150, *ante*.

496. Yacht laid up—Default of bailee.]—Deft.'s yacht was intrusted for reward to yachting agents for sale, &, by their servants, moored in the winter season without striking her topgear, whereby, on a gale occurring, the yacht drifted & fouled another yacht :—*Held :* deft.'s yacht was liable in a proceeding *in rem* in the Admlty. Ct.—THE RUBY QUEEN (1861), Lush. 266. S. C. No. 901, *post*.

Annotations :—**Consd.** The Ripon City, [1897] P. 226 ; **Refd.** The Mullingar (1872), 26 L. T. 326 ; The Dictator, [1892] P. 304 ; The Jacob Christensen, [1 9] P. 281.

•497. Tug & tow—Collision with third vessel—All to blame.]—Where a steam tug towing a vessel came into collision with a third vessel & all three vessels were found to blame :—*Held :* (1) such collision was a maritime tort within the jurisdiction of the Admlty. Ct. ; (2) the right to recover damages was governed by the rule prevailing in that ct., not by the common law doctrine of contributory negligence ; (3) the owners of the tug & of the tow were liable for half the damages of the third vessel after deducting half the damages of the tug.—THE ENGLISHMAN & THE AUSTRALIA, [1894] P. 239 ; 63 L. J. P. 133 ; 70 L. T. 876 ; 43 W. R. 62 ; 7 Asp. M. L. C. 603 ; 6 R. 743. S. C. on further proceedings [1895] P. 212.

Annotation :—**Expld.** The Frankland, [1901] P. 161.

498. Liability of cargo.]—In a collision action *in rem* the decision may go against the cargo on the wrong-doing ship as well as against the ship.—TOMLINSON *v.* VOGUEL (1733), Burrell, 313.

499. —— To extent of freight only.]—The cargo of a ship in fault for negligent collision can be arrested for the purpose of obtaining freight only, & according to all practice (upon which r. 49 of the Admlty. Ct. Rules is founded), the cargo must be released upon payment of the freight. It cannot be attached for the purpose of making good by its own value the damages done by the ship in which it is conveyed. Although the liability of a foreign shipowner is not limited by M. S. Act, 1854 (c. 104), ss. 504, 514, to the value of ship & freight, the ct. has no jurisdiction, where the value is insufficient to pay the damage, to attach the cargo, even if it is the property of the foreign shipowner, in order to make it pay for the deficiency.—THE VICTOR (1860), Lush. 72 ; 28 L. J. P. M. & A. 110 ; 2 L. T. 331. S. C. Nos. 718, 762, 789, *post*.

Annotations :—**Consd.** The Volant (1864), Brown. & Lush. 321 ; The Mullingar (1872), 26 L. T. 326. **Refd.** The Roecliff (1869), 17 W. R. 745 ; The Princess Royal (1870), L. R. 3 A. & E. 41 ; The Dictator, [1892] P. 304.

500. —— —— Deductions allowed.]—The owner of cargo on board a ship sued for collision is only compellable to pay into ct. the freight due from him to the ship-owner. In computing the amount of such freight, deductions, as by charter, from gross freight will be allowed ; & if the cargo is delivered at a place short of destination by reason of the collision, such reasonable reduction as may have been agreed upon between the ship-owner & the owner of the cargo. Costs of paying freight into ct. may also be deducted.—THE LEO (1862), Lush. 444 ; 31 L. J. P. M. & A. 78 ; 6 L. T. 58 ; 1 Mar. L. C. 200.

Annotations :—**Refd.** The Roecliff (1869), 17 W. R. 745. **Mentd.** Stewart *v.* Rogerson (1871), L. R. 6 C. P. 424.

501. —— —— Collision on outward voyage—Homeward freight liable.]—A vessel under charterparty as to both her outward & homeward cargo, whilst on the outward voyage came into collision with another vessel :—*Held :* the freight for the homeward voyage was liable to arrest for the damage.—THE ORPHEUS (1871), L. R. 3 A. & E. 308 ; 40 L. J. Adm. 24 ; 23 L. T. 855 ; 3 Mar. L. C. 531.

502. —— —— Arrest & release.]—A pltf. in a cause of collision suing ship & freight may always arrest the cargo for freight, & if freight is not due, will not incur costs & damages ; but upon affidavit that no freight is due, & that he is ready to carry on to destination, deft., owner of the ship sued, is entitled to have the cargo released.—THE FLORA (1866), L. R. 1 A. & E. 45 ; 35 L. J. Adm. 15 ; 14 L. T. 192 ; 2 Mar. L. C. 325.

Annotation :—**Refd.** The Brothers *v.* The Fingal (1869), 21 L. T. 621.

D. Under other Statutes.

See cases *infra*.

PART II. SECT. 8, SUB-SECT. 1.—D.

a. *Ship doing damage—Foreign ships at sea—High Court of Calcutta.*]—A collision had taken place at sea in the Bay of Bengal between two foreign vessels, which afterwards came within the jurisdiction of the ct. :—*Held :* the High Ct. at Calcutta had jurisdiction to try an action in respect of such collision.—THE GARLAND *v.* THE DRAGON (1863), 1 Hyde, 275.—**IND.**

b. —— *Hulk.*]—A hulk used for storing ice, moored in a harbour, dragged her anchors across a telegraph cable, & injured it. The owners of the cable brought an action *in personam* in Admlty. against the owners of the hulk for the damage caused :—*Held :* this hulk was a "ship" within Admlty. Ct. (Ireland) Act, 1867 (c. 114).—ANGLO-AMERICAN TELEGRAPH CO. *v.* DODD & POWER (1900), 34 I. L. T. 29.—**IR.**

c. *Damage to piles & works.*]—In a cause of damage by collision between a ship & a pile-driving engine, Admlty. Ct. (Ireland) Act, 1867 (c. 114), s. 29, extends the ct.'s jurisdiction not only to causes of damage by collision occurring within the body of a county, but also to causes of damage done by a ship to property of a different nature. —THE MAID OF THE MIST (1873), 21 W. R. 310 ; 7 I. L. T. 18.—**IR.**

d. *Damage to submarine cable.*]—Pltfs. brought an action against the *C.* for negligently breaking submarine cables placed on the bed of the river St. Lawrence by pltfs. The cables did not hinder the navigation of the river, & the *C.* drifted with her chains & anchors across a cable & broke it :—*Held :* the *C.* was liable for injury done to the cable. *The Clara Killam* (1870), L. R. 3 A. & E. 161, cited.—THE CZAR (1857), 19 L. C. J. 197.—**CAN.**

e. *Damage to wharf.*]—In an action against a ship by the lessees of a wharf for damage done by her in a collision with the wharf :—*Held :* Vice-Admlty. Cts. Act, 1863 (c. 24), conferring jurisdiction on Vice-Admlty. Cts., where damage was done by any ship did not extend to consequential damages to the traffic of a lessee.—*Re* THE BARCELONA (1882), 8 Q. L. R. 343.—**CAN.**

f. *Liability of cargo—To extent of freight only.*]—The freight earned by a vessel after a collision takes place, & before she is made amenable to the Admlty. Ct., is, in the event of a decree against her, liable to be ordered in to liquidate the promovent's claim for damages & costs.—THE JERSEY TAR (1854), 1 Ir. Jur. N. S. 317 (Adm.).—**IR.**

g. *Damage apart from collision—Tort—Colonial Courts of Admiralty Act*, 1890 (*c.* 27).]—To establish a maritime lien for damage against a ship, the damage must be the direct result of some unskilful or negligent conduct of those in charge of the ship which does the mischief, the ship herself being the "instrument of mischief." The *T.*, in dock, discharged a quantity of oil, which, floating on the dock-water & becoming ignited, caused damage to the *C.*, lying in same dock. The charterers of the *C.* applied for the arrest of the *T.* :—*Held :* the application must be refused, the *T.* not being the direct cause of the damage, & appts. not having an action *in rem* in the Admlty. Ct. against the owners. *The Vera Cruz (No. 2)* (1884), 9 P. D. 96 ; *Currie v. M'Knight*, [1897] A. C. 97, refd. ; *The Industrie* (1871), L. R. 3 A. & E. 303 ; *The Bataver* (1889), 15 P. D. 37 ; *The Clara Killam* (1870), L. R. 3 A. & E. 48, distd.—THE TELENA (1901), I. L. R. 29 Calc. 402 ; 6 C. W. N. 773.—**IND.**

E. Cases not within Jurisdiction.

FOREIGN SHIPS OF WAR. *See* pp. 110, 111, *ante.*

503. Collision in river—Nondescript craft—Contributory negligence.]—An action of damage for collision in a river brought by the owner of a launch against the owners of a dredger with wings employed in dredging the river:—*Held:* this was a common law, not an Admlty. action; & as the negligence of the pltf. had contributed to the collision, he could not recover damages in respect either of the collision or of subsequent damage arising to the launch without negligence in consequence of the collision.—THE BLOW BOAT, [1912] P. 217; 82 L. J. P. 24.

504. Damage apart from collision—Wilful tort—Committed in foreign river.]—The ct. has jurisdiction over causes of collision, but not over damage generally.

The master of a Danish schooner lying alongside the quay at the port I., in the Danube got on board an English barque lying outside him, & with a view to getting the schooner out, wilfully cut the barque adrift from her moorings, whereby she swung to the stream, & capsized a barge, which contained part of her cargo belonging to Turkish owners:—*Held:* the Turkish owners of the cargo destroyed could not sue the Danish schooner in the Admlty. Ct. *Qu.:* whether in an action brought in the Admlty. Ct. in England by a foreign pltf. against a foreign deft., in respect of a matter occurring in foreign waters, deft. is liable for the wilful act of his servant.—THE IDA (1860), Lush. 6; 1 L. T. 417.

Annotations:—**Apld.** The Lady Clermont (1870), 23 L. T. 283. **Distd.** The Princess Royal (1870), L. R. 3 A. & E. 41; Wilson *v.* Wilson (1871), 40 L. J. P. & M. 77; R. *v.* City of London Court Judge, [1892] 1 Q. B. 273, C. A.; Mersey Docks & Harbour Board *v.* Turner, [1893] A. C. 468; The Ripon City, [1897] P. 226. **Mentd.** Forster *v.* Forster 1863), 9 L. T. 147; *Re* Mercantile Trading Co., *Ex p.* Official Liquidator (1869), 38 L. J. Ch. 698.

505. Compulsory pilotage—Action against pilot.]—A ship by compulsion of law in charge of a duly licensed pilot in the Mersey came into collision with & occasioned damage to another ship. *Semble:* the Admlty. Ct. had no jurisdiction to entertain a suit for damages against the pilot.—THE ALEXANDRIA, No. 1784, *post.*

Annotations:—**Apld.** Flower *v.* Bradley (1874), 44 L. J. Ex. 1. **Distd.** Turner *v.* Mersey Docks & Harbour Board (1891), 65 L. T. 230. **Apld.** R. *v.* City of London Court Judge, [1892] 1 Q. B. 273, C. A.

506. *S. P.* THE URANIA (1861), 5 L. T. 402; 10 W. R. 97; 1 Mar. L. C. 153.

Annotations:—**Folld.** The Alexandria (1872), L. R. 3 A. & E. 574; Flower *v.* Bradley (1874), 44 L. J. Ex. 1; R. *v.* City of London Court Judge, [1892] 1 Q. B. 273, C. A.

See, generally, SHIPPING & NAVIGATION.

507. Harbour master's directions.]—Where a master & crew are bound by stat. to obey the directions of a harbour-master in going into dock & a collision is occasioned by the ship being conducted according to his directions, the ship is not liable in the Admlty. Ct.—THE BILBAO, Nos. 85, 475, *ante;* Nos. 724, 771, *post.*

Annotations:—**Consd.** The Cynthia (1876), 2 P. D. 52; The Mystery, [1902] P. 115.
For full anns., *see* S. C. No. 475, *ante.*

508. Claim by cargo-owner—Against carrying ship.]—The jurisdiction conferred by Admlty. Ct. Act, 1861 (c. 10), s. 7, "over any claim for damage done by any ship," does not cover a claim by a cargo-owner against the ship carrying cargo for damage received by the cargo in a collision.

A foreign vessel pronounced to blame for a collision with another vessel was at the time of collision under orders for Malta, & laden with a cargo of sugar, portions of which were after the collision carried to Malta, & thence, as there ordered, to Havre. The owners of the cargo instituted an action *in rem* in the Admlty. Ct. against the vessel on which the cargo had been so laden, to recover for damage done to the cargo by the collision. The owners of the vessel appeared, & their agents deposed that no part of the cargo had been brought by the vessel proceeded against into any port of England or Wales:—*Held:* the action must be dismissed as brought without jurisdiction.—THE VICTORIA (1887), 12 P. D. 105; 56 L. J. P. 75; 56 L. T. 499; 35 W. R. 291; 6 Asp. M. L. C. 120.

Annotation:—**Refd.** The Normandy, [1904] P. 187.

Rights of cargo-owner against carrying ship, *see* pp. 146—149, *post.*

509. Claim by charterer — Loss of profit on charter — Damage to property.]—Motion on behalf of defts., owners of the Dutch s.s. *A.*, to set aside the service of a writ in an action *in rem* brought against their vessel by pltfs., time charterers of the *T.* The *A.* collided with the *T.* in the Humber, & both vessels sustained damage. The owners of the *A.* filed an admission of liability in the action brought by the owners of the *T.*, but a few days later the charterers of the *T.* commenced proceedings *in rem* for loss alleged to have been caused to them by the collision, & arrested the *A.* Defts., who alleged that the *T.* was in the possession & control of her owners at the time of the collision, sought to stay the proceedings. At the time of collision the *T.* was running under a charterparty entered into between pltfs. & the owners of the vessel, whereby she was chartered for a fixed period with an option of renewal for various periods making twenty-four months in all; at the time in question she was employed by pltfs. in a regular trade between Goole & London. The charter was a source of profit to pltfs. who had entered into engagements for freights, which engagements rendered it necessary for pltfs. to engage other steamers at an increased rate of hire during the time that the *T.* was under repairs; further, they had incurred expense in removing bunker coal belonging to them from the *T.*:—*Held:* (1) neither in Admlty. nor at common law had a charterer a right of action against another vessel or her owners in respect of profit on the charterparty lost by reason of a collision; (2) as there were coals belonging to the charterers on board, & there had been some expense & delay the motion to set aside the writ on the ground that there was no jurisdiction whatever must fail, as there was a *primâ facie* case of some small claim which would support a writ.—THE AMSTELSTROOM (1904), 18 Com. Cas. 99 n.

Annotation:—**Refd.** The Okehampton (1913), 110 L. T. 130, C. A.

SUB-SECT. 2.—PERSONAL INJURIES.

A. Injuries not resulting in Death.

510. Injuries caused by ship—Arbitration no bar.]—By Admlty. Ct. Act, 1861 (c. 10), s. 7, the Admlty. Ct. has jurisdiction to entertain a cause of damage for personal injuries done by a ship.

A diver, while engaged in diving in the Mersey, was caught by the paddle-wheel of a steamer & suffered considerable injury, for which he brought an action against the owners, which was referred to arbn. By the agreement of reference, all the rights of pltf. were reserved in case the award of the arbitrator should not be performed. The arbitrator awarded compensation, but defts. never paid. Pltf. instituted a cause of damage against the ship. On motion to dismiss the petition:—*Held:* (1) the ct. had jurisdiction to enter-

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tain the suit; (2) pltf., by submitting to arbn., had not debarred himself from proceeding *in rem* in the Admlty. Ct.—THE SYLPH (1867), L. R. 2 A. & E. 24; 37 L. J. Adm. 14; 17 L. T. 519; 3 Mar. L. C. 37.

Annotations:—**Folld.** The Guldfaxe (1868), L. R. 2 A. & E. 325. **Apprvd.** The Beta (1869), L. R. 2 P. C. 447, C. A. **Dbtd.** Simpson *v.* Blues (1872), L. R. 7 C. P. 290. **Apprvd.** The Franconia (1877), 2 P. D. 163, C. A.; Mersey Docks & Harbour Board *v.* Turner, [1893] A. C. 468. **Consd.** The Normandy, [1904] P. 187, D. C. **Refd.** Smith *v.* Brown (1871), L. R. 6 Q. B. 729; The Bernina (1886), 54 L. T. 499; R. *v.* City of London Court Judge (1891), 61 L. J. Q. B. 337, C. A.; The Veritas, [1901] P. 304.

511. —— Collision.]—Resp. sued applts.' ship for personal injury done to himself by a collision, alleged to be caused by the unskilful navigation of applts.' ship:—*Held:* Admlty. Ct. Act, 1861, s. 7, included personal injury.—THE BETA (1869), 6 Moo. P. C. C. N. S. 55; L. R. 2 P. C. 447; 38 L. J. Adm. 50; 20 L. T. 988; 17 W. R. 933; 16 E. R. 647, P. C.

Annotations:—**Consd.** The Nepoter (1869), L. R. 2 A. & E. 375. **N.F.** Smith *v.* Brown (1871), L. R. 6 Q. B. 729. **Dbtd.** Simpson *v.* Blues (1872), L. R. 7 C. P. 290. **Apprvd. & Folld.** The Franconia (1877), 2 P. D. 163, C. A. **Consd.** The Normandy, [1904] P. 187, D. C. **Refd.** The Bernina (1886), 54 L. T. 499; The Veritas, [1901] P. 304.

512. —— Ship active instrument of damage.]—The words "damage done by any ship" in Admlty. Ct. Act, 1861, s. 7, apply to cases of injury to the person as well as to damage to property; the sect. only confers jurisdiction where the ship is the active instrument causing the damage.

Pltf. issued a writ *in rem*, & arrested a vessel, claiming damages for personal injuries sustained through falling down into the hold of that vessel owing to the hatchway being only covered with a tarpaulin, when he was crossing to his own ship, which was moored outside the first-mentioned vessel in the Regent's Canal Dock. On motion to set aside the writ for want of jurisdiction:—*Held:* the action must be dismissed for, though the word "damage" included personal injury, the damage was not "done by any ship" within the above sect. —THE THETA, [1894] P. 280; 63 L. J. P. 160; 71 L. T. 25; 43 W. R. 160; 7 Asp. M. L. C. 480; 6 R. 712.

Annotation:—**Refd.** Davidsson *v.* Hill, [1901] 2 K. B. 606.

B. Fatal Injuries.

See, now, Maritime Conventions Act, 1911 (c. 57), s. 5.

513. Law before Maritime Conventions Act, 1911 (c. 57)—Action in rem—Whether maintainable.]—A collision took place between the *B.* & the *S.* within three miles of the shore of Gt. Britain, & the master & four of the crew of the *S.* were drowned. The *B.* was arrested in a cause of damage by the owners of the *S.* On an application on behalf of the representatives of the drowned men to the ct. to direct a citation *in rem* to issue against the vessel, for compensation in respect of their deaths on the ground that Admlty. Ct. Act, 1861 (c. 10), s. 7, extended the jurisdiction of the ct. to questions of damage done by any ship & that Fatal Accidents Act, 1846 (c. 93) (Lord Campbell's Act), was applicable:—*Held:* (1) a sufficient *primâ facie* case had been shown; (2) a citation should be issued.—THE BORODINO (1861), 5 L. T. 291; 1 Mar L. C. 155.

514. —— —— Held maintainable.]—*Held:* (1) the Admlty. Ct. had jurisdiction, by virtue of Admlty. Ct. Act, 1861 (c. 10), s. 7, to entertain a claim for damages under Lord Campbell's Act when the death was caused by an act or omission which would give jurisdiction to the ct. in cases other than that of death; (2) such claim might, under s. 35 of the Act of 1861, be pursued by proceedings *in rem* as well as by proceedings *in personam*.—THE GULDFAXE (1868), L. R. 2 A. & E. 325; 38 L. J. Adm. 12; 19 L. T. 748; 17 W. R. 578; 3 Mar. L. C. 201. S. C. No. 520, *post*.

Annotations:—**Folld.** The Explorer (1870), L. R. 3 A. & E. 289. **Dbtd.** Smith *v.* Brown (1871), L. R. 6 Q. B. 729; Simpson *v.* Blues (1872), L. R. 7 C. P. 290; Adam *v.* British & Foreign S.S. Co., [1898] 2 Q. B. 430. **Refd.** The Franconia (1877), 2 P. D. 163, C. A.; The Vera Cruz (1884), 53 L. J. P. 33, C. A.

515. —— —— —— Plaintiffs foreigners.] A collision occurred on the high seas, out of British waters, between a British & a foreign ship. Foreigners on board the latter were drowned. A suit was brought for the benefit of their relatives against the British ship to recover compensation for their deaths:—*Held:* (1) the Admlty. Ct had jurisdiction to entertain a claim under Lord Campbell's Act by virtue of Admlty. Ct. Act, 1861 (c. 10), s. 7; (2) the claim was within Lord Campbell's Act, notwithstanding the persons killed were foreigners on the high seas.—THE EXPLORER (1870), L. R. 3 A. & E. 289; 40 L. J. Adm. 41; 23 L. T. 604; 19 W. R. 166; 3 Mar. L. C. 507.

Annotations:—**Folld.** The Franconia (1877), 2 P. D. 163, C. A. **Dbtd.** Adam *v.* British & Foreign S.S. Co., [1898] 2 Q. B. 430. **Folld.** Davidsson *v.* Hill, [1901] 2 K. B. 606. **Refd.** The Vera Cruz (1884), 53 L. J. P. 33, C. A.

PART II. SECT. 8, SUB-SECT. 2.—A.

512 i. *Injuries caused by ship—Ship active instrument of damage.*]—A stevedore was injured by a derrick breaking. The derrick, a donkey engine, windlass, & some other machinery was being used to remove a cross-beam, whilst the vessel was at anchor at N. The stevedore having brought an action *in rem* in the Admlty. Ct., claiming £1,000 damages for the injuries & against the vessel:—*Held:* the case was not within Admlty. Ct. (Ireland) Act, 1867 (c. 114), s. 29, as the ship was not the active cause of the damage, & the ct. had no jurisdiction.—M'EVOY *v.* THE SNEVD (1895), Ad. 29; I. L. T. Jo. 317. —**IR.**

512 ii. —— ——.]—The mooring warp of a steamer about to leave a harbour broke, & injured pltf. He sued the owners for damages, on the ground that the breaking of the warp was caused by overstraining through the negligence of the captain, & arrested the ship by Admlty. process:—*Held:* it was not an Admlty. case, & deft. was discharged from the suit.—THE CYGNUS (1860) 2 L. T. 196. —**JERSEY.**

512 iii. —— ——.]—Owing to a defect in the supports of a portion of the coverings of a hatch upon a steamship, pltf., who was employed by a stevedore to assist in discharging the cargo, & was standing on part of the coverings of the hatch whilst assisting to uncover it, was injured. He brought an action for damages against the ship in the Admlty. jurisdiction of the Supreme Ct.:—*Held:* in view of the dicta in "*The Vera Cruz*" (*No.* 2) (1884), 9 P. D. 96, 99, 101, & the decision in "*The Theta*," [1894] P. 280, the damage was not "done by the ship" within Admlty. Ct. Act, 1861 (c. 10), s. 10, & there was no Admlty. jurisdiction over the matter.—THE QUEEN ELEANOR (1899), 18 L. R. 78.—**N. Z.**

512 iv. —— —— *Negligence of fellow workmen.*]—Owing to the breakage of a stop valve, pltf. was injured whilst repairing the engines of a ship, & brought an action against the ship, claiming damages for injuries arising through the negligence of the owners of the ship in using defective machinery:—*Held:* under Vice-Admlty. Cts. Act, 1863 (c. 24), s. 10, the ct. had jurisdiction in claims for damages done by any ship, but negligence of fellow workmen would not render the owner liable.—WYMAN *v.* THE DUART CASTLE (1899), 6 EX. C. R. 387.—**CAN.**

PART II. SECT. 8, SUB-SECT. 2.—B.

a. *Maritime Court Act—Pleading.*]—Applt.'s child, a minor, was killed in a collision between two vessels, & applt. libelled under Maritime Court Act at Windsor, claiming damages suffered by her, owing to the death of her son & servant. Resp. demurred on the ground that the petition did not set forth a cause of action within the jurisdiction of the ct.:—*Held:* the maritime ct. of Ontario had no jurisdiction apart from R. S. O. 1877, c. 128 (re-enacting in that province Fatal Accidents Act, 1846 (c. 93)), in an action for personal injury resulting in death, & therefore applt. had no *locus standi*, not having brought her action as the personal representative of the child.—*Re* THE GARLAND, MONAGHAN *v.* HORN (1881), 7 S. C. R. 409.—**CAN.**

516. —— —— Held not maintainable.]—An accident resulting from negligence in management of a vessel, having caused loss of life, a suit for damages by deceased's surviving relatives, who would have been entitled to compensation under Lord Campbell's Act, was commenced in the Admlty. Ct. under Admlty. Ct. Act, 1861 (c. 10), s. 7. On demurrer to a declaration in prohibition:—*Held:* the above sect. conferred no jurisdiction upon the Admlty. Ct. to entertain such suit.—SMITH *v.* BROWN (1871), L. R. 6 Q. B. 729; 40 L. J. Q. B. 214; 24 L. T. 808; 36 J. P. 264; 19 W. R. 1165; 1 Asp. M. L. C. 56.

Annotations:—**Apld.** James *v.* L. & S. W. Ry. Co. (1872), L. R. 7 Exch. 187. **Consd.** Simpson *v.* Blues (1872), L. R. 7 C. P. 260; Gaudet *v.* Brown, Brown *v.* Gaudet, Geipel *v.* Cornforth (1873), L. R. 5 P. C. 134; The Maid of the Mist (1873), 21 W. R. 310; Flower *v.* Bradley (1874), 44 L. J. Ex. 1; The Franconia (1877), 2 P. D. 163, C. A.; Mackonochie *v.* Penzance (1881), 6 App. Cas. 424. **Distd.** Seward *v.* Vera Cruz (1884), 10 App. Cas. 59, H. L. **Refd.** The Normandy, [1904] P. 187, D. C.; Goldsmiths' Co. *v.* Wyatt, [1907] 1 K. B. 95, C. A.

517. —— —— Held maintainable.]—An action was instituted against a foreign ship to recover damages for the death of pltf.'s husband alleged to have been caused by a collision brought about by improper navigation of the ship proceeded against. The ct. below having held that it had jurisdiction to entertain the action:—*Held:* (1) the Admlty. Div. had jurisdiction under Admlty. Ct. Act, 1861 (c. 10), s. 7 (JAMES & BAGGALLAY, L.JJ.); (2) the Admlty. Div. had no such jurisdiction (BRAMWELL & BRETT, L.JJ.).—THE FRANCONIA (1877), 2 P. D. 163; 46 L. J. P. 33; 36 L. T. 640; 3 Asp. M. L. C. 435; 25 W. R. 796, C. A.

Annotation:—**Folld.** The Vera Cruz (1884), 9 P. D. 96, C. A.

518. —— —— Held not maintainable.]—*Held:* the Admlty. Ct. had no jurisdiction to entertain a claim in an action *in rem* for damages under Lord Campbell's Act, the right of action given by that Act not being "a claim for damage done by any ship" within Admlty. Ct. Act, 1861 (c. 10), s. 7. *The Franconia* (1877), 2 P. D. 163, overd.—THE VERA CRUZ (1884), 10 App. Cas. 59; 54 L. J. P. 9; 52 L. T. 474; 49 J. P. 324; 33 W. R. 477; 1 T. L. R. 111; 5 Asp. M. L. C. 386.—H. L.

Annotations:—**Distd.** The Englishman & The Australia, [1894] P. 239. **Consd.** The Theta, [1894] P. 280; Adam *v.* British & Foreign S.S. Co., [1898] 2 Q. B. 430. **Distd.** The Swift, [1901] P. 168. **Expld.** Davidsson *v.* Hill, [1901] 2 K. B. 606. **Consd.** The Circe, [1906] P. 1; Clark *v.* London General Omnibus Co., [1906] 2 K. B. 648, C. A.; Jackson *v.* Watson, [1909] 2 K. B. 193, C. A.; British Electric Ry. Co. *v.* Gentile, [1914] A. C. 1034, P. C. **Distd.** Hobson *v.* Leng, [1914] 3 K. B. 1245, C. A. **Refd.** Kelly *v.* Isle of Man Steam Packet Co. (1894), 71 L. T. 731; The Tynwald, [1895] P. 142; Whitechapel Board of Works *v.* Crow (1901), 84 L. T. 595; Cavendish *v.* Strutt, [1904] 1 Ch. 524; Headland *v.* Coster, [1905] 1 K. B. 219, C. A. Williams *v.* Mersey Docks & Harbour Board, [1905] 1 K. B. 804, C. A.; Bristol Corpn. *v.* Canning (1906), 95 L. T. 183; R. *v.* L. C. Board, *Ex p.* South Stoneham Union, [1908] 2 K. B. 368, C. A.; Retter *v.* Walker (1910), 74 J. P. Jo. 483; British Assocn. of Glass Bottle Manufacturers *v.* Nettlefold (1911), 27 T. L. R. 527; The Amerika, [1914] P. 167, C. A.; Date *v.* Gas Coal Collieries, [1915] 2 K. B. 454, C. A.; Admlty. Comrs. *v.* S.S. Amerika, [1917] A. C. 38, H. L.

520. ——.]—THE GULDFAXE, No. 514, *ante*.

For full anns., *see* S. C. No. 514, *ante*.

521. Compensation payable under Workmen's Compensation Act, 1906 (c. 58)—Recoverable.]—The *A.* & the *B.* collided owing to the negligence of the *B.* The master of the *A.* fell overboard & was drowned, & his employers, the owners of the *A.*, had to pay his dependants £300 as compensation under s. 6 of the above Act. In a damage action by the owners of the *A.* against the owners of the *B.*:—*Held:* (1) the £300 paid to the dependants of deceased master was damage which arose from the negligent navigation of the *B.*; (2) it was recoverable in an action *in personam*.—THE ANNIE (1909), 100 L. T. 415; 11 Asp. M. L. C. Adm. 213.

522. —— Not recoverable.]—A lightship owned by the Irish Lights Comrs. was run into & damaged by a German sailing ship in tow of a tug. The sailing ship was arrested in England in an action instituted by the owners of the lightship to recover the damage they had sustained, & an undertaking was given in the action to appear & put in bail to answer the claim. After the writ was issued & the undertaking given, one of the crew on the lightship made a claim under the above Act against her owners for compensation for injury caused by shock by fright before the collision actually took place, & an award was made in his favour in those proceedings which were taken in Ireland. The owners of the lightship claimed an indemnity for any sum paid or payable to the workman in respect of his injury, & sought to recover the sum so paid from the owners of the German sailing ship:—*Held:* (1) even assuming the seaman had sustained the shock alleged & was entitled to recover compensation under the Act from the comrs., & though the ship was for the purposes of the Act to be considered a British ship, the owners of the German sailing ship were not bound by the decision in the arbn.; (2) money paid under the award was not recoverable in an action *in rem* as it was not damage done by a ship, as the shock had been sustained before the collision happened; (3) the claim was too remote.—THE RIGEL, [1912] P. 99; 81 L. J. P. 86; 106 L. T. 648; 28 T. L. R. 251; 12 Asp. M. L. C. 192.

523. Compensation payable under foreign law—Not recoverable.]—The Spanish s.s., *S.* collided with the French s.s. *C.* Some seamen on board the *S.* were drowned, & the owners of the *S.* had to pay to relatives of the drowned seamen certain sums under Spanish Accident Act, 1900. Such payments were payable under the Act, although there was no proof of negligence on the part of the shipowner who employed the seamen. The claims

C. Measure of Damages.

519. Admiralty rule not applicable.]—The *A.* & the *B.* collided through default of the masters & crews of each vessel, & two persons on board the *A.*, one of the crew & a passenger, neither of whom had anything to do with the negligent navigation, were drowned. The representatives of the deceased having brought in the Admlty. Div. actions *in personam* against the owners of the *B.* for negligence under Fatal Accidents Act, 1846 (c. 93):—*Held:* (1) the deceased persons were not identified in respect of the negligence with those navigating the *A.*; (2) their representatives could maintain the actions; (3) they could recover the whole of the damages, the Admlty. rule as to half damages not being applicable to actions under the above Act.—THE BERNINA (1888), 13 App. Cas. 1; 57 L. J. P. 65; 58 L. T. 423; 52 J. P. 212; 36 W. R. 870; 4 T. L. R. 360; 6 Asp. M. L. C. 257, H. L.; *affg.* (1887) 12 P. D. 58, C. A.

Annotations:—**Distd.** The Sara (1887), 12 P. D. 158, C. A. **Consd.** Page *v.* Metropolitan Ry. Co., Heard *v.* Metropolitan Ry. Co. (1887), 4 T. L. R. 103; The Orwell (1888), 13 P. D. 80; Mathews *v.* London Street Tramways Co. (1888), 58 L. J. Q. B. 12. **Distd.** The Englishman & The Australia, [1894] P. 239. **Consd.** The Frankland, [1901] P. 161; Davidsson *v.* Hill, [1901] 2 K. B. 606. **Distd.** The Duc d'Aumale, [1904] P. 60. **Consd.** The Harvest Home, [1904] P. 409; The Circe, [1906] P. 1; The Tongariro *v.* The Drumlanrig, [1911] A. C. 16; The Seacombe, The Devonshire, [1912] P. 21, C. A.; The Devonshire *v.* The Leslie, [1912] A. C. 634. **Refd.** Secretary of State for India *v.* Hewett (1888), 5 T. L. R. 152; *Re* Palmer, Palmer *v.* Answorth (1893), 62 L. J. Ch. 988, C. A.; Reynolds *v.* Tilling (1903), 19 T. L. R. 539; The General Havelock, [1905] P. 3, n.; The Drumlanrig, [1910] P. 249, C. A.; The Hero, [1911] P. 128, C. A.; Harrowing S.S. Co. *v.* Thomas, [1913] 2 K. B. 171, C. A.; Admlty. Comrs. *v.* S.S. Amerika, [1917] A. C. 38, H. L.

Sect. 8.—Damage by Collision, etc. : Sub-sect. 2, C. Sect. 9 : Sub-sect. 1, A.]

by the owners of the *S.* & the *C.* were settled on the terms that both ships were to blame for the collision. The owners of the *S.* sought to recover from the owners of the *C.* half the amounts paid under the Spanish Act to relatives of the deceased seamen :—*Held :* (1) they were not entitled to recover anything in respect of the amounts so paid, because these amounts were not damages recognised by English law, but payments made under a foreign Act in respect of an accident ; (2) the rule as to division of loss as enforced in the Admlty. Ct. could not apply to them, as they were not damages which could have been recovered under Admlty. jurisdiction.—THE CIRCE, [1906] P. 1 ; 74 L. J. P. 106 ; 93 L. T. 640 ; 22 T. L. R. 525 ; 10 Asp. M. L. C. 149.

Annotation :—**Consd.** The Amerika, [1914] P. 167, C. A.

SECT. 9.—DAMAGE TO CARGO.

SUB-SECT. 1.—NATURE AND EXTENT OF JURISDICTION.

A. Where Jurisdiction exists.

524. Admiralty Court Act, 1861 (c. 10), s. 6—Construction of.]—The above Act being intended to remedy a grievance, by amplifying the jurisdiction of the English Admlty. Ct., ought to be construed liberally, to afford the utmost relief which the fair meaning of its language will allow.—THE PIEVE SUPERIORE, Nos. 526, 539, 545, 555, 769, *post.*

Annotations :—**Apld.** The Franconia (1877), 2 P. D. 163, C. A. ; The Cap Blanco, [1913] P. 130, C. A. **Refd.** Gunestead *v.* Price, Fullmore *v.* Wait (1875), 32 L. T. 499 ; The Heinrich Bjorn (1885), 10 P. D. 44, C. A.
For full anns , *see* S. C. No. 545, *post.*

525. —— —— Breach of duty.]—In construing the above sect. the ct. will not be limited by considerations as to whether or not there would be a corresponding right of action at common law, but will so interpret the sect. as to give a remedy in all cases contemplated by the Act itself.

It is a breach of duty under the above sect. for the master to withhold from the holder of a bill of lading such particulars within his knowledge as are necessary in order to compute the amount of freight & general average contribution.—THE NORWAY, Nos. 534, 558, 1074, *post.*

Annotation :—**Refd.** Huth *v.* Lamport, Gibbs *v.* Lamport (1886), 16 Q. B. D. 735, C. A.
For full anns., *see* S. C. No. 534, *post.*

526. —— Effect of.]—The above Act does not confer a maritime lien. It only gives to the Admlty. Ct. jurisdiction to entertain a suit either *in personam* or *in rem* by arrest of the ship whenever it comes within reach of process. The arrest cannot avail against any valid charge on the ship, or against a *bonâ fide* purchaser. The general words " any claim for any breach of contract on part of owner etc. of the ship," in the above sect., have relation to the contract in the bill of lading.—THE PIEVE SUPERIORE, No. 524, *ante ;* Nos. 539, 545, 555, 769, *post.*

Annotations :—**Folld.** The Heinrich Bjorn (1885), 10 P. D. 44, C. A. **Refd.** Gunestead *v.* Price, Fullmore *v.* Wait (1875), 32 L. T. 499 ; The Franconia (1877), 2 P. D. 163, C. A. ; The Cella (1888), 13 P. D. 82, C. A. ; The Cap Blanco, [1913] P. 130, C. A.

527. —— —— Act retrospective.]—*Held :* the above sect. is remedial, & subject to equitable considerations applying to proceedings *in rem*, & conferred jurisdiction over causes of action which occurred before the time when the Act came into operation.—THE IRONSIDES, No. 37, *ante ;* Nos. 528, 562, *post.*

Annotations :—**Consd.** The Langdale (1907), 76 L. J. P. 154.
For full anns., *see* S. C. No. 37, *ante.*

528. —— —— Where liability arises—Original ship.] —THE IRONSIDES, Nos. 37, 527, *ante ;* No. 562, *post.*

For full anns., *see* S. C. No. 37, *ante.*

529. —— —— —— Chartered ship.]—A shipowner who charters his vessel to another, but not so as to give up possession, is liable for a breach of contract contained in a bill of lading, signed by the master, such as injury to goods by improper stowage, if it is not proved that at the time of shipment the shipper had notice of the charter. In the same circumstances (the owner of the ship not being domiciled in England or Wales) the ship is liable under ss. 6, 35 of the above Act.—THE ST. CLOUD (1863), Brown. & Lush. 4 ; 1 New Rep. 244 ; 8 L. T. 54 ; 1 Mar. L. C. 309. S. C. Nos. 549, 561, 569, *post.*

Annotations :—**Folld.** Sandeman *v.* Scurr (1866), L. R. 2 Q. B. 86. **Apld.** Hayn *v.* Culliford (1878), 3 C. P. D. 410. **Consd. & Apld.** Baumwoll Manufactur von Carl Scheibler *v.* Furness, [1891] 2 Q. B. 310. **Distd.** Baumwoll Manufactur von Carl Scheibler *v.* Furness, [1893] A. C. 8. **Refd.** The Norway (1864), Brown. & Lush. 226 ; The Figlia Maggiore (1868), L. R. 2 A. & E. 106 ; The Felix (1868), L. R. 2 A. & E. 273 ; The Nepoter (1869), L. R. 2 A. & E. 375 ; Simpson *v.* Blues (1872), L. R. 7 C. P. 290 ; Gaudet *v.* Brown, Brown *v.* Gaudet, Geipel *v.* Cornforth (1873), L. R. 5 P. C. 134 ; The Mecca, [1895] P. 95, C. A. ; The Cap Blanco, [1913] P. 130, C. A. **Mentd.** The Ella A. Clark (1863), Brown. & Lush. 32 ; Sewell *v.* Burdick (1884), 10 App. Cas. 74.

530. —— —— ——.]—THE FIGLIA MAGGIORE, Nos. 537, 550, *post.*

For full anns., *see* S. C. No. 537, *post.*

531. —— —— ——.]—THE EMILIEN MARIE, No. 532, *post,*

For full anns., *see* S. C. No. 532, *post.*

532. —— —— —— Person in default.]—*Semble :* the Admlty. Ct. has jurisdiction to proceed *in rem* against a ship for breach of contract, within the above sect., although the breach is committed by one of the part-owners of the ship only (the master), & is one for which the other part-owners would not be responsible.—THE EMILIEN MARIE (1875), 44 L. J. Adm. 9 ; 32 L. T. 435 ; 2 Asp. M. L. C. 514. S. C. No. 531, *ante,*

Annotation :—**Mentd.** Parsons *v.* New Zealand Shipping Co. (1900), 69 L. J. Q. B. 419.

533. —— —— Consignee named in bill of lading.]—The consignees named in a bill of lading are entitled under the above sect. to sue for negligence in carriage of the goods, or for breach of contract contained in the bill of lading, although the property in the goods has not passed to them.—THE NEPOTER (1869), L. R. 2 A. & E. 375 ; 38 L. J. Adm. 63 ; 22 L. T. 177 ; 18 W. R. 49 ; 3 Mar. L. C. 355.

Annotations :—**Folld.** The Freedom (1870), 22 L. T. 175. **Consd.** Simpson *v.* Blues (1872), L. R. 7 C. P. 290. **Distd.** Thrift *v.* Youle (1877), 2 C. P. D. 432. **Refd.** Sewell *v.* Burdick (1884), 10 App. Cas. 74.

534. —— —— Assignee of bill of lading Extent of right.]—The above sect. gives an assignee of a bill of lading a right to sue in the Admlty. Ct. for damage done to his goods, or other breach of contract, before he is entitled to delivery of the goods ; at least, if he is entitled to sue for non-delivery. If he is no party to the charterparty he cannot sue for breaches of it other than breaches of such portions as by construction are included in the bill of lading.

Where a charterparty stipulated for lump freight, " the master guaranteeing the ship to carry 3,000 tons on a draft of 26 ft. water, or to forfeit freight

in proportion to the deficiency" & the ship could not, & in fact did not, carry a cargo of 3,000 tons:—*Held:* an assignee of a bill of lading for such cargo, making freight "payable as per charterparty" had no cause of action against the ship in respect of the master fraudulently guaranteeing its capacity.—THE NORWAY (1864), Brown. & Lush. 226; 10 L. T. 40; 12 W. R. 719; 2 Mar. L. C. 17; *varied* on another point 3 Moo. P. C. C. N. S. 245. S. C. No. 525, *ante;* Nos. 558, 1074, *post.*

Annotations:—**Refd.** The Felix (1868), L. R. 2 A. & E. 273. **Mentd.** Huth *v.* Lamport, Gibbs *v.* Lamport (1886), 16 Q. B. D. 735, C. A.

535. —— —— —— ——.]—In a suit for damage to cargo under the above sect. it appeared that the cargo was stowed while the charterer was on board & without any objection being raised on his part as to the mode of stowage. Part of the cargo consisted of oil shipped under a bill of lading which was assigned to merchants, purchasers of the oil, who had no notice of the charter. On the voyage leakage of the oil took place. The assignees sued the shipowners on the bill of lading for the loss of the oil:—*Held:* while the assignees of the bill of lading were entitled to recover by reason of the breach of contract contained in the bill of lading, the rights & liabilities as between the shipper & the master *dehors* of the bill of lading contract in respect of other goods or of the charterparty were unaffected by the transfer to the assignees of the bill of lading, the latter not incorporating the charterparty, & the shippers might also have sued the shipowner for the loss of the oil.—THE HELENE (1865), Brown. & Lush. 415; 5 New Rep. 448; *revsd.* on other points, Brown. & Lush. 429, P. C. S. C. No. 566, *post.*

Annotations:—**Consd. & Distd.** The Figlia Maggiore (1868), L. R. 2 A. & E. 106. **Mentd.** Czech *v.* General Steam Navigation Co. (1867), L. R. 3 C. P. 14; Giblin *v.* McMullen (1868), L. R. 2 P. C. 317, C. A.; The Nepoter (1869), L. R. 2 A. & E. 375; Thrift *v.* Youle (1877), 46 L. J. Q. B. 402; The Xantho (1886), 11 P. D. 170, C. A.

536. —— —— —— ——.]—Pltfs. were indorsees of the bill of lading of a cargo which, according to the charterparty which contained a reference to the bill of lading, was to be unloaded at S. "at the usual place of discharge, & according to the custom of the port." Pltfs. had agreed to sell the cargo to B. & Co., but the purchase-money had not been paid, nor had the bill of lading been indorsed to B. & Co. On arrival of the vessel at S., the master put into the South dock, when pltfs. ordered him to remove her to the G. dock, which the master refused to do until he had been paid the expenses incurred by entering the South dock. Both docks were usual places of delivery for similar cargoes. In a suit for breach of contract for non-delivery of the cargo:—*Held:* (1) pltfs. were entitled to sue in the Admlty. Ct. under the above sect., when construed with Bills of Lading Act, 1855 (c. 111); (2) the master was guilty of breach of duty.—THE FELIX (1868), L. R. 2 A. & E. 273; 37 L. J. Adm. 48; 18 L. T. 587; 17 W. R. 102; 3 Mar. L. C. 100. S. C. No. 559, *post.*

Annotations:—**Consd.** The Princess Royal (1870), L. R. 3 A. & E. 41. **Refd.** Saunders *v.* Jenkins (1896), 13 T. L. R. 24; Leonis S.S. Co. *v.* Rank, [1907] 1 K. B. 344; Leonis S.S. Co. *v.* Rank, [1908] 1 K. B. 499, C. A.; Armement Adolf Deppe *v.* Robinson, [1917] 2 K. B. 204, C. A.

537. —— —— —— ——.]—Pltfs. were the consignees of certain oil-cake; they were also indorsees of the bill of lading on which they had made an advance. The ship was under a charter, but of this the shippers had no knowledge & had made a contract with the master, who put up the ship as a general ship. The oil-cake having suffered damage on the voyage, a suit was brought under the above sect. by pltfs. against shipowners for the amount of deterioration in its value:—*Held:* (1) the proper defts. were before the ct.; (2) the property in the oil-cake had vested in pltfs. so as to entitle them to sue for breach of contract under the above Act when construed with Bills of Lading Act, 1855 (c. 111), s. 1; (3) in any case pltfs. were entitled to sue under the former sect. on the ground of negligence.—THE FIGLIA MAGGIORE (1868), L. R. 2 A. & E. 106; 37 L. J. Adm. 52; 18 L. T. 5 32; 3 Mar. L. C. 97. S. C. No. 530, *ante;* No. 550, *post.*

Annotations:—**Extd.** The Nepoter (1869), L. R. 2 A. & E. 375. **Foll.** The Freedom (1870), 22 L. T. 175. **Consd.** Sewell *v.* Burdick (1884), 10 App. Cas. 74. **Refd.** The Freedom (1869), L. R. 2 A. & E. 346.

538. —— —— —— ——.]—In a suit for damage to cargo & improper delivery thereof by consignees, who were also assignees of the bills of lading:—*Held:* pltf. had a *persona standi* as to both negligence & breach of contract.—THE FREEDOM (1870), 22 L. T. 175; 3 Mar. L. C. 359. S. C. No. 551, *post.*

539. —— —— —— ——.]—THE PIEVE SUPERIORE, Nos. 524, 526, *ante;* Nos. 545, 555, 769, *post.*
For full anns., *see* S. C. No. 545, *post.*

540. —— —— —— ——.]—THE PRINCESS ROYAL, No. 375, *ante;* Nos. 554, 1248, *post.*
For full anns., *see* S. C. No. 375, *ante.*

541. —— —— —— **Though cargo sold before proceedings.**]—An indorsee of a bill of lading has a right to sue for damage to the cargo arising from breach of contract contained in the bill of lading under Bills of Lading Act, 1855 (c. 111), & in the case of a foreign vessel to take proceedings *in rem* under Admlty. Ct. Act, 1861 (c. 10), though at the time of institution of the suit he has sold the cargo.—THE MARATHON (1879), 40 L. T. 163; 4 Asp. M. L. C. 75. S. C. Nos. 552, 1199, *post.*

542. —— **Breach of duty—Goods deliverable in England.**]—The breach of duty or contract, which gives the Admlty. Ct. jurisdiction, under the above sect., must be in respect of goods absolutely to be delivered in England or Wales.—THE KASAN, No. 563, *post.*

543. —— —— **Goods carried into English port.**]—The words "goods carried into any port in England" in the above sect. do not mean "goods imported into England" exclusively.

Where the master of a foreign ship, having a cargo consigned from New York to Dunkirk in France, put into Ramsgate & landed the cargo, & refused either to carry it on to Dunkirk or to give delivery to the owners at Ramsgate:—*Held:* for such breach of duty by the master the ship could be sued in the Admlty. Ct. under the above Act.—THE BAHIA (1863), Brown. & Lush. 61. *S. C.* on further proceedings, Brown. & Lush. 292. S. C. No. 553, *post.*

Annotations:—**Foll.** The Princess Royal (1870), L. R. 3 A. & E. 41; The Patria (1871), L. R. 3 A. & E. 436; The Pieve Superiore (1873), L. R. 4 A. & E. 170. **Apprvd. & Distd.** Dupuch *v.* Coyllie (1874), L. R. 5 P. C. 182. **Apprvd.** The Franconia (1877), 2 P. D. 163, C. A.; The Cap Blanco, [1913] P. 130, C. A.

544. —— —— ——.]—Where the master of a German ship, bound for Hamburg, put into Falmouth in consequence of the outbreak of war between France & Germany, & the consignees of the cargo claimed delivery of the cargo at Falmouth but the master refused to deliver it:—*Held:* the ct. had jurisdiction under the above sect. to entertain an action *in rem* against the ship for breach of duty or breach of contract on the part of her owners or master.—THE PATRIA (1871), L. R. 3 A. & E. 436; 41 L. J. Adm. 23; 24 L. T. 849; 1 Asp. M. L. C. 71.

Annotations:—**Apld.** The Pieve Superiore (1873), L. R. 4 A. & E. 170. **Apprvd. & Distd.** The Pieve Superiore (1874), L. R. 5 P. C. 482. **Refd.** Baumvoll Manufactur von Scheibler *v.* Gilchrest (1891), 60 L. J. Q. B. 605. **Mentd.** The San Roman (1872), L. R. 3 A. & E. 583.

Sect. 9.—Damage to Cargo: Sub-sect. 1, *A. & B.; sub-sect.* 2. *Sect.* 10: *Sub-sect.* 1.]

545. —— —— ——.]—When a foreign ship carrying cargo, acting in pursuance of the contract of affreightment, which gives the option of several ports of call, English & foreign, puts into an English port of call for orders, she carries her cargo into the English port within the above sect., &, though she is ordered to a foreign port & there discharges her cargo, the Admlty. Ct. has jurisdiction to entertain against her a suit by the assignees of the bills of lading of the cargo for damage to cargo, & to arrest her on her return after discharging to England.—THE PIEVE SUPERIORE (1874), L. R. 5 P. C. 482; 43 L. J. Adm. 20; 30 L. T. 887; 22 W. R. 777; 2 Asp. M. L. C. 319. S. C. Nos. 524, 526, 539, *ante*; Nos. 555, 769, *post*.

Annotations:—**Apld.** The Cap Blanco, [1913] P. 130, C. A. **Refd.** Gunestead *v.* Price, Fullmore *v.* Wait (1875), 32 L. T. 499; The Franconia (1877), 2 P. D. 163, C. A.; The Heinrich Bjorn (1885), 10 P. D. 44, C. A.; The Cella (1888), 13 P. D. 82, C. A.

546. —— —— —— **Though not delivered.**]—A right of action is given to a consignee by the above sect. in all cases in which there is non-delivery of goods, subject only to the condition of arrival of the vessel upon which the goods were to be shipped within an English port.—THE DANZIG (1863), Brown. & Lush. 102; 2 New Rep. 526; 32 L. J. P. M. & A. 164; 9 L. T. 236; 1 Mar. L. C. 392. S. C. No. 556, *post*.

Annotations:—**Refd.** The Princess Royal (1870), L. R. 3 A. & E. 41; The Madge Wildfire (1872), 41 L. J. C. P. 121. **Mentd.** The Victoria (1877), 56 L. T. 499.

547. —— —— —— ——.]—Pltfs., under a bill of ading, giving liberty to call at intermediate ports, & providing that any disputes as to its interpretation were "to be decided in Hamburg according to German law," shipped at Hamburg, on board a German vessel, owned by defts., ten cases of gold coin, for delivery to the order of pltfs., at Monte Video or Buenos Aires. The vessel called at Southampton on the way out; on her arrival at Monte Video only nine of the cases were delivered. On the return voyage to Hamburg the vessel again put into Southampton, where she was arrested on behalf of pltfs., in an action for breach of contract or duty in respect of the missing case. On objection by defts. to the jurisdiction of the English ct.: —*Held*: under the words "goods carried into any port in England" in the above sect. the ct. had jurisdiction to arrest the vessel & entertain the action.—THE CAP BLANCO [1913] P. 130; 83 L. J. P. 23; 109 L. T. 672; 29 T. L. R. 557; 12 Asp. M. L. C. 399, C. A. S. C. No. 557, *post*.

548. —— —— **Actionable though felonious.**]—In a cause *in rem* instituted on behalf of assignees of a bill of lading, petitioner alleged that whilst the vessel was on a voyage to a British port with the cargo mentioned in the bill of lading on board, the master & sole owner of the vessel wilfully cut down & destroyed parts of the vessel, & wilfully abandoned the vessel on the high seas; & the vessel & cargo were afterwards taken possession of as derelict by certain salvors, & towed by them into a British port, & the cargo never was delivered by deft. to pltfs. in accordance with the terms of the bill of lading, although such non-delivery was not occasioned by any of the perils in the bill of lading excepted, & pltfs. were compelled to pay money to the salvors before they could get possession of the cargo, & delivery of the cargo to pltfs. was delayed. The vessel was a foreign vessel & the master was a foreign subject:—*Held*: (1) the facts di closed a breach of duty or breach of contract within the above sect., in respect of which pltfs. were entitled to institute a cause *in rem*; (2) it was competent to pltfs. to institute such cause, although no criminal proceedings had been taken against deft.—THE PRINCESS ROYAL (1870), L. R. 3 A. & E. 41; 39 L. J. Adm. 43; 22 L. T. 39; 3 Mar. L. C. 328.

549. —— —— **Damage to cargo.**]—THE ST. CLOUD, No. 529, *ante*; Nos. 561, 569, *post*.

For full anns., *see* S. C. No. 529, *ante*.

550. —— —— ——.]—THE FIGLIA MAGGIORE, Nos. 530, 537, *ante*.

For full anns., *see* S. C. No. 537, *ante*.

551. —— —— ——.]—THE FREEDOM, No. 538, *ante*.

552. —— —— ——.]—THE MARATHON, No. 541, *ante*; No. 1199, *post*.

553. —— —— **Non-delivery.**] — THE BAHIA, No. 543, *ante*.

For full anns., *see* S. C. No. 543, *ante*.

554. —— —— ——.]—THE PRINCESS ROYAL, Nos. 375, 540, *ante*; No. 1248, *post*,

For full anns., *see* S. C. No. 375, *ante*.

555. —— —— ——.]—THE PIEVE SUPERIORE, Nos. 524, 526, 539, 545, *ante*; No. 769, *post*.

For full anns., *see* S. C. No. 545, *ante*.

556. —— —— ——.]—THE DANZIG, No. 546, *post*.

For full anns., *see* S. C. No. 546, *ante*.

557. —— —— ——.]—THE CAP BLANCO, No. 547, *ante*.

558. —— —— **Master's failure to furnish particulars.**]—THE NORWAY, Nos. 525, 534, *ante*; No. 1074, *post*.

For full anns., *see* S. C. No. 534, *ante*.

559. —— —— **Disobedience to instructions.**]—THE FELIX, No. 536, *ante*.

For full anns., *see* S. C. No. 536, *ante*.

560. —— —— **Refusal to stop in transit.**]—A master's refusal to recognise the right of the vendor of goods to stoppage *in transitu* is a breach of duty, for which the vessel may be liable under the above sect.—THE TIGRESS (1863), Brown. & Lush. 38; 32 L. J. P. M. & A. 97; 8 L. T. 117; 11 W. R. 538; 1 Mar. L. C. 323; *sub nom.* THE TIGRIS, 1 New Rep. 449; 9 Jur. N. S. 361. S. C. No. 1237, *post*.

Annotations:—**Consd.** Gaudet *v.* Brown, Geipel *v.* Cornforth (1873), 28 L. T. 77, P. C. **Dbtd.** Glyn Mills Currie *v.* East & West India Dock Co. (1880), 6 Q. B. D. 475, C. A. **Expld.** Glyn Mills Currie *v.* East & West India Dock Co. (1882), 7 App. Cas. 591. **Refd.** The Princess Royal (1870), L. R. 3 A. & E. 41; The Patria (1871), L. R. 3 A. & E. 436; Glyn Mills Currie *v.* East & West India Dock Co. (1880), 5 Q. B. D. 129; Booth S.S. Co. *v.* Cargo Fleet Iron Co., [1916] 2 K. B. 570, C. A.

B. Where Jurisdiction does not exist.

561. No remedy at common law.]—With respect to damage to goods, the Admlty. Ct. possesses no right of action not previously existing at common law. A bare assignee, to whom the property in the goods has not passed & who cannot sue at common law under Bills of Lading Act, 1855 (c. 111), is not entitled to sue in the Admlty. Ct., notwithstanding the words "any assignee of a bill of lading" in Admlty. Ct. Act, 1861 (c. 10), s. 6.—THE ST. CLOUD, Nos. 529, 549, *ante*; No. 569, *post*.

Annotations:—**Consd.** The Norway (1864), Brown. & Lush. 226. **Apld.** The Figlia Maggiore (1868), L. R. 2 A. & E. 106. **N.F.** The Nepoter (1869), L. R. 2 A. & E. 375. **Consd.** Simpson *v.* Blues (1872), L. R. 7 C. P. 290. **Apprvd.** Sewell *v.* Burdick (1884), 10 App. Cas. 74. **Refd.** The Ella A. Clark (1863), Brown. & Lush. 32; Sandeman *v.* Scurr (1866), L. R. 2 Q. B. 86; The Felix (1868), L. R. 2 A. & E. 273; Gaudet *v.* Brown, Brown *v.* Gaudet, Geipel *v.* Cornforth (1873), L. R. 5 P. C. 134; Hayn *v.* Culliford (1878), 3 C. P. D. 410; Baumwoll Manufactur von Carl Scheibler *v.* Furness, [1893] A. C. 8; The Mecca, [1895] P. 95, C. A.; The Cap Blanco, [1913] P. 130, C. A.

562. Admiralty Court Act, 1861 (c. 10), s. 6—After transhipment.]—The above sect. gives the ct. jurisdiction only where the breach of contract complained of has been committed by the ship which actually brings the goods into a port in England & Wales. Where a part of goods shipped on board the *A.* was lost, & the remainder was transhipped & brought into an English port on board the *B.*:—*Held:* no jurisdiction was given to it to arrest the *B.*, to satisfy the owner of the goods lost.—THE IRONSIDES, Nos. 37, 527, 528, *ante.*

Annotations:—**Distd.** The Danzig (1863), 2 New Rep. 526. **Refd.** The Langdale (1907), 76 L. J. P. 154.

563. —— Breach of duty abroad.]—A foreign vessel was chartered to carry coals on charterers' account to a foreign port, & bring home to England a return cargo of timber; the charterers sued the ship under the above sect., claiming damages for (1) non-delivery of certain coals on the outward voyage, & (2) improper delivery of the timber on the return voyage.—*Held:* they were not entitled to sue in respect of non-delivery of the coals abroad, as the Act did not give the ct. such jurisdiction.—THE KASAN (1863), Brown. & Lush. 1; 1 New Rep. 246; 32 L. J. P. M. & A. 97; 9 Jur. N. S. 235. S. C. No 542, *ante.*

564. —— No breach of duty—Reasonable delay.]—An apprehension of capture by enemies' cruisers in time of war, founded on circumstances calculated to affect the mind of a master of ordinary courage, judgment & experience, will justify him in delaying his ship in port during continuance of the risk of capture, & the ship is not responsible in a suit *in rem* in the Admlty. Ct. for damage to the cargo caused by such reasonable delay, if the voyage is ultimately completed & the cargo delivered. *Semble:* if the voyage were abandoned, & the cargo not delivered according to contract, the shipowners would be bound to show that they had been actually prevented from performing the voyage.—THE SAN ROMAN (1873), L. R. 5 P. C. 301; 42 L. J. Adm. 46; 28 L. T. 381; 21 W. R. 393; 1 Asp. M. L. C. 603, P. C.

For full anns., *see* SHIPPING & NAVIGATION.

565. —— —— No loss.]—The omission by the master to state in his protest all the circumstances in detail in which the damage took place does not deprive the owner of the goods of his right of action against underwriters on account of general average, & is not a breach of duty or breach of contract within the above sect.—THE SANTA ANNA (1863), 32 L. J. P. M. & A. 198; 9 Jur. N. S. 1205.

Annotation:—**Refd.** The Princess Royal (1870), L. R. 3 A. & E. 41.

SUB-SECT. 2.—EXERCISE OF JURISDICTION.

566. Cause of damage to be pleaded.]—In a suit for damage to cargo under Admlty. Ct. Act, 1861 (c. 10), s. 6, the petition ought in general to state, so far as is practicable, the cause to which pltf. attributes the loss or damage.—THE HELENE, No. 535, *ante.*

For full anns., *see* S. C. No. 535, *ante.*

567. Interpleader by master—Not available.]—Where a suit has been instituted in the Admlty. Ct. by the arrest of a ship, on behalf of a person claiming to be the owner of goods, on the ground of breach of duty on the part of the master in not delivering the goods to him, & a like proceeding has been instituted in same ct. by another claimant in respect of same goods. *Semble:* a bill of interpleader by the master of the ship will not lie, on the grounds: (1) the proceedings are not against him but against the ship; (2) the Admlty. Ct. has jurisdiction to decide the whole question.—SABLICICH *v.* RUSSELL (1866), L. R. 2 Eq. 441; 14 W. R. 913.

568. Amount recoverable—Both ships to blame.]—The Admlty. Ct. rule that in cases of collision the damages are to be equally divided where both ships are to blame does not apply to actions for breach of contract of carriage brought by owners of cargo against the carrying ship to recover damages for loss of, or injury to, their goods, & pltfs. in such actions are entitled to recover their full damages from the owners of the carrying ship.—THE BUSHIRE (1885), 52 L. T. 740; 5 Asp. M. L. C. 416.

Annotation:—**Refd.** The Englishman & The Australia, [1894] P. 239.

569. —— Reference to registrar.]—In cases brought under Admlty. Ct. Act, 1861 (c. 10), s. 6, the ct. will refer the damages for assessment to the registrar & merchants.—THE ST. CLOUD, Nos. 529, 549, 561, *ante.*

For full anns., *see* S. C. No. 529, *ante.*

570. —— —— Where counterclaim.]—Where to a claim for damage to cargo a counterclaim of general average is set up, it is not necessary that such general average should have been adjusted; but if the evidence supports the fact of a general average loss having been sustained, that amount together with the amount of loss sustained through damage to the cargo will be referred to the registrar & merchants to report.—THE OQUENDO (1878), 38 L. T. 151; 3 Asp. M. L. C. 558. S. C. No. 658, *post.*

SECT. 10.—LIMITATION OF LIABILITY.

SUB-SECT. 1.—NATURE AND EXTENT OF JURISDICTION.

571. Action in rem instituted—Bail given—Arrest not necessary.]—Where proceedings *in rem* have been instituted in the Admlty. Ct. against a vessel, & bail has been given for the vessel, the ct. has jurisdiction to entertain a suit instituted by the owners of the vessel for limitation of liability, although the vessel may not actually have been under arrest of the ct.—THE NORTHUMBRIA (1869), L. R. 3 A. & E. 24; 39 L. J. Adm. 24; 21 L. T. 683; 18 W. R. 356; 3 Mar. L. C. 316.

Annotations:—**Distd.** The Normandy (1870), L. R. 3 A. & E. 152; James *v.* L. & S. W. Ry. Co. (1872), L. R. 7 Exch. 187, 287. **Refd.** The Crathie, [1897] P. 178.

PART II. SECT. 9, SUB-SECT. 1.—B.

562 i. *Admiralty Court Act*, 1861 (c. 10), *s. 6—Owner within jurisdiction.*]—The Admlty. Ct. has no jurisdiction over claims by the owner or consignee of goods for damages done thereto by negligence or breach of duty by owner, master, or crew of the ship, if it is shown that at the institution of the cause any such owner, or part-owner, is within the Province.—RITHET *v.* THE BARBARA BOSQWITZ & PORTER (1894), 3 B. C. R. 445.—**CAN.**

b. *Foreign ship—Charterparty—Stoppage of delivery of cargo.*]—A Danish ship was chartered to proceed to a safe port in the sea of Azof, & there load a cargo of wheat for a safe port in the United Kingdom. Bills of lading were signed by the captain, & the ship arrived at T., & commenced to deliver the cargo; but, disputes arising between the captain & pltf., delivery was stopped & proceedings were instituted by pltf. against the ship to recover damages for non-delivery of the cargo:—*Held:* in the contract of affreightment there was nothing from which a right of maritime lien could flow so as to enable proceedings to be taken against the ship *in specie* before the Admlty. Ct. *The Bold Buccleugh* (1851), 7 Moo. P. C. C. 267, cited.—ANON. (1859), 1 L. T. 200.—**IR.**

Sect. 10.—*Limitation of Liability: Sub-sects.* 1 & 2. *Sect.* 11: *Sub-sect.* 1.]

572. Ship sunk — Action maintainable.]—The *N.* & the *M.* collided & the *N.* was sunk. Cross causes of damage were instituted, but had not been heard, nor the liability for the collision determined, but the owners of the *N.* paid into ct. the amount of their liability as limited by Act:—*Held:* (1) the ct. had jurisdiction in a suit for limitation of liability, though the *N.* had been sunk, & could not be arrested, notwithstanding Admlty. Ct. Act, 1861 (c. 10); (2) the ct. could grant an injunction to restrain actions at common law in respect of same collision; (3) actions at common law for loss of goods damaged by collision might be restrained, even though the goods were to be carried partly by sea & partly by land.—THE NORMANDY (1870), L. R. 3 A. & E. 152; 39 L. J. Adm. 48; 23 L. T. 631; 18 W. R. 903; 3 Mar. L. C. 519.

Annotation:—**Refd.** James *v.* L. & S. W. Ry. Co. (1872), L. R. 7 Exch. 187, 287.

573. —— Action not maintainable.]—Pltf., a passenger by the steamer *N.*, which after negligently colliding with another ship, had been totally lost at sea, brought an action in the Exch. Ct. against defts., owners of the *N.*, for personal injuries & loss of baggage occasioned to him thereby. Cross causes of damage were also instituted by the owners of both vessels in the Admlty. Ct. & £5,000 paid in by defts. in lieu of bail. The latter began a suit under Admlty. Ct. Act, 1861 (c. 10), s. 13, for limitation of their liability to pltf. & similar claimants. The Admlty. judge held that he had jurisdiction, entertained the suit, & ordered that the sum of £6,376, the amount of possible liability calculated at £15 per ton of the *N.*, should be paid into ct. Defts., having paid in that sum, & admitted their liability, prayed for an injunction restraining the action of pltf., who thereupon declared in prohibition:—*Held:* as the Admlty. Ct., although in some respects a Superior Ct., is one of limited jurisdiction, & as it had not jurisdiction, because neither the ship nor "the proceeds thereof" were "under arrest," within the above sect., prohibition would lie, & might issue.—JAMES *v.* L. & S. W. RY. CO., Nos. 23, 94. *ante.*

Annotation:—**Consd.** The Franconia (1877), 2 P. D. 163, C. A.

574. Launch — Not registered.]—Two vessels came into collision. One of them, though intended to be fitted as a steamship, was at the time of collision without her engines & boilers & in the incomplete state of a launch, & came into collision with the other vessel on leaving the ways through the negligence of the persons employed by her owner to launch her. In an action of damage brought against the launch the ct. ruled that the launch was solely to blame for the collision. The owner of the launch, a natural-born British subject, thereupon instituted an action of limitation of liability for the purpose of limiting his liability under M. S. Acts. At the hearing of this last-mentioned action it was admitted that the launch exceeded the burden of 15 tons, & was not registered as a British ship at the time the collision happened:—*Held:* (1) the damage arising out of the collision was damage caused by "improper navigation" within M. S. Amendment Act, 1862 (c. 63), s. 54; (2) as at the time of the collision the launch was not a registered British ship, the suit must be dismissed.—THE ANDALUSIAN (1878), 3 P. D. 182; 47 L. J. P. 65; 39 L. T. 204; 27 W. R. 172; 4 Asp. M. L. C. 22.

575. Tug.]—Under M. S. Act, 1894 (c. 60), s. 3 (1), a small tug—solely employed in the manner mentioned in the sect.—of the "gross tonnage," if measured in accordance with the Act, of 35·99 tons, is exempted from registry, &, therefore, as the vessel is properly exempted from registry, her owners are entitled, under s. 503, to limit their liability to £8 for each ton of her gross tonnage ascertained by measuring her in accordance with the Act.—THE BRUNEL, [1900] P. 24, C. A.

576. Chartered ship—Charterer by demise.]—The charterers by demise of a vessel found to blame for a collision are entitled to the statutory limitation of liability conferred by M. S. Act, 1894 (c. 60), ss. 503, 504.—THE STEAM HOPPER NO. 66, [1908] A. C. 126; 77 L. J. P. 84; 98 L. T. 464; 24 T. L. R. 384; 11 Asp. M. L. C. 37, H. L.

577. Foreign ship—Within territorial waters.]—M. S. Act, 1854 (c. 104), s. 504, limiting the liability of owners of sea-going ships, was applied in the case of damage done by a British ship to a foreign vessel, when such damage occurred within three miles of the coast of England.—GENERAL IRON SCREW COLLIER CO. *v.* SCHURMANNS (1860), 1 John. & H. 180; 29 L. J. Ch. 877; 4 L. T. 138; 6 Jur. N. S. 883; 8 W. R. 732; 70 E. R. 712.

Annotations:—**Distd.** The Annapolis & The Johanna Stoll (1861), Lush. 295. **Consd.** The Wild Ranger (1862), Lush. 553; The Amalia (1863), Brown. & Lush. 151, P. C.; R. *v.* Keyn (1876), 2 Ex. D. 63, C. C. R. **Refd.** The Northumbria (1869), L. R. 3 A. & E. 6.

578. —— On high seas.]—M. S. Act, 1854 (c. 104), ss. 504, 514, limiting the liability of owners of ships in case of collisions at sea, are not applicable to collisions on the high seas between two foreign ships belonging to foreign owners.—COPE *v.* DOHERTY (1858), 2 De G. & J. 614; 4 K. & J. 367; 27 L. J. Ch. 600; 31 L. T. O. S. 173, 307; 4 Jur. N. S. 457, 689; 6 W. R. 537, 695; 44 E. R. 1127.

Annotations:—**Expld.** General Iron Screw Colliery Co. *v.* Schurmanns (1860), 1 John. & H. 180. **Foll.** The Wild Ranger (1862), Lush. 553. **Consd.** The Amalia (1863), 2 New Rep. 462; Cail *v.* Papayanni (1863), 1 Moo. P. C. C. N. S. 471, P. C.; The Scotia (1869), 20 L. T. 375; R. *v.* Keyn (1876), 2 Ex. D. 63, C. C. R.; Poll *v.* Dambe, [1901] 2. K. B. 579. **Refd.** Burns *v.* Chapman (1858), 5 C. B. N. S. 481; The Victor (1860), Lush. 72; The Johannes (1860), Lush. 182; The Annapolis, The Johanna Stoll (1861), Lush. 295; Davidsson *v.* Hill, [1901] 2 K. B. 606; Varesick *v.* British Columbia Copper Co. (1906), 1 B. W. C. C. 446.

579. —— Outside territorial waters.]—In a cause of collision beyond British jurisdiction, between an English & Belgian vessel:—*Held:* M. S. Amendment Act, 1862 (c. 63), s. 54, with respect to limited liability applied equally to British & foreign vessels.—THE AMALIA (1863), Brown. & Lush. 151; 1 Moo. P. C. C. N. S. 471; 2 New Rep. 462, 533; 32 L. J. P. M. & A. 191; 8 L. T. 805; 9 Jur. N. S. 1111; 12 W. R. 24; 1 Mar. L. C. 359; 15 E. R. 778, P. C. S. C. No. 580, *post.*

Annotations:—**Consd.** The Albert (1863), 3 New Rep. 217; The Halley (1867), L. R. 2 A. & E. 3; The Normandy (1870), L. R. 3 A. & E. 152. **Refd.** Lloyd *v.* Guibert (1865), L. R. 1 Q. B. 115; Liverpool, Brazil & River Plate *v.* Renham (1868), L. R. 2 P. C. 193, C. A.; The Fanny M. Carvill (1875), 13 App. Cas. 455, n., P. C. **Mentd.** Ellis *v.* M'Henry (1871), L. R. 6 C. P. 228; Smith *v.* Kirby (1875), 24 W. R. 207; The Sisters (1875), 32 L. T. 837; The Karo (1887), 13 P. D. 24.

PART II. SECT. 10, SUB-SECT. 1.

575 i. *Tug—Not registered.*]—SEWELL *v.* B. C. TOWING CO. & MOODYVILLE SAWMILL CO. (1883), 9 S. C. R. 527.—**CAN.**

a. *British fishing-boat.*]—A British fishing-boat registered only in the Fishing-Boat Register under M. S. Act, 1894 (c. 60), Part IV., & not under Part I., is a British ship registered under the Act within s. 2, & its owner is entitled to the limitation of liability conferred by s. 503.—COUPER *v.* MACKENZIE (1906), 43 Sc. L. R. 416; 13 S. L. T. 870; 8 F. 1202.—**SCOT.**

SUB-SECT. 2.—EXERCISE OF JURISDICTION.

580. Admission of liability—Not necessary.]—In a cause of collision the ct. will not require, before the owners of a vessel can claim a limitation of their liability to damage to the amount of ship & freight, that they should acknowledge their vessel was to blame.—THE AMALIA No. 579, *ante*.

Annotations:—**Consd.** The Normandy (1870), L. R. 3 A. & E. 152. **Expld.** James *v.* L. & S. W. Ry. Co. (1872), 7 Exch. 187. **Folld.** The Sisters (1875), 32 L. T. 837. **Dbtd.** The Karo (1887), 13 P. D. 24.
For full anns., *see* S. C. No. 579, *ante*.

581. —— ——.]—Defts. in a collision cause, in which their ship was under arrest, having instituted a suit for limitation of liability, the ct., upon the motion of pltfs. in the limitation suit, ordered the ship to be released on payment into ct. in that suit of the aggregate amount of £15 per ton of registered tonnage of the ship, & a sum to cover interest & costs, & did not require pltfs. in the limitation suit to admit liability before ordering the release.—THE SISTERS (1875), 32 L. T. 837; 2 Asp. M. L. C. 589.

582. —— How far necessary.]—Jurisdiction is given by M. S. Act, 1854 (c. 104), s. 514, to a ct. of equity to ascertain the value of the ship & freight lost or damaged, & to order the amount to be brought into ct. & distributed among the several claimants, in those cases only where the shipowner, against whom a liability is alleged in respect of such loss or damage, admits, by his bill, a liability to someone in respect of same.

Where a shipowner filed his bill under the above sect. without admitting liability to anyone, a motion for an injunction to restrain proceedings in the Admlty. Ct. in respect of loss & damage to the ship & cargo of defts. was refused with costs.—HILL *v.* AUDUS (1855), 1 K. & J. 263; 3 Eq. Rep. 422; 24 L. J. Ch. 229; 24 L. T. O. S. 251; 3 W. R. 230; 69 E. R. 456.

Annotations:—**N.F.** The Amalia (1863), 2 New Rep. 462. **Consd.** The Normandy (1870), L. R. 3 A. & E. 162; James *v.* L. & S. W. Ry. Co. (1872), L. R. 7 Exch. 187.

SECT. 11.—SALVAGE.

See, generally, SHIPPING & NAVIGATION.

SUB-SECT. I.—LIFE SALVAGE.

583. No life salvage at common law—How far cognisable.]—For the mere preservation of life the ct. has no power of remunerating; it must be left to the bounty of the individuals; but if it can be connected with preservation of property, whether by accident or not, then the ct. can take notice of it, & the ct. is always willing to join that to the animus displayed in the first instance.—THE AID (1822), 1 Hag. Adm. 83.

584. *S.P.* THE ZEPHYRUS (1842), 1 Wm. Rob. 329; 1 Notes of Cases, 338; 6 Jur. 304.

Annotations:—**Consd.** The Johannes (1860), Lush. 182; The Schiller (1877), 2 P. D. 145, C. A.; The Renpor (1883), 52 L. J. P. 49, C. A. **Reid.** The Willem III. (1871), 25 L. T. 386.

585. —— Jurisdiction statutory.]—The Admlty. Ct. has no original jurisdiction to award salvage for saving life only; its jurisdiction arises under M. S. Act, 1854 (c. 104), & is limited to cases within the Act.—THE JOHANNES (1860), Lush. 182; 30 L. J. P. M. & A. 91; 3 L. T. 757; 1 Mar. L. C. 24. S. C. No. 586, *post*.

Annotations:—**Consd.** The Pacific, [1898] P. 170. **Reid.** The Willem III. (1871), L. R. 3 A. & E. 487; The Gas Float Whitton (No. 2), [1895] P. 301. **Mentd.** The Mullingar (1872), 26 L. T. 326; The Renpor (1883), 8 P. D. 115, C. A.

See, now, M. S. Act, 1894 (c. 60), ss. 544 *et seq.*

586. Extent of jurisdiction—Foreign ship—On high seas.]—M. S. Act, 1854, does not give the ct. jurisdiction over salvage of life only performed on the high seas at a distance of more than three miles from the shore of the United Kingdom, at least if the ship from which the lives are saved is a foreign ship. It is immaterial to this question that before action the ship has been brought by other salvors into a British port.—THE JOHANNES, No. 585, *ante*.

Annotations:—**Consd.** The Pacific, [1898] P. 170. **Reid.** The Willem III. (1871), L. R. 3 A. & E. 487; The Gas Float Whitton (No. 2), [1895] P. 301.
For full anns., *see* S. C. No. 585, *ante*.

587. *S. P.* THE WILLEM III., No. 720, *post*.

For full anns., *see* S. C. No. 720, *post*.

588. —— —— ——.]—Defts. in a cause of salvage instituted against the cargo of a foreign ship to recover for salvage services rendered in saving the lives of a number of the crew & passengers on board such ship alleged in their defence that the vessel in which the cargo proceeded against had been laden was not, at the time salvage services were rendered, stranded or in distress on the shore of any sea or tidal water within the limits of the United Kingdom. On demurrer:—*Held:* the facts stated were not sufficient to exclude the jurisdiction of the ct.—THE DEUTSCHLAND (1877), 25 W. R. 755.

589. —— —— Services partly in territorial waters.]—An English vessel fell in with a Norwegian vessel in the North Sea, more than three miles from the coasts of the United Kingdom, flying signals of distress, waterlogged & unmanageable, in want of immediate assistance for herself & crew, & rendered life salvage services to the crew of the distressed vessel by taking them off their vessel & bringing them into an English port in safety:—*Held:* the English ct. had jurisdiction under M. S. Act, 1894 (c. 60), s. 544, to make an award of life salvage remuneration to the owners, master, & crew of the salving vessel, such services having in fact been rendered in part within British waters.—THE PACIFIC, [1898] P. 170; 67 L. J. P. 65; 79 L. T. 125; 46 W. R. 686; 8 Asp. M. L. C. 422.

590. No jurisdiction in personam.]—Where lives & cargo have been salved from a ship, which has been totally lost, the owners of the cargo are liable to pay salvage in respect of the lives, & the owners of the lost ship are not liable to contribute to such payment. Life salvage awards can only be made

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PART II. SECT. 10, SUB-SECT. 2.

a. *Distribution of amount of liability—Injunction of action at law.*]—Where a ship has been lost by collision, the ct. has jurisdiction under Admlty. Ct. (Ireland) Act, 1867 (c. 114), without regard to the ship or proceeds being under arrest, to make an order at the suit of an owner, determining the amount of his liability, & to distribute such amount ratably among the several claimants, & after such order the ct. will grant an injunction to restrain an action at law for damages in respect to goods lost in the ship.—THE TORCH (1873), 7 I. L. T. 192.—**IR.**

PART II. SECT. 11, SUB-SECT. 1.

586 i. *Extent of jurisdiction—Foreign ship—On high seas.*]—A British steam trawler rescued seamen from a disabled vessel about 200 miles from land. The salvors landed them at Hull, the port for which the trawler was bound. The owners of the trawler claimed salvage:—*Held:* the claim must be disallowed in respect that the salvage was complete when the seamen were taken on board a seaworthy vessel & was not rendered thereby wholly or in part in British waters within M. S. Act, 1894 (c. 60), s. 544 (1).—JORGENSEN *v.* NEPTUNE STEAM FISHING CO., LTD. (1902), 4 F. 992; 39 Sc. L. R. 765; 10 S. L. T. 206.—**SCOT.**

Sect. 11.—*Salvage: Sub-sects.* 1 & 2, *A. (a) i. & ii. & (b) & B. Sect.* 12: *Sub-sect.* 1, *A.*]

out of the *res* salved, & not against the owners of a ship personally.—THE SARPEDON, CARGO EX (1877), 3 P. D. 28; 37 L. T. 505; 26 W. R. 375; 3 Asp. M. L. C. 509. S. C. No. 1326, *post.*

Annotation:—**Refd.** The Renpor (1883), 48 L. T. 887.

591. *S. P.* THE ANNIE (1886), L. R. 12 P. D. 50; 56 L. J. P. 70; 56 L. T. 500; 35 W. R. 366; 6 Asp. M. L. C. 117.

592. *S. P.* THE RENPOR (1883), 8 P. D. 115; 52 L. J. P. 49; 48 L. T. 887; 31 W. R. 640; 5 Asp. M. L. C. 98, C. A.

Annotations:—**Consd.** The Mariposa, [1896] P. 273; The Port Victor, [1901] P. 243, C. A. **Refd.** The Crusader, [1907] P. 196, C. A. **Mentd.** Nourse *v.* Liverpool Sailing Shipowners' Assocn. (1896), 65 L. J. Q. B. 507, C. A.

SUB-SECT. 2.—SALVAGE OF PROPERTY.

Property subject or not subject to salvage, *see* pp. 106, 107, *ante.*

A. Nature and Extent of Jurisdiction.

(a) Extent of Jurisdiction.

i. *Where Jurisdiction exists.*

593. Salvage—Extent of jurisdiction.]—All questions relating to salvage, both as regards the amount due in respect of services rendered & the apportionment of such amount among the different classes of salvors, are within the jurisdiction of the Admlty. Ct., subject to M. S. Act, 1854 (c. 104).—ATKINSON *v.* WOODHALL (WOODALL) (1862), 1 H. & C. 170; 31 L. J. M. C. 174; 36 L. T. 361; 26 J. P. 759; 8 Jur. N. S. 720; 10 W. R. 671; 1 Mar. L. C. 224; 158 E. R.

594. —— ——.]—An ordinary action for salvage is within the exclusive jurisdiction of the Admlty. Div.—HUMPHREYS *v.* EDWARDS (1875), 1 Char. Pr. Cas. 81; 45 L. J. Ch. 112.

595. —— **Agreement though made on land—Incidental matters.**]—A ship sunk on Nore Sand was raised & an action brought against her in a cause of salvage, civil & maritime. The owners appeared under protest, alleging that the ct. had no jurisdiction, the services having been rendered under an agreement made upon land. The protest was overruled on the grounds: (1) the services were salvage services, & the ct. had jurisdiction over the subject-matter; (2) having original jurisdiction over the subject-matter, the ct. had jurisdiction over the incidents; (3) the ct. had jurisdiction over agreements made upon land for performance of salvage services.—THE CATHERINE (1848), 6 Notes of Cases, Supp. xliii.; 12 Jur. 682.

596. **Statutory jurisdiction.**]—A British steamship belonging to pltfs., with cargo from & to a continental port, was in the English Channel, in distress, for want of fuel, twenty miles off the coast. A British steam tug towed her into Plymouth, & at the request of the master of the tug, deft., receiver of wreck at that port, detained pltfs.' vessel two days pending the production of satisfactory bail to answer a claim for salvage. In an action for illegal arrest:—*Held:* deft. was entitled to judgment, as the words in M. S. Act, 1894 (c. 60), s. 552, "salvage due under this Act" were not confined to salvage expressly made payable under that Act, but included salvage which might be awarded by the cts. mentioned in the Act, whose jurisdiction was conferred or recognised by it. *Semble:* the words in s. 546 "near the coasts of the United Kingdom" were restricted to the territorial limits.—THE FULHAM, [1899] P. 251; 68 L. J. P. 75; 81 L. T. 19; 47 W. R. 598; 15 T. L. R. 404; 43 Sol. Jo. 568; 8 Asp. M. L. C. 559, C. A. S. C. No. 708, *post.*

597. —— **Statutory limitation removed.**]—Jurisdiction in salvage cases where the value of the property saved is under £1,000, taken away from the Admlty. Ct. by M. S. Act, 1854 (c. 104), s. 460, & M. S. Amendment Act, 1862 (c. 63), s. 49, is restored to that ct. by Cty. Cts. Admlty. Jurisdiction Act, 1868 (c. 71).—THE EMPRESS (1872), L. R. 3 A. & E. 502; 41 L. J. Adm. 32; 25 L. T. 885; 20 W. R. 553; 1 Asp. M. L. C. 183.

598. **Incidental jurisdiction—Though jurisdiction on principal matter taken away by statute.**]—Though, by reason of the value of property saved being under £1,000, the Admlty. Ct. may not have jurisdiction to determine & award the amount of salvage due, yet it has jurisdiction to condemn, in costs & damages, salvors wrongfully arresting property & for other collateral purposes.—THE KATE (1864), Brown. & Lush. 218; 3 New Rep. 583; 33 L. J. P. M. & A. 122; 9 L. T. 782; 10 Jur. N. S. 444; 1 Mar. L. C. 421. S. C. No. 748, *post.*

ii. *Where Jurisdiction does not exist.*

599. **Property not saved.**]—The Admlty. Ct. has no power to award salvage for services wholly unsuccessful in saving any property whatever.—THE E. U. (1853), 1 Ecc. & Ad. 63.

Annotations: **Consd.** Ocean S.S. Co. *v.* Anderson (1883), 13 Q. B. D. 651, C. A. **Refd.** The Renpor (1883), 8 P. D. 115, C. A.; The Camellia (1883), 9 P. D. 27; The Kate B. Jones, [1892] P. 366.

600. **Services not salvage services—Transhipment.**]—The Admlty. Ct. has not jurisdiction over a mere question of transhipment; but conveying part of a cargo, consisting of tea, from a ship stranded near M. to L., it being needful to discharge the cargo & remove it to a place of safety, is not to be considered merely as a transhipment to fulfil the owner's duty of forwarding the goods to earn freight; but is a salvage service by persons rendering such service.—THE WESTMINSTER (1841), 1 Wm. Rob. 229: 6 L. T. 868.

Annotations:—**Refd.** The Diamond (1845), 9 Jur. 694. **Mentd.** The Elton, [1891] P. 265.

601. *S. P.* THE WATT (1843), 2 Wm. Rob. 70.

Annotations:—**Refd.** Bird *v.* Gibb (1883), 8 App. Cas. 559; The Janet Court (1897), 76 L. T. 172.

PART II. SECT. 11, SUB-SECT. 2.—A (a) i.

593 i. *Salvage—Extent of jurisdiction.*]—Where a claim is simply for salvage services, & no question of apportionment arises, an action at law can be maintained, although where apportionment of the amount among several claimants is asked for, it is probably a matter exclusively within the jurisdiction of the Admlty. Ct.—COPPS *v.* READ (1876), 3 Pug. 527.—**CAN.**

593 ii. —— ——.]—Where the vessel saved was brought into port in Newfoundland & then sold; but a portion of her materials was brought to Halifax, & then proceeded against by two of the salvors who had not been paid in Newfoundland:—*Held:* the ct. had jurisdiction, salvage constituting a lien upon the goods saved.—THE FLORA (1869), Y. A. D. 48.—**CAN.**

PART II. SECT. 11, SUB-SECT. 2.—A (a) ii.

600 i. *Services not salvage services—Blasting rock.*]—A ship having run aground, the captain employed pltf. to blast away rock which held her. The operation was carried out successfully, & pltf. claimed salvage:—*Held:* (1) although the removal of the rock might be regarded as a *sine qud non* for the safety of the ship, it was not salvage, as, after the operation, the ship had to be towed off & navigated to a place of safety; (2) the only justification for bringing the action in the Admlty. Ct. was that a question of salvage arose; (3) pltf. having failed to prove salvage, the action might be dismissed with costs, but, the ct. having jurisdiction to award reasonable remuneration, it would do so, leaving each party to their own costs. *The Watt* (1843), 2 Wm. Rob. 70; *The Favourite* (1844), 2 Wm. Rob. 255; *The Chetah* (1868), L. R. 2 P. C. 205, refd.—THE COSTA RICA (1891), 3 Ex. C. R. 23.—**CAN.**

602. —— Towage.]—In a salvage suit, in which there has been no tender made by defts., an Admlty. Ct. cannot, on finding that no salvage service has been performed by pltfs. & that their service was mere towage, make a decree for the amount of towage due to pltfs.—THE STRATHNAVER, No. 749, *post*.

For full anns., *see* S. C. No. 749, *post*.

603. —— —— Services beyond what contemplated.]—Where the owners of a tug contracted to tow a number of barges at sea for an agreed sum, it being part of the contract that, if the barges or any of them broke adrift during towage, the tug-owners were nevertheless to be entitled to the sum, & in consequence of severity of weather the voyage was unduly protracted, the barges broke adrift on several occasions, & were picked up again, & men in charge of the barges were saved from possible loss of life, the ct. awarded salvage on the ground that the services were beyond what was contemplated by the parties when entering into the towage contract.—FIVE STEEL BARGES, Nos. 147, 148, *ante*; Nos. 606, 613, *post*.

Annotations:—**Apprvd.** The Leon Blum, [1915] P. 90. **Refd.** The Port Victor, [1901] P. 243, C. A.; The Veritas, [1901] P. 304.
For full anns., *see* S. C. No. 147, *ante*.

604. Bond taken by receiver of Admiralty droits.]—A receiver of Admlty. droits, on notice from the agent of salvors, detained a ship, which he afterwards released under 9 & 10 Vict. c. 99, s. 19 (repealed by M. S. Repeal Act, 1854 (c. 104), s. 4), taking as security a bond, from two persons, as sureties for the master & owners of the ship & cargo, & submitting themselves to the jurisdiction of the Admlty. Ct. to answer such salvage as should be decreed by that ct.; &, unless they should so do, consenting that execution should issue against them, their heirs, exors., & administrators, goods & chattels, wheresoever they should be found:—*Held*: the Admlty. Ct. had not jurisdiction to enforce the bond.—THE BAGNALL (1848), 3 Wm. Rob. 112; 6 Notes of Cases, 542; 12 Jur. 1008.

605. Distribution of salvage—Awarded by inferior court.]—Where an award has been made by magistrates in a cause of salvage, the parties are not at liberty to resort to the Admlty. Ct. for a distribution, unless an application has been made first to the magistrates for an order of distribution, as the Admlty. Ct. has no original jurisdiction as to distribution of salvage awarded by magistrates. THE HOPE (1841), 1 Wm. Rob. 265; 1 Notes of Cases, 110.

For full anns., *see* SHIPPING & NAVIGATION.

(b) Liability to pay Salvage.

606. Persons interested.]—The liability to pay salvage is not confined to actual legal owners of property saved, but extends to those who have an interest in that property, which interest has been saved by placing the property itself in a position of security.—FIVE STEEL BARGES, Nos. 147, 148, 603, *ante*; No. 613, *post*.

Annotations:—**Apprvd.** The Port Victor, [1901] P. 243, C. A.; The Veritas, [1901] P. 304. **Refd.** The Leon Blum, [1915] P. 90.
For full anns., *see* S. C. No. 147, *ante*.

607. —— Statutory limitation on jurisdiction.]—THE LOUISA, No. 775, *post*.

For full anns., *see* S. C. No. 775, *post*.

B. Exercise of Jurisdiction.

608. Action in rem—Or in personam.]—On objection being taken that the only mode of proceeding for salvage was by a warrant of arrest of the ship, & that there was no precedent in the books of a monition against the owner personally:—*Semble*: the objection failed.—THE HOPE (1801), 3 Ch. Rob. 215.

Annotations:—**Consd.** The Elton, [1891] P. 265. **Refd.** The Schiller (1887), 2 P. D. 145, C. A.

609. —— ——.]—In case of a salvage of a ship afterwards given up to the master for convenience of proceeding on the voyage, proceedings had been instituted by a monition calling on the owners to show cause why salvage should not be decreed. The owners appeared under protest, & in support of the protest took objection that a suit of salvage in a case civil & maritime should commence by arrest of the ship, as being a proceeding *in rem*; that in the arts., Feb. 18, 1633, it was particularly expressed "that if suit shall be in Admlty. Ct. for building, amending, saving, or necessary victualling the ship against the ship, & not against any party by name, but such, as for his interest, makes himself a party, no prohibition shall be granted, though this be done within the realm," that for saving the ship the suit should originate against the ship, & not against the owner. The protest was overruled.—THE TRELAWNEY (1801), 3 Ch. Rob. 216 n. *S. C.* on further proceedings (1802), 4 Ch. Rob. 223.

Annotations:—**Consd.** The Francis & Eliza (1816), 2 Dods. 115. **Refd.** The Schiller (1877), 2 P. D. 145, C. A.

610. —— ——.]—Proceedings *in rem* are the real foundation of the jurisdiction, though there may be some cases of special circumstances where salvors have been allowed to proceed by monition; but generally the ship & freight are alone liable. Where they can be proceeded against, the ct. is not disposed to regard salvors as having a right to follow cargo, as prize goods may be followed to abide final adjudication.—THE RAPID (1838), 3 Hag. Adm. 419.

Annotations:—**Mentd.** The Iodine (1844), 3 Notes of Cases, 140; The Samuel (1851), 17 L. T. O. S. 204.

611. —— ——.]—An action for salvage in the Admlty. Ct. can be brought either *in personam* or *in rem* (LORD ALVERSTONE, C.J.).—THE PORT VICTOR, Nos. 134, 149, *ante*.

612. Action in personam—Sale of ship.]—Where a vessel was assisted on the coast of Africa in being got off the ground & repaired, & a bill was drawn on the owners for salvage, the ship meanwhile having been sold:—*Held*: the Admlty. Ct. had no jurisdiction.—THE CHIEFTAIN (1846), 2 Wm. Rob. 450; 4 Notes of Cases, 459; 8 L. T. 440.

Annotation:—**Consd.** The Elton, [1891] P. 265.

613. —— ——.]—An action *in personam* for salvage lies against owners of the salved property, although it has been transferred to others before institution of the suit.—FIVE STEEL BARGES, Nos. 147, 148, 603, 606, *ante*.

Annotations:—**Foll.** The Port Victor, [1901] P. 243, C. A. **Refd.** The Leon Blum, [1915] P. 90.
For full anns., *see* S. C. No. 147, *ante*.

SECT. 12.—DROITS OF ADMIRALTY.

SUB-SECT. 1.—UNCLAIMED WRECK.

Grant of wreck, *see* CONSTITUTIONAL LAW; WATERS & WATERCOURSES.

A. Where Jurisdiction exists.

614. Flotsam, jetsam & ligan—Not wreccum maris.]—In an action of trespass for taking certain

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602 i. —— *Towage.*]—Pltf. brought an action *in rem* against a ship under an agreement for salvage services. The facts showed no salvage services had been rendered, but merely towage services:—*Held*: towage services did not constitute a maritime lien.—MUNRO *v.* THE HOME RULE (1894), 4 Ex. C. R. 146.—**CAN.**

Sect. 12.—*Droits of Admiralty: Sub-sect.* 1, *A. & B.; sub-sect.* 2.]

goods which were wreck & cast upon certain land within the manor & fee of H., which manor & fee, with wreck of the sea within it had by letters patent been granted by the Crown in fee to pltf.'s father, whose heir pltf. was, it appeared part of the goods were wrecked & cast upon shore within the manor, between high-water & low-water marks, & the rest of the goods were floating between high-water & low-water marks:—*Held:* (1) such goods only which were cast or left on land by the sea were *wreccum maris;* (2) the Admlty. Ct. had no jurisdiction of wreck, but it had of flotsam, jetsam & ligan; (3) the King had flotsam, jetsam & ligan when the ship perished or the owners of the goods were not known; (4) deft. was entitled to judgment. —CONSTABLE'S CASE (1601), 5 Co. Rep. 106a; 1 And. 86; 77 E. R. 218. S. C. No. 1, *ante;* No. 623, *post.*

Annotations:—**Distd.** Prideaux *v.* Warne (1673), Freem. K. B. 355. **Consd.** Dunwich Corpn. *v.* Skerry (1830), 1 B. & Ad. 831; R. *v.* Wood (1849), 3 Cox, C. C. 453, C. C. R.; The Schiller (1877), 2 P. D. 145, C. A. **Refd.** R. & Waller *v.* Hanger (1615), 3 Bulst. 1; R. *v.* Forty-Nine Casks of Brandy (1836), 3 Hag. Adm. 257; R. *v.* Two Casks of Tallow (1837), 3 Hag. Adm. 294; R. *v.* G. W. Ry. Co. (1842), 3 Q. B. 333; R. *v.* Thurborn (1848), 2 Car. & Kir. 831; Beaufort *v.* Swansea Corpn. (1849), 3 Exch. 413; The Gas Float Whitton (No. 2), [1896] P. 42, C. A.; The Olympic, [1913] P. 92, C. A. **Mentd.** Admiralty Case (1609), 13 Co. Rep. 51; Gold *v.* Deaths (1615), Cro. Jac. 381; Onslow *v.* Horne (1771), 3 Wils. 177; Baldwin *v.* Elphinston (1775), 2 Wm. Black. 1037; Penryn Corpn. *v.* Holm (1877), 37 L. T. 13 3.

615. —— Effect of touching ground.]—All things found derelict on the sea, whether flotsam, jetsam, or ligan, if they have not touched the ground are droits of Admlty. *Qu.:* if they have touched the ground, but are still moved by the sea.—R. *v.* FORTY-NINE CASKS OF BRANDY, No. 1, *ante;* No. 622, *post.*

Annotations:—**Consd.** R. *v.* Keyn (1876), 2 Ex. D. 63. C. C. R.; The Olympic, [1913] P. 92, C. A. **Refd.** R. *v.* Two Casks of Tallow (1837), 3 Hag. Adm. 294; R. *v.* Le Pauline (1845), 3 Notes of Cases. 616.

616. —— ——.]—Things floating, though between high-water & low-water marks, not having touched the ground cannot be *wreccum maris;* if fixed to land between high-water & low-water marks, though with some water round them, they are *wreccum maris.* If after having once touched land between high-water & low-water marks, they are again afloat, they are not necessarily *wreccum maris,* but their legal character will depend upon their state at the time they were seized & secured into possession; whether, for instance, the person who seized them as salvor was in a boat, or wading, or swimming. "*Wreccum maris*" is not such, in legal acceptation, till it comes ashore, until it is within land jurisdiction; whilst at sea, it belongs to the King in his office of Admlty., as derelict, flotsam, jetsam, or ligan.—R. *v.* TWO CASKS OF TALLOW (1837), 3 Hag. Adm. 294; 6 L. T. 558. S. C. No. 106, *ante;* No. 624, *post.*

Annotations:—**Consd. & Distd.** The Pauline (1845), 2 Wm. Rob. 358. **Consd.** The Olympic, [1913] P. 92, C. A.

617. Derelict—Rights of salvors.]—In derelict, the first occupant, if equal to the service, has a right of exclusive possession, subject to the rights of the Crown or owners.—THE DANTZIC PACKET (1837), 3 Hag. Adm. 383.

Annotation:—**Apprvd.** The Kathleen (1874), L. R. 4 A. & E. 269.

618. —— Wages.]—Two actions of wages had been entered against a ship on behalf of the late carpenter & a seaman, who had been left by the master at Hamburg & sent home by the British consul. Before the warrants of arrest could be served the ship had sailed. She was afterwards found a derelict at sea, & upon being towed into Selsea the Admlty. proctor there arrested her, & she was condemned as a droit of Admlty. 1 Will. 4, c. 25, had then been passed, enacting that the produce of the hereditary casual revenues arising from any droits of Admlty. should be made part of the consolidated fund, & by s. 12 that nothing therein contained should affect certain rights or powers, which had been or might be exercised by authority of the Crown or other lawful warrant, as therein specified. The claims were for £23 7*s.* 4*d.* The proceeds were £72:—*Held:* the amount might be paid out of the proceeds.—THE SPECULATOR (1832), 3 Hag. Adm. 330.

619. Goods on board derelict vessel—Salvage payable—Rights of owner.]—The *I.* fell in with a merchant vessel water-logged & shattered. She was not an English vessel, & had been drifting about the sea several months; on board a trunk containing various gold coins to the value of between £300 & £400, some gold watches, rings, etc. & some cordage &. claret were found. The cordage was used up on board the *I.* & the claret drunk by the master & crew; & J., the master, divided the gold coin with his crew in tolerably fair proportions. On an application for a monition against J. to show cause why the property found on board the derelict, or the value thereof, should not be brought into the registry of the ct., to be proceeded against as droits of Admlty.:—*Semble:* (1) whatever property is found derelict must be restored, upon payment of a salvage, to the owner, if he appear in due time; (2) if not, it must, subject to the same demand, be condemned as a droit of Admlty. J. having brought in the property, accompanied by an affidavit as to his perfect ignorance of the law, the ct. condemned the property & directed a moiety of the coin & other articles to be delivered out for a salvage remuneration.—R. *v.* PROPERTY DERELICT (1825), 1 Hag. Adm. 383.

620. Prize—Wrecked or stranded in English port.] —A prize taken at sea & wrecked or stranded in an English port is within the jurisdiction of the Admlty.—TURNER *v.* SMITH (1668), 1 Sid. 367; 82 E. R. 1161.

621. Priorities—Previous forfeiture.]—A judicial sale of a vessel found at sea & brought into port as derelict, under order of the Instance Ct. of the Admlty., on the part of the salvors & claimant (without fraud), is valid against the Crown's right of seizure for previous forfeiture incurred by the ship having been guilty of a forfeitable offence against the revenue laws, although the Crown was not a party to proceedings in the Admlty. Ct., other than by the King's Procurator-General claiming the vessel as an Admlty. droit, & although no decision of droit, or no droit, was awarded, & the sale took place *pendente lite* under an interlocutory

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PART II. SECT. 12, SUB-SECT. 1.—A.

615 1. *Flotsam, jetsam & ligan—Effect of touching ground.*]—A log of wood floating in the sea near the shore was drawn on a rock by a person wading into the water; another log having been cast upon the beach was by the next tide swept out to sea, & then taken while floating. This log had been marked by a knife, with the object of claiming property in it for the grantee of wreck, before it was swept back to sea:—*Held:* both were droits of Admlty., & did not belong to the grantee by patent of wreck on the coast.—STACKPOOLE *v.* R. (1875), I. R. 9 Eq. 619.—**IR.**

a. *Enforcement of jurisdiction—Possession by receiver-general of droits.*]—The Admlty. Ct., although possessing to the fullest extent its ancient jurisdiction in cases of wreck & droits of Admlty. since the passing of Wreck & Salvage Act, 1846 (c. 99), is not bound to enforce its jurisdiction upon the application of the Queen's proctor when the wreck & droits of Admlty. have been properly taken possession of by the receiver-general of droits, appointed by that Act, or his deputy lawfully authorised.—HAMILTON *v.* WATT (1851), 4 Ir. Jur. O. S. 253 (Adm.).—**IR.**

order. The Crown should have claimed before the ct., either as against the ship in the first instance or subsequently against proceeds of sale, which were paid into the registry to answer claims under the order of sale, or should have moved a prohibition. —A.-G. *v.* NORSTEDT (1816), 3 Price, 97; 146 E. R. 203. S. C. No. 727, *post*.

Annotations:—**Apprvd.** The Segredo (1853), 1 Ecc. & Ad. 36. **Refd.** The Veritas, [1901] P. 304.

B. Where no Jurisdiction exists.

622. Wreccum maris—Wreck cast on land.]—The Admlty. Ct. has no jurisdiction over any wreck of the sea, for that must be cast upon land before it becomes wreck. To constitute wreck of the sea, goods must have touched the ground, though they need not have been left dry.—R. *v.* FORTY-NINE CASKS OF BRANDY, Nos. 1, 615, *ante*.

Annotations:—**Consd.** R. *v.* Keyn (1876), 2 Ex. D. 63, C. C. R.; The Olympic, [1913] P. 92, C. A. **Refd.** R. *v.* Two Casks of Tallow (1837), 3 Hag. Adm. 294; R. *v.* Le Pauline (1845), 3 Notes of Cases, 616.

623. —— ——.]—CONSTABLE'S CASE, Nos. 3, 614, *ante*.

For full anns., *see* S. C. No. 614, *ante*.

624. —— ——.]—R. *v.* TWO CASKS OF TALLOW, No. 106, 616, *ante*.

For full anns., *see* S. C. No. 616, *ante*.

625. —— ——.]—A ship cannot be considered *wreccum maris*, nor the claim of the lord to wreck sustained, unless at time of taking possession she is either on the actual shore itself, or left high & dry on land. Priority of seizure is a fact of no importance in determining whether property be wreck of the sea, or a droit of Admlty.

Where a vessel stranded within low-water mark was taken possession of by the bailiff & the lord of the manor, not at low-water, but when the tide was in to the extent of some feet, on a claim being made to proceeds of sale:—*Held*: (1) the vessel was not *wrecum maris*, but a droit of Admlty.; (2) the lord's claim must be dismissed.—THE PAULINE (1845), 2 Wm. Rob. 358; 3 Notes of Cases, 616; 6 L. T. 558; 9 Jur. 286. S. C. No. 107, *ante*.

626. Property in possession of receiver of droits.] —Where a vessel had become derelict, but was afterwards recovered by the owners, & taken possession of, under Wreck & Salvage Act, 1846 (c. 99), by the receiver of droits, who refused to relinquish possession until his charges were paid, the ct. declared it had no power to interfere, having no jurisdiction over the receiver.—THE TRITONIA (1847), 2 Wm. Rob. 522; 5 Notes of Cases, 110; 8 L. T. O. S. 348.

627. *S. P.* THE DERELICT IRON (1851), 15 Jur. 300.

628. Goods derelict at sea—If enemy property—Prize.]—During the Russian war one of H.M. ships of war, on her passage to O., fell in with & took possession of a raft of timber, having the Russian imperial mark painted on the several spars composing same:—*Held*: such timber must be condemned as a droit of the Crown, & not a droit of Admlty.—THE RAFT OF RUSSIAN TIMBER (1859), 5 Jur. N. S. 1109.

629. Priorities—Previous forfeiture.] — A ship was seized by the admiral's officers as a perquisite & afterwards seized by a Custom-house officer, as forfeited under French Prohibition Act; he exhibited an information, & moved for a prohibition, which was granted. WARD, C.B., cited a case in the time of Lord Hale, where goods were put on board, duty not being paid, & carried to sea & became flotsam; a suit was commenced in the Admlty., who have jurisdiction of flotsam; & upon an information in the Exch. for forfeiture, in regard of the fact that they were shipped before duty paid, a prohibition was granted; for the Crown had a title by the forfeiture, & the goods becoming flotsam after did not purge the forfeiture.—SCORE *v.* LORD ADMIRAL (1709), Park. 273; 145 E. R. 777.

Annotation:—**Distd.** A.-G. *v.* Norstedt (1816), 3 Price, 97.

SUB-SECT. 2.—GOODS OF PIRATES.

630. Forfeiture on conviction—Restoration to owner.]—By his patent the admiral has *bona piratarum*:—*Held*: (1) these meant the pirate's proper goods, & not goods which the pirate had stolen from others; (2) such goods must be restored to their owners, if claimed, otherwise they were forfeited to the King. The pirate ought to be attainted of piracy before forfeiture of his own goods to the admiral.—PRINSTON *v.* ADMIRALTY COURT (1615), 3 Bulst. 147; 81 E. R. 126.

Annotations:—**Consd.** The Panda (1842), 1 Wm. Rob. 423. **Refd.** The Hercules (1819), 2 Dods. 353; R. *v.* McCleverty (1871), L. R. 3 P. C. 673, P. C.

631. —— —— **Position where ownership doubtful.**]—Properties found in possession of convicted pirates, & clearly belonging to pirates, are droits of Admlty. Properties found in possession of pirates, & belonging to other persons, are not droits of Admlty.

Money taken on board a piratical vessel, not proved to belong to pirates, & not claimed, nor shown by proof or reasonable presumption to be property belonging to others:—*Held*: *bona piratarum* & droits of Admlty.—THE PANDA (1842), 1 Wm. Rob. 423; 1 Notes of Cases, 603.

632. Goods recaptured — Unclaimed — Bona vacantia.]—Goods recaptured from pirates, if unclaimed, belong to the King in his office of Admlty. as *bona vacantia*.—THE MARIANNA (1835), 3 Hag. Adm. 206.

633. Restoration to original owners—After forfeiture.]—Property found on board a pirate ship, & condemned as droits of Admlty., was granted to the original owners upon a memorial to the Crown.—THE HELEN (1823), 1 Hag. Adm. 142.

634. Restitution — Action in Admiralty.] — A pirate is triable by the Admlty. Ct. for restitution of property, but for his life is triable by the Commission of Oyer, etc.—ADAMS' CASE (1625), Lat. 47; 82 E. R. 268.

635. —— ——.]—The Admlty. Ct. has authority to entertain a civil suit for restitution of goods piratically taken on the high seas.—THE HERCULES (1819), 2 Dods. 353; 1 Hag. Adm. 143. S. C. No. 641, *post*.

Annotations:—**Consd.** R. *v.* McCleverty (1871), 8 Moo. P. C. C. N. S. 43, P. C.; Mersey Docks & Harbour Board *v.* Turner, [1893] A. C. 468.

636. —— —— **Action against purchaser.**]—A libel will lie in the Admlty. Ct., against the vendee upon land, for goods piratically taken at sea.—ANON. (1599), Cro. Eliz. 685; 78 E. R. 921.

Annotations:—**Consd.** The Hercules (1819), 2 Dods. 353. **Refd.** R. *v.* Broom (1697), 12 Mod. Rep. 134.

637. *S. P.* RADLEY *v.* EGGLESFIELD (1670), 2 Saund. 259; 85 E. R. 1050; *sub nom.* RADLY & DELBOW *v.* EGLESFIELD & WHITAL (1671), 1 Vent. 173; *sub nom.* RADLY *v.* WHITWELL & ECCLESFIELD (1671), 2 Keb. 828; *sub nom.* RIDLEY *v.* EGGLESFIELD (1671), 2 Lev. 25. S. C. No. 158, *ante*.

Annotations:—**Consd.** R. *v.* Broom (1697), 12 Mod. Rep. 134; Shermoulin *v.* Sands (1697), 1 Ld. Raym. 271; Rigdon *v.* Hedges (1698), 12 Mod. Rep. 246; Le Caux *v.* Eden (1781), 2 Doug. K. B. 594; The Hercules (1809), 2 Dods. 353; The Telegrafo or Restauracion (1871), L. R. 3 P. C. 673, P. C.

Sect. 12.—*Droits of Admiralty: Sub-sect.* 2. *Sects.* 13, 14, 15 & 16.]

638. ——— ——— ———.]—In the case of a prohibition, prayed to the Admlty. Ct. :—*Held:* if a pirate takes goods upon the sea, & sells them, the property of them is changed no more than if a thief upon land steals them, & sells them.—GREENWAY & BAKER'S CASE (1612), Godb. 193 ; 78 E. R. 117.

Annotation :—**Refd.** The Hercules (1819), 2 Dods. 353.

639. ——— ——— ———.]—Prohibition does not lie where the owner of goods taken by pirates seeks to recover them civilly in the Admlty. Ct. from a purchaser.—R. *v.* MARSH, No. 121, *ante*.

640. ——— **None, if ship bona fide purchased.**]—Though goods piratically taken cannot be transferred to a third party as against their legitimate owner, yet that rule does not apply to a ship belonging formerly to a pirate, as the taint of piracy does not, in the absence of conviction or condemnation, continue, like a maritime lien, to travel with the ship through her transfer to various owners.

A ship was arrested by the Crown in Tortola, on a charge of piracy. The affidavit which led to the warrant of arrest alleged that the ship was bought at S. in Hayti, from a British subject by the revolutionary Govt. of Hayti, & that the ship, having been equipped as a ship of war, was afterwards employed in acts of hostility. The ship had been sold by public auction, six months before seizure, to a *bonâ fide* purchaser, a British subject. The Vice-Admlty. Ct. of Tortola sustained a protest to the jurisdiction of the ct. & decreed restitution of the ship but without costs or damages. On appeal :—*Held:* there was no authority to be derived from principle or precedent for a ship, sold by public auction to a *bonâ fide* innocent purchaser before any proceedings had been taken on the part of the Crown against the ship, being afterwards arrested & condemned on account of having been engaged previously in piratical acts.—THE TELEGRAFO OR RESTAURACION (1871), L. R. 3 P. C. 673 ; 8 Moo. P. C. C. N. S. 43 ; 40 L. J. Adm. 18 ; 24 L. T. 748 ; 20 W. R. 242 ; 1 Asp. M. L. C. 63 ; 17 E. R. 229, P. C.

641. **Arrest.**]—The ct. may decree warrants to arrest the proceeds of the cargo of a foreign ship, unlawfully & piratically taken possession of on the high seas.—THE HERCULES, No. 635, *ante*.

For full anns., *see* S. C. No. 635, *ante*.

SECT. 13—FORFEITURE, ETC.

642. **Illegal colours.**]—A warrant of arrest will be granted against the master of a private ship of war for wearing false colours, as a warrant of course.—THE MINERVA (1800), 3 Ch. Rob. 34.

643. ———.]—A master of a British merchant vessel was condemned in the penalty of £50, & in costs, for wearing illegal colours, a red pennant at the main peak of his merchant steam vessel, near the Douro, on the coast of Portugal.—R. *v.* BENSON (1833), 3 Hag. Adm. 96.

644. ———.]—A British merchant ship was boarded, having an ensign with the St. George's Cross, etc., colours other than those legally worn by merchantmen. A warrant of arrest was directed to issue against the master, upon affidavit of the facts in lieu of declarations in support of them.—R. *v.* EWEN (1856), 2 Jur. N. S. 454.

645. **Contempt—Failing to salute H.M. ship.**]—A warrant of arrest will issue against the master of a merchant schooner for contempt in passing one of H.M.'s ships without striking or lowering her royal, being the uppermost sail she was then carrying.—THE NATIVE (1829), cited 3 Hag. Adm. 97 n.

646. **Concealment of British character—Nominal transfer to foreign flag.**]—Where a British subject, owner of a British ship, by a representation to the collector of customs at the port of registry that his ship has been sold to foreigners procures the closing of the registry, & sails her under a foreign flag, whilst he continues to own her & to receive the profits of working her, doing such acts with the intent to conceal her British character from the officers of customs, & prevent her seizure as unseaworthy, he commits an offence against M. S. Act, 1854 (c. 104), s. 103, by reason of which his ship is liable to, & will be condemned to, forfeiture to Her Majesty.—THE SCEPTRE (1876), 35 L. T. 429 ; 3 Asp. M. L. C. 269.

647. ——— ——— **Subsequent bonâ fide purchase immaterial.**]—The forfeiture incurred under M. S. Act, 1854 (c. 104), s. 103, accrues at the time of the illegal & fraudulent act, & a subsequent seizure relates back to the date of the act constituting the cause of forfeiture, & this is so even as against a *bonâ fide* purchaser without notice of such act.

The A., with the consent of the British owners, sailed under the Belgian flag in 1874. In 1876 deft. bought her *bonâ fide*, & for valuable consideration. The ship was claimed as forfeited to the Crown under the above Act. Deft. pleaded his *bonâ fide* purchase for valuable consideration. Pltf. demurred :—*Held:* such sale was of no effect as against the prior forfeiture which accrued at the time of the act of sailing under foreign colours. The original British owners, who were added as defts. by order of the ct., & who had not appeared, were condemned in costs.—THE ANNANDALE (1877), 2 P. D. 218 ; 47 L. J. P. 3 ; 37 L. T. 139 ; 26 W. R. 38 ; 3 Asp. M. L. C. 489, C. A. *S. C.* on further proceedings, 37 L. T. 364.

Annotation :—**Refd.** The Polzeath, [1916] P. 241, C. A.

648. **Breach of Foreign Enlistment Act, 1870 (c. 90), s. 8.**]—A French ship of war captured in the English Channel a Prussian ship as prize of war. A prize crew under a French naval officer was put on board. The prize ship being driven by stress of weather into the Downs, anchored within British waters, & after lying there two days the French consul at Dover engaged an English steam-tug then lying in the Downs to tow the captured ship from British waters to a port of the captors, & under such agreement the tug towed the prize to Dunkirk Roads :—*Held:* (1) the engagement by the owners of the tug for the express purpose of towing the detached prize crew, its prisoners & prize vessel, speedily & safely into French waters, where the prisoners & prize would be taken charge of by the French authorities, & the prize crew set free, was dispatching a ship within the above sect., for the purpose of taking part in the naval service of a belligerent ; (2) the tug must be condemned as a forfeiture to the Crown. *Qu.:* whether the Admlty. Ct. has power under the above Act to condemn the Crown in costs.—THE GAUNTLET (1872), 8 Moo. P. C. C. N. S. 428 ; L. R. 4 P. C. 184 ; 26 L.T. 45 ; 20 W. R. 497 ; 1 Asp. M. L. C. 211 ; 17 E. R. 373, P. C.

Annotation :—**Refd.** Palmer *v.* Hutchinson (1881), 6 App. Cas. 619, C. A.

SECT. 14.—BOOTY OF WAR.

See PRIZE LAW & JURISDICTION.

SECT. 15.—SLAVE TRADE, ETC.

See CRIMINAL LAW & PROCEDURE; TRADE & TRADE UNIONS.

SECT. 16.—MISCELLANEOUS.

649. Appellate jurisdiction.] — *Semble:* the Admlty. Ct. may exercise an appellate jurisdiction in a matter over which it has no original jurisdiction.—THE DOWSE, Nos. 1737, 1788, *post.*

Annotations:—**Consd.** Simpson *v.* Blues (1872), L. R. 7 C. P. 290. **Folld.** Allen *v.* Garbutt (1880), 6 Q. B. D. 165. **Consd.** R. *v.* City of London Court Judge, [1892] 1 Q. B. 273, C. A.
For full anns., see S. C. No. 1737, *post.*

650. Application of equity.]—Although in the decision of cases properly within the jurisdiction of the Admlty. Ct. equitable considerations ought to have weight, yet that ct. has not jurisdiction to do all that an Equity Ct. might do, in suits instituted by persons, suing either for themselves or on behalf of themselves & others, for administration of assets or distribution of a common fund.

Where the owners of a vessel & part of the cargo, lost in a collision, brought an action in the Admlty. Ct. against the damaging vessel, & obtained a decree for condemnation of the ship, referring the amount of damages to the registrar & merchants who were to report them; & on the same day the decree was pronounced the owners of the remaining portion of the cargo brought an action against the damaging vessel, & applied to the ct. to be let in to participate rateably in the proceeds of the condemned ship remaining in the registry:—*Held:* (1) the Admlty. Ct., in such circumstances, had no jurisdiction to decree a rateable distribution, & thereby take away the priority of the *prior petens;* (2) the decree for damage & reference to the registrar & merchants was a definitive sentence. — THE SARACEN (1847), 6 Moo. P. C. C. 56; 13 E. R. 604. S. C. No. 61, *ante;* Nos. 1227,1491, *post.*

Annotations:—**Apld.** The Clara (1855), Sw. 1. **Consd.** The Desdemona (1856), Sw. 158. **Expld.** The Markland (1871), L. R. 3 A. & E. 340; The Africano (1894), 63 L. J. P. 125.

651. Beaconage.]—An action to recover beaconage should be brought in the Admlty. Ct. although the profits of the beacon belong to the admiral.—CROSSE *v.* DIGGS (1663), 1 Sid. 158; 82 E. R. 1030.

Annotation:—**Refd.** The Gas Float Whitton (No. 2), [1895] P. 301.

652. Breach of charterparty—Before shipment.] —The Admlty. Ct. has not jurisdiction over breach of a stipulation in a charterparty with regard to acts to be done before the goods are shipped.

A ship was chartered to proceed to a port abroad & there take in cargo. The charterers instituted a suit against the ship, & in their petition alleged, *inter alia*, that the master of the ship improperly refused to proceed with the ship to the agreed port of loading & proceeded with her to another port:—*Held:* (1) such conduct on the part of the master did not constitute a breach of duty or breach of contract within Admlty. Ct. Act, 1861 (c. 10), s. 6; (2) the ct. had no jurisdiction to entertain any claim for damages arising therefrom.—THE DANNEBROG (1874), L. R. 4 A. & E. 386; 44 L. J. Adm. 21; 31 L. T. 759; 23 W. R. 419; 2 Asp. M. L. C. 452.

653. —— Claim for damages—In personam.]—The Admlty. Div. has jurisdiction to entertain a claim *in personam* for damages for breach of a charterparty.—THE CHEAPSIDE, No. 967, *post.*

For full anns., see S. C. No. 967, *post.*

654. Exception to jurisdiction.]—If an exception is taken to the jurisdiction of the ct. it can only be sustained by the allegations contained in it. In order to decide the question raised by the exception, the ct. must necessarily examine the grounds laid before it by the exception itself, & rule whether they are well founded in law; if the exception does not set forth good & valid grounds on the face of it, it will be overruled.—THE EVANGELINE, No. 851, *post.*

Appearance under protest, *see* pp. 166, 167, *post.*

655. General average.]—The Admlty. Ct. has not, as an ordinary rule, jurisdiction in cases of general average, because it has not the power to bring all parties interested before the ct.—LA CONSTANCIA (1846), 2 Wm. Rob. 487; 4 Notes of Cases, 677; 10 Jur. 845.

Annotations:—**Consd.** The Galam (1863), Brown. & Lush. 167. **Refd.** The Daring (1868), L. R. 2 A. & E. 260. **Mentd.** The Benares (1850), 14 Jur. 581; Westrup *v.* Great Yarmouth Steam Carrying Co. (1889), 43 Ch. D. 241.

656. ——.]—A right to general average contribution from a ship after adjustment gives the cargo-owners no lien on the ship by the law maritime.—THE NORTH STAR, No. 314, *ante;* No. 1253, *post.*

Annotations:—**Consd.** The Galam (1863), Brown. & Lush. 167. **Refd.** The Daring (1868), L. R. 2 A. & E. 260.
For full anns., see S. C. No. 1253, *post.*

657. —— How far cognisable in Admiralty.]—An Admlty. Ct. will not interfere to enforce a lien for general average which does not depend on possession or to adjust the rights which grow out of it. But where a clear legal right of lien is proved in the Admlty. Ct. to exist, the ct. will not dispose of the property without regarding it. The possessory lien for general average of the captain will be supported when it arises incidentally in the progress of a cause over which the ct. properly has jurisdiction.—THE GALAM, CARGO EX (1863), 2 Moo. P. C. C. N. S. 216; Brown. & Lush. 167; 3 New Rep. 254; 33 L. J. P. M. & A. 97; 9 L. T. 550; 10 Jur. N. S. 477; 12 W. R. 495; 1 Mar. L. C. 408; 15 E. R. 883, P. C. S. C. No. 690, *post.*

Annotations:—**Consd.** The Daring (1868), L. R. 2 A. & E. 260. **Distd.** The Veritas, [1901] P. 304. **Consd.** The Sorfareren (1915), 114 L. T. 46. **Mentd.** The Bahia (1864), Brown. & Lush. 292; The Soblomsten (1866), L. R. 1 A. & E. 293.

658. —— Effect of Judicature Act, 1873 (c. 66).] —*Semble:* since the above Act the Admlty. Div. has acquired a right to entertain a claim for a general average loss which the Admlty. Ct. did not possess.—THE OQUENDO, No. 570, *ante.*

659. Jurisdiction by leave—County court.]—In pursuance of Cty. Cts. Admlty. Jurisdiction Act, 1868 (c. 71), s. 9, application may be made to the Admlty. Ct. for an order to institute in that ct. proceedings which might have been taken without agreement in a cty. ct., & the Admlty. Ct. will, if it sees fit, make such order.—THE BENGAL (1869), L. R. 3 A. & E. 14; 21 L. T. 727; 3 Mar. L. C. 316.

660. ——.]—When there are circumstances rendering it advisable that an action which a cty. ct. has jurisdiction to try under Cty. Cts. Admlty. Jurisdiction Act, 1868 (c. 71), s. 3, should be commenced in the Admlty. Ct., such as the necessity for a commission abroad, that ct. will grant leave for a writ to issue under ss. 3, 9, of the above Act, though the cause of action may be of less amount than the limit of the cty. ct. jurisdiction. In such a case notice of the order made by the ct. should be given when the writ is served.—ELLIS & CO. *v.* GENERAL STEAM NAVIGATION CO., LTD. (1878), 38 L. T. 570; 3 Asp. M. L. C. 581.

661. Jurisdiction by transfer—County court—Demurrage.]—The Admlty. Ct. may, by transfer from a cty. ct., acquire jurisdiction in a cause upon a question of demurrage, as to which the ct. has

Sect. 16.—*Miscellaneous.* *Part III. Sect.* 1: *Subsect.* 1, *A.* (*a*) & (*b*).]

no original jurisdiction.—THE SWAN, No. 887, *post.*

Annotations:—**Consd.** Simpson *v.* Blues (1872), L. R. 7 C. P. 290. **Distd.** R. *v.* Southend County Court Judge (1884), 13 Q. B. D. 142. **Refd.** Gunnestad *v.* Price, Fullmore *v.* Wait (1875), L. R. 10 Exch. 65; The Montrosa, [1917] P. 1.

662. —— —— Damages for breach of charterparty.]—The Admlty. Ct. may, by transfer from a cty. ct., acquire jurisdiction to hear & determine an action *in rem* for damages for breach of charterparty, although the action could not have been instituted in the Admlty. Ct. originally.—THE MONTROSA, Nos. 886, 1710, *post.*

663. —— —— Conditions of.]—Where a cause of necessaries is instituted in a cty. ct. under Cty. Cts. Admlty. Jurisdiction Act, 1868 (c. 71), & is transferred under s. 8 to the Admlty. Ct., & the petition of pltf. shows the claim to be based on a bottomry bond (the cty. ct. having no jurisdiction over bottomry bonds), the ct. will reject the petition. *Semble:* where a suit is instituted in a cty. ct. over which that ct. has no jurisdiction, the Admlty. Ct. cannot acquire jurisdiction by transfer, even if it has original jurisdiction in such suit.—THE ELPIS, Nos. 888, 1721, *post.*

For full anns., *see* S. C. No. 888, *post.*

664. Interpleader.]—Where two actions are brought against a ship for non-delivery of cargo by two persons claiming adversely to each other:—*Semble:* the Admlty. Ct., if applied to, has power to relieve the ship from the cost of resisting at the same time two conflicting demands.—THE ARGENTINA (1867), L. R. 1 A. & E. 370; 16 L. T. 743; 2 Mar. L. C. 529.

665. Process.]—A person committed by the Admlty. in execution is not removable into Q. B. to answer an action to be brought there.—KEACH'S CASE (1702), 1 Salk. 351; 91 E. R. 307.

666. ——.]—THE DON FRANCISCO, No. 60, *ante;* No. 978, *post.*

For full anns., *see* S. C. No. 978, *post.*

Part III.—Present and Former Practice of the Admiralty Division of the High Court of Justice and of Courts other than English County and local Courts.

SECT. 1.—ACTIONS IN REM.

SUB-SECT. 1.—WRIT OF SUMMONS.

A. Since the Judicature Acts.

(a) In General.

667. Writ—Amendment—Discretionary.]—Pltf.s having brought an action *in rem* against a yacht purchased by deft., in respect of wages due from her former owner, brought a second action *in rem* against the yacht in respect of necessaries supplied to the former owner:—*Held:* (1) the second action was misconceived, not being an action *in rem;* (2) leave to amend the writ in the second action must be refused by the ct. in the exercise of its discretion, as by amending the writ in the first action pltf. could obtain all relief to which he was entitled.—KENNERLEY *v.* THE OLGA (OWNER) (1898), 42 Sol. Jo. 792.

668. —— —— Increase of amount.]—Where, in a salvage action *in rem*, pltfs. on their writ claimed £5,000 & defts.' solr. gave an undertaking to put in bail for that amount, the ct., having awarded £7,500, allowed pltfs., before the decree was drawn up, to amend their writ by altering the sum of £5,000 as therein claimed to £8,500.—THE DICTATOR, [1892] P. 64; 61 L. J. P. 72; 66 L. T. 863; 7 Asp. M. L. C. 175.

Annotation:—**Folld.** The Alert (1894), 72 L. T. 124.

669. Parties—Misdescription of plaintiff—Title of action.]—In an Admlty. action *in rem* for damage to cargo, the writ was issued in the name of a firm, & indorsed "pltfs., as owners of goods laden on board" the carrying ship, claim compensation. The owners of the carrying ship appeared as defts., gave bail, & on their demand for particulars of names & addresses, pltfs. gave the name of a single individual residing in Paris, trading under the firm name at a London address. Defts. applied for security for costs, &, on this application being refused, moved to set aside the writ on the ground that under R. S. C., O. 48A, r. 1, the firm in the name of which the writ was issued must consist of two or more persons:—*Held:* (1) as the indorsement on the writ stated that pltfs. sued as "owners" of the cargo, the practice in Admlty. would have been satisfied if the word "owners" had appeared on the face of the writ; (2) the mistake was a mere "irregularity" which could be cured by leave to amend under R. S. C., O. 70, r. 1; (3) as defts. had, by applying for security for costs, taken a fresh step after knowledge of the irregularity, they were precluded by *ibid.*, r. 2, from taking advantage of the irregularity.

The Admlty. practice as to the title in an action *in rem* for damage to cargo is not abrogated by the rules of procedure under Jud. Acts (JEUNE, P.).—THE ASSUNTA, [1902] P. 150; 71 L. J. P. 75; 86 L. T. 660; 50 W. R. 544; 18 T. L. R. 570; 9 Asp. M. L. C. 302.

670. —— Addition of parties—Rights of added parties affected.]—Pltfs. commenced an action *in rem* under Fatal Accidents Act, 1846 (c. 93), in respect of loss of life by collision at sea. It was held the Admlty. Ct. had no jurisdiction in such actions, & pltfs. applied to add as defts. the owners of the wrongdoing ship personally:—*Held:* (1) under R. S. C., O. 16, r. 11, proceedings against the parties proposed to be added would only be deemed to have commenced from the date of service upon them of the writ of summons, & hence the action would not have been commenced against

PART III. SECT. 1, SUB-SECT. 1.—A (a.)

667 i. *Writ—Indorsement—Action for personal injuries.*]—In an action for damages through negligence a claim under M. S. Act, 1894 (c. 60), s. 207, for expenses incurred in hospital cannot be included in the same indorsement of the writ.—WYMAN *v.* THE DUART CASTLE (1889), 6 Ex. C. R. 387.—**CAN.**

667 ii. —— —— —— *Amount involved.*]—In an action by the managing owner of a ship against his co-owner:—*Semble:* the indorsement on the writ need not show that there was any dispute as to the amount involved.—HALL *v.* THE SEAWARD (1892), 3 Ex. C. R. 268.—**CAN.**

them within the time provided by the Act; (2) the ct., being of opinion that it had no power to add parties as defts. *in personam* in an action *in rem*, ought not to make the order merely because the objection as to time was an objection which ought strictly to be taken at a later stage.—THE BOWESFIELD (1884), 51 L. T. 128; 5 Asp. M. L. C. 265.

671. —— —— ——.]—Pltfs., owners of a s.s., issued a writ *in rem* against the owners of, & parties interested in, another s.s. for damage by collision. The owners of the other s.s. appeared, & statements of claim, defence & counterclaim were respectively delivered, the defence including an allegation of compulsory pilotage. Pltfs. then applied to the district registrar for liberty to add, as a deft., the pilot who was compulsorily in charge of the other s.s. at the time of the collision. The registrar refused the application; but on appeal to the Admlty. Div. pltfs. obtained the order on the ground that no difficulty would result from engrafting a claim *in personam* on an action *in rem*:—*Held*: assuming there was jurisdiction, the order ought not, as a matter of discretion, to be made, as the trial of the action might thereby be embarrassed.—THE GERMANIC, [1896] P. 84; 65 L. J. P. 53; 73 L. T. 730; 44 W. R. 394; 8 Asp. M. L. C. 116, C. A.

Annotation:—**Distd.** The Cheapside, [1904] P. 339, C. A.

672. —— —— Damage to cargo—Real owners.]—A collision occurred between two Norwegian ships, the *F.* & the *C.*, in the North Sea, & the cargo on board the *F.* was damaged. The *C.* was arrested upon arrival in England by pltfs. alleging they were the owners of the cargo on board the *F.* A preliminary objection was taken that pltfs. were not the owners of the cargo, & this objection was held to be good, & the *C.* was ordered to be released. An application was then made to add the real owners of the cargo as pltfs.:—*Held*: the ct. had jurisdiction so to do.—THE CHARLOTTE (1907), 23 T. L. R. 750.

673. —— Joinder of plaintiffs—Separate causes of action.]—The practice which existed in the Admlty. Ct. before Jud. Acts, permitting several pltfs. to sue collectively, has not been affected or altered by the Jud. Acts or the rules made thereunder.

Pltfs., the owners, masters, & crews of four steam-tugs, issued a writ of summons *in rem* in the Admlty. Div. claiming reward for alleged salvage services rendered to a ship, her cargo, & freight. The owners of the ship, & cargo, appeared as defts., under protest, & moved to set aside the writ, or, in the alternative, to strike out all pltfs., except one, on the ground that their causes of action were separate & distinct:—*Held*: the motion must be dismissed, the practice in Admlty., as to parties to the suit, & joinder of causes of action, not being affected by R. S. C., O. 16, r. 1, & O. 18, r. 1, as interpreted by *Smurthwaite* v. *Hannay*, [1894] A. C. 494.—THE MARECHAL SUCHET, [1896] P. 233; 65 L. J. P. 94; 74 L. T. 789; 45 W. R. 141; 12 T. L. R. 510; 8 Asp. M. L. C. 158.

(b) Service of Writ.

674. Mode of service—How far effective.]—The rules of the Supreme Ct. of Judicature as to service of writ of summons in Admlty. actions *in rem* are to be strictly followed. Service of the writ on the captain of the ship on board & nailing of the warrant of arrest on the mast are not sufficient notice of a suit *in rem* against the ship to all whom it may concern.—THE MARIE CONSTANCE (1877), 37 L. T. 366; 3 Asp. M. L. C. 505.

675. —— Access to cargo.]—There is no power in an action *in rem* to issue either the writ of summons or the warrant to arrest cargo & freight unless there is access to the cargo, except that in the case where access is refused service may be effected on the custodian.—THE KALETEN, No. 700, *post*.

676. —— Foreign ship—Service on consul not sufficient.]—A foreign ship, after coming into collision with pltfs.' pier, became a total loss, & the foreign vice-consul, acting as agent of the owners, sold the wreck & stores, having previously given pltfs. an undertaking on behalf of the owners to hold the proceeds of the sale until the question of liability for damage to the pier was determined. In an action *in rem* against the owners, pltfs. served the writ upon the vice-consul:—*Held*: the service was bad.—THE FORNJOT (1907), 24 T. L. R. 26.

Annotation:—**Apld.** The Kaleten (1914), 30 T. L. R. 572, P. D.

677. By whom effected—Solicitor's clerk.]—In an action *in rem* the writ of summons was served by a clerk in the employment of pltfs.' solrs. in the manner prescribed by the rules, namely by affixing it to the mast of the vessel, no appearance was entered, & the action came on for judgment by default under R. S. C., O. 13, rr. 12, 13. The affidavit of service of the writ was made by the solr.'s clerk who had served such writ:—*Held*: (1) service of a writ *in rem* by a solr. or his clerk, & not by the marshal or his substitute, was a valid service; (2) the affidavit was sufficient.—THE SOLIS (1885), 10 P. D. 62; 34 L. J. P. 52; 52 L. T. 440; 33 W. R. 659; 5 Asp. M. L. C. 368.

678. ——.]—THE NAUTIK, No. 679, *post*.

For full anns., *see* S. C. No. 679, *post*.

679. Effect of service—Arrest unnecessary.]—A writ *in rem* was duly served within the jurisdiction by nailing it to the mast of a foreign vessel proceeded against for damage to cargo, & a warrant for her arrest was issued, but, before it could be served, the master clandestinely put to sea. On motion for judgment by default:—*Held*: the ct. had jurisdiction to pronounce judgment, for, though according to the ordinary practice, the property proceeded against must be under the arrest of the ct., still the service of the writ by which actions *in rem* are now commenced is notice to all persons interested in the property of the claim indorsed on the writ, & has the same effect, so far as notice is concerned, as service of the warrant under the former practice.—THE NAUTIK, [1895] P. 121; 64 L. J. P. 61; 72 L. T. 21; 43 W. R. 703; 7 Asp. M. L. C. 591; 11 R. 716. S. C. No. 678, *ante*.

Annotation:—**Refd.** The Messicano (1916), 32 T. L. R. 519.

680. On whom effected—Default actions—Registrar—Amended writ.]—After a vessel has been sold under an order of the judge of the Admlty. Div., & the proceeds are in the registry, no owner having appeared, the writ in an action against those proceeds, whether original or amended subsequent to the sale, must be personally served on the registrar. An amended writ must in all cases be served in the same way as an original writ would be in similar circumstances. Where a writ is served on the registrar to render the service good, R. S. C., O. 9, r. 13, must be strictly adhered to.

In an action *in rem* for necessaries supplied a writ was served on the ship, but the owners did not appear. The ship was sold & the proceeds brought into ct. in a previous action. Pltfs. in the second action then amended their writ by adding a claim as mtgees.:—*Held*: the amended writ making a new claim must be served on the registrar & indorsed with the date of such service according to R. S. C., O. 9, r. 13, & not merely delivered to him to be filed.—THE CASSIOPEIA (1879), 4 P. D. 188; 48 L. J. P. 39; 40 L. T. 869; 27 W. R. 703; 4 Asp. M. L. C. 148, C. A.

Annotations:—**Distd.** Holland *v.* Leslie, [1894] 2 Q. B. 450, C. A. **Consd. & Expld.** Jamaica Ry. Co. *v.* Colonial Bank, [1905] 1 Ch. 677, C. A.

Sect. 1.—*Actions in rem: Sub-sect.* 1, *A.* (*b*) *& B.; sub-sect.* 2, *A.* (*a*).]

681. —— —— —— Affidavit of service unnecessary.]—Pltf., having on the order of the master of the French ship *B.* supplied necessaries, issued after the sale of the ship in another action a specially indorsed writ *in rem* against the *B.* or the proceeds of sale of the vessel then in ct., claiming £26 for the necessaries supplied, & £3 3*s.*, or such as might be allowed on taxation, for costs. The writ was served on the registrar, who indorsed it with an acceptance of service. Pltf. then filed a notice of trial & also an affidavit verifying the claim with a copy of his account annexed. The action then came on by way of motion for judgment by default against the proceeds of the vessel, & a clerk to pltf.'s solr. was called as a witness to give the date when the writ was served on the registrar. The ct. gave judgment for pltf. against the proceeds for £26 & taxed costs, subject to priorities, & dispensed with an affidavit of service of the writ.—THE BERENGERE, [1905] W. N. 18. S. C. No. 1092, *post.*

682. Agreement to accept service—Solicitor's authority withdrawn.]—Where in a collision action *in rem* solrs. for defts. accept service of the writ & indorse it with the words "We accept service on behalf of the defts., the owners of the *A.*, & undertake to put in bail in a sum not exceeding the value of the *A.*," & in consequence of their authority being withdrawn by defts. they do not enter an appearance, they do not thereby commit a breach of their undertaking so as to render themselves liable to attachment, inasmuch as they have never expressly undertaken to appear.—THE ANNA & BERTHA (1891), 64 L. T. 332; 7 Asp. M. L. C. 31.

683. Leave to serve abroad.] — A collision took place on the high seas between a British ship & the *C.* belonging to foreigners. Neither the *C.* nor her owners were within the territorial jurisdiction of the Admlty. Ct. An application that a writ should issue for service upon the owners abroad was refused.—*Re* THE CITY OF MECCA, *Re* SMITH (1876), 45 L. J. P. 92.

B. Before the Judicature Acts.

684. Procedure—Act on petition—Plea & proof.] —In proceedings in the Admlty. Ct., the suitor is entitled to choose his own mode of proceeding, whether by act on petition, or by plea & proof. A proceeding by plea & proof was the ancient law of the Admlty. Ct.—THE MINERVA (1841), 1 Wm. Rob. 1, 169.

685. —— —— —— Power of court to direct.]—It is competent generally for proceedings in the Admlty. Ct. to be either by act on petition, or by plea & proof, & the examination of witnesses by commission; but the ct. necessarily has the option of directing the proceedings to be in one form or the other.—THE ACTÆON (1853), 1 Ecc. & Ad. 176. S. C. Nos. 1167, 1205, *post.*

686. *S. P.* THE FAME (1849), 7 Notes of Cases, 55; 13 Jur. 546.

687. —— ——.]—The admission of an act on petition may be opposed, but there are very few instances of that mode of proceeding; the better way is to answer it, & so raise the point intended to be taken.—THE N. R. GOSFABRICK, Nos. 339, 350, *ante.*

For full anns., *see* S. C. No. 339, *ante.*

688. —— Change of mode—Not allowed where prejudicial.]—An action in a cause of damage was entered on behalf of the owners of the *A.* against the *B.*; an appearance was given for the owners of this ship, & the usual assignations made, as though the suit was to be by act on petition. The proctor for the *A.* prepared his act from the information given him by her crew, who then went to the East Indies. Before the original act was brought in the proctor for the *B.* prayed a libel:—*Held:* the motion must be refused.—THE BALDUR (1852), 16 Jur. 802.

689. Parties—Salvage by Queen's ship.]—It is the most regular mode that a suit for salvage services rendered by a subordinate officer of the crew of a Queen's ship should be brought in the commander's name.—THE ALEXANDER ROBERTSON (1842), 8 L. T. 30.

690. —— Effect of abandonment to insurers.]—The practice in the Admlty. Ct. is for the original owners of maritime property to be the parties in a cause, although they have abandoned the property to underwriters & received from them payment as for a total loss.—THE GALAM, No. 657, *ante.*

For full anns., *see* S. C. No. 657, *ante.*

691. —— Assignment of cause of action.]—In a suit for building & equipping a vessel deft. pleaded that pltfs.' claim had vested in their trustee under a composition deed; & pltfs. in their reply alleged they had assigned the causes of action before the execution of the deed, & the suit was now brought in their names as trustees for the assignees. On motion in objection to the reply:—*Held:* (1) the assignment of the causes of action carried with it all rights of action, which though inchoate at the time might become complete; (2) where there is an absolute assignment of a beneficial interest in a debt, the assignor may sue as trustee for the assignee, notwithstanding his execution of a composition deed.—THE WASP (1867), L. R. 1 A. & E. 367; 16 L. T. 854; 2 Mar. L. C. 552.

692. —— Appearance by proctor—Authority.]—A proctor may commence or defend a suit in the Admlty. Ct. upon his own responsibility without the production of any proxy; but the ct. may, at any time during the proceedings, call upon him to state, not generally, but specifically by name, the whole of the parties for whom he is authorised to appear. A demand for the exhibition of a proxy is contrary to the ordinary practice of the ct., & except in special circumstances, the proctor for the opposite parties is not chargeable with laches in not making the demand.—THE WILHELMINE (WHILELMINE), Nos. 1256, 1266, 1509, *post.*

Annotation:—Apprvd. The Euxine (1871), L. R. 4 P. C. 8, C. A.

693. —— —— ——.]—THE EUXINE, No. 1802, *post.*

694. Amendment—Title of cause—Where necessary.]—The institution of a suit as a cause of necessaries does not estop pltf. from pleading & proving that his claim is in respect of repairs; but the title of the cause must be amended.—THE SKIPWITH (1864), 10 L. T. 43; 10 Jur. N. S. 445; 2 Mar. L. C. 20.

For full anns., *see* SHIPPING & NAVIGATION.

695. — — Præcipe—Cause of action.]—In the *præcipe* to institute the cause pltfs. stated the suit as one of "damage to cargo," & the affidavit to lead warrant alleged pltfs. had sustained damage by breach of duty & breach of contract. After arrest of the ship & appearance entered on behalf of her owners, a motion to amend by striking out of the *præcipe* to institute the words "damage to cargo," & substituting the words "breach of duty & breach of contract on the part of the master & crew," was granted on payment of the costs, occasioned by the mis-statement in the *præcipe.*—THE PRINCESS ROYAL (1869), L. R. 3 A. & E. 27; 39 L. J. Adm. 29; 3 Mar. L. C. 328.

696. —— —— Amount.]—An action of damage having been entered in the sum of £2,500, it was discovered that that amount would not pay the expenses of repairing pltf.'s vessel. No bail had been given in the cause, as defts.' vessel had not been

arrested. A motion before the hearing of the cause to increase the amount for which the action was entered was granted.—THE MÆANDER, THE FLORENCE NIGHTINGALE (1862), 6 L. T. 400; 1 Mar. L. C. 221; *affd.* Brown. & Lush. 29, P. C.

Annotation:—**Folld.** The Hero (1865), Brown. & Lush. 447.

697. —— —— —— **At what stage allowed.**]—The ct. will, in special circumstances, permit the *præcipe* to institute to be amended by increasing the amount in which the suit is instituted, even after admission of liability & order of reference.—THE JOHANNES (1870), L. R. 3 A. & E. 127; 39 L. J. Adm. 41; 23 L. T. 26; 3 Mar. L. C. 462.

Annotation:—**Consd.** The Dictator, [1892] P. 304.

SUB-SECT. 2.—WARRANTS OF ARREST AND CAVEAT WARRANTS.

A. Since the Judicature Acts.

(a) In General.

698. Caveat warrant—Liability of solicitor signing præcipe.]—A solr. who, without any qualification, signs a *præcipe* for *caveat* warrant is personally liable to see that the undertaking to give bail therein given is complied with.—THE CRIMDON, No. 709, *post*.

699. Detainer by telegram.]—The practice prevailing in the Admlty. Ct., where on the issue of a warrant the marshal, if so requested by pltf.'s solr., at once communicated by telegram with his substitute at the out port, directing him to detain the property proceeded against until the warrant could be served, is still in force in the Admlty. Div.—THE SERAGLIO, No. 704, *post*.

Annotation:—**Reid.** Curtice *v.* London City & Midland Bank, [1908] 1 K. B. 293, C. A.

700. Warrant against freight—Freight already paid.]—A warrant cannot issue against freight separately from ship or cargo, or against the proceeds of the freight already paid to the owners of the ship by the owners or consignees of cargo.—THE KALETEN (1914), 30 T. L. R. 572. S. C. No. 675, *ante*.

701. Effect of arrest—Ship security for plaintiff's claim.]—Where proceedings *in rem* are taken under Admlty. Ct. Act, 1861 (c. 10), s. 4 or s. 5, the ship, from the moment of her arrest by the ct., is held as a security for the amount for which judgment is afterwards recovered in the action. The security is not affected by the liquidation of the owners, a limited co., after commencement of the action but before judgment.—THE CELLA (1888), 13 P. D. 82; 57 L. J. P. 55; 59 L. T. 125; 36 W. R. 540; 6 Asp. M. L. C. 293, C. A.

Annotation:—**Consd.** The Africano, [1894] P. 141.

702. Interference with arrest—Contempt.]—A foreign ship under arrest, which had been placed with the permission of the ct. in a wet dock, was moved into a dry dock for repairs because she showed signs of sinking:—*Held:* a technical contempt had been committed, the proper course before moving the ship being to communicate with the collector of customs, who was acting as agent for the marshal of the ct.—THE VICTOR PRETOT (1898), 14 T. L. R. 244.

703. ——.]—THE SELINA STANFORD (1908), *Times*, Nov. 17.

704. —— —— **Though arrest not complete—Detainer by telegram.**]—A warrant for arrest of a ship lying at Plymouth having been issued, the marshal telegraphed to the collector of customs at Plymouth, who arrested her. The master telegraphed for instructions to his owner, who ordered him to proceed to sea. The master sailed with the custom-house officer on board:—*Held:* the owner had been guilty of contempt of ct.—THE SERAGLIO (1885), 10 P. D. 120; 54 L. J. P. 76; 52 L. T. 865; 34 W. R. 32; 1 T. L. R. 446; 5 Asp. M. L. C. 421. S. C. No. 699, *ante*.

Annotation:—**Mentd.** Curtice *v.* London City & Midland Bank, [1908] 1 K. B. 293, C. A.

705. Stay of proceedings to arrest.]—On Feb. 8, 1915, pltfs., the owners, master & crew of a tug,

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PART III. SECT. 1, SUB-SECT. 2.—A (a).

a. *Affidavit to lead warrant—Sufficiency—Discretion of registrar—Admiralty Rules of Exchequer Court of Canada.*]—In an action *in rem* for necessaries supplied, the affidavit did not state the national character of the ship or that the aid of the ct. was required. Deft. sought to set aside the warrant of arrest on the grounds that the affidavit did not contain all the particulars required by the Admlty. Rules, rr. 35-37, & that the registrar had no jurisdiction to issue the warrant:—*Held:* the motion must be dismissed, as the registrar had "thought fit" to dispense with some of the prescribed particulars which he was entitled to do under r. 39.—LETSON *v.* THE TULADI (1912), 17 B. C. R. 170; 21 W. L. R. 570.—**CAN.**

b. —— ——.]—An affidavit to lead warrant made by a town agent is sufficient under Admlty. O. 3, r. 1 (1).—THE ALPHA (1893), 27 I. L. T. 137.—**IR.**

c. *Supplementary affidavit — When allowed to be filed.*]—Upon an application to vacate warrants issued against a ship under arrest in an action *in rem* for necessaries, although it appeared that, on the facts disclosed in the affidavits filed before the registrar, the ct. would not have justification to issue the warrant for arrest, pltfs. were allowed to file supplementary affidavits to show that there was jurisdiction to issue the warrants & that the case was one in which the discretion of the registrar could be properly exercised.—VICTORIA MACHINERY DEPOT CO., LTD. *v.* THE CANADA & THE TRIUMPH, p. 127, c, *ante*.—**CAN.**

701 i. *Effect of arrest—Ship security for plaintiff's claim—Unauthorised release—Order for pleadings.*]—Acting on a telegram from the A.-G., a customs officer arrested the *T.* Later, a telegram from the Public Works Department was sent to the solrs. for the crown, reading:—"*T.* was sold by Marshal, Admlty. Ct., in 1903. Claim now invalid; attorney advises release." On the following day this telegram was cancelled. A person interested in the *T.* obtained from the Public Works Department a copy of the telegram advising the release, & re-telegraphed it to the customs officer, who, acting solely on this telegram, released the ship:—*Held:* (1) the rules of the Admlty. Ct. respecting the release of ships & property arrested under its warrants were set out in rr. 53-59, & ships so arrested were in the custody of the ct. & could only be released by order of the judge, or by a release issued by the registrar under the prescribed conditions as to security; (2) the act of the collector was clearly unauthorised; (3) after a bond has been given & approved an order for pleadings may issue.—*R. v.* THE TUTTLE (1905), 11 Ex. C. R. 174; 5 O. W. R. 384.—**CAN.**

701 ii. —— *Marshal's liability for dock dues.*]—The arrest of a vessel puts an end to any contract for repairs which she may be undergoing at the time, & the marshal in whose custody she remains is responsible for subsequent dock dues. He may include in his account a charge for the dock dues from arrest until sale.—CANADA SHIPPING CO. *v.* THE CHRYSOLITE (1888), 14 Q. L. R. 341.—**CAN.**

704 i. *Interference with arrest—Contempt—Though arrest not complete—Detainer by telegram.*]—A marshal sent a telegram to his deputy to arrest the *I.*, & informed him that the writ & warrant had been mailed to him. The deputy, before receiving the warrant, went on board, read the telegram & a copy of the writ to the master, informed him that the ship was under arrest, & nailed up the copy writ on the ship. The mate, without the knowledge of the master, took the ship out of port before the warrant arrived:—*Held:* the arrest upon the telegram was valid & the master was guilty of contempt of ct. *The Seraglio* (1885), 10 P. D. 120, folld. & apld.—*Re* THE ISHPENNING (1903), 8 Ex. C. R. 379.—**CAN.**

d. *Re-arrest—When allowed—Judgment unsatisfied.*]—The *A.* was arrested, released under a bail bond, & later judgment was recovered against her with costs, but had not been paid. An application for an order for a warrant to issue for re-arrest of the *A.* was granted. *The Freedom* (*No.* 3) (1871), L. R. 3 A. & E. 495, refd.—THOMSON *v* THE AURORA (1913), 18 B. C. R. 355.—**CAN.**

Sect. 1.—*Actions in rem: Sub-sect.* 2, *A.* (*a*) & (*b*), *B.* (*a*), (*b*) & (*c*).]

issued a writ *in rem* against the owners of a s.s., her cargo & freight, in respect of salvage services rendered on Feb. 6, 1915, but they did not arrest the vessel, & subsequently abandoned their claim against the cargo which was the property of the Crown. The owners of the ship & her freight appeared as defts., & gave an undertaking in lieu of bail. In September, 1914, the ship had been requisitioned by the Crown under a royal proclamation & thereupon became a King's ship within M. S. Act, 1894 (c. 60), s. 557. The Crown applied by motion that the writ & all subsequent proceedings in the action be set aside, or that the proceedings against the ship & her freight be stayed so long as the ship should remain in the service of the Crown: —*Held:* all further proceedings in the action with a view to the arrest or detention of the ship should be stayed so long as the vessel remained under requisition in the service of the Crown.—THE BROADMAYNE, Nos. 69, 131, *ante;* No. 1262, *post.*

For full anns., *see* S. C. No. 131, *ante.*

706. ——.]—An action *in rem* in respect of a collision was brought against a ship requisitioned by the Govt. of a state, one of Great Britain's allies in the European war. Service of the writ, which was in the ordinary form, was accepted by the solrs. for the shipowners. A warrant of arrest having been issued & duly served, an appearance was entered by the solrs. for the owners & an undertaking to give bail given, under protest, in order that the ship might be released. On a motion to dismiss the action:—*Held:* (1) the fact that the ship was requisitioned did not deprive pltfs. of the right of action, although it precluded them from exercising some of the rights ordinarily incident to the action; (2) the appearance entered under protest, the warrant of arrest, & the arrest thereunder, & the undertaking to give bail, given under protest, must be struck out & set aside, & the time for entering appearances extended for 8 days; (3) all further proceedings in the action with a view to the arrest or detention of the ship must be stayed for so long as the ship should remain under requisition in the service of the Govt. of the allied state.—THE MESSICANO (1916), 32 T. L. R. 319. S. C. No. 141, *ante.*

(*b*) *Wrongful Arrest.*

See, generally, MALICIOUS PROSECUTION & PROCEDURE.

707. Principles governing liability.] — Where a ship is wrongfully arrested by Admlty. process, an action will lie in Admlty. without proof of actual damage, if the arrest was made *malâ fide* or *crassâ negligentiâ* so as to imply malice. *Semble:* an action lies at common law for malicious arrest of a ship by Admlty. process.—THE WALTER D. WALLET, [1893] P. 202; 62 L. J. P. 88; 69 L. T. 771; 7 Asp. M. L. C. 398; 1 R. 627.

708. ——.]—THE FULHAM, No. 596, *ante.*

709. When damages awarded.]—Defts.' solrs. signed, without qualification, a notice, under R. S. C., O. 29, r. 12, undertaking to enter an appearance & give bail in a sum not exceeding the value of ship, cargo, & freight. Pltfs., notwithstanding the *caveat* which on filing of the above notice in the registry had been entered, took out under *ibid.*, r. 18, a warrant for the arrest of defts.' vessel in a salvage action:—*Held:* (1) defts.' solrs., by signing the undertaking without qualification, rendered themselves personally responsible; (2) pltfs. might have taken a reasonable time to make inquiry whether the undertaking was satisfactory; (3) as, instead of so doing, they had insisted upon the security of the ship, pltfs. had failed to show "good & sufficient reason" within r. 18 for arresting the vessel, & must be condemned in damages & costs.—THE CRIMDON, [1900] P. 171; 69 L. J. P. 103; 82 L. T. 660; 48 W. R. 623; 16 T. L. R. 403. S. C. No. 698, *ante.*

710. —— **Commission on Bond.**]—THE COLLINGROVE, THE NUMIDA, No. 1268, *post.*

711. Costs.]—Where the holder of a bottomry bond arrests the vessel & freight on which the bond is secured before the bond is due, & the bond is paid at or before maturity, the shipowner is entitled to the costs occasioned by the proceedings, but not, in the absence of malice or gross negligence on the part of the bondholder, to damages.—THE EUDORA (ENDORA) (1879), 4 P. D. 208; 48 L. J. P. 32; 40 L. T. 166; 4 Asp. M. L. C. 78.

712. Co-ownership action — Duty of managing owner.]—Where part-owners wrongfully institute an action of restraint & arrest the ship thereon, it is the duty of the managing owner to take all reasonable steps to minimise losses & expenses consequent on such arrest, & the arresting owners are not liable for such losses & expenses after a reasonable time has elapsed within which such steps could have been taken.—THE VINDOBALA (1887), 13 P. D. 42; 57 L. J. P. 37; 58 L. T. 353; 6 Asp. M. L. C. 250; *revsd.* on another point (1889), 14 P. D. 50, C. A.

713. Demand for excessive bail.]—In a salvage action in which pltfs. arrested the salved ship in the sum of £3,000, & the ct. on a value of £14,000 awarded £450, the salvors were ordered to pay all costs & expenses of finding bail for £3,000, such sum being in the opinion of the ct. unreasonably excessive.—THE GEORGE GORDON (1884), 9 P. D. 46; 53 L. J. P. 28; 50 L. T. 371; 32 W. R. 596; 5 Asp. M. L. C. 216. S. C. No. 912, *post.*

B. Before the Judicature Acts.

(*a*) *Proceedings to Arrest.*

714. Arrest—Mode of instituting proceedings—What may be arrested—Appurtenances.]—The mode of initiating a suit by arrest of the ship, tackle, apparel & furniture is the ancient formula of the ct. The liability to arrest extends to the appurtenances of the ship, *i.e.*, the indispensable instruments without which the ship cannot execute its mission & perform its functions. On the other hand, cargo is not an appurtenance of the ship; its connection with the ship is merely transitory & it bears a distinct character of its own. The fishing stores of a ship engaged in the Greenland fisheries are appurtenances of the ship, & not cargo.—THE DUNDEE (1823), 1 Hag. Adm. 109. S. C. No. 719, *post.*

Annotations:—**Consd.** The John Dunn (1840), 1 Wm. Rob. 159. **Expld.** Langton *v.* Horton (1842), 11 L. J. Ch. 233. **Consd.** Stoomvaart Maatschappy Vederland *v.* Peninsular & Oriental Steam Navigation Co. (1882), 7 App. Cas. 795. **Distd.** *Re* Salmon, *Ex p.* Gould (1885), 2 Morr. 137. **Expld.** The Dictator, [1892] P. 304. **Reld.** The Girolamo (1834), 3 Hag. Adm. 169; Cope *v.* Doherty (1858), 31 L. T. O. S. 173; The Duna (1861), 5 L. T. 217; The Milan (1861), 31 L. J. P. M. & A. 105; The Wild Ranger (1862), Lush. 553.

715. What may be arrested—Sails, etc. on shore.] —The warrant of the ct. will extend to sails & rigging taken on shore for the purpose of safe custody, as well as to the ship itself.—THE ALEXANDER (1812), 1 Dods. 278.

Annotations:—**Mentd.** The Kennersley Castle (1833), 3 Hag. Adm. 1; The Vibilia (1838), 1 Wm. Rob. 1; The Laurel (1864), Brown. & Lush. 317; The Karnak (1868), L. R. 2 A. & E. 289.

716. —— **Freight.**]—A ship was arrested on account of wages, & motion made on behalf of a bondholder for a warrant of arrest against the freight, the bond in terms binding only the ship. The ct. directed the warrant to issue though it would not, upon motion, determine whether the

bond in such case extended to the freight.—THE MARY ANN (1845), 9 Jur. 94.

Annotations :—**N.F.** The Louisa Bertha (1850), 16 L. T. O. S. 216. **Consd.** The Union (1860), Lush. 128.

717. —— Proceeds of sale.]—The proceeds of a vessel hypothecated, sold under a decree of the ct. in a cause of salvage, may be allowed to be arrested in the registry, at the peril of the bondholder.—THE WILSONS (1841), 1 Notes of Cases, 115.

718. What cannot be arrested—Cargo.]—The cargo on board a ship at the time of a collision cannot be sued for the damage.—THE VICTOR, No. 499, *ante ;* Nos. 762, 789, *post.*

Annotations :—**Refd.** The Volant (1864), Brown. & Lush. 321 ; The Roecliff (1869), 17 W. R. 745 ; The Princess Royal (1870), L. R. 3 A. & E. 41 ; The Mullingar (1872), 26 L. T. 326 ; The Dictator, [1892] P. 304.

719. —— ——.]—THE DUNDEE, No. 714, *ante.*

For full anns., *see* S. C. No. 714, *ante.*

720. Privilege from arrest—Passenger's wearing apparel.]—Services were rendered by means of which a vessel & goods on board were saved from total loss & the lives of a number of passengers were saved. Suits were instituted on behalf of the person who rendered the services against the vessel & her cargo to recover salvage reward :—*Held :* the wearing apparel of the passengers, & other things belonging to them *ejusdem generis*, on board the vessel were privileged from arrest.—THE WILLEM III. (1871), L. R. 3 A. & E. 487 ; 25 L. T. 386 ; 20 W. R. 216 ; 1 Asp. M. L. C. 129. S. C. No. 587, *ante.*

Annotations :—**Consd.** The Pacific, [1898] P. 170. **Refd.** The Gas Float Whitton (No. 2), [1895] P. 301.

721. Caveat—Transferred action—Arrest in other actions.]—Where an Admlty. cause, instituted *in rem* against a ship, has been transferred from a cty. ct. to the Admlty. Ct., & no bail has been given in either ct., & the ship is already under the arrest of the ct. in other suits, the ct. will order the issue of a *caveat* to prevent her release, in case the other causes should be withdrawn.—THE RIO LIMA (1873), 28 L. T. 775 ; 2 Asp. M. L. C. 34.

Annotation :—**Refd.** The Montrosa, [1917] P. 1.

722. —— When improperly executed—Ship on voyage.]—The diligence of arrestment is inapplicable to a ship sailing on her voyage ; & force must not be used to bring her back to port.

An arrestment *ad fundandam jurisdictionem* was used on a vessel lying in Glasgow Harbour. A second warrant of arrestment on dependence of the action was then given to the messenger-at-arms to execute ; he, finding the vessel had sailed on her voyage, pursued her on board a steam-tug with 30 men, & overtaking her some way down the Clyde, within the jurisdiction of the Scotch cts. as she was approaching the high seas, seized her, & brought her back to port, & dismantled her :—*Held :* the execution of arrestment was illegal, & should be recalled.—BORJESSON & WRIGHT *v.* CARLBERG (1878), 3 App. Cas. 1316, H. L.

723. Mode of arrest — Foreign ship.] — THE GOLUBCHICK, No. 452, *ante.*

For full anns., *see* S. C. No. 452, *ante.*

724. ——— ———].—*Qu.:* whether in suing a foreign ship under M. S. Act, 1854 (c. 104), s. 527, the arrest & action may be according to the ordinary process of the ct.—THE BILBAO, Nos. 85, 475, 507, *ante ;* No. 771, *post.*

Annotation :—**Consd.** The Vera Cruz (1884), 9 P. D. 96, C. A. For full anns., *see* S. C. No. 475, *ante.*

725. —— ——].—THE HERZOGIN MARIE, No. 454, *ante.*

For full anns., *see* S. C. No. 454, *ante*

726. —— ——].—THE NINA, No. 450, *ante.*

For full anns., *see* S. C. No. 450, *ante.*

(*b*) *Effect of Arrest.*

727. Warrant of arrest—Notice to all the world.]—The warrant for arresting a ship by the Admlty. & the subsequent citation is notice to all the world of the subsequent proceedings.—A.-G. *v.* NORSTEDT, No. 621, *ante.*

For full anns., *see* S. C. No. 621, *ante.*

728. —— Notice to persons interested.]—The warrant of arrest calls upon all persons who have an interest to appear & show cause ; & if the party in possession at the time when the warrant was executed is no longer in possession, it is his own default ; he has, by not appearing to give bail, acquiesced in being dispossessed, & has thus allowed the proceeds arising upon the sale of the ship to come into the registry of the ct.—THE NEPTUNE, Nos. 56, 58, 243, *ante.*

For full anns., *see* S. C. No. 56, *ante.*

729. Position of necessary men.]—The ct. will not permit a tradesman to retain the sails of a ship left in his possession for the purpose of repairs until the repairs are paid for, if such ship is under arrest. It will order them to be delivered up & will protect the right of the tradesman. A monition against a sailmaker to bring in the sails of an arrested vessel was directed to issue.—THE HARMONIE (1841), 1 Wm. Rob. 178. S. C. No. 733, *post.*

Annotation :—**Mentd.** The Tergeste (1902), 72 L. J. P. 18.

730. Marshal responsible for safe custody.]—On a demand made against the marshal, to recover the value of a long-boat, & best bower cable, lost whilst the ship was under his custody, no appearance for the marshal having been given :—*Held :* (1) it was the duty of the marshal to answer the complaint & to show that the property was not lost by any default of his ; (2) the marshal was liable ; (3) as no answer had been given, the marshal must pay the costs.—THE HOOP (1801), 4 Ch. Rob. 145.

Annotation :—**Consd.** The Rendsberg (1805), 6 Ch. Rob. 143.

(*c*) *Interference with Arrest.*

731. Contempt—Removal of ship.]—Where a vessel was under arrest for bail to the amount of a part-owner's interest, & after a commission to take bail, at the instance of the master, the other part-owner, had issued, was removed by the master & others to Jersey, the ct. decreed an attachment against the master & mate for their contempt (& they were

PART III. SECT. 1, SUB-SECT. 2.—B (b).

727 i. *Warrant of arrest—Derelict—Salvage—Practice of court.*]—Salvors of a derelict should in the first instance give notice to the proctor for the Admlty. who will forthwith extract a warrant. After issue of the warrant the salvors should move for leave to intervene. If the case be one of only trivial importance, the ct. will then direct the filing of affidavits in proof of claims, etc. In cases of greater moment, it will sanction an act on petition, with the usual pleadings & proof under the Rules of 1859 ; & when there are claims represented by several proctors, or subsequent to each other, a consolidation will be ordered, as in other cases of salvage.—THE SARAH (1871), Y. A. D. 102.—**CAN.**

PART III. SECT. 1, SUB-SECT. 2.—B (c).

731 i. *Contempt—Removal of ship.*]—A master taking his vessel out of jurisdiction after she has been regularly attached is guilty of contempt of ct., & the promoter is entitled to a monition on the master to show cause why attachment should not issue.—*Re* THE FRIENDS (1836), S. V. A. C. 72, 73.—**CAN.**

731 ii. *S. P. The Petrel* (1836), 3 Hag. Adm. 299, cited.—THE DELTA (1838), S. V. A. C. 207.—**CAN.**

731 iii. *S. P.* STANWOOD'S CASE (1807), Stewart, 123 —**CAN.**

Sect. 1.—*Actions in rem: Sub-sect.* 2, *B.* (*c*), (*d*) & (*e*)].

imprisoned) & a monition against others to show cause.

Such offence is an offence of great enormity —a great breach of the law, & a great violation of the rights of property, a species of theft & piracy. All parties who conspire to effect this violence are guilty of contempt; it is not confined to those who actually carry off the vessel, but it includes all who are privy to & assist in the transaction.—THE PETREL (1836), 3 Hag. Adm. 299.

732. —— Sale of cargo.]—After a ship had been taken possession of, under warrant of the Admlty., as derelict, & the cargo had been put into a warehouse by the agent of the Admlty., the warehouse was broken open, & the cargo taken out & sold; the ct. decreed a monition to show cause why an attachment should not issue for contempt.—ANON. (1799), 1 Ch. Rob. 331.

733. —— Exercise of lien.]—THE HARMONIE, No. 729, *ante*.

For full anns., *see* S. C. No. 729, *ante*.

734. —— Rigging sold by harbour-master—To pay harbour dues.]—A harbour-master was arrested by order of the Admlty. Ct. for carrying off & selling part of a vessel's rigging, etc., to pay harbour dues, though the vessel had been arrested by warrant of the Admlty. Ct. He was released on giving bail to answer any damage & expenses caused by his act.—THE HARMONIE (1841), 1 Wm. Rob. 179.

735. —— Removal of tackle—Under distress warrant.]—A warrant of distress issued by magistrates in a suit for seamen's wages under 7 & 8 Vict. c. 112 cannot be executed against a ship under arrest, & an auctioneer acting on such warrant & removing part of the ship's tackle & furniture is guilty of contempt.—THE WESTMORELAND (1845), 2 Wm. Rob. 394; 4 Notes of Cases, 173.

736. —— Any interference with property under arrest.]—THE ARMENIAN (1874), March 20, unreported.

737. —— Though arrest wrongful.]—If a warrant issued under the authority of the ct. be forcibly superseded, parties so doing, or who have advised or aided in it, are liable to attachment for contempt of ct.; the proper mode of obtaining redress is to make an affidavit of the facts & apply to the ct. to supersede the warrant.—THE BURE (1850), 16 L. T. O. S. 285; 14 Jur. 1123.

738. —— Party arrested in Scotland—Brought to England—Release ordered by Scottish court.]—A vessel, under arrest by warrant of the Admlty. Ct., was forcibly removed to Scotland. An attachment issued against the party guilty of the contempt, & an order of concurrence was, upon petition, made by the Lord Ordinary in Edinburgh. The party was, under this last order, arrested in Scotland & brought to England, where he was taken under attachment by the marshal of the Admlty. & lodged in the Queen's Bench prison. The Lord Ordinary was moved to issue a note of suspension of the arrest, &, after hearing counsel, ordered a warrant of liberation to issue. From this last order an appeal was instantly lodged in the inner Ct. of Sess. The judge of the Admlty. Ct. ordered the prisoner to be released.

The true principle of Admlty. jurisdiction I take to be this; whenever an attachment has issued from this ct., it must be lawfully served, wherever it is served; there is no limitation whatever to the place where it may be served, provided it be served according to the law of the country where it is attempted to be put in force (DR. LUSHINGTON). —THE MATHESIS (1844), 2 W. Rob. 286; 3 Notes of Cases, 133; 8 Jur. 582.

(*d*) *Re-arrest.*

739. When second arrest allowed—General principle.]—The jurisdiction, which the ct. undoubtedly possesses, to order a second arrest in respect of the same cause of action, should be cautiously exercised. Application for such arrest should generally be made to the ct. itself.

Pltf. having re-arrested, after the ship had been released on bail, the ct. made an equitable order, allowing the re-arrest to stand, but cancelling the bail-bond, & directing the value of the ship (which had been repaired since the release) should be estimated at the time of the first arrest.—THE FLORA (1866), L. R. 1 A. & E. 45; 35 L. J. Adm. 14; 14 L. T. 191; 2 Mar. L. C. 324.

Annotations:—**Refd.** The Dictator, [1892] P. 304. **Mentd.** The Brothers *v.* The Fingal (1869), 21 L. T. 621.

740. —— Bond defective.]—A vessel released from arrest upon a bail-bond, taken before a comr. in the country & signed by two persons in partnership, was ordered to be re-arrested notwithstanding 24 hours' notice of the bail tendered had, in accordance with Admlty. Ct. Rules, 1859, r. 43, been given to pltf.'s agents in London, pltf.'s solr. in the country having, within that time, given to deft.'s solr. there formal notice of objection to the bail. The omission of pltf.'s country solr. to order, by telegraph, a *caveat* release to be entered:—*Held*: in the circumstances, not to amount to negligence. —THE CORNER (1863), Brown. & Lush. 161; 3 New Rep. 94; 33 L. J. P. M. & A. 16; 12 L. T. 62; 2 Mar. L. C. 168. S. C. No. 802, *post*.

Annotations:—**Folld.** The Don Ricardo (1880), 5 P. D. 121 **Consd.** The Crimdon, [1900] P. 171.

741. —— Mistake in sum claimed—Clerical error.]—In a cause to recover for damage sustained in a collision pltf. ordered his proctor to enter the action for £2,600. The proctor filled up the *præcipe* correctly & gave it to his clerk to enter the action. The clerk, by mistake, entered the action for £1,000 instead of £2,600, & the mistake was not discovered for some time. The ct., on application made before judgment had been given in the cause, decreed the re-arrest of the vessel for the larger sum, but ordered pltf. to pay all expenses arising from the mistake.—THE HERO (1865), Brown. & Lush. 447; 13 W. R. 927.

Annotation:—**Refd.** The Dictator, [1892] P. 304.

742. —— Amount awarded in excess of bail.]—Where a suit has been instituted against a vessel, & bail given for an estimated amount to cover damages & costs, & the damages recovered & the costs taxed are a larger sum than the bail given, & there has been no carelessness on the part of pltfs., the ct. will issue a writ under Admlty. Ct. Act, 1861 (c. 10), ss. 15, 22, for the re-arrest of the ship to satisfy the costs, & will direct such writ to the marshal for execution. The fact that generally the amount in which a suit is instituted is laid to cover probable damages & costs is simply a matter of convenience.—THE FREEDOM (1871), L. R. 3 A. & E. 495; 41 L. J. Adm. 1; 25 L. T. 392; 1 Asp. M. L. C. 136.

Annotations:—**Distd.** The Gemma (1889), 81 L. T. 379, C. A. **Refd.** The Dictator, [1892] P. 304.

743. —— ——.]—Bail having been given in the full value of the ship, & the owner found liable to the owners of part cargo for loss by collision, a motion to supersede arrest of the ship by other owners of cargo was rejected.—THE TUSCARORA (1858), 5 L. T. 557.

744. —— Second action—Different parties.]—A warrant of arrest of a ship was granted by the Admlty. Ct. at the suit of several passengers, who had lost property in consequence of negligent collision; the ship had already been arrested in a previous action. The ct. can prevent inconvenience

to owners by means of the costs.—THE EUROPA (1849), 13 Jur. 856. S. C. No. 1158, *post*.

745. When re-arrest not allowed—After ship unlawfully brought back.]—A ship on her voyage having been arrested by a warrant on dependence of an action, & brought back by force into harbour, the arrestment was recalled as illegally executed. Other arrestments were then used against the vessel by parties acting in concert with the original arresters:—*Held:* the second arrestments must also be recalled.—BORJESSON & WRIGHT *v.* CARLBERG (1878), 3 App. Cas. 1322, H. L.

746. —— Damage in excess of bail—Second action.]—When bail has been given for a certain amount in a suit for damage by collision, & the ship has been released from arrest, if the damage decreed exceed that amount, the ship cannot be arrested in a new action to make up the deficiency.—THE KALAMAZOO, No. 808, *post*.

Annotations:—**Folld.** The Nostra Senora Del Carmine (1854), 1 Ecc. & Ad. 303. **Distd.** The Temiscouata (1855), 2 Ecc. & Ad. 208. **Expld.** Nelson *v.* Couch (1863), 33 L. J. C. P. 46. **Consd.** The Hero (1865), Brown. & Lush. 447. **Folld.** Home Insce. Co. *v.* Prop Concord (1870), 22 L. T. 490. **Consd.** The Dictator, [1892] P. 304. **Refd.** The Fairport (1882), 8 P. D. 48.

747. —— ——.]—In a cause of collision, the ship having been released from arrest upon bail given in the full sum in which the cause was instituted cannot be re-arrested by pltf. to answer his damages, if, after the ordinary decree & reference, they prove to exceed that sum; & if the ship has been sold by the ct. in another action brought by other parties, the ct. cannot under its general authority, or under Admlty. Ct. Act, 1861 (c. 10), s. 15, order the proceeds of the ship to be applied to satisfy damages or interest or costs in the first action.—THE WILD RANGER (1863), Brown. & Lush. 84; 2 New Rep. 402.

Annotations:—**Expld.** The Hero (1865), Brown. & Lush. 447. **Consd.** The Dictator, [1892] P. 304. **Refd.** The Gemma (1899), 81 L. T. 379, C. A.

(e) Wrongful Arrest.

748. Damages not awarded if bonâ fide.]—The ct. will not make a decree for damages unless the circumstances show *mala fides* or *crassa negligentia* on the part of the salvors in arresting, whereof the fact that the salvors arrested without first obtaining a valuation of the property from the receiver of wreck (as provided for by M. S. Amendment Act, 1862 (c. 6), s. 50, is not conclusive evidence.—THE KATE, No. 598, *ante*.

749. ——.]—Defts. in a salvage suit have no right to recover damages for demurrage against pltfs., who, having *bonâ fide* & through mere error of judgment arrested defts.' vessel & carried on the suit to recover reward for their alleged salvage services, are held to have performed no salvage, but mere towage, services.—THE STRATHNAVER (1875), 1 App. Cas. 58; 34 L. T. 148; 3 Asp. M. L. C. 113, P. C. S. C. No. 602, *ante*.

Annotation:—**Refd.** The Walter D. Wallet (1893), 69 L. T. 771.

750. —— Mistake in identity — Identity not proved.]—A collision took place at sea. The vessel causing the damage got away. From the appearance of a vessel in port, the owners of the damaged vessel caused her to be arrested to answer an action for damages. The vessel seized was a foreign vessel, & as the owner had no funds in England, she was detained for some months before she was released on bail. Pltfs. failed in identifying the vessel seized as being the one causing the damage, & the Admlty. Ct. dismissed the action with costs, refusing to award damages:—*Held:* the decree must be affirmed, there being no evidence of *mala fides*, or *crassa negligentia*, which might imply malice, on the part of pltfs. in arresting the ship, such arrestment being necessary & the foundation of the action in the Admlty. Ct., the proceedings being *in rem*.—THE EVANGELISMOS (1858), 12 Moo. P. C. C. 352; Sw. 378; 14 E. R. 945, P. C.

Annotations:—**Folld.** The Active (1862), 5 L. T. 773; The Kate (1864), Brown. & Lush. 218; Wilson *v.* R. (1866), L. R. 1 P. C. 405, P. C. **Distd.** The Cathcart (1867), L. R. 1 A. & E. 314. **Consd.** The Margaret Jane (1869), L. R. 2 A. & E. 345. **Folld.** The Strathnaver (1875), 1 App. Cas. 58, P. C. **Consd.** The Walter D. Wallet, [1893] P. 202. **Refd.** The Collingrove, The Numida (1885), 10 P. D. 158.

751. —— —— ——.] — In a cause of damage, if the identity of deft.'s vessel as that which caused the damage be not proved, the ct. nevertheless does not condemn pltfs. in damages as well as costs, unless there be proved against them either *mala fides* or such *crassa negligentia* as would imply malice.—THE ACTIVE (1862), 5 L. T. 773; 1 Mar. L. C. 191.

752. —— Abandonment of proceedings by mortgagee.]—The mtgee. of four sixty-fourth shares of a vessel caused her to be arrested in a suit which he subsequently abandoned. The ct. condemned him in costs, but not in damages.—THE EGERATEIA (1868), 38 L. J. Adm. 40; 20 L. T. 961; 3 Mar. L. C. 241.

753. —— —— Interest on money in court.]—A ship was mtged. to deft. to secure a sum exceeding £1,400; the mtge. was duly registered, & deft. took possession of the ship & advertised her for sale. Before the sale pltf., who held a mtge. on the ship, made & registered after the date of the registration of the mtge. to deft., instituted a suit against the ship to enforce his mtge., & caused the ship to be arrested. Deft., to obtain the release of the ship, paid £500 into ct. in lieu of bail. The ship was sold by deft., & the proceeds were insufficient to satisfy deft.'s mtge. Pltf., when the cause was ripe for hearing, abandoned the suit. The ct. condemned pltf. in costs, & ordered him to pay to deft. interest on the £500 paid into ct.—THE WESTERN OCEAN (1870), L. R. 3 A. & E. 38.

Annotation:—**Distd.** The Acacia (1879), 41 L. T. 564.

754. Damages awarded — Negligence.] — No general rule can be laid down as to condemning salvors in costs & damages for arresting in the Admlty. Ct. property of less total value than £1,000. The fact that the arrest was made without verbal claim, & for a sum disproportionate to the value of the property & the services rendered, is evidence that the arrest was made negligently.—THE ELEONORE (1863), Brown. & Lush. 185; 3 New Rep. 95; 33 L. J. P. M. & A. 19; 9 L. T. 397; 12 W. R. 218; 1 Mar. L. C. 400. S. C. Nos. 773, 1401, *post*.

755. —— Wrong ship.]—The *O.* was arrested at the suit of the *W.*'s owners. In a few days it was found that the *O.* was not the ship which had collided with the *W.* The action was subducted & the *O.* was released, having been under arrest 6 days. The owners of the *W.* were condemned in the costs, losses, charges, damage, demurrage, & expenses caused by the illegal arrest of the *O.* & her freight, & the amount was referred to the registrar.—THE ORION (1852), 12 Moo. P. C. C. 356 n.; 14 E. R. 946.

756. —— —— Security.]—Where in a cause of damage in which the vessel of defts. had been arrested it appeared upon affidavits that pltfs. were mistaken as to the identity of the vessel proceeded against, & defts. offered to disclose the real wrongdoer, the ct. refused to accede to an application to extend the security to be given by pltfs. to meet the costs if unsuccessful so as to cover the damages caused by the wrongful arrest. *Semble:* cases may arise in which the security would be extended.—THE D. H. PERI (1862), Lush. 543; 32 L. J. P. M. & A. 46; 8 Jur. N. S. 1230; 11 W. R. 44. S. C. No. 1033, *post*.

Annotation:—**Refd.** The Mary *or* Alexandra (1867), L. R. 1 A. & E. 335.

Sect. 1.—*Actions in rem: Sub-sect.* 2, *B.* (*e*); *sub-sect.* 3, *A. & B.* (*a*) & (*b*).]

757. —— Proceedings unwarrantable.]—On a case of salvage coming before two JJ. it appeared that under M. S. Act, 1854 (c. 104), s. 460, the JJ. had no jurisdiction. They, however, by consent of the parties, heard the case & awarded £53. The salvors refused to accept the award or to appeal, but entered an action in the Admlty. Ct. against ship & cargo for £250. The owners tendered the £53, which the salvors, after the vessel had been for some time under arrest, accepted:—*Held:* the salvors were liable for costs & damages occasioned by improper arrest of the ship.—THE NAUTILUS (1856), Sw. 105.

758. —— ——.]—Pltfs. were awarded £40 by the Comrs. of the Cinque Ports for salvage services to the *G.* Being dissatisfied with the award they lodged an appeal against it, but arrested the *G.* in an action in the Admlty. Ct. for £1,200. The action was abandoned after appearance:—*Held:* (1) the action in the Admlty. Ct. was illegal to all intents & purposes; (2) pltfs. were liable for costs, damages, demurrage & expenses.—THE GLORIA DE MARIA (1856), Sw. 106.

759. —— Where no jurisdiction.]—If a pltf. institutes or continues a suit against a vessel & so causes it to be kept under arrest, knowing the ct. to be without jurisdiction, he will be condemned in the damages consequent on the detention.

A salved vessel was valued by a receiver of wreck at £746 on Dec. 3. On Dec. 8 the salvors instituted a suit in the sum of £2,500; on Dec. 18 they applied for an appraisement of the vessel; on Jan. 14 following they gave notice that they proceeded no further in the suit:—*Held:* (1) the salvors must have been aware within a short time of taking out the appraisement that the value fixed by the receiver was substantially correct; (2) they must be condemned in costs & in damages from Dec. 22 to Jan. 14.—THE MARGARET JANE (MARGARET AND JANE) (1869), L. R. 2 A. & E. 345; 38 L. J. Adm. 38; 20 L. T. 1017; 17 W. R. 1064; 3 Mar. L. C. 296.

760. Improper detention.]—Salvors who detain a vessel after the owners have given in their affidavit of value & applied for a *supersedeas* are guilty of vexatious conduct, & will be condemned in costs for the further detention of the vessel; they will not be condemned in costs in the absence of any such application.—THE INDIA (1842), 1 Wm. Rob. 406, 411.

For full anns., *see* SHIPPING & NAVIGATION.

761. —— Salved property released by receiver of wreck.]—After release of salved property by the receiver of wreck upon security to his satisfaction, salvors have no right to detain the property, or to arrest it by warrant of the Admlty. Ct.; release in such case will be granted, with costs, against the salvors.—THE LADY KATHERINE BARHAM (1861), 1 Lush. 404; 5 L. T. 693; 1 Mar. L. C. 184.

762. —— Of cargo—After freight paid.]—Where cargo is improperly detained under arrest, the owner is entitled to costs & damages.

A cause of collision was entered against a foreign ship, freight & cargo. The ship was arrested, & the cargo was arrested for the freight. The ship was released upon an appearance & bail being given for the owners of the ship. The ct. pronounced for the damage. An appearance was entered for the freight & the freight paid into ct., & the surrogate was prayed to release the cargo. The value of ship & freight being insufficient to satisfy the damage, pltf. prayed the surrogate not to release the cargo. The surrogate referred the question to the judge:—*Held:* the cargo, even if the property of the owners of the ship, was not liable for the damage, & must be released with costs & damages for improper detention of it.—THE VICTOR, Nos. 499, 718, *ante;* No. 789, *post.*

Annotations:—**Consd.** The Volant (1864), Brown. & Lush 321; The Mullingar (1872), 26 L. T. 326. **Refd.** The Roecliff (1869), 17 W. R. 745; The Princess Royal (1870), L. R. 3 A. & E. 41; The Dictator, [1892] P. 304.

763. Detention by leave—After suit dismissed—Damages awarded.]—A vessel having been arrested in a cause of damage, & the suit having been dismissed with costs, pltf. obtained leave to detain her for 12 days that he might have time to consider whether he would appeal. On the 13th day the vessel was released:—*Held:* deft. entitled to damages for the 12 days detention.—THE CHESHIRE WITCH (1864), Brown. & Lush. 362; 11 L. T. 350; 2 Mar. L. C. 145.

SUB-SECT. 3.—APPEARANCE BY DEFENDANTS.

A Since the Judicature Acts.

764. Appearance under protest — Practice.]—Where a deft. objects to the jurisdiction in a cause *in rem* & appears under protest, the former practice of the Admlty. Ct. as to proceedings under protest must be observed throughout.—THE EVANGELISTRIA, No. 171, *ante;* No. 783, *post.*

Annotations:—**Followed.** The Vivar (1876), 2 P. D. 29, C. A. **Distd.** The Agincourt (1877), 2 P. D. 239.

765. —— ——.]—THE VIVAR, Nos. 841, 845, 1608, *post.*

766. Effect of absolute appearance—Submission to jurisdiction.]—Pltfs., owners of a British ship, commenced an action *in rem* & caused a vessel within the jurisdiction to be arrested in respect of a collision on the high seas. The owners of the vessel arrested were foreigners domiciled abroad. They appeared & obtained the release of their vessel by giving bail to the value of ship & freight. They then defended the action, denying their liability, & counterclaiming for damage they had sustained by reason of collision. The foreign vessel was found alone to blame, & judgment pronounced in the usual form condemning defts. & their bail in the amount of damage sustained by pltfs. together with costs of the claim & counterclaim. Defts. moved to vary the decree by limiting it to the value of their vessel, freight, & costs:—*Held:*

PART III. SECT. 1, SUB-SECT. 3.—A.

a. *Entry of appearance—Waiver of objection to jurisdiction.*]—Entering an appearance to an action is not a waiver of objection to the jurisdiction.—RITHET *v.* THE BARBARA BOSQWITZ & PORTER, No. 562, i, *ante.*—**CAN.**

764 i. *Appearance under protest—Waiver of objection to jurisdiction.*]—Defts.' steamer was attached to respond such judgment as pltf. might obtain in an action for breach of a charterparty. Defts. appeared under protest, without prejudice to the right to object to the jurisdiction of the ct., & subsequently moved to set aside the summons & attachment, on the ground that the service was irregular:—*Held:* (1) the defective service of a summons, regularly issued, & in proper form, was cured by the appearance of defts.; (2) such a thing as appearance "under protest" was unknown to the practice of the Supreme Ct. of Nova Scotia, but, even if defts.' right to object to the legality of the service could be protected by protest, the protest, in this case, was limited in terms to the jurisdiction.—DOMINION COAL CO., LTD. *v.* KINGSWELL S.S. CO., LTD. (1898), 30 N. S. R. 397.—**CAN.**

764 ii. —— *Subsequent acts amounting to waiver of protest.*]—A summons & warrant were served & executed & an appearance entered "under protest." A bond was given (not under protest) & the ship released:—*Held:* the giving of a bond, in which the sureties on behalf of the owners of deft. ship submitted themselves & consented to the jurisdiction of the ct., being given after the appearance under protest, was a step in the cause, & thereby a waiver of the protest.—DUNBAR DREDGING CO. *v.* THE MILWAUKEE (1907), 11 EX. C. R. 179.—**CAN.**

apart from any application for a statutory limitation of liability, the appearance of defts. being voluntary & their proceedings in the action amounting to a submission to the jurisdiction of the ct., they were personally liable to the full extent of pltfs.' proved claim.—THE DUPLEIX, [1912] P. 8; 81 L. J. P. 9; 106 L. T. 347; 27 T. L. R. 577; 12 Asp. M. L. C. 122. S. C. No. 1501, *post*.

767. —— Objection to plaintiffs' title not excluded.]—Where shipowners, in an action of restraint instituted by mtgees. alleging themselves to be owners, enter appearance not under protest & give bail for the safe return of the ship, they are not precluded at the trial from questioning pltfs.' title, & if it in fact appears that pltfs. are merely mtgees. the ct. will order the bond to be given up & cancelled.—THE KEROULA, Nos. 235, 253, *ante*.

768. Entry of appearance—Action in district registry.]—Where a cause *in rem* has been instituted in the Liverpool district registry of the Admlty. Ct. the owners of the ship proceeded against, if resident out of the limits of the Liverpool district, may appear in the London registry of the Admlty. Div., but the *præcipe* to enter an appearance must contain a recital of the institution of the cause in the Liverpool district registry of the Admlty Ct. showing the title under which the cause was entered at Liverpool.—THE GENERAL BIRCH (1875), 33 L. T. 792; 24 W. R. 24; 3 Asp. M. L. C. 99.

B. Before the Judicature Acts.

(a) Form of Appearance.

769. Appearance under protest—Facts excluding jurisdiction to be stated.]—Where a petition on protest is filed on the ground of want of jurisdiction, before pltf.'s petition setting forth the particulars of his damage, the petition on protest ought to state the facts which show want of jurisdiction.—THE PIEVE SUPERIORE, Nos. 524, 526, 539, 545, 555, *ante*.

For full anns., *see* S. C. No. 545, *ante*.

770. —— When not proper course—Case within jurisdiction.]—Where an action for wages is brought against a foreign ship, defts. should not appear under protest, as the ct. has jurisdiction if it thinks proper to exercise it.—THE FRANZ ET ELIZE, No. 456, *ante*; No. 1035, *post*.

Annotation:—**Distd.** The Nina (1867), L. R. 2 A. & E. 44.
For full anns., *see* S. C. No. 456, *ante*.

771. Absolute appearance—Effect of—Formal objection to jurisdiction not available.]—Formal objections to jurisdiction are not allowed to be taken after an absolute appearance given.

Damage having been done by a foreign ship to a barge in the Thames, the ship was arrested according to the ordinary process; there was an absolute appearance & release of the vessel thereon. On the petition being filed, deft. pleaded the barge was not a sea-going vessel within Admlty. Ct. Act, 1840 (c. 65), s. 6, & that the ct. had no jurisdiction:—*Held*: (1) ct. had jurisdiction by M. S. Act, 1854 (c. 104), s. 527; (2) after absolute appearance defts. could not object that the arrest had not strictly followed the course prescribed in that sect.—THE BILBAO, Nos. 85, 475, 507, 724, *ante*.

Annotations:—**Consd.** Everard *v.* Kendall (1870), L. R. 5 C. P. 428; The Vera Cruz (1884), 9 P. D. 96, C. A.
For full anns., *see* S. C. No. 475, *ante*.

772. —— —— Estoppel.]—In a salvage suit defts. entered an absolute appearance. The vessel being arrested, was released on Jan. 11, on an undertaking by the proctors of the owners to file an affidavit of value within a week. On Jan. 15 they filed an affidavit stating the value of the vessel, freight, & cargo to be over £1,000. On Jan. 19 a receiver of wreck made an affidavit that the value was under £1,000. On Feb. 1 defts. applied upon this affidavit, to dismiss the suit with costs on the ground that the ct. had not jurisdiction, which in such case lay with JJ. under M. S. Amendment Act, 1862 (c. 63), s. 49:—*Held*: in the circumstances, defts. had estopped themselves from objecting to the jurisdiction.—THE DART (1870), 21 L. T. 765; 3 Mar. L. C. 327.

773. —— —— No estoppel where no jurisdiction.]—Where the ct. has not jurisdiction deft. is not prejudiced in his claim for damages by having appeared absolutely.—THE ELEONORE, No. 754, *ante*; No. 1401, *post*.

774. —— —— —— Plea to jurisdiction allowed.]—Where a party objects to the jurisdiction of the ct., the proper course is to appear under protest. Where the jurisdiction is admitted, on a proper case stated (*ex p.*), the ct. will allow the party to sever his defence, & to plead in bar in the first instance, reserving to him the right to plead generally, if the plea in bar be not sustained.—THE SARAH JANE (1843), 7 Jur. 659.

775. —— —— ——.]—Where deft. intends to object to the jurisdiction of the ct. on the ground of the value of the property salved he ought to enter an appearance under protest; but if he appears absolutely, & raises the objection after the petition is filed, the ct. will entertain it, but will not give him costs.—THE LOUISA (1863), Brown. & Lush. 59; 9 Jur. N. S. 676; 11 W. R. 614. S. C. No. 607, *ante*.

Annotations:—**Distd.** The Herman Wedel (1870), 39 L. J. Adm. 30. **Mentd.** The Port Victor, [1901] P. 243, C. A.

776. Second appearance—Change of solicitors—Lien of first solicitor.]—Where a solr. for a deft. in a wages suit was entitled to a lien for his costs on the balance of the proceeds of the ship in the registry (after payment of pltf.'s claim & costs) & deft., wishing to dispute the registrar's report on pltf.'s claim to which he had previously submitted, caused a second appearance to be entered for him by other solrs. without previously paying his original solr.'s costs, the ct. ordered the second appearance to be set aside, & the original solr.'s costs to be paid out of the fund after payment of pltf.'s claim & costs, leaving the other solrs. to apply to enter an appearance after this had been done.—THE ONEIZA (1872), L. R. 4 A. & E. 36; 27 L. T. 632; 21 W. R. 232; 1 Asp. M. L. C. 476.

(b) Who may Appear.

777. Insurers.]—The former practice of the ct. was to permit only the master or owners of a ship arrested to appear & defend. But the ct. will allow the insurers of the ship to defend, on terms, if they show a substantial interest which may be prejudiced by pltf. proceeding to judgment.

A ship having been arrested in a cause instituted in the Admlty. Ct., & the owner not appearing, the foreign insurers then entered an appearance & applied for leave to defend, upon the ground that if the ship was sold by the ct., they might be made responsible to the owner for a total loss. The ct. granted the application upon their giving security for costs. In another action brought for necessaries against same ship, no appearance having been entered for the owner, the same insurers appeared & paid the amount of the claim into ct., making at the same time an offer to pay costs. The ct.

PART III. SECT. 1, SUB-SECT. 3.—B (b).

a. *Persons interested.*]—Where a proceeding *in rem* is instituted in the Admlty. Ct. to enforce a maritime lien, it is immaterial to whom the *res* belongs. The owner or other persons interested may intervene to defend the suit, but the ct deals with the *res* only, & it is the *res* & not the owner that is liable in the suit.—THE MULLINGAR (1872), 26 L. T. 326.—IR.

Sect. 1.—*Actions in rem: Sub-sect.* 3, *B.* (*b*); *sub-sect.* 4, *A. & B.* (*a*), (*b*) & (*c*) *i.*]

rejected a motion on behalf of pltf. to sell the ship as for want of appearance.—THE REGINA DEL MARE (1864), Brown. & Lush. 315.

778. Persons not bound to appear—Public officers—Crown interests involved—Collision with H.M. ship—Lords of Admiralty.]—Public officers of the Crown are not bound to appear at the suit of private individuals when the interests of the Crown are concerned. The ct. cannot compel the Lords of the Admlty. to appear by their proctor in a suit against a Queen's ship, & a monition will be refused for this purpose; but the ct. will intimate to their lordships that such an application has been made & the monition refused.—THE ATHOL (1842), 1 Wm. Rob. 374; 1 Notes of Cases, 586; 6 Jur. 376.

Annotations:—**Folld.** The Resolute (1856), 33 L. T. O. S. 80. **Apld.** The Thomas A. Scott (1864), 10 L. T. 726. **Consd.** The Parlement Belge (1880), 5 P. D. 197, C. A.

SUB-SECT. 4.—RELEASE ON BAIL, ETC.

Re-arrest, *see* pp. 164, 165, *ante*.

A. Since the Judicature Acts.

779. Value—Appraisement—Conclusiveness of.]—In an action of salvage pltfs. obtained an award of £1,500 upon an appraised value of defts.' ship of £1,250 & of her cargo of £5,004; total £6,254. The ship was sold by the marshal for £713, the cargo, which was of a nature not readily saleable in England, for £1,649, & the total £2,363 was reduced by fees & disbursements to £1,625. An award of £130 obtained by the pilot & £100 by boatmen in separate actions in respect of same salvage operations brought the total salvage claims up to £1,730, which more than absorbed the whole proceeds. On motion by defts. to vary the decree by reducing the award of £1,500:—*Held:* the application must be refused as defts. had allowed the ct. to proceed to award salvage upon the basis of the appraisement without taking any exception at the time, & beyond the difference between the appraised value & the sum realised by the sale, there was nothing to indicate that the appraisement did not fairly represent the value at the time & place when the property was brought into safety.—THE GEORG, [1894] P. 330; 71 L. T. 22; 7 Asp. M. L. C. 476. S. C. No. 1225, *post*.

Annotation:—**Mentd.** The San Onofre, [1917] P. 96.

780. —— —— ——.] — In ordinary circumstances an appraisement by the marshal in a salvage action is conclusive.—THE HOHENZOLLERN, [1906] P. 339; 76 L. J. P. 17; 95 L. T 585; 22 T. L. R. 778; 10 Asp. M. L. C. 296.

781. —— **Affidavit of—Evidence.**]—Where, in a salvage action, defts. file affidavits of value of their ship, freight, & cargo, which values are accepted & agreed to by pltfs., defts. will not be allowed at the hearing to give evidence to decrease the values.—THE HANNA (1877), 37 L. T. 364; 3 Asp. M. L. C. 505.

782. Discharge of bail—Change of indorsement on writ.]—Bail given to answer judgment in a cause where the appearance is under protest will not be discharged on account of a change in the indorsement on the writ of summons, which renders the protest of no avail.—THE CITY OF MECCA (1881), 6 P. D. 106; 50 L. J. P. 53; 44 L. T. 750; 4 Asp. M. L. C. 412, C. A.

For full anns., *see* CONFLICT OF LAWS.

783. Action of possession—Bail.]—In suits for possession the Admlty. Ct. can take bail.—THE EVANGELISTRIA, No. 171, *ante*; No. 764, *post*.

For full anns., *see* S. C. No. 171, *ante*.

784. Action of restraint—Value of plaintiff's shares.]—In an action of restraint the bail bond should not be given to pay what may be adjudged against deft. in an action, but simply for the appraised or agreed value of pltf.'s shares, in case the ship does not return to the particular port named in the bond.

It has never been the practice to give a bond in double the value (BUTT, J.).—THE ROBERT DICKINSON, THE GLANNIBANTA (1884), 10 P. D. 15; 54 L. J. P. 5; 52 L. T. 55; 33 W. R. 400; 5 Asp. M. L. C. 341. S. C. No. 227, *ante*.

785. —— ——.]—In an action of restraint the amount of bail to be put in by defts. is the same proportion of the whole value of the vessel as the number of shares held by pltf. bears to the whole number of shares in the vessel.—THE CAWDOR (1898), 79 L. T. 357; 8 Asp. M. L. C. 475.

786. Caveat release—Groundless objection to bail.]—Where a pltf., being dissatisfied with the sufficiency of bail, enters a *caveat* against the release of a vessel, he will, on its appearing to the ct. that his objection to the bail was groundless, be condemned in damages & costs.—THE DON RICARDO (1880), 5 P. D. 121; 49 L. J. P. 28; 42 L. T. 32; 28 W. R. 431; 4 Asp. M. L. C. 225. S. C. No. 1037, *post*.

B. Before the Judicature Acts.

(a) Persons entitled to Release.

787. Person entitled to freight—Mortgagee in possession.]—If a ship is arrested for ship & freight, a person showing a *primâ facie* title to freight is entitled to a release of the ship upon giving bail in the action. In an action against ship & freight for master's wages, the mtgee. in possession is entitled to a release of the ship, upon giving bail in the action, notwithstanding that the master has become liable in respect of bills of exchange drawn upon the charterers for the ship's use. The mtgee. in possession has a *primâ facie* title to freight, & therefore has a right to give bail.—THE RINGDOVE (1858), Sw. 310. S. C. No. 248, *ante*.

788. —— **Receiver appointed by the court—Before arrest—Without bail.**]—The Ct. of Chancery appointed certain persons receivers of a freight, which, before they had obtained possession, was arrested in a suit in the Admlty. Ct. Upon motion, in the Admlty. Ct. on behalf of the receivers, the release was decreed, but without costs.—THE BLOOMER (1864), 11 L. T. 46; 2 Mar. L. C. 147.

789. Cargo owner—Release of cargo—Conditions.]—Cargo arrested for freight will be released upon payment of the freight into ct., with an affidavit of value.—THE VICTOR, Nos. 499, 718, 762, *ante*.

Annotations:—**Reid.** The Volant (1864), Brown. & Lush. 321. The Roecliff (1869), 17 W. R. 745; The Princess Royal (1870), L. R. 3 A. & E. 41; The Mullingar (1872), 26 L. T. 326; The Dictator, [1892] P. 304.

790. —— —— —— **Though owner of ship.**]—A vessel was arrested in a cause of collision. At the time of the collision she had a cargo on board; at the time of arrest a portion only of such cargo remained on board. The vessel & cargo belonged to the same owner. On motion for release of the cargo remaining on board:—*Held:* the freight due

779 i. *Value—Appraisement—How valuation should be estimated.*]—Where, in a case of salvage, there is no market value for the ship in the port where it is brought by the salvors, the *res* should be valued, not on the basis of a forced sale, but as a "going concern" in the hands of a solvent owner, using it for the particular purposes of his trade at the sum for which the owner, as a reasonable man, would be willing to sell it.—VERMONT S.S. CO. *v.* THE ABBY PALMER (1904), 8 Ex. C. R. 446.—**CAN.**

upon the whole cargo must be paid into ct. before the portion on board at the time of arrest could be released.—THE ROECLIFF (1869), L. R. 2 A. & E. 363; 38 L. J. Adm. 56; 20 L. T. 586; 17 W. R. 745; 3 Mar. L. C. 243.

Annotation:—**Refd.** The Kaleton (1914), 30 T. L. R. 572.

791. Salvage action against injured ship—Intervention of owner of ship to blame.]—Where a ship has been found to blame in a cause of collision, & a cause of salvage has been instituted against the other (the injured) ship, the owners of the ship found to blame have a right to intervene in the salvage cause to protect their own interest; if they choose to put in bail to answer the claim of the salvors in lieu of bail given by the owners of the injured vessel, the Admlty. Ct. will give them the conduct of the defence of the salvage suit; in such circumstances the owners of the injured vessel are entitled to have their bail released, & to be paid their costs up to the time when the new bail is put in.—THE DIANA (1874), 31 L. T. 203; 2 Asp. M. L. C. 366.

792. Arrest under Foreign Enlistment Act, 1870 (c. 90)—Conditions of release—Amount of bail.]—Where a vessel is arrested under the above Act, the ct. will admit her to bail with the consent of the Crown. *Semble:* the consent of the Crown is not necessary. The ct. will only require bail to be given to the extent of the value of the ship & her equipment, & not any further sum for costs.—THE GAUNTLET (1871), L. R. 3 A. & E. 319; 24 L. T. 597; 1 Asp. M. L. C. 45.

(*b*) *Appraisement.*

793. Commission of appraisement—Commission of unlivery.]—It is the right of salvors if they cannot obtain a full valuation of ship & cargo to apply for a commission of appraisement, & it may be also for a commission of unlivery; but the former is an extreme measure & not to be resorted to except in cases of extreme necessity. In the case of cargo the commission of unlivery will be granted as the cargo cannot be duly appraised without being unladen. In the particular case the ship & cargo were released upon affidavits of value, the right being reserved to the salvors to have another valuation & the owners undertaking to afford every facility for ascertaining such valuation if the value was impeached.—THE GLASGOW PACKET (1843), 8 Jur. 67.

794. Affidavit of value.]—In a salvage suit the regular course is for the owners to bring in an affidavit, but the first step on the part of the salvors is to demand one before taking out a commission of appraisement.—THE SARAH (1849), 6 Notes of Cases, 677; 13 L. T. O. S. 103; 13 Jur. 263. S. C. No. 1276, *post.*

795. Appraisement—Where value disputed.]—In all cases where the value of property to which salvage service has been rendered is disputed, the proper mode, if practicable, is to resort to a decree of appraisement.—THE LADY EGLINTON *v.* THE BLACK SEA (1856), 3 L. T. 218.

Costs of appraisement.]—*See* p. 206, *post.*

796. Effect of appraisement.]—An appraisement made by the marshal of the ct. will be held conclusive as to the value of the property salved.—THE VENUS, CARGO EX (1866), L. R. 1 A. & E. 50; 12 Jur. N. S. 379; 14 W. R. 466.

Annotations:—**Consd.** The Georg, [1894] P. 330. **Mentd.** The San Onofre, [1917] P. 96.

797. Second appraisement—When made.]—When the valuation of the ship is impeached, a new appraisement, to be made at the expense of the party applying, is permitted.—THE MARGARET, Nos. 211, 226, 231, 236, *ante.*

For full anns., *see* S. C. No. 226, *ante.*

798. Appraisement unnecessary—Where question one of law.]—Where the question is one, not of fact, but of law, a commission of appraisement is unnecessary.—THE CHARLOTTE WYLIE (1846), 2 Wm. Rob. 495; 5 Notes of Cases, 4.

799. Where no appraisement—Value fixed by arbitration.]—In a cause of mixed military & civil salvage (rescue from pirates) against the owners, the ct. is unwilling, though no bail has been given, to disturb a valuation, not clearly excessive, made under a reference on the spot to three arbitrators chosen by the salvors & consignees of the vessel.—THE SIR FRANCIS BURTON (1828), 2 Hag. Adm. 156.

800. —— Question for registrar & merchants.]—In a cause of damage the responsive allegation pleaded the value of the ship:—*Held:* the value of the ship, where not agreed upon or ascertained by appraisement, was a question for the registrar & merchants, & one which the ct. would not decide from evidence given upon the allegation.—THE SPECULATOR (1848), 12 Jur. 546.

(*c*) *Bail.*

i. *In General.*

801. Bail bond—Substitute for res.]—Bail bonds are not mere personal securities to individual captors, but are given to the ct. to abide the adjudication of all events impending before it at the time; they are regarded as pledges or substitutes for the thing itself, in all points fairly in adjudication before the ct.—THE NIED ELWIN (1811), 1 Dods. 50.

802. —— Sureties—Partners disqualified—Sufficiency for registrar.]—By the practice of the Admlty. Ct., sureties to a bail-bond must not be partners. A question of sufficiency of bail is to be referred to the registrar.—THE CORNER, No. 740, *ante.*

Annotation:—**Folld.** The Don Ricardo (1880), 5 P. D. 121. For full anns., *see* S. C. No. 740, *ante.*

803. —— —— Omission of description.]—A bail-bond to lead the *supersedeas* of an arrest, signed before a comr. by the sureties simply, without the addition of their descriptions & addresses, is good.—THE TAMARAC (1860), Lush. 28.

804. Effect of bail—Unloading of cargo stopped.]—The ct. will stop salvors under a decree of appraisement (after bail has been given) from unloading the cargo at an outport.—THE SUSSEX (1836), 3 Hag. Adm. 339.

805. —— Release—Supersedeas.]—When a *supersedeas* is issued instant obedience must be paid to it.—THE TOWAN, No. 1343, *post.*

PART III. SECT. 1, SUB-SECT. 4.—B (b).

795 i. *Appraisement—Excessive value—Order for sale at upset price.*]—After two commissions of appraisement had been issued & the returns in both cases found too high, so that no sale could be effected, the ct. fixed an upset price, ordered a sale at short notice, & made a decree of salvage upon the proceeds thereof.—THE CAMBRIDGE (1870), Y. A. D. 63.—**CAN.**

795 ii. —— *Setting aside—Derelict.*]—An appraisement of a derelict was objected to on the grounds: (1) the appraisers had been chosen by the proctor for the salvors; (2) the writ had not been directed to the marshal or to comrs., but to the appraisers themselves:—*Held:* the appraisement could not be sustained.—THE CAMBRIDGE, No. 795, i, *ante.*—**CAN.**

796 i. *Effect of appraisement.*]—The ct. will not allow an appraisement ordered at the instance of the salvors, which has been duly made by reliable parties, to be questioned.—THE S. B. HUME (1881), Y. A. D. 228.—**CAN.**

796 ii. —— *Appraisement after sale.*]—An appraisement, made by the marshal after sale of the ship:—*Held:* void.—THE QUEEN (No. 1) (1869), 19 L. T. 705.—**IR.**

Sect. 1.—*Actions in rem: Sub-sect.* 4, *B.* (*c*) *ii. & iii.; sub-sect.* 5, *A. & B.*]

ii. *Limits of Liability.*

806. Liability limited to amount of bail.]—Where an action for damages is prosecuted by an arrest of the vessel, & where bail is given & accepted for the value of the vessel, the ct. cannot enforce payment of the damage beyond the amount of that bail, but will condemn the owners in costs.—THE VOLANT, No. 472, *ante;* Nos. 816, 1032, 1503, *post.*

Annotations:—**Consd.** The Mellona (1848), 6 Notes of Cases, 62. **Dbtd.** Harmer *v.* Bell (1851), 7 Moo. P. C. C. 267, P. C. **Consd.** The Temiscouata (1855), 2 Ecc. & Ad. 208; Laws *v.* Smith (1884), 9 App. Cas. 356, P. C.; The Dictator, [1892] P. 304.

For full anns., *see* S. C. No. 1503, *post.*

807. ——.]—A bottomry bondholder entered an action against ship, cargo, & freight. The owners of the cargo appeared, & gave bail in the sum of £350. The proceedings were *in pœnam.* The bond was pronounced for, the ship sold, & proceeds of sale & the freight were brought into the registry. The claims for wages, which proved unexpectedly heavy, having been settled, the deficiency on the ship's account for the bond & proctor's costs amounted to £409 9*s.* 2*d.* which the owners of the cargo were called upon to pay. They tendered £350 the amount of their bail:—*Held:* (1) though the master may become *ex necessitate* agent of the owners of the cargo, he can render them liable only to the value of the cargo; (2) any liability beyond that can arise only from the conduct of such owners in contesting the validity of the bond; (3) they cannot be liable to costs not occasioned by their conduct; (4) the amount of their bail is the limit of their liability, as regards the bond; (5) the bail might have been taken to the full value of the cargo; & its not having been so taken was the act of the bondholder himself, who must abide by the consequence.—THE NOSTRA SENORA DEL CARMINE (1854), 1 Ecc. & Ad. 303; 18 Jur. 730.

Annotation:—**Distd.** The Temiscouata (1855), 2 Ecc. & Ad. 208.

808. —— **No second action if bail insufficient.**]—When bail has once been given in an action for damage, & the ship is released, the party proceeding must be content to abide by the sum which such bail will cover; he cannot enter a fresh action for any further sum. The bail represents the ship, & when a ship is once released upon bail, she is altogether released from that action. When a party has once proceeded before the ct. & recovered judgment, he is barred from proceeding in a second action.—THE KALAMAZOO (1851), 18 L. T. O. S. 66; 15 Jur. 885. S. C. No. 746, *ante.*

Annotations:—**Folld.** The Nostra Senora Del Carmine (1854), 1 Ecc. & Ad. 303. **Distd.** The Temiscouata (1855), 2 Ecc. & Ad. 208. **Expld.** Nelson *v.* Couch (1863), 33 L. J. C. P. 46. **Consd.** The Hero (1865), Brown. & Lush. 447. **Folld.** Home Insce. Co. *v.* Prop Concord (1870), 22 L. T. 490. **Consd.** The Dictator, [1892] P. 304. **Refd.** The Fairport (1882), 8 P. D. 48.

809. Liability limited to value of res—Though bail in greater amount.]—In a cause of damage the bail is only liable to the extent of the value of the ship & freight, & not for the full amount of the damage done, even though bail may have been given for a sum beyond the value of the ship & freight.—THE DUCHESSE DE BRABANT (1857), Sw. 264; 30 L. T. O. S. 282; 6 W. R. 329. S. C. No. 818, *post.*

Annotations:—**Expld.** The Wild Ranger (1862), Lush. 553. **Consd.** Smith *v.* Bank of New South Wales (1872), L. R. 4 P. C. 194, C. A.

810. Bail not conclusive of real value.]—Where in a cause of collision bail is given & accepted between the party charged with damage & the party promoting the suit, the promoter of the suit, if he succeeds in his action, is not precluded from disputing before the registrar & merchants the real value of the ship & freight.—THE MELLONA (1848), 3 Wm. Rob. 16; 6 Notes of Cases, 62; 11 L. T. O. S. 182; 12 Jur. 271.

Annotation:—**Expld. & Distd.** The Temiscouata (1855), 2 Ecc. & Ad. 208.

811. Appropriation of bail—Where part of claim outside jurisdiction.]—In a suit against ship & freight, bail to obtain a release was given generally. The freight was not liable:—*Held:* it was proper to order an inquiry as to the respective values of the ship & freight, & to hold the bail as a security only for that which might be found to be the value of the former.—THE STAFFORDSHIRE (1872), 8 Moo. P. C. C. N. S. 443; L. R. 4 P. C. 194; 41 L. J. Adm. 49; 27 L. T. 46; 20 W. R. 557; 1 Asp. M. L. C. 365; 17 E. R. 378.

Annotations:—**Consd.** The Dictator, [1892] P. 304. **Mentd.** The Onward (1873), L. R. 4 A. & E. 38; Louisiana Citizens' Bank *v.* Wendelin (1886), 2 T. L. R. 240; Barber *v.* Mackrell (1892), 67 L. T. 108.

812. Benefit of bail—Available only for party to action.]—A sum of money having been deposited by the party found in fault, to answer costs, & proceeds of the sale of the ship proving to be more than sufficient to pay the damages to the shipowner with costs:—*Held:* the deposit must be returned to the wrongdoer, & could not be claimed by the proprietor of the cargo, as he did not proceed with an action at the same time as the shipowner.—THE BALDUR (1853), 5 L. T. 525.

813. ——.]—Where actions are brought by different pltfs. in respect of a collision, the bail in the first action is not liable to pltf. in the second action.—THE CLARA, No. 1492, *post.*

Annotations:—**Consd.** The Africano, [1894] P. 141. **Refd.** The Desdemona (1856), 28 L. T. O. S. 192; The Dictator, [1892] P. 304.

814. Release of bail—If action compromised.]—The Admlty. Ct. having decreed for damage in a collision cause & referred the amount to the registrar & merchants, the case was afterwards settled by compromise, without going before the registrar & merchants:—*Held:* the bail was released.—THE HARRIETT (1841), 1 Wm. Rob. 182, 188; 1 Notes of Cases, 325; 6 Jur. 197.

iii. *Amount of Bail.*

815. Value of ship & freight—Limit of liability.]—The responsibility of shipowners in an action for damage by collision is limited by 53 Geo. 3, c. 159, to the value of the wrong-doing vessel, & to the freight due or to grow due for the then voyage; nor is such responsibility extended by having given bail, unconditionally, in a sum plus the real value to answer the action.—THE RICHMOND (1838), 3 Hag. Adm. 431.

Annotations:—**Apld.** The Mellona (1848), 6 Notes of Cases, 62; The Mary Caroline (1848), 3 Wm. Rob. 101.

816. *S. P.* THE VOLANT, Nos. 472, 806, *ante;* Nos. 1032, 1503, *post.*

For full anns., *see* S. C. 1503, *ante.*

817. —— ——.]—*Held:* (1) the value of the ship, to which the liability of a shipowner for damage done by his ship, without his fault or privity, was limited by 53 Geo. 3, c. 159, was to be taken at the moment of the collision; (2) the bail was liable to the extent only of such value; (3) it was immaterial that bail had in fact been given unconditionally for a greater amount.—THE MARY CAROLINE (1848), 3 Wm. Rob. 101; 6 Notes of Cases, 536; 12 L. T. O. S. 247; 12 Jur. 945.

818. —— ——.]—Bail should be given for value of ship & freight, not for the amount of damage, & if given for a larger amount, it will be reduced by the ct., according to practice, to the value of ship & freight. Bail is not liable for the deficiency of

that value to pay the damage, although given for a larger amount.—THE DUCHESSE DE BRABANT, No. 809, *ante*.

Annotations:—**Expld.** The Wild Ranger (1862), Lush. 553. **Consd.** Smith *v.* Bank of New South Wales (1872), L. R. 4 P. C. 194, C. A.

819. —— At time of arrest.]—When the release of a vessel arrested in a suit *in rem* is sought, bail cannot be required to a greater amount than the value of the vessel at the time of arrest, though the statutory limit of the owner's liability may be greater, & though the value of the vessel may have been afterwards increased by repairs.—THE ST. OLAF (1869), L. R. 2 A. & E. 360; 38 L. J. Adm. 41; 20 L. T. 758; 17 W. R. 743.

820. Salvage—Proportionate to services.]—Proctors are not justified in entering actions & requiring bail to an amount quite disproportioned to the service.—THE EARL GREY (1850), 1 Ecc. & Ad. 180.

821. Action of possession—Double value.]—In a possession suit bail was decreed in double the value of the ship. *Semble*: this was the ordinary practice.—ALSTROM *v.* HOULTUYN (1727), Burrell, 310.

822. Reduction of bail—Where part of claim outside jurisdiction.]—An action upon various claims was entered & bail given in the sum of £1,500. The ct. having upon motion decided that it had no jurisdiction over some of the claims, the amount for which bail was necessary was reduced to £460—*i.e.*, £260 to answer the remaining claims, & £200 for costs.—THE CHIEFTAIN, Nos. 378, 382, 387, *ante*.

For full anns., *see* S. C. No. 378, *ante*.

823. —— —— Difference between appraised value & selling value—No ground for reduction.]—An application on the part of a claimant, who had taken goods on bail at an admitted value, to have the bail reduced to the actual value of the goods, on a suggestion that the sale had not produced so much as the sum at which they had been appraised, was refused.—THE BETSEY (1804), 5 Ch. Rob. 295.

Annotations:—**Distd.** The Sir Francis Burton (1828), 2 Hag. Adm. 156. **Reid.** The Meliona (1848), 12 Jur. 172; The Mary Caroline (1848), 3 Wm. Rob. 101.

SUB-SECT. 5.—SALE OF PROPERTY UNDER ARREST BEFORE JUDGMENT.

A. Since the Judicature Acts.

824. Default action—Property deteriorating.]—Where in a salvage action, in which no appearance had been entered, it was alleged upon affidavit that the ship & cargo were daily deteriorating in value, & large expenses were being incurred in respect of the charge of the property & pltfs. had been in communication with the owners as to a sale, the ct., on motion by pltfs. prior to decree, ordered an appraisement & sale of the property.—THE ANNA HELENA (1883), 48 L. T. 681; 5 Asp. M. L. C. 61.

825. —— Foreign ship.]—The ct. will not order the sale of a foreign ship in a default action *in rem* merely on the affidavit to lead the warrant & the report of the marshal alleging that it is desirable the ship should be sold, but it further requires an affidavit verifying the cause of action & stating that no appearance has been entered on behalf of the ship.—THE HERCULES (1885), 11 P. D. 10; 54 L. T. 273; 34 W. R. 400; 5 Asp. M. L. C. 545.

826. Sale by private contract—Consent of mortgagees—Notice to claimants.]—In an action for master's wages & disbursements, where the ship proceeded against was subject to other claims by mtgees. & material men, the ct. upon motion, no opposition being offered, ordered an official appraisement of the ship to be made, & the ship to be sold by the marshal by private contract for a sum of money not less than the appraisement, upon proof that the mtgees. assented to such sale & notice of the motion had been served upon all claimants.—THE PLANET (1883), 49 L. T. 204; 5 Asp. M. L. C. 144.

827. Sale not ordered—Ship not under arrest—Plaintiff's ship.]—An order will not be made for the sale of a vessel, even upon the application of the owner, where such vessel is not proceeded against in the ct.

The owners of a vessel seriously damaged in a collision, who had issued but had not served a writ in an action of damage *in rem* instituted against the vessel with which their vessel came into collision, applied, while their vessel was under their control & without the territorial jurisdiction of the ct., that the ct. should order a sale of their vessel, so as to bind defts. on the question of damages:—*Held*: the application was unprecedented, & must be refused.—THE WEXFORD (1887), 13 P. D. 10; 57 L. J. P. 6; 58 L. T. 28; 36 W. R. 560; 6 Asp. M. L. C. 244.

B. Before the Judicature Acts.

828. Property deteriorating.] — A foreign ship, being at the time on a slip in the building yard of C. at G., was arrested for necessaries supplied by D. On affidavit from D. that the amounts claimed would exceed the present value of the ship, & the vessel was rapidly deteriorating, the judge ordered her removal from the building yard, & appraisement & sale without prejudice to the claim or lien of C. for rent & other charges on the proceeds of sale.—THE NORDSTJERNEN (1857), Sw. 260.

829. ——.]—A barque laden with a cargo shipped at Charleston under bills of lading whereby the cargo was to be delivered on payment of freight at Bremen, whilst prosecuting her voyage to Bremen was run into in the English Channel & damaged by another vessel, which was alone to blame for the collision. The master & crew of the barque abandoned her, & in her abandoned state she was taken possession of by salvors, who brought the barque & her cargo into Dover. The cargo was damaged by sea-water & was alleged to be deteriorating. In a suit instituted by some of the salvors against the barque, her cargo & freight, the ct., on an application made on behalf of pltfs. without notice to the owners of the barque, ordered the cargo to be sold. The owners of the barque afterwards hearing of the order, & wishing to have the cargo transhipped & carried on to its destination, applied to the ct. to rescind the order, & offered to give bail for the cargo. The ct., being of opinion that it was for the benefit of all parties that the cargo should be sold refused to prevent the sale, but reserved all questions of freight. Afterwards the cargo was sold & the proceeds brought into ct., & the owners of the barque then applied to the ct. to order the payment out of the proceeds in ct. of a sum of money in respect of freight:—*Held*: (1) by the abandonment of the barque the contract to pay freight had been dissolved; (2) the owners of the barque were not entitled to any payment in respect of freight.—THE KATHLEEN (1874), L. R.

822 i. *Reduction of bail—Application for.*]—If a vessel is held to bail in too large a sum, her owners should bring forward a substantive motion to reduce it; but if, instead of so doing, they plead extraneous matter, they will not be allowed to prove it; & it will, on motion by notice, be expunged, with moderate costs.—THE MELISSA (1853), 6 Ir. Jur. O. S. 104 (Adm.).—IR.

Sect. 1.—*Actions in rem: Sub-sect* 5, *B. Sect* 2: *Sub-sect.* 1.]

4 A. & E. 269; 43 L. J. Adm. 39; 31 L. T. 204; 23 W. R. 350; 2 Asp. M. L. C. 367.

Annotations:—**Folld.** The Cito (1881), 7 P. D. 5, C. A.; **Refd.** Newsum, Sons & Co., Ltd. *v.* Bradley (1917), 33 T. L. R. 309.

830. Property perishable.]—In a cause of collision the ct. will, preparatory to a decree of sale, sign a *primum decretum* on an affidavit of a perishable condition.—THE SYLVAN (1828), 2 Hag. Adm. 155.

Annotation:—**Refd.** R. *v.* Stone (1853), 6 Cox, C. C. 235, C. C. A.

831. Raised wreck.]—After a collision the owners of the ship doing the damage raised, at their own expense, the vessel sunk, & offered her to her owner, who claimed as for a total loss; he refused to take her:—*Held:* (1) the owner of the sunken vessel was not bound to take her, & might proceed & recover as for a total loss; (2) the proper course would have been to sell the ship so raised, under a decree of the ct., & bring the proceeds into the registry, to abide the event of the suit.—THE COLUMBUS (1848), 3 Wm. Rob. 158; 6 Notes of Cases, 671; 13 Jur. 285.

Annotations:—**Consd.** British Columbia Saw Mill Co. *v.* Nettleship (1868), L. R. 3 C. P. 499; The Argentino (1888), 13 P. D. 191, C. A.; The Kate, [1899] P. 165. **Expld.** The Philadelphia, [1917] P. 101, C. A. **Refd.** Harrison *v.* R. (1852-6), 10 Moo. P. C. C. 202; The Clyde (1856), Sw. 23. **Mentd.** The Linda (1857), 30 L. T. O. S. 234; The Cumberland (1861), 5 L. T. 496; The Racine, [1906] P. 273, C. A.

832. Sale by consent—Insurers.]—The ct. is reluctant to order a sale of ship & cargo immediately after the arrest, especially where there has been no attempt to find the owners, but will do so, in the case of the cargo, if the insurers on cargo consent.—THE BESSY (1855), 4 W. R. 92.

SECT. 2.—ACTIONS IN PERSONAM.

SUB-SECT. 1.—SINCE THE JUDICATURE ACTS.

833. Writ—Misdescription.]—A shipowner, residing & carrying on business in Scotland, described on the face of a writ of summons for service within the jurisdiction sued out against him in an action of damage *in personam* as "of the city of London," applied, before service of the writ & after a cross-action of damage in respect of the same collision had been instituted on his behalf, that the writ should be set aside. The ct. refused the motion.—THE HELENSLEA, THE CATALONIA (1881), 7 P. D. 57; 51 J. P. 416; 47 L. T. 446; 30 W. R. 616; 4 Asp. M. L. C. 594. S. C. No. 846, *post.*

834. —— ——.]—In an action *in personam* for damage by collision, the name of the agent, instead of the owner of the cargo on board pltfs.' vessel, was, by a *bonâ fide* mistake, inserted in the writ as co-pltf. The case was carried up to the House of Lords, with the result that defts.' vessel was found alone to blame, & a decree made in favour of pltfs. The mistake was then discovered, &, to enable the claim of the cargo-owner for damages to be assessed by the registrar & merchants, application was made that the name of the owner of the cargo should be substituted for that of the agent as pltf.:—*Held:* (1) a decree in an Admlty. action, fixing the liability but leaving damages to be assessed, is not final; (2) there was power under R. S. C., O. 16, rr. 2, 11, to make the order, subject to the written consent of the cargo-owner to be added as pltf. being obtained within a limited period.—THE DUKE OF BUCCLEUCH, [1892] P. 201; 61 L. J. P. 57; 67 L. T. 739; 40 W. R. 455; 36 Sol. Jo. 394; 7 Asp. M. L. C. 294, C. A.

Annotation:—**Folld.** Hughes *v.* Pump House Hotel Co. (1902), 71 L. J. K. B. 803, C. A.

835. —— **Foreign corporation—Address within jurisdiction.**]—A writ *in personam* for service within the jurisdiction must contain deft.'s address as well as name, & such writ issued without any address against a foreign corpn. having no place of business in England is irregular & will be set aside. *Semble:* a writ for service in England upon a foreign corpn. having no address there, will not be issued without the leave of the judge, even if it contains the name & foreign address of the corpn.—THE W. A. SHOLTEN (SCHOLTEN) (1887), 13 P. D. 8; 57 L. J. P. 4; 58 L. T. 91; 36 W. R. 559; 6 Asp. M. L. C. 244.

Annotation:—**Expld.** Smith *v.* Hammond, [1896] 1 Q. B. 571.

836. —— **Service—Foreign corporation—Service on agent.**]—Defts., a foreign corpn., had their name on the door of an office of their agents in London, & issued business cards & advertisements directing the public to apply to them there respecting the carriage of goods by their steamers. The rent of the office was paid by agents of defts., & the clerks, including the manager, employed in the office were servants of the agents. Pltfs., owners of cargo in a foreign ship, commenced an action for damages by collision against defts., & served the writ of summons on the managing clerk at the office in London. On motion by defts. to set aside the service:—*Held:* service of the writ was not on "the . . . clerk . . . of such corpn." within R. S. C., O. 9, r. 8, & must be set aside, but without costs, as defts. had held themselves out as having an office in London.—THE PRINCESSE CLEMENTINE, [1897] P. 18; 66 L. J. P. 23; 75 L. T. 695; 8 Asp. M. L. C. 222.

Annotation:—**Consd.** La Bourgogne (1898), 68 L. J. P. 9, C. A.

837. —— —— —— ——.]—Applts. were a foreign corpn. who owned several lines of steamers, including one trading between French & English ports. Their principal place of business was in Paris, but they had an office in England, the lease of which was in their name & the rent paid by them. Their business in England was managed by an agent, paid by commission, a minimum being guaranteed. Besides the rent applts. paid income tax, legal expenses, advertising, printing, & postage. The agent paid the clerks, & the warming, lighting, & furnishing of the office:—*Held:* (1) applts. carried on business in England; (2) service on their agent, at the office in England, of a writ in an Admlty. action *in personam* for damage by collision on the high seas, was a good service on applts. within R. S. C., O. 9, r. 8.—LA BOURGOGNE, [1899] A. C. 431; 68 L. J. P. 104; 80 L. T. 845; 15 T. L. R. 424; 8 Asp. M. L. C. 550, H. L.

Annotations:—**Consd.** Dunlop Pneumatic Tyre Co. *v.* Act. fur Motor & Motorfahrzenghan Norm Cudell, [1902] 1 K. B. 342, C. A.; Okura *v.* Forsbacka Jernverks Aktiebolag (1914), 110 L. T. 464, C. A. **Refd.** Logan *v.* Bank of Scotland, [1904] 2 K. B. 495, C. A.; De Beers Consolidated Mines *v.* Howe, [1905] 2 K. B. 612, C. A.

838. —— — **Leave to serve out of jurisdiction—Proper parties.**]—In a suit of salvage *in personam* brought against the owners of a ship & the owners of her cargo, where it appeared the owners of the cargo were foreign subjects resident without the jurisdiction, the ct., being of opinion that the owners of the cargo were necessary & proper parties to the suit, & that it had been properly brought against the owners of the ship properly served within the jurisdiction, refused to set aside an order allowing service of notice of the writ of summons to be given

to the owners of the cargo out of the jurisdiction under R. S. C., O. 11, r. 1 (*g*), notwithstanding the salved cargo had never been within the territorial jurisdiction of the ct.—THE ELTON, [1891] P. 265; 60 L. J. P. 69; 65 L. T. 232; 39 W. R. 703; 7 T. L. R. 434; 7 Asp. M. L. C. 66. S. C., No. 1330, *post*.

Annotations:—**Apprvd.** Frith *v.* De Las Rivas (1893), 9 R. 51, C. A. **Refd.** The Duc D'Aumale (1902), 72 L. J. P. 11, C. A. **Mentd.** The Port Victor, [1901] P. 243, C. A.

839. ——————.]—A collision occurred in the English Channel, outside British territorial waters, between a British s.s. & a French sailing vessel, which at the time was in tow of a British steam tug. The French vessel was towed into a French port. The owners of the British s.s. commenced proceedings *in personam* in England against the owners of the French vessel & the owners of the tug:—*Held:* after due service of the writ upon the owners of the tug, leave could be given under R. S. C., O. 11, r. 1 (*g*), to issue a concurrent writ & serve notice thereof out of the jurisdiction upon the owners of the French vessel as being, within the rule, proper parties "to an action properly brought against some other person (the owners of the tug) duly served within the jurisdiction."—THE DUC D'AUMALE, [1903] P. 18; 72 L. J. P. 11; 87 L. T. 674; 51 W. R. 332; 19 T. L. R. 87; 9 Asp. M. L. C. 359, C. A.

Annotation:—**Distd.** The Hagen, [1908] P. 189, C. A.

840. —— —— —— **When allowed or refused.**]—A ship sailing under a foreign flag, & belonging to a co. established abroad, came into collision with an English ship on the high seas. The owners of the English ship applied for leave to issue a writ, of which notice should be given out of the jurisdiction, claiming damages against the foreign co.:—*Held:* leave must be refused.

Under the old law the ct. would have possessed no jurisdiction *in personam* over owners of the *res* unless they could have been served with a citation within the territorial jurisdiction. Parliament, in enacting Jud. Act, 1875 (c. 77), Sched. I., O. 11, r. 1, did not contemplate any alteration of the law in cases similar to the present (SIR R. PHILLIMORE).—*Re* SMITH (1876), 1 P. D. 300; 35 L. T. 380; 24 W. R. 903; 3 Asp. M. L. C. 259; 5 Char. Pr. Cas. 22.

Annotations:—**Followed.** The Vivar (1876), 2 P. D. 29, C. A. **Refd.** The Duc D'Aumale (1902), 87 L. T. 674, C. A.

841. —— —— —— ——.]—A collision took place at sea, about 10 miles from the South Stack Lighthouse, between an American & a Spanish vessel. Both vessels sank in consequence, & the owners of the American vessel applied in the registry for leave to issue a writ for service out of the jurisdiction in an action to recover compensation for loss of their vessel against a British subject resident in Spain, alleged to be one of the owners of the Spanish vessel. The registrar having granted the necessary leave, the writ was issued & service effected on deft. in Spain. An appearance under protest was entered on his behalf. On these facts being brought before the judge of the Admlty. Ct., on motion, the ct. ordered the action to be dismissed. On appeal:—*Held:* the order was right.—THE VIVAR (1876), 2 P. D. 29; 35 L. T. 782; 25 W. R. 379, 453; 3 Asp. M. L. C. 308, C. A. S. C. No. 765, *ante;* Nos. 845, 1605, *post*.

842. —— —— —— ——.]—M. S. Act. 1854, (c. 104), s. 527, which gives a remedy in certain cases against the owner of a foreign ship for damage done to a British subject in any part of the world, is confined to damage to property, & does not extend to injury to the person.

The ordinary cts. of England have no jurisdiction over acts done by foreigners on the high seas below low-water mark; & R. S. C., 1875, O. 11, r. 1 (*see now*, R. S. C., 1883, O. 11, r. 1), does not warrant an order for the service of a writ on a foreigner residing abroad, in respect of a cause of action arising at sea below low-water mark, though within 3 miles of the English coast.—HARRIS *v.* THE FRANCONIA (OWNERS) (1877), 2 C. P. D. 173; 46 L. J. Q. B. 363. S. C. No. 126, *ante*.

Annotation:—**Refd.** The Duc D'Aumale (1902), 87 L. T. 674, C. A.

843. —— —— —— ——.]—A German ship belonging to a German co. carrying on business in Germany having stranded on the English coast, her master entered into a written contract with a German & a Swedish salvage co. by which they undertook to get the ship off & to convey her to Southampton against "a salvage reward or compensation" of 50 per cent. of the value of the salved property, the value in case of difference to be settled by arbn., the money to be paid to the German salvage co., which was to have a lien upon the ship & cargo. No place of payment was named in the contract. The ship was got off, & delivered to her owners in Southampton. The value was ascertained by arbn. held in Germany. In these circumstances the Swedish co. commenced an action *in personam* in the Admlty. Div. against the German shipowners to recover its proportion of the salvage money due under the contract, & sought to obtain leave under R. S. C., O. 11, r. 1 (*e*), to serve notice of the writ out of the jurisdiction:—*Held:* (1) there was no breach of contract which ought to be performed within the jurisdiction; (2) pltfs. were not entitled to serve notice of the writ upon defts. out of the jurisdiction.—THE EIDER, [1893] P. 119; 62 L. J. P. 65; 69 L. T. 622; 9 T. L. R. 312; 7 Asp. M. L. C. 354; 1 R. 593, C. A.

Annotations:—**Apprvd.** Comber *v.* Leyland, [1898] A. C. 524. **Consd.** Duval *v.* Gans, [1904] 2 K. B. 685, C. A.

844. —— **Substituted service—Solicitor functus officio.**]—When pltf. in a suit *in rem* has given notice of discontinuance to deft., it is not competent to deft. in that action to obtain substituted service of a writ *in personam* in a cross cause on the solr. of pltf. in the first action *in rem*.—THE POMMERANIA (POMORANIA) (1879), 4 P. D. 195; 48 L. J. P. 55; 39 L. T. 642. S. C. No. 1084, *post*.

Annotation:—**Mentd.** Spencer *v.* Watts (1889), 5 T. L. R. 570.

845. Appearance under protest.]—Deft. in an Admlty. action desiring to object to the jurisdiction of the ct. may enter an appearance under protest in accordance with the practice in the Admlty. Ct. before the coming into operation of Jud. Act, 1873 (c. 66).—THE VIVAR, Nos. 765, 841, *ante;* No. 1608, *post*.

846. Consolidation—Not before writ served in principal action.]—Consolidation of cross causes of damage will not be ordered where service of the writ in the principal action has not been effected.—THE HELENSLEA, THE CATALONIA, No. 833, *ante*.

847. Counterclaim—Security for damages.]—Foreign owners of a tug, sunk in collision in the English Channel with a British vessel, brought an Admlty. action *in personam* against the owners of the British vessel, who appeared, counterclaimed, & applied that all proceedings in the action might be ordered to be stayed until foreign pltfs. gave security for damages under the counterclaim:—*Held:* there was no jurisdiction to make the order, either under the special powers conferred on the Admlty. Ct. by Admlty. Ct. Act, 1861 (c. 10), s. 34, or under the general powers of the cts. of law & equity kept alive & conferred on the High Ct. & the C. A. by Jud. Act, 1873 (c. 66), s. 25 (5), (7).—THE JAMES WESTOLL, No. 1024, *post*.

848. Order for sale.]—Pltfs., owners of forty-eight/sixty-fourth shares in the *E.*, who had

Sect. 2.—*Actions in personam: Sub-sects.* 1 & 2. *Sect.* 3: *Sub-sects.* 1 & 2. *Sect.* 4: *Sub-sect.* 1.]

brought a co-ownership action *in personam* under Admlty. Ct. Act, 1861 (c. 10), s. 8, applied to the ct. for an order for the sale of the *E.* Deft., owner of four shares, consented to the sale. The owner & the mtgee. of the remaining shares were dead, & their representatives were not forthcoming. The sale appeared to be for the benefit of all persons interested:—*Held:* the order should be made, the *E.* to be arrested & appraised, & after sale the proceeds to be brought into ct., & representatives of owners of the remaining shares to be advertised for.—THE ESTRELLA (1895), 39 Sol. Jo. 761.

849. Default action—Specially indorsed writ.]—The practice of the Admlty. Div. as to the procedure in default actions under R. S. C., O. 13, r. 3, is the same as in other divisions.

Where pltfs. issued a specially indorsed writ in an action *in personam* in the Admlty. Div.:—*Held:* they were entitled to enter final judgment on expiration of the time allowed to defts. to appear.—THE MADELEINE & THE ANDRÉ THEODORÉ (1903), 73 L. J. P. 24; 89 L. T. 675; 20 T. L. R. 83; 9 Asp. M. L. C. 508.

850. Short cause.]—An action against a master upon bills of exchange drawn by him upon the owners & given in payment for necessaries, but dishonoured at maturity, is a proper case to be brought under Short Cause Rules, 1908.—THE CAIRO (1908), 99 L. T. 940; 11 Asp. M. L. C. 161.

SUB-SECT 2.—BEFORE THE JUDICATURE ACTS.

851. Action in personam—Available equally with action in rem—Necessity for appearance.]—An exception to the jurisdiction, to the effect that "there has been no proceeding *in rem*," will be overruled, as it is the well-settled practice of the Admlty. Ct. that the first process may be either *in personam* or *in rem.* If a personal action is instituted, no judgment can be awarded until deft. appears, & if he does not appear voluntarily, or enter into a stipulation of bail, the Admlty. Ct. may compel his appearance, by his arrest under a warrant; but if deft. does not appear, & pltf. still goes on with his suit, the ct. will allow an exception to its jurisdiction, taken on that ground.—THE EVANGELINE (1860), 2 L. T. 137. S. C. No. 654, *ante.*

852. Cross-action—Security for costs.]—In an action & cross-action, if the proceedings are *in personam*, & the ship has not been arrested nor bail given in the principal cause, the ct. cannot stay the proceeding in the cross-action until pltf. in the principal cause has given security for costs as deft. in the cross cause.—THE AMAZON, THE OSPREY (1866), 36 L. J. Adm. 4.

853. Separate action—Evidence in action in rem—Available only by consent.]—Where a cause of damage, arising out of a collision between two ships, has been heard & decided, & both ships have been found to blame, & the owners of cargo on board the ship proceeded against in the former cause subsequently institute a cause *in personam* against former pltfs. in respect of same collision, the Admlty. Ct. has no power to make an order allowing pltfs. (the cargo owners) to use the evidence given in the former cause, on the hearing of the latter, if defts. refuse to consent to such order. *Qu.:* whether if defts. refuse their consent they will be entitled to their costs.—THE DEMETRIUS, No. 863, *post.*

For full anns., *see* S. C. No. 863, *post.*

SECT. 3.—**CONSOLIDATION.**

SUB-SECT. 1.—SINCE THE JUDICATURE ACTS.

854. Consent of plaintiffs unnecessary.]—Where more than one salvage action has been brought in respect of services rendered to the same property & in relation to the same peril, the ct., having regard only to questions of convenience & economy, will, where it can so do without injustice to either of the parties, make an order for the consolidation of the actions, notwithstanding the refusal of one or more of the parties to consent to such consolidation.—THE STRATHGARRY, [1895] P. 264; 64 L. J. P. 59; 72 L. T. 202; 7 Asp. M. L. C. 573; 11 R. 732.

For full anns., *see* SHIPPING & NAVIGATION.

855. —— Desirable.]—The ct. has power to order the consolidation of salvage suits in all cases, but it will not usually exercise the power contrary to the wish of the various pltfs.; if pltfs. institute & prosecute several suits without necessity, they will be condemned in costs.—THE JACOB LANDSTROM (1878), 4 P. D. 191; 40 L. T. 38; 4 Asp. M. L. C. 58.

Annotation:—**Dbtd.** The Strathgarry, [1895] P. 264.

856. Separate representation at trial—By leave—Costs.]—Where a party obtains leave to appear separately at the trial of a salvage action, he does so subject to his costs being disallowed.—THE LONGFORD (1881), 6 P. D. 60; 50 L. J. P. 28; 44 L. T. 254; 29 W. R. 491; 4 Asp. M. L. C. 385.

SUB-SECT. 2.—BEFORE THE JUDICATURE ACTS.

857. General principle—Wider principle applied in salvage suits.]—The universal practice of the ct. has been to consolidate actions where the decision of each action depends on precisely the same facts. In salvage suits the ct. has gone further, consolidating actions where there are several sets of salvors not rendering precisely the same services.—THE WILLIAM HUTT (1860), Lush. 25; 1 L. T. 448. S. C. No. 864, *post.*

Annotations:—**Consd.** The Demetrius (1872), L. R. 3 A. & E. 523. **Foll.** The Jacob Landstrom (1878), 4 P. D. 191. **Consd.** The Strathgarry, [1895] P. 264.

PART III. SECT. 3, SUB-SECT. 1.

a. *Separate actions — Collision — Discretion of judge.*]—Separate actions for damage by collision against deft. ship were brought in the Nova Scotia Admlty. District by the owner of the other ship & the owner of her cargo. Deft. applied for consolidation, or for an order for release of the ship upon tendering bail to the amount of her appraised value, & for a commission of appraisement. The local judge made an order for appraisement, & that upon bail being given for the appraised value in each action, the ship be discharged from arrest, & the two actions be tried together. Deft. appealed to the Exch. Ct., & contended that there should have been an order for consolidation & for release of the ship in both actions upon giving bail to the amount of her appraised value:—*Held:* (1) it was within the discretion of the local judge to grant or refuse an order for consolidation, & as such ought not to be interefered with on appeal; (2) the order should be varied to allow in the alternative the ship to be released in respect of both actions, upon payment into ct. of her appraised value & the amount of her freight, if any.—ACT. BORGESTAD *v.* THE THRIFT, DOMINION COAL CO. *v.* THE THRIFT (1905), 26 C. L. T. 459; 10 Ex. C. R. 97.—**CAN.**

PART III. SECT. 3, SUB-SECT. 2.

857 i. *General principle—Discretion of judge.*]—The ct. will, in the exercise of its discretion, make such order for consolidation as it considers will meet the justice of the case & protect the interest of the suitors.—THE VILDOSALA, THE EMERALD, THE SATELLITE, THE TOILER (1880), 42 L. T. 96.—**IR.**

857 ii. —— *Salvage of derelict.*]—THE SARAH, No. 727, i, *ante.*

858. Notwithstanding opposition of defendants.]—The Admlty. Ct. ordered two suits of salvage to be consolidated though the application was made on behalf of pltfs. & opposed by defts.—THE MELPOMENE (1873), L. R. 4 A. & E. 129; 42 L. J. Adm. 45; 28 L. T. 76; 21 W. R. 956; 1 Asp. M. L. C. 515. S. C. No. 867, *post.*

Annotations:—**Expld. & Distd.** The Jacob Landstrom (1879), 4 P. D. 191. **Consd.** The Strathgarry, [1895] P. 264. **Mentd.** The Camellia (1883), 9 P. D. 27; The Kate B. Jones, [1892] P. 366; The Dart (1899), 80 L. T. 23.

859. Wages.]—Actions for wages may be consolidated.—THE ADVENTURE (1834), 3 Hag. Adm. 153.

860. Separate actions—Undesirable.]—The ct. may sometimes see excuse for two sets of salvors bringing separate actions; but it is displeased with such a course when it can be avoided:—THE CHARLES ADOLPHE (1856), Sw. 153.

For full anns., *see* SHIPPING & NAVIGATION.

861. —— Different parties.]—Owners of ship & cargo, being different parties, are not both bound to proceed at one & the same time to recover against the wrongdoer; it may be agreed that the judgment in one case shall govern the other. The ct. inflicts the penalty of costs where vexatious proceedings & double suits unnecessarily take place.—THE LITTLE HAMPTON, No. 482, *ante.*

862. —— Distinct cause of action—Disagreement as to conduct of case.]—A sailor who saves life in addition to the services rendered by him in connection with the other salvors is not bound to consolidate where the other salvors cannot agree as to the conduct of the case.—THE MOROCCO (1871), 24 L. T. 598; 1 Asp. M. L. C. 46. S. C. Nos. 1107, 1109, *post.*

Annotation:—**Distd.** Thomson *v.* S. E. Ry. Co. (1882), 30 W. R. 537, C. A.

863. —— After judgment in one action—Consolidation not ordered.]—When judgment has been given in one of two suits the ct. cannot order the two suits to be consolidated.—THE DEMETRIUS (1872), L. R. 3 A. & E. 523; 41 L. J. Adm. 69; 26 L. T. 324; 20 W. R. 761; 1 Asp. M. L. C. 250. S. C. No. 853, *ante.*

Annotation:—**Mentd.** The Hector (1883), 8 P. D. 218, C. A.

864. Severance of consolidated actions.]—Where several actions are brought against a ship in respect of one collision by different pltfs., & several bail bonds given, & the actions are consolidated by order of the ct., & the damage pronounced for in the usual course, the ct. has power to open the order of consolidation & dissever the actions, but will not do so unless due cause be shown. If the cause is remitted from the Appeal Ct. with injunction "to proceed according to the tenor of former acts had & done," the ct. has no authority to relax an order made previous to the appeal.—THE WILLIAM HUTT, No. 857, *ante.*

Annotations:—**Consd.** The Demetrius (1872), L. R. 3 A. & E. 523. **Folld.** The Jacob Landstrom (1878), 4 P. D. 191. **Consd.** The Strathgarry, [1895] P. 264.

865. Separate representation—Conflicting interests.]—Where salvage suits have been consolidated by order of the ct., but it appears the interests of one of pltfs. conflicts with those of the others, the ct. will give leave for that pltf. to appear separately by counsel at the hearing.—THE SCOUT, No. 1110, *post.*

866. Separate reference—Where convenient.]—The ct. will, where it is convenient so to do, order one of several consolidated causes to be referred to the registrar separately.—THE HELEN R. COOPER (1871), L. R. 3 A. & E. 339; 40 L. J. Adm. 46.

867. Costs.]—*Semble:* though actions of salvage have been consolidated the ct. can deal separately with the costs in each action.—THE MELPOMENE, No. 858, *ante.*

Annotation:—**Consd.** The Jacob Landstrom (1879), 4 P. D. 191.

For full anns., *see* S. C. No. 858, *ante.*

SECT. 4.—TRANSFER OF ACTIONS.

SUB-SECT. 1.—ACTIONS COMMENCED IN THE HIGH COURT.

868. Transfer to Admiralty Division—Transfer allowed—Case involving salvage.]—An action commenced in the Ex. Div., ostensibly in contract but which might possibly turn out to be one of salvage, had been transferred to the Admlty. Div. by a judge at chambers & was in the Queen's Bench Div. refused to be retransferred, cases of salvage properly belonging to the Admlty. Div.—NELSON *v.* SINGAPORE S.S. Co. (1876), 2 Char. Pr. Cas. 88. S. C. No. 875, *post.*

869. —— —— Personal injury resulting from collision.]—A collision having occurred between ships A. & B., by which, besides damage to cargo, personal injuries were occasioned to a fireman on board ship A., an action in the Admlty. Div. by the owners of that ship resulted in ship B. being adjudged solely to blame. The owners of the latter having thereupon instituted a limitation action also in the Admlty. Div., the fireman issued a writ in the Queen's Bench Div. claiming £1,000 damages for personal injuries from the owners of ship B. By the statement of claim in the limitation action it was alleged that the fireman's was the only claim arising out of the collision in respect of personal injuries, & that it was for £500. Defts. in the limitation action, of whom the fireman was one, replied that his claim was for £1,000. Judgment was given in the limitation action on this basis. In these circumstances the fireman's action was transferred from the Queen's Bench Div. to the Admlty. Div. upon application made by defts. under R. S. C. 1875, O. 41, r. 2.—HAWKINS *v.* MORGAN (1880), 49 L. J. Q. B. 618.

Annotation:—**Refd.** Ocean S.S. Co. *v.* Anderson (1885), 33 W. R. 536.

870. —— Transfer refused—No question of seamanship.]—An application was refused which sought transfer to the Admlty. Div. of an action for negligence arising out of a collision in the Thames between two vessels, one at anchor, the other in charge of a pilot, the occurrence not having taken place on the high seas & not involving questions of seamanship, etc. Costs ordered to be pltfs.' in any event.—GENERAL STEAM NAVIGATION Co. *v.* LONDON & EDINBURGH SHIPPING Co. (1876), Bitt. Prac. Cas. 127; Char. Cham. Cas. 67.

871. —— —— Jury case.]—Although an action in which the sole question is a question of salvage may, under R. S. C., O. 49, r. 3, be properly transferred to the Admlty. Div., such transfer should not be ordered where there are other questions in the action capable of being tried by a jury.—OCEAN

PART. III. SECT. 4, SUB-SECT. 1.

868 i. *Transfer to Admiralty side of King's Bench Division—Transfer allowed—Collision.*]—Pltfs. brought an action in the K. B. Div. for damages to their barge, occasioned by a collision in the Foyle. The venue was laid in the county of the city of L., admittedly the most convenient venue, having regard to the residences of the witnesses. The ct. ordered all further proceedings in the action to be carried on as an action in the K. B. Div. (Admlty.), & the action disposed of by the judge assigned for the hearing of Admlty. actions, assisted by nautical assessors.—STRABANE CANAL Co. *v.* LONDON & NORTH-WESTERN, & LANCASHIRE & YORKSHIRE RY. Cos., [1912] 2 I. R. 147.—IR.

Sect. 4.—*Transfer of actions: Sub-sects.* 1 & 2, *A. & B. Sect.* 5: *Sub-sect.* 1.]

S.S. Co. *v.* ANDERSON, TRITTON & CO. (1885), 33 W. R. 536: 1 T. L. R. 413, C. A.

872. —— —— Action under Fatal Accidents Act, 1846 (c. 93).]—The owners of a ship which had been lost at sea obtained a decree in the Admlty. Div. limiting their liability to a certain sum. The personal representative of a deceased person who was lost with the vessel brought an action against the shipowners in the Queen's Bench Div. for damages under the above Act. The shipowners admitted that the limited amount of their liability would not exceed the amount of the numerous claims made against them. Upon an application by the shipowners for the transfer of the Queen's Bench action to the Admlty. Div.:—*Held:* the judge at chambers rightly refused the application.—ROCHE *v.* LONDON & SOUTH WESTERN RY. CO., [1899] 2 Q. B. 502; 68 L. J. Q. B. 1041; 81 L. T. 315; 48 W. R. 1; 15 T. L. R. 514; 8 Asp. M. L. C. 588, C. A.

873. Transfer from Admiralty Division—Transfer ordered—Right to jury.]—Pltfs., as owners of a causeway abutting on the Thames, claimed to recover the amount of damage done to the causeway through, as they alleged, negligent navigation of a steamship which at the time was compulsorily in charge of deft. as a Trinity House pilot. Pltfs. brought an action *in personam* in the Admlty. Div. against deft., & they also brought an action *in rem* against the owners of the steamship. Deft. took out two summonses asking respectively that the action against him might be tried with a jury & transferred to the King's Bench Div. The judge dismissed both summonses on the ground that there being an action *in rem* against the ship which would, according to the usual practice, be tried by a judge with assessors, it would not be convenient that the personal action should be tried before another tribunal. On appeal:—*Held:* the action should be tried in the King's Bench Div. by a judge with a jury.—METROPOLITAN ASYLUMS BOARD *v.* SPARROW (1913), 29 T. L. R. 450, C. A.

874. —— —— No jurisdiction.]—When an action is commenced in the Admlty. Div. in a matter over which that div. has not jurisdiction, deft. can insist as of right on its transfer to another div.—THE SEAHAM (1879), 48 L. J. P. 29; 40 L. T. 38; 4 Asp. M. L. C. 58. S. C. No. 1101, *post.*

875. —— Transfer refused—Case involving salvage.]—NELSON *v.* SINGAPORE S.S. Co., No. 868, *ante.*

876. Effect of transfer—Measure of damages.]—Where an action is transferred to the Admlty. Div. by consent of the parties to assess the amount of damages, the registrar & merchants are entitled, in accordance with the practice of the Admlty. Div., to give interest in addition to actual damages, even where such interest would not be recoverable in the div. whence the action is transferred.—THE BARON ABERDARE (1888), 36 W. R. 616; 4 T. L. R. 431, C. A.

Annotation:—**Refd.** The Orwell (1888), 13 P. D. 80.

SUB-SECT. 2.—TRANSFER FROM COUNTY COURTS.

A. Since the Judicature Acts.

877. Transfer discretionary.]—An application to transfer an action for demurrage brought in the City of London Ct. to the High Ct. on the ground that a commission might be issued to examine witnesses abroad, having been refused, on appeal:—*Held:* (1) the matter was entirely one of discretion; (2) defts. could not succeed unless they could show that the discretion had been wrongly exercised; (3) there were no circumstances in the case to show that the judge was so wrong that his decision ought to be reversed.—THE NELLY WISE (1887), 4 T. L. R. 33, C. A.

878. Mode of transfer—Summons.]—A wages suit having been instituted in a cty. ct. sitting in Admlty., defts., in accordance with Cty. Ct. Admlty. Jurisdiction Act, 1868 (c. 71), s. 6, moved in the Admlty. Div. that the action should be transferred to the High Ct. The application to the High Ct. was made by motion in ct.:—*Held:* (1) the transfer should be made; (2) the proper method of asking for a transfer from the cty. ct. to the High Ct. under s. 6 of the above Act was by way of summons in chambers.—THE INDRA, [1905] W. N. 150; 94 L. T. 110; 22 T. L. R. 12; 10 Asp. M. L. C. 196.

879. Proceedings after transfer—Pleadings.]—Where a case is transferred to the Admlty. Ct. under Cty. Cts. Admlty. Jurisdiction Act, 1868, s. 8, pleadings must be delivered as in actions originally commenced in the Admlty. Div.—THE CARISBROOK (1890), 38 W. R. 543.

880. Concurrent action in High Court—Consolidation after transfer—Conduct of consolidated action.]—Where an action was brought in a cty. ct. by the owners of the *C.* against the *V.*, & a second action begun in the Admlty. Ct. by the owners of the *V.* against the *C.*, the first action was transferred to the Admlty. Ct. & made the principal cause.—THE COSMOPOLITAN (1874), 9 P. D. 35 n.

881. —— —— ——.]—Where a cty. ct. action, instituted to recover damages arising out of a collision with defts.' vessel, is, at the instance of pltfs., transferred to the High Ct., & there consolidated with an action instituted in the Admlty. Div. by defts. in the cty. ct. action against pltfs. in that action subsequent to the institution of the cty. ct. action, pltfs. in the cty. ct. action, being the first to institute proceedings, will have the conduct of the consolidated actions.—THE NEVER DESPAIR (THE STORK, THE NEVER DESPAIR) (1884), 9 P. D. 34; 53 L. J. P. 30; 50 L. T. 369; 32 W. R. 599; 5 Asp. M. L. C. 211.

Annotation:—**Consd.** The Mersey, [1901] P. 369.

882. —— —— ——.]—The rule laid down in *The Never Despair*, No. 881, *ante*—namely, that when an action is transferred from an inferior ct. & consolidated with a cross-action begun in the High Ct., pltfs. in the action in the inferior ct. will be placed in the position of pltfs. in the consolidated actions, if they began the action in the inferior ct. before the cross-action in the High Ct.—will not be followed unless there is clear priority in time, so that where commencement of the two actions is practically simultaneous the action in the High Ct. will be treated as the principal cause.—THE MERSEY, [1901] P. 369; 70 L. J. P. 100; 85 L. T. 584; 18 T. L. R. 14; 9 Asp. M. L. C. 273.

883. —— Transfer after judgment in county court.]—Where causes of necessaries & wages had been instituted against a ship in the High Ct., & other causes of necessaries in a cty. ct. against the same ship, & the latter causes had been transferred after decree made to the High Ct. for the purpose of enforcing the decrees, the ship being under arrest of the High Ct., the High Ct. ordered all the causes to be referred to the registrar & merchants to report the amount due therein.—THE TURLIANI

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873 i. *Transfer from Admiralty Division—Transfer ordered.*]—The judge in Admlty. has jurisdiction to remit an action for demurrage for trial in the Dublin Recorder's Ct. where the amount claimed in the writ is under £50.—BULL *v.* PILE, THE ERMINIA (1893), 27 I. L. T. 136.—IR.

(1875), 32 L. T. 841; 2 Asp. M. L. C. 603. S. C. No. 1762, *post*.

884. —— ——.]—A foreign vessel was under arrest in three actions of necessaries, one in the City of London Ct. & the other two in the Admlty Ct., & after judgment pronounced in the City of London Ct. was about to be sold by the bailiff of that ct. In these circumstances pltf. in one of the actions in the Admlty. Ct. applied for an order to transfer the action in the City of London Ct. to the former ct., alleging that a sale by the marshal would be to the benefit of all parties. The ct. made the order, but directed that it should be without prejudice to any priorities claimed by pltf. in the action ordered to be transferred.—THE IMMACOLATA CONCEZIONE (CONCEZZIONE) (1882), 8 P. D. 34; 47 L. T. 388; 31 W. R. 644; 4 Asp. M. L. C. 593.

885. —— ——.]—*Qu.:* whether if a judgment has been obtained in the cty. ct., & the action is afterwards transferred to the High Ct., such judgment would give priority, or whether pltf. in the cty. ct. action should only be admitted to share in the proceeds in the High Ct. on terms of equality with suitors in that ct.—THE AFRICANO, [1894] P. 141; 63 L. J. Adm. 125; 70 L. T. 250; 42 W. R. 413; 7 Asp. M. L. C. 427; 6 R. 767.

Annotation:—**Refd.** The Veritas, [1901] P. 304.

886. Effect on transfer—Extension of jurisdiction—Where no original jurisdiction].—THE MONTROSA, No. 662, *ante;* No. 1710, *post*.

B. Before the Judicature Acts.

887. Effect of transfer—Extension of jurisdiction—Where no original jurisdiction.]—The Admlty. Ct. may, by virtue of Cty. Cts. Admlty. Jurisdiction Acts, 1868 (c. 71) & 1869 (c. 51), transfer to the Admlty. Ct. an Admlty. or maritime cause pending in a cty. ct. & instituted there by virtue of the latter Act, notwithstanding that the suit may relate to matters over which the Admlty. Ct. has not original jurisdiction.—THE SWAN (1870), L. R. 3 A. & E. 314; 40 L. J. Adm. 8; 23 L. T. 633; 19 W. R. 424. S. C. No. 661, *ante*.

Annotations:—**Consd.** Simpson *v.* Blues (1872), L. R. 7 C. P. 290. **Distd.** R. *v.* Southend County Court Judge (1884), 13 Q. B. D. 142. **Refd.** Gunnestad *v.* Price, Fullmore *v.* Wait (1875), L. R. 10 Exch. 65; The Montrosa, [1917] P. 1.

888. —— **Jurisdiction over case as transferred—No general jurisdiction.]**—A suit of necessaries was instituted against the owners of a foreign ship in a cty. ct. having Admlty. jurisdiction, & was afterwards transferred to the Admlty. Ct. under Cty. Cts. Admlty. Jurisdiction Act, 1868, s. 8. The claim disclosed by pltfs. was a claim founded on bottomry, over which the cty. ct. could exercise no jurisdiction:—*Held:* (1) the Admlty. Ct., to which the suit had been transferred as a suit of necessaries, could not admit the petition; (2) notwithstanding that a simple contract debt for necessaries once existed in favour of pltfs., it must be considered on the facts pleaded to have become merged in the bottomry security, so that the only contract which pltfs. could enforce would be a contract arising out of bottomry.—THE ELPIS (1872), L. R. 4 A. & E. 1; 42 L. J. Adm. 43; 27 L. T. 664; 21 W. R. 576; 1 Asp. M. L. C. 472. S. C. No. 663, *ante;* No. 1721, *post*.

Annotation:—**Consd.** The Haabet, [1899] P. 295.

889. Concurrent proceedings.]—Of two sets of salvors, the first in possession claimed salvage, summarily, before magistrates; the second, cognizant of such claim, sued in the Admlty. Ct. by action. The owners appealed from the magistrate's award; & the ct., rejecting an application on the part of the owners not to hear, on appeal, until the case of the second salvors was ready for adjudication, affirmed the award; &, subsequently, on dismissing the action:—*Held:* (1) the second salvors ought to have intervened before the magistrates; (2) the first salvors had a primary interest, & had a right to choose their own jurisdiction, to proceed before the magistrates. *Semble:* if parties have equal rights, a resort to the subordinate jurisdiction, when objected to, would be improper.—THE EUGENE (1834), 3 Hag. Adm. 156.

SECT. 5.—**PRELIMINARY ACTS IN DAMAGE ACTIONS.**

SUB-SECT. 1.—SINCE THE JUDICATURE ACTS.

890. Where necessary—Action not in Admiralty Division.]—The principle of filing a preliminary act, under R. S. C., O. 19, r. 28, applies to every division of the High Ct., & is not confined exclusively to actions in the Admlty. Div.

Pltf. had a quantity of goods on board a barge. This barge was sunk by a vessel belonging to defts., & pltf.'s goods were damaged. Cross actions were brought by the owners of the barge & vessel respectively, but these actions were dismissed, as both parties were to blame. Afterwards an action was brought in the Queen's Bench Div. by pltf., the owner of the goods, against the owners of the vessel, for the damage to his goods. Defts. required pltf. to file a preliminary act under the above rule:—*Held:* (1) the damage sued for was "damage by collision" within the rule; (2) pltf. must file a preliminary act.—SECRETARY OF STATE FOR INDIA *v.* HEWITT & CO., LTD. (1888), 60 L. T. 334; 5 T. L. R. 152; 6 Asp. M. L. C. 384.

Annotation:—**Distd.** Armstrong *v.* Gaselee (1889), 5 T. L. R. 182.

891. —— **Loss of life.]**—In an action for loss of life by collision between vessels, preliminary acts must be filed.—WEBSTER *v.* MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. CO. (1884), Bitt. Rep. in Ch. 172.

892. Where not necessary—Damage to barge.]—An action was brought in the Queen's Bench Div. by the owner of a barge & her cargo against the owners of a tug for negligence in towing, in consequence of which, as pltf. alleged, the barge came into collision with another vessel, & was lost with her cargo:—*Held:* (1) the action was not one "for damage by collision between vessels" within R. S. C., O. 19, r. 28; (2) the parties were not required to file preliminary acts as prescribed by the rule.—ARMSTRONG *v.* GASELEE (1889), 22 Q. B. D. 250; 58 L. J. Q. B. 149; 59 L. T. 891; 37 W. R. 462; 5 T. L. R. 182; 6 Asp. M. L. C. 353.

893. —— **Damage to cargo.]**—Pltfs. in an action instituted by the owners of cargo laden on board the *A.* against the owners of the *A.* to recover for damage sustained by such cargo in consequence of a collision between the *A.* & the *B.* took out a summons calling upon defts. to show cause why an order should not be made that preliminary acts should be filed in such action:—*Held:* preliminary acts need not be filed.—THE JOHN BOYNE (1877), 36 L. T. 29; 25 W. R. 756; 3 Asp. M. L. C. 341.

Annotation:—**Folld.** Armstrong *v.* Gaselee (1889), 22 Q. B. D. 250.

894. —— **Damage to pier.]**—A floating landing stage permanently fixed to a river side except in so

Sect. 5.—Preliminary acts in damage actions: Sub-sects. 1 & 2. Sect. 6: Sub-sects. 1 & 2, A.]

far as it is capable of rising & falling with the tide is not a " vessel " within R. S. C., O. 19, r. 28 ; & in an action for damage by collision between a s.s. & such landing stage, the parties cannot, under that rule, be ordered to file preliminary acts. Even assuming that under Admlty. Ct. Rules, 1859, a practice existed according to which preliminary acts might be ordered in cases of collision other than collision between vessels, inasmuch as these Rules have been repealed by R. S. C., Introduction & Appendix O. (22), that practice has also been repealed & has not been continued in force by R. S. C., O. 72, r. 2.—THE CRAIGHALL,[1910] P. 207; 79 L. J. P. 73 ; 103 L. T. 236 ; 11 Asp. M. L. C. 419, C. A.

895. Contents—Magnetic or true course—Collision in river.]—In damage actions resulting from collisions in rivers in which the colliding vessels are on a fixed course as opposed to a course which has to be constantly changed, either the magnetic or the true course, & not the compass course, should be pleaded in the preliminary act.—THE RIEVAULX ABBEY (1910), 102 L. T. 864 ; 11 Asp. M. L. C. 427.

896. —— Distance & bearing of other vessel.] —THE GODIVA, No. 900, *post.*

897. —— Lights of other vessel.]—Defts.' preliminary act contained the following statements in answer to R. S. C., O. 19, r. 28, par. (k): " The masthead, towing, & both side lights of the *T.* " ; & in answer to *ibid.*, par. (l). " None." In fact the master of defts.' vessel, after seeing all lights on pltfs.' vessel, saw the green light shut in, leaving the red open alone, & then the red light was shut in & the green alone left open :—*Held :* the answer to the question contained in par. (l) ought to show not merely the fact that further or other lights were seen, but what the exact alterations in the lights were.—THE MONICA, [1912] P. 147 ; 81 L. J P. 92 ; 106 L. T. 349 ; 28 T. L. R. 154 ; 12 Asp. M. L. C. 164.

898. Binding effect — Departure — Not without special leave.]—A statement of fact in a preliminary act is a formal admission binding the party making it, & can only be departed from by special leave (FLETCHER MOULTON, L.J.).—THE SEACOMBE, THE DEVONSHIRE, [1912] P. 21 ; 81 L. J. P. 36 ; 106 L. T. 241, 246 ; 28 T. L. R. 107 ; 56 Sol. Jo. 140 ; 12 Asp. M. L. C. 137, 142, C. A. ; *affd.* on another point, [1912] A. C. 634.

For full anns., *see* SHIPPING & NAVIGATION.

899. —— Amendment not allowed—Though of clerical error.]—The ct. will refuse to allow a mistake in a preliminary act to be amended, even though the application for an amendment be made before the hearing of the suit, & be supported by affidavit alleging that the mistake was the result of a clerical error.—THE MIRANDA (1882), 7 P. D. 185 ; 51 L. J. P. 56 ; 47 L. T. 447 ; 30 W. R. 615 ; 4 Asp. M. L. C. 595.

900. Amendment ordered—Answer not sufficient.] —In an action for damage by collision defts. in their preliminary act instead of stating, as required by R. S. C., O. 19, r. 28, " the distance & bearing of the other vessel when first seen " stated only that " the *L.* when first seen was at anchor " :—*Held :* (1) the question in the preliminary act must be answered fully ; (2) an amendment must be made. —THE GODIVA (1886), 11 P. D. 20 ; 55 L. J. P. 13 ; 54 L. T. 55 ; 34 W. R. 551 ; 5 Asp. M. L. C. 524. S. C. No. 896, *ante.*

SUB-SECT. 2.—BEFORE THE JUDICATURE ACTS.

901. Time for preliminary act.]—In a cause of collision, where the case is to be heard on *viva voce* evidence only, the preliminary acts are to be exchanged before the evidence is taken.—THE RUBY QUEEN, No. 496, *ante.*

For full anns., *see* S. C. No. 496, *ante.*

902. ——.]—Where, in a cause of collision, after petition & answer filed, the crew of pltf.'s ship are upon application examined immediately in open ct., the ct. will order the preliminary acts to be exchanged.—THE TWO FRIENDS (1862), Lush. 552.

903. Effect—Deviation not allowed.]—Deviation from the particulars contained in preliminary acts given in under an order of the Admlty. Ct., & sanctioned by the Privy Council, is not permitted. —THE SQUIRREL *v.* THE WYKE REGIS (1856), 5 L. T. 557 ; *Shipping Gazette*, May 8.

904. —— Amendment not allowed.]—The object of the preliminary act is to commit the parties to statements of the facts when they are fresh in their recollection. At the hearing of a cause of damage the ct. refused to allow a material averment in the preliminary act to be amended, but admitted before the evidence was given a corresponding alteration in the answer.—THE FRANKLAND (1872), L. R. 3 A. & E. 511 ; 41 L. J. Adm. 3 ; 25 L. T. 889 ; 20 W. R. 592 ; 1 Asp. M. L. C. 207.

905. —— —— Except where mistake.]—An application to amend a mistake in a preliminary act must be made immediately upon discovery, & must be supported by affidavit.—THE VORTIGERN (1859), Sw. 518 ; 1 L. T. 307. S. C. No. 974, *post.*

Annotations :—**Refd.** Secretary of State for India *v.* Hewitt (1888), 60 L. T. 334 ; Armstrong *v.* Gasclee (1889), 22 Q. B. D. 250, D. C. **Mentd.** The Great Eastern (1864), Brown. & Lush. 287, P. C.

SECT. 6.—**PLEADINGS.**

SUB-SECT. 1.—SINCE THE JUDICATURE ACTS.

906. Forms of pleading—Forms in R. S. C. Appendix—Fuller statement of claim—Salvage action.]—The forms of pleading under R. S. C., O. 19, r. 5,

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PART III. SECT. 5, SUB-SECT. 1.

898 i. *Binding effect—Admissibility of evidence.*]—Defts.'s preliminary act alleged that at a certain point the bearing of the ship at fault was " a little abaft the starboard beam " of the injured ship ; evidence was admitted to show that the line of approach was not more than two points abaft, or was forward of the beam of the injured vessel.—MAGDALEN ISLANDS S.S. Co. *v.* THE DIANA (1907), 11 Ex. C. R. 40 ; 3 E. L. R. 158.—**CAN.**

898 ii. —— *Correction of errors.*]—An error or a misstatement of a material fact in the preliminary act is not absolutely fatal or binding on the party making it. Such amendment may be rectified in the pleadings &, if so rectified, will be a subject for comment at the hearing, but, if the parties go to trial without pleadings or with pleadings which do not correct errors, they will be held most strongly to their preliminary acts.—MONTREAL TRANSPORTATION Co. *v.* NEW ONTARIO S.S. Co. (1908), 40 S. C. R. 160.—**CAN.**

899 i. — *Amendment not allowed.*]—Pltfs. objected to a motion by defts. to amend a preliminary act by including points on which information for the first time came to their knowledge on an inquiry under Canada Shipping Act :—*Held :* there was no reason for departing from the practice laid down in *The Miranda* (1882), 7 P. D. 185.—PALLEN *v.* THE IROQUOIS (1912), 17 B. C. R. 156 ; 21 W. L. R. 565 ; 6 D. L. R. 527. —**CAN.**

899 ii. —— ——.]—The ct. will not allow the preliminary acts to be amended after trial.—NORTHERN ELEVATOR Co. *v.* RICHELIEU & ONTARIO NAVIGATION Co. (1907), 32 Que. S. C. 52.—**CAN.**

PART III. SECT. 5, SUB-SECT. 2.

a. *Form in Vice-Admiralty Courts.*]—The form of preliminary acts now in use in the High Ct. of Justice in collision cases should be used in similar cases in the Vice-Admlty. Cts.—THE NORMA (1876), 35 L. T. 418, P. C.—**CAN.**

are not in all circumstances to be rigidly complied with, but rather to be taken as the class of pleading it is desired to introduce. In salvage actions it may be proper in some cases, owing to the practice of the ct. that where defts. admit facts alleged in the statement of claim pltfs. are not allowed to give any evidence at the hearing, to use a fuller form of statement of claim than that given in the example in R. S. C. Appendix C., s. 3, form No. 6, & approaching more nearly to the old form.

In a salvage action where pltfs. had delivered a statement of claim in accordance with the above form the ct., on motion by defts., ordered pltfs., under R. S. C., O. 19, r. 7, to deliver a further & better statement of the nature of their claim, & ordered costs of the motion to be costs in the cause. —THE ISIS (1883), 8 P. D. 227; 53 L. J. P. 14; 49 L. T. 444; 32 W. R. 171; 5 Asp. M. L. C. 155.

907. Statement of claim—Inability to give particulars—Allegation struck out.]—THE KANAWHA, No. 1072, *post*.

908. —— Amendment of—Time for.]—In a salvage action defts. having by their defence admitted the facts alleged in the statement of claim, but not the inferences drawn therefrom, pltfs. at the trial asked for leave to amend the statement of claim on the ground that discovery of defts.' documents, obtained after the defence had been delivered, particularly letters & telegrams of defts.' master, disclosed material facts tending to lead to inferences increasing the value of services rendered by pltfs.: —*Held:* (1) further evidence at the trial as to the salvage services was inadmissible, the ct. being only concerned with the inferences to be drawn from the admitted facts; (2) the application was too late, & should have been made before the trial, after discovery had been obtained; (3) it must be refused.—THE BUTESHIRE, [1909] P. 170; 78 L. J. P. 108; 100 L. T. 1005; 11 Asp. M. L. C. 278. S. C. No. 916, *post*

909. —— ——.]—THE ANNE, No. 1760, *post*.

910. Defence — Admission of Facts — Salvage action.]—THE ROTHBURY, No. 915, *post*.

911. —— Limitation action.] — THE KARO, Nos. 1223, 1494, *post*.

912. —— Pleading unnecessary facts—Salvage.] —An allegation by defts. in a salvage suit, pleading that a specified amount had been accepted by persons not parties to the suit in satisfaction of whatever salvage assistance had been rendered to defts. on the occasion on which the services proceeded on were rendered, will be disregarded by the ct. as surplusage.—THE GEORGE GORDON, No. 713, *ante*.

913. Reply—How far necessary—Salvage action.] —*Qu.:* whether a reply is necessary in a salvage action where the only defence is admission of pltf.'s facts & tender of a sum in satisfaction which is rejected by pltf. Leave was given to reply & the claim was amended before reply.—THE MARIA, No. 1058, *post*.

914. —— Where counterclaim—Payment by insurers.]—In an action of wages by a master against the shipowner, deft., by way of set-off & counterclaim, claimed damages for loss of the ship by pltf.'s negligence. Reply, the ship was insured against a total loss, & the underwriter had paid or agreed to pay to the owner the whole amount payable by him on a total loss. On demurrer:—*Held:* the reply was bad, because pltf. had not pleaded that the money had been actually paid to deft., or that the counterclaim had been brought without the underwriter's authority.—THE SIR CHARLES NAPIER (1880), 5 P. D. 73; 49 L. J. P. 23; 42 L. T. 167; 28 W. R. 718; 4 Asp. M. L. C. 231, C. A.

915. Admissions in pleadings—Effect of.]—The defence in a salvage action admitted the facts, & denied only the inferences drawn from those facts by pltfs. in their statement of claim. At the trial of the action the ct. refused to allow pltfs. to give evidence as to the facts of the salvage services.—THE ROTHBURY (1893), 10 T. L. R. 60. S. C. No. 910, *ante*.

916. —— ——.]—To recover remuneration for services rendered to a stranded s.s., seven actions of salvage were commenced on behalf of eight tugs & the crews of two lifeboats. These actions were consolidated & one defence put in, the material paragraph of which stated that "defts. admit the facts alleged in the various statements of claim . . . but not the inferences sought to be drawn from the facts, & they submit themselves to the judgment of the ct. thereon." At the trial leave was asked on behalf of some of the salvors to put in the log of defts.' vessel, on the ground that discovery of defts.' documents, obtained after the defence had been delivered, particularly the letters & telegrams of defts.' master, had disclosed material facts tending to lead to inferences increasing the value of the services rendered by these pltfs.:—*Held:* the application must be refused, on the ground that further evidence at the trial as to the salvage services was inadmissible, the ct. being only concerned with inferences to be drawn from admitted facts.—THE BUTESHIRE, No. 908, *ante*.

SUB-SECT. 2.—BEFORE THE JUDICATURE ACTS.

(NOTE.—*Cases which are clearly obsolete are omitted.*)

A. Contents of Pleadings.

917. Material facts.]—It is important that no unnecessary matter should be introduced into Admlty pleadings.—THE CLARENCE (1854), 1 Ecc. & Ad. 206. S. C. No. 45, *ante*.

918. ——.]—Both in proceedings upon plea & proof & proceedings in an act on petition, parties should state at the earliest opportunity everything within their knowledge pertinent to the ultimate decision.—THE PILOT (1842), 3 L. T. 90; *Shipping Gazette*, March 2.

919. Sufficient to show facts of case—To examiner.]—The principle which governs the Admlty. Ct. as to pleadings is that they should be such as to indicate, if laid before an examiner, every fact of the case which he ought to elicit.—THE CLAUS THOMESEN (1863), 32 L. J. P. M. & A. 106; 8 L. T. 121; 9 Jur. N. S. 388; 11 W. R. 538; 1 Mar. L. C. 327.

Annotation:—**Folld.** The Why Not (1868), 38 L. J. Adm. 26.

920. Pleading contents of written instruments.]—The contents of a written instrument cannot be pleaded without exhibiting the document or show-

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PART III. SECT. 6, SUB-SECT. 1.

908 i. *Statement of claim—Amendment of—Time for.*]—The local judge in Admlty. found that a collision occurred between pltf.'s ship *N.* & defts.' ship *W.*, and held defts. liable for the resulting damage. In the preliminary act pltfs. stated that the parts of each ship which first came into contact were "the port bow of the *W.*" & the "port quarter of the *N.* abreast of the kitchen." The parties went to trial practically on the statement of facts contained in the preliminary act. The captain of the *N.* stated that the "bluff of the *W.*'s bow struck the *N.*'s stern," & the judge found that the impact was "not near the bows, . . . but somewhere near the sterns," & admitted evidence to support this finding, although a protest was made. The statement of claim was not amended until after the judgment, & then on the invitation of the judge. In the case no application was made to amend the pleadings before the trial, & it was not proper to have made the amendments allowed after the trial & so set up an entirely new & different case from that stated in the preliminary act & pleadings. *The Frankland* (1872), L. R. 3 A. & E. 511; *The Miranda* (1881), 7 P. D. 135, refd.—MONTREAL TRANSPORTATION CO. *v.* NEW ONTARIO S.S. Co., No. 898, ii., *ante*.—**CAN.**

Sect. 6.—Pleadings: Sub-sect. 2, A.]

ing why it was not exhibited.—THE ROB ROY (1849), 13 Jur. 756.

921. Facts sufficient to establish case.]—Pleadings should state the cause of collision accurately & distinctly, leaving nothing to inference.—THE LADY ANNE (1850), 7 Notes of Cases, 364; 15 Jur. 18.

922. —— Failure of defence set up.]—Pltf. in a collision case is only bound to plead such facts from which the ct. may infer that the collision was occasioned by default of the party proceeded against. A counter allegation by deft., pleading a certain fact as cause of collision, may as an answer to the action fail to be proved; nevertheless, pltf. must establish his case according to his own pleadings & evidence, not upon failure of the defence set up by deft.—THE EAST LOTHIAN (1860), 14 Moo. P. C. C. 177; Lush. 241; 4 L. T. 487; 1 Mar. L. C. 76; 15 E. R. 271, P. C. S. C. Nos. 937, 960, *post*.

Annotations:—**Expld. & Distd.** The Why Not (1868), L. R. 2 A. & E. 265. **Consd. & Apld.** Yeo *v.* Tatem (1871), 8 Moo. P. C. C. N. S. 66, P. C. **Refd.** The Secret (1872), 26 L. T. 670.

923. Presumptions not to be pleaded.]—It is not necessary for pltfs. in a collision case in their petition to state every fact material to their case—as that they complied with certain sailing rules—but it lies upon defts. to allege violation of such rules.—THE WEST OF ENGLAND (1866), L. R. 1 A. & E. 308; 36 L. J. Adm. 4.

924. When particular allegation necessary.]—A party cannot, at the hearing, avail himself of a rule of seamanship, in order to show misconduct in the other party, no charge of misconduct being made in the pleadings.—THE EBENEZER (1843), 2 Wm. Rob. 206; 7 Jur. 1117. S. C. No. 1303, *post*.

Annotation:—**Mentd.** The London (1863), 9 L. T. 348.

925. Defendant's default to be shown.]—The party against whom a judgment is given in the Admlty. Ct. is entitled to know from his adversary's complaint what is the default imputed to him, that he may have an opportunity of meeting the case by his defence.—THE CITY OF ANTWERP & THE FRIEDRICH, No. 1645, *post*.

For full anns., *see* S. C. No. 1645, *post*.

926. Negligence—When general allegation sufficient.]—THE BOTHNIA, Nos. 929, 947, *post*.

927. —— ——.]—If a pltf. in a collision suit intends to rely on a particular act of negligence by deft., he is bound specifically to allege that act in his pleadings, & it is not sufficient that the act may be included generally in an allegation in the pleadings, which do not state clearly such particular act, as it is likely to mislead deft., & prevent his being prepared to meet that particular case.—THE MARPESIA, Nos. 1130, 1305, *post*.

For full anns., *see* S. C. No. 1130, *post*.

928. Violation of statute — Exact violation to be pleaded.] — The ship proceeded against, a steamer, on her passage down the river T. came into collision with a sailing vessel. In answer to the case set up against her it was pleaded by the owners of the steamer that the sailing vessel, just previous to the collision, "was seen to be suddenly, & in violation of M. S. Act, 1854 (c. 104), s. 296, approaching the steamer on her port bow":—*Held*: (1) in pleading it was necessary to state, as accurately as the circumstances would admit, in what respect it was intended to allege that the above Act has been violated; (2) in the instance before the ct. it was sufficient to plead that the helm of the sailing vessel had not been ported in accordance with the Act—THE IRONMASTER (1860), 6 Jur. N. S. 782.

929. —— ——.]—Where it is intended to charge a breach of M. S. Act, 1854 (c. 104), s. 296, with respect to the rule of port helm, the act done or not done should be specifically pleaded to be done in violation of the Act. — THE BOTHNIA, No. 926, *ante*; No. 947, *post*.

930. *S. P.* GENERAL STEAM NAVIGATION CO. *v.* MORRISON (1853), 13 C. B. 581; 1 C. L. R. 103; 22 L. J. C. P. 178; 21 L. T. O. S. 76; 17 Jur. 673; 1 W. R. 330; 138 E. R. 1327.

931. Special damage not to be pleaded.]—In a cause of collision pleadings should be confined to the merits of the collision. Special damages, as reward paid to salvors for services rendered necessary by the collision, are not to be pleaded.—THE GEORGE ARKLE (1861), Lush. 222; 1 Mar. L. C. 154. S. C. No. 1145, *post*.

Annotation:—**Mentd.** The Esk & The Gitana (1869), L. R. 2 A. & E. 350.

932. Res inter alios acta — How far to be pleaded.]—In a cause of damage by plea & proof, the libel pleaded, *inter alia*, to the effect "that half an hour previous to the collision the *C.* had run foul of a barge opposite Barking Creek, & that, on being threatened with legal proceedings, her owners had paid the damage." Objection being taken to the article, the ct. directed it to be struck out.—THE COSMOPOLITAN (1853), 1 Ecc. & Ad. 179.

933. —— ——.]—In a cause of salvage against ship, freight, & cargo, the shipowner, after institution of the cause, paid a sum in settlement of the claim against him, which was accepted by pltfs. Pltfs. proceeded against the cargo & pleaded in their petition payment of this sum by the shipowner, & stated the amount:—*Held*: pltfs. not entitled to plead the amount so accepted by them, although they might plead the fact that they had so settled with the shipowner.—THE DUE CHECCHI (1872), L. R. 4 A. & E. 35; 26 L. T. 593; 20 W. R. 686; 1 Asp. M. L. C. 294.

Annotation:—**Consd.** The Antelope (1873), L. R. 4 A. & E. 33.

934. Defence—General principles.]—It is the duty of the ct. to watch that no unnecessary matter is introduced into pleadings. A defence should be limited to matters contradictory & responsive to the petition, & not be a repleader of it. An allega-

PART III. SECT. 6, SUB-SECT. 2.—A.

921 i. *Facts sufficient to establish case—Injury resulting in death—Fatal Accidents Act*, 1846 (c. 93)—*Setting out cause of action.*]—*Re* THE GARLAND, MONAGHAN *v.* HORN, p. 144, a, *ante*.—CAN.

926 i. *Negligence — When general allegation sufficient.*]—Where a petition alleges general carelessness, neglect, default, bad seamanship, etc., the ct. will not go into an inquiry of so wide a nature, or investigate any alleged neglect, etc., not expressly raised by the petition. A petitioner must state the instances of neglect, etc., on which he intends to rely, & make his case in accordance with his statement.—THE GENERAL LEE (1869), L. R. 3 Eq. 155.—IR.

a. *Violation of statutory regulation.*]—*Semble*: the established rule, requiring a pltf. in a cause of damage to state with reasonable certainty the instances of neglect on which he intends to rely, &, if he relies on breach of a statutory rule of navigation, specifically to plead that the act done or not done was in violation of that particular rule, does not apply to a case where one vessel is under way & the other incapable of moving.—THE SECRET (1872), 26 L. T. 670; 6 I. L. T. 146.—IR.

934 i. *Defence — Matters that may be pleaded—Application to expunge article.*]—Pltfs. in a cause of damage to cargo having alleged in their petition, as a particular instance of neglect, that the vessel was in a damaged & leaky condition when the cargo was shipped, deft.'s answer denied this statement, & added in its fifth article "that the agent of the shippers of said cargo saw & inspected the said vessel during the shipment of said cargo, & after said cargo was put on board of her, & made no complaint whatever of her state or condition." A motion by pltfs. to expunge this article from the record was refused.—THE FORTUNA (1872), 6 I. L. T. 79.—IR.

tion repeating the facts in the petition will be rejected as unnecessary. Forms of pleading in an action for wages the defences of (1) refusal to work; (2) embezzlement.—THE TEST (1836), 3 Hag. Adm. 307.

935. —— Essential particulars to be pleaded.]—The practice of the ct. requires that all essential particulars of the defence should be set forth in the pleadings in the first instance.—THE VIRGIL (1843), 2 Wm. Rob. 201; 2 Notes of Cases, 499; 7 Jur. 1174.

For full anns., *see* SHIPPING & NAVIGATION.

936. —— ——.]—The defence intended to be relied on as against a bottomry bond should be stated in the pleadings.—THE BONAPARTE (1852), 21 L. T. O. S. 280; 17 Jur. 285.

Annotation:—**Refd.** The Segredo (1853), 1 Ecc. & Ad. 36.

937. —— When mere denial sufficient—Collision.]—THE EAST LOTHIAN, No. 922, *ante*; No. 960, *post*.

For full anns., *see* S. C. No. 922, *ante*.

938. —— When mere denial not sufficient—Collision.]—Pleadings should be framed so as to assist not only the party in his statement of the case, but also the ct. in its investigation of the truth between the litigants; & deft. in a collision case in his answer cannot rely on a simple negative, but must enter into a detail of circumstances leading to the collision, & this statement must be free from vagueness.

To a petition alleging that the *M.* had been for some time close-hauled on the starboard tack, & the *W.* on the port tack came into collision with her, the answer admitted that the *W.* was close-hauled on the port tack, & alleged that the *M.* was seen on the port tack, distant about a mile:—*Held:* defts. were bound to allege what was subsequently done on board the *W.* & before the collision, & the mode of the collision.—THE WHY NOT (1868), L. R. 2 A. & E. 265; 38 L. J. Adm. 26; 18 L. T. 861; 3 Mar. L. C. 135.

Annotation:—**Apld.** The Orient (1869), 39 L. J. Adm. 8.

939. —— Notice of points relied on.]—Where a defence is so framed that, although it puts in issue all the facts alleged on claimant's part, it gives no notice, or insufficient notice, of any particular point to which evidence should be especially directed, the ct., in judging of the effects of such evidence, will have regard to the degree of notice given by defts. to claimants of the nature of the objections on which it is intended to rely.—THE MINNEHAHA (1861), Lush. 335; 15 Moo. P. C. C. 133; 30 L. J. P. M. & A. 211; 4 L. T. 810; 7 Jur. N. S. 1257; 9 W. R. 925; 1 Mar. L. C. 111; 15 E. R. 444, P. C. S. C. Nos. 1382, 1703, *post*.

Annotations:—**Mentd.** The Annapolis, The Golden Light, The H.M. Hayes (1861), Lush. 355, P. C.; General Steam Navigation Co. *v.* De Jersey (1862), 15 Moo. P. C. C. 486, P. C.; The Lady Egidia (1862); Lush. 513; The Edward Hawkins (1862), Lush. 515, P. C.; The Philadelphia (1863), Brown. & Lush. 28; The Falkland, The Navigator (1863), Brown. & Lush. 204, P. C.; Grindley *v.* Stevens (1863), 1 Moo. P. C. C. N. S. 379, P. C.; The White Star (1866), L. R. 1 A. & E. 68; The I. C. Potter (1870), L. R. 3 A. & E. 292; Brown *v.* Clegg (1871), 23 L. T. 634; The Waverley (1871), L. R. 3 A. & E. 369; Yeo *v.* Tatem (1871), L. R. 3 P. C. 696, C. A.; The Robert Dixon (1879), 5 P. D. 54, C. A.; The Westbourne (1889), 58 L. J. P. 78; The Liverpool, [1893] P. 154; The Duc D'Aumale, [1904] P. 60; The Aboukir (1905), 21 T. L. R. 200; The Maréchal Suchet, [1911] P. 1; The West Cock, [1911] P. 208, C. A.; The Leon Blum, [1915] P. 90.

940. —— —— Inevitable accident to be pleaded.]—In a cause of damage, where evidence is taken before an examiner, the old rule applies that if it is intended to rely upon a defence of inevitable accident, such defence must be in terms distinctly raised on the pleading.—THE E. Z. (1864), 33 L. J. P. M. & A. 200; 10 L. T. 790; 2 Mar. L. C. 42.

941. —— Defence not pleaded not available.]—*Semble:* it is not open to deft. after pleading inevitable accident & no other plea to impeach the conduct of pltf.'s ship.—THE HAWK *v.* THE HANNAH MARY (1866), Holt, Adm. 119.

942. —— —— Bottomry.]—In a cause of bottomry the defence that the master ought to have transhipped the cargo rather than have bottomried it ought to be pleaded specially.—THE ONWARD (1873), L. R. 4 A. & E. 38; 42 L. J. Adm. 61; 28 L. T. 204; 21 W. R. 601; 1 Asp. M. L. C. 540.

Annotation:—**Consd.** Kleinwort, Cohen *v.* Cassa Marittima of Genoa (1877), 2 App. Cas. 156, P. C.

943. —— Matters not to be pleaded—Admissions.]—In an action of collision, brought by the owners of a vessel & the crew for their private effects, admissions by the crew as to the circumstances of collision cannot be pleaded.—THE FOYLE (1860), Lush. 10.

944. —— —— Misconduct since action brought.]—The ct. refused to allow defts. in a salvage suit to add to their pleas an allegation that the alleged salvors, since commencement of the suit, had assaulted some of the witnesses who were going to give evidence on behalf of the owners.—THE FIELDEN (1862), 11 W. R. 156.

945. —— —— Defects in plaintiffs' case.]—The rules of pleading do not require defts., under penalty of losing costs, to draw attention specifically upon their pleadings to a defect in pltfs.' case known to pltfs.—THE ORIENT, Nos. 1507, 1630, *post*.

For full anns., *see* S. C. No. 1507, *post*.

946. Reply—Contents of.]—Whatever is pleaded in the nature of a reply must be in contradiction of what is alleged in the answer, or explanatory of averments in the defence, or else necessary to corroborate the original statements in same; it ought not to repeat matters already pleaded or state matters which should have been pleaded in the first instance.—THE ANNE (ANN) & JANE (1843), 2 Wm. Rob. 98; 2 Notes of Cases, 313; 7 Jur. 659. S. C. No. 963, *post*.

947. —— ——.]—Pltf. may plead new matter in reply, if it is really matter of reply, & not properly a part of the case set up in his libel. A pltf. whose vessel has been run down at anchor may charge negligence generally, & the burden of proof, the collision being proved, is thrown upon deft. to establish his defence. Where pltf.'s vessel was run down at anchor, & pltf. pleads that fact, charging negligence generally, & the answer pleads that the collision was not occasioned by negligence, but by violence of tempest & sea, which prevented the anchor of deft.'s vessel from holding, pltf. may reply that the collision was occasioned by default of deft.'s ground tackle.—THE BOTHNIA (1860), Lush. 52; 29 L. J. P. M. & A. 65; 2 L. T. 160. S. C. Nos. 926, 929, *ante*.

948. —— —— Mortgagee.]—A reply in a cause of necessaries, leaving it doubtful whether the person in possession of the vessel at the time of the supply was the original mtgee. or deft., the transferee of the mtge., is bad. An allegation that deft. was in possession of the vessel at the date of the supplies, & personally liable for them, would not be a good reply to an answer of deft. claiming to be mtgee. prior to the date of the supply.—THE TROUBADOUR (1866), L. R. 1 A. & E. 302; 16 L. T. 156; 2 Mar. L. C. 475.

Annotations:—**Consd.** The Two Ellens (1871), L. R. 3 A. & E. 345; Johnson *v.* Black (1872), L. R. 4 P. C. 161. **Refd.** The Heinrich Bjorn (1885), 10 P. D. 44, C. A.

949. Rejoinder—Contents of.]—A rejoinder in an act on petition must not state new matter of defence unless such matter has come to the knowledge of the party since his answer was given in. But matter subsidiary to the defence contained in the

Sect. 6.—*Pleadings: Sub-sect.* 2, *A. & B.* (*a*), (*b*) & (*c*). *Sect.* 7: *Sub-sect.* 1.]

answer may be stated in a rejoinder, when the reply to the answer takes issue upon the matter of defence there stated.—THE HEBE (1843), 2 Wm. Rob. 146; 4 Notes of Cases, 361; 7 Jur. 564.

For full anns., *see* SHIPPING & NAVIGATION.

B. How far Pleadings binding.

(*a*) *In General.*

950. Material facts.]—Pleadings in Admlty. are binding as to material but not as to incidental facts.—THE AMAZON, THE OSPREY (1867), Holt, Adm. 137.

951. ——.]—The rule that a party seeking redress for an injury can only recover *secundum allegata et probata* applies only to cases where the averments alleged in the pleadings are material to the issue raised.

Where, in a case of collision caused by a vessel drifting & driving down upon another at anchor in the same anchorage, though the relative bearing of the two vessels previous to the collision was incorrectly pleaded & alleged by the vessel proved to be entitled to redress:—*Held:* the vessels not being in motion, their previous relative bearing when at anchor was not such material fact to the issue, namely, which vessel caused the collision, as to render actual proof of the damage of no avail, & so entitle the offending party to the benefit of the rule. *Semble:* in the case of a collision between two vessels originally at anchor, the bearing of one vessel with respect to the other is not such material fact as is necessary to be stated upon the issue raised.—THE ALICE (OWNERS) & THE ROSITA (OWNERS) (1868), 5 Moo. P. C. C. N. S. 300; L. R. 2 P. C. 214; 19 L. T. 753; 3 Mar. L. C. 193; 16 E. R. 528; *sub nom.* THE ROSITA & THE ALICE (1868), 38 L. J. Adm. 20, P. C.

Annotation:—**Consd.** The Transit (1876), 34 L. T. 934, C. A.

952. —— **When sufficiently proved.**]—Where pltf. charges two separate collisions, whereby his vessel, being at anchor, was driven on the rocks, & sustained great damage, & the first collision was such that pltf.'s vessel might, probably would, have been driven on the rocks if no second collision had happened, he will be entitled to recover on proving the first collision only; as the rule that a pltf. must recover *secundum allegata et probata* is thereby satisfied.—THE DESPATCH (1860), Lush. 98; 14 Moo. P. C. C. 83; 3 L. T. 219; 15 E. R. 237, C. A.

953. —— ——.]—In a cause of collision pltf. alleged (1) deft. improperly starboarded; (2) if he did not starboard, at all events he neglected to port as he ought to have done:—*Held:* (1) the ct. might, on the evidence, find for pltf. without deciding whether deft. had starboarded or not, for the first charge, if proved, necessarily involved the second; and if not proved, the second was sufficient to sustain the judgment; (2) the objection of want of certainty in pleading was untenable.—THE AMALIA, THE MARIE DE BRABANT (1864), Brown. & Lush. 311; 10 L. T. 826; 2 Mar. L. C. 58, P. C.

For full anns., *see* SHIPPING & NAVIGATION.

954. —— ——.]—*Semble:* all words in the allegation in a petition need not necessarily be proved to the full extent.

An allegation in a petition that the vessel proceeded against in a collision cause was "considerably further over to the south side of the river than" the other vessel, which was kept under a starboard helm along the north shore, & that the former vessel instead of passing on the starboard side improperly ported & so brought about a collision, is sufficiently proved, to entitle the owners of the vessel making the allegation to recover, by showing that the vessel proceeded against was further over to the side of the river than the other, & improperly ported. The word "considerably" need not be proved to the full extent.—THE RANGER & THE COLOGNE (1872), 9 Moo. P. C. C. N. S. 352; L. R. 4 P. C. 519; 27 L. T. 769; 21 W. R. 273; 1 Asp. M. L. C. 484; 17 E. R. 546, P. C.

For full anns., *see* SHIPPING & NAVIGATION.

955. Admissions in pleadings—Effect of.]—Where in a salvage cause pltf.'s petition states expenses to have been incurred in rendering the services without stating their amount & deft.'s answer admits all the allegations of the petition, the Admlty. Ct. will not allow evidence to be called by pltf. to show the amount of the expenses. If specific amounts are claimed they must be pleaded so as to give to deft. the opportunity of admitting or denying them. *Semble:* the ct. will, if necessary, amend the pleadings, allowing pltfs. to set forth the accounts, but giving deft. time to admit or deny such accounts.

Where in a salvage suit deft. admits all the allegations of fact in pltf.'s petition, but denies the inferences of fact made therefrom in the petition, pltf. may call evidence to establish those inferences.—THE EINTRACHT (1874), 2 Asp. M. L. C. 198; 29 L. T. 851.

956. —— **Extent of.**]—Admission by pleading extends to matters of fact, not of law. Foreign regulations set out in plea & not traversed are thereby admitted; but an inference of the effect of such regulations, though pleaded & not denied, being a matter of judicial construction, is not admitted.—THE PEERLESS (OWNERS) *v.* THE JASON

PART III. SECT. 6, SUB-SECT. 2.—B (a).

950 i. *Material facts—Defence.*]—The rule that a party, proceeding to recover damage sustained in a collision, must correctly allege in his petition the facts on which he relies, & must establish in proof the case he sets up in pleading, is inapplicable to the defence of a vessel proceeded against. Deft. in his answer attributed the collision to pltf.'s vessel having attempted to cross the bows of his vessel, but the ct. was of opinion that the collision was attributable to a different cause:—*Held:* the defence was not thereby invalidated.—THE BELLE *v.* THE MULLINGAR (1872), 6 I. L. T. 153.—**IR.**

955 i. *Admissions in pleadings—Effect of.*]—In a suit for collision:—*Semble:* the promovents cannot recover more, as the value of their vessel, than the sum they have pleaded by their libel.—THE CARLOTA (1849), 4 Ir. Jur. O. S. 237 (Adm.).—**IR.**

a. Amendment of pleadings.]—*Semble:* the Admlty. Ct. will, in order to let a case be tried on the merits, if thoroughly satisfied of the *bona fides* of the transaction, allow an amendment to be made in the pleadings.—THE BRIG WAKEFIELD (1852), 5 Ir. Jur. O. S. 69.—**IR.**

b. —— *Terms for allowing.*]—In a suit to recover damages for collision, the ct. will, on the application of the promovents, allow the pleadings to be amended on payment of costs, & in so doing will not, at the instance of the impugnant, order the discharge of the special bail as part of the terms for granting the application.—THE LIFFEY (1859), 4 Ir. Jur. N. S. 232 (Adm.).—**IR.**

c. —— *Withdrawal of answer—Pleading de novo.*]—Leave may be granted to withdraw an answer & plead *de novo* on payment of costs of the motion & of those caused by the amendment. THE CASTIGLIONE & CARGO (1869), 3 I. L. T. Jo. 176.—**IR.**

PART III. SECT. 6, SUB-SECT. 2.—B (b).

957 i. *Plaintiff—Secundum allegata et probata—Particular default pleaded to be proved.*]—At the hearing of the petition for damages on account of injury done to a cargo of corn by the alleged negligence of deft., or of his servants, pltf. must adhere to the case made by his petition, & give satisfactory proofs of such negligence.—THE AUSTIN FRIARS (1869), 3 I. L. T. Jo. 608.—**IR.**

957 ii. —— —— *Proof of one material allegation.*]—The rule that parties are only entitled to recover *secundum allegata et probata* is complied with in a cause of collision if one material allegation of negligence be proved, even if all others fail.—CHINA MERCHANTS' STEAM NAVIGATION CO. *v.* BIGNOLD, BIGNOLD *v.* CHINA MERCHANTS' STEAM NAVIGATION CO. (1882), 47 L. T. 485, P. C.—**CHINA & JAPAN.**

(OWNERS) (1860), Lush. 103 ; 30 L. J. P. M. & A. 89 ; 3 L. T. 125 P. C.

Annotation :—**Mentd.** The Tactician (1907), 76 L. J. P. 80, C. A.

(b) When Binding.

957. Plaintiff—Secundum allegata et probata—Particular default pleaded to be proved.]—In cases of collision the ct. will confine its judgment to the issues raised upon the pleadings. Where the libel charges default in a particular manner, it must be proved in the manner in which it is laid ; & it is not sufficient to prove that default was committed in another manner, although the results would be the same upon the merits.

Pltfs. in a cause of damage by collision against the *A.* put their case on the ground of the *A.* having suddenly & improperly starboarded her helm. Issue being taken on this fact, it was proved that the collision arose through the *A.* having not altered her course till the last moment, when a collision was inevitable, & that the *A.* had not starboarded her helm at all, but ported it too late :—*Held :* this being an entire variance of the cause of action, the suit was dismissed.—THE ANN (1860), Lush. 55 ; 13 Moo. P. C. C. 198 ; 3 L. T. 128 ; 8 W. R. 567 ; 15 E. R. 74, P. C.

Annotations :—**Distd.** The Despatch (1860), Lush. 98, P. C. ; The Ironmaster (1860), 6 Jur. N. S. 782 ; The East Lothian (1860), Lush. 241, P. C. **Consd.** The Alice & Rosita (1868), 19 L. T. 753. **Refd.** The Bothnia (1860), 2 L. T. 160.

958. —— —— ——.]—A party complaining of an injury, suing for damages as in a collision case, cannot be permitted to recover upon a state of facts established to the satisfaction of the ct., but quite inconsistent with the alleged state of facts set up by them in their pleadings before the Admlty. Ct. as the grounds upon which they seek to recover. —THE NORTH AMERICAN (1858), 12 Moo. P. C. C. 331 ; Sw. 358 ; 14 E. R. 937, P. C. S. C. No. 1705, *post.*

Annotations :—**Apld.** The Ann (1860), Lush. 55, P. C. ; The Despatch (1860), Lush. 98, P. C. ; Kilgour *v.* Alexander (1860), Lush. 241, P. C. **Refd.** North German Lloyd S.S. Co. *v.* Elder (1860), Lush. 239, P. C. **Mentd.** Chapman *v.* Royal Netherlands Steam Navigation Co. (1879), 4 P. D. 157, C. A. ; Stoomvaart Maatschappy Nederland *v.* Peninsular & Oriental Steam Navigation Co. (1882), 31 W. R. 249, H. L.

959. —— —— ——.]—In a cause of collision pltf. is only entitled to recover *secundum allegata et probata.*

Pltfs. pleaded that the collision was caused by defts.' vessel having "suddenly put her helm a-starboard," but the evidence given in support of the petition was that the collision was caused by defts.' vessel having ported, instead of continuing her course under a starboard helm :—*Held :* (1) the evidence could not be applied to the statement in the petition ; (2) pltfs. not entitled to recover.—THE HASWELL (1864), Brown. & Lush. 247, P. C.

Annotation :—**Refd.** The Alice & The Rosita (1868), 19 L. T. 753.

960. Defendant—Failure of defence pleaded immaterial—If plaintiff fails.]—THE EAST LOTHIAN, Nos. 922, 937, *ante.*

For full anns., *see* S. C. No. 922, *ante.*

961. Defence not pleaded not available—Defence in law.]—*Semble :* a defence in law which might have been raised in the pleadings, & was not so raised, cannot be afterwards relied upon at the hearing.—THE SEINE (1859), Sw. 411 ; 5 Jur. N. S. 298.

Annotation :—**Refd.** Grill *v.* General Iron Screw Collier Co., Ltd. (1868), L. R. 3 C. P. 476.

962. —— —— **Amendment.**]—The ct. will not, at the hearing of a cause of collision, allow a plea to be added, alleging that the vessel proceeded against was in charge of a licensed pilot & the accident was caused by his default.—THE ALHAMBRA (1864), Brown. & Lush. 286.

963. Foreign parties—Indulgence of court.]—*Semble :* where the parties suing are foreigners, the ct. will be more indulgent in overlooking mere technical defects in the conduct of the proceedings than in the case of a British suitor.—THE ANNE (ANN) & JANE, No. 946, *ante.*

(c) Failure to plead Statute.

964. Judicial notice—Public statute.]—In causes of collision, the party intending to take the benefit of 6 Geo. 4, c. 125, should state such intent in the pleadings, but the omission so to do will not deprive him of the exemption from liability conferred by the Act, the Act being a public Act, which the ct. is bound to take notice of without its being specially pleaded —THE CANADIAN (1842), 1 Wm. Rob. 343 ; 7 L. T. 648.

965. —— **Admiralty rules.**]—The ct. is bound to take notice of 14 & 15 Vict. c. 79, & of the Admlty. rules, made by virtue thereof, though not put in plea, nor touched upon in argument.

Neither of two sailing vessels, which came into collision, having observed the Admlty. regulations respecting lights, & neither having pleaded that the collision was occasioned by such non-observance on the part of the other :—*Held :* in the circumstances both vessels were barred of recovery by s. 28 of the above Act.—THE ALIWAL (1853), 1 Ecc. & Ad. 96 ; 18 Jur. 296.

Annotation :—**Refd.** The James (1856), Sw. 60.

966. —— ——.]—Where a ship at anchor had not a light hoisted according to Admlty. regulations, but this is not pleaded in the case, the ct. is bound by Act of Parliament to take notice of it, & determine whether the collision appeared to have been occasioned from absence of a light —THE CHANGE *v.* THE LEGATUS (1856), 4 L. T. 839. S. C. No. 1144, *post.*

SECT. 7. — CROSS-ACTIONS AND COUNTER-CLAIMS.

Security to answer counterclaim, *see* pp. 188—190, *post.*

SUB-SECT. 1.—SINCE THE JUDICATURE ACTS.

967. Nature of counterclaim—Breach of charterparty.]—An action *in rem* was brought in the Admlty. Div. to recover remuneration for salvage services rendered by pltfs.' vessel to defts.' vessel when the latter took the ground in crossing the bar of a river. Defts., besides denying that any salvage services had been rendered, counterclaimed *in personam* against pltfs., foreigners resident abroad, as charterers of their vessel, for damages for breach of charterparty in delay in loading defts.' vessel, whereby she was too late in crossing the bar. The judge having refused to strike out the counterclaim :—*Held :* (1) the judge of the Admlty. Div. had jurisdiction to try the counterclaim ; (2) he had rightly exercised his discretion in refusing to strike it out.—THE CHEAPSIDE, [1904] P. 339 ; 73 L. J. P. 117 ; 91 L. T. 83 ; 53 W. R. 120 ; 20 T. L. R. 655 ; 9 Asp. M. L. C. 595, C. A. S. C. No. 653, *ante.*

Annotation :—**Refd.** Bow *v.* Camosun, [1909] A. C. 597, P. C.

967 i. *Nature of counterclaim—Claim arising under mortgage of ship.*]—BOW MCLACHLAN & CO. *v.* THE CAMOSUN, p. 253, c, *post.*—**CAN.**

Sect. 7.—Cross-actions & counterclaims: Subsects. 1 & 2. Sect. 8: Sub-sect. 1, A. & B.]

968. —— Limitation of liability—In lieu of separate action.]—THE CLUTHA, No. 1537, *post.*

969. No counterclaim—Action discontinued before appearance.]—On the same day that a collision occurred in the Bristol Channel between a French & a British vessel the owners of the French vessel (which was sunk) issued a writ *in rem*, & arrested the British vessel at Cardiff. On the following day the warrant was withdrawn, & the British vessel released on notice given that the action was discontinued. Later in the day telegrams passed between the respective solrs., & on the next day the solrs. for the owners of the British vessel wrote that their clients "have a counterclaim for the damage to their ship, with which we intend to proceed," &, after entering an appearance to the action, they applied for an order that the owners of the French vessel should file a preliminary act with a view to the owners of the British vessel delivering their counterclaim:—*Held:* even if the application was right in form, it must be refused, as a counterclaim could not be set up to an action which had been wholly discontinued within R. S. C., O. 26, r. 1.—THE SALYBIA, [1910] P. 25; 79 L. J. P. 31; 101 L. T. 959; 26 T. L. R. 170; 11 Asp. M. L. C. Adm. 361.

SUB-SECT. 2.—BEFORE THE JUDICATURE ACTS.

970. Action by foreigner—Bail not enforceable in cross-action.]—A Danish & a British ship came into collision; the Danish ship was entirely lost, & the British received some damage. An action was entered on behalf of the owners of the Danish ship, & bail given; a cross-action was entered on behalf of the owners of the British ship, & bail demanded & refused:—*Held:* the property being entirely gone, & the owners foreigners, resident abroad, there was no way of enforcing the bail to be given.—THE SERINGAPATAM (1846), 3 Wm. Rob. 41 n.; 6 Notes of Cases, 165; 3 L. T. 419; 10 Jur. 1064.

Annotations:—**Folld.** The Carlyle (1858), 30 L. T. O. S. 278. **Apld.** The Emily (1859), 33 L. T. O. S. 80. **Folld.** The North American (1859), 5 Jur. N. S. 659. **Apld.** Chapman *v.* Royal Netherlands Steam Navigation Co. (1879), 4 P. D. 157, C. A.; Stoomvaart Maatschappy Nederland *v.* Peninsular & Oriental Steam Navigation Co. (1882), 7 App. Cas. 795. **Consd.** Imperial Japanese Government *v.* Peninsular & Oriental Steam Navigation Co., [1895] A. C. 644, P. C.

971. —— No stay till appearance in cross-action.]—Where, on a collision between an English & a foreign vessel, cross-actions were brought by the owners of the two vessels, & in the action by the English vessel the foreign vessel did not put in an appearance:—*Held:* the ct. could not stay the action brought by the foreign vessel until she had entered an appearance in the action against her.—THE HEART OF OAK (1860), 29 L. J. P. M. & A. 78.

Annotation:—**Apld.** Chapman *v.* Royal Netherlands Steam Navigation Co. (1879), 4 P. D. 157, C. A.

972. Cross-action—Usual practice.]—The Admlty. Ct. will discourage, so far as in its power, through the medium of costs, any departure from the usual practice of entering cross-actions & letting the one decision govern the other or consolidating them, whereby expenses are kept down.—THE CALYPSO, No. 973, *post.*

For full anns., *see* S. C. No. 973, *post.*

973. —— Failure to bring—No bar to subsequent action.]—In a cause of damage, no cross-action having been brought, both vessels having been pronounced in fault, deft. in the first action is not estopped from bringing a suit against original pltf.—THE CALYPSO (1856), Sw. 28; 26 L. T. O. S. 206; 4 W. R. 303. S. C. No. 972, *ante.*

Annotation:—**Refd.** Chapman *v.* Royal Netherlands Steam Navigation Co. (1879), 4 P. D. 157, C. A.

974. —— Facts of principal action applied.]—Where, in a cause of collision, there is a cross-action, & both come on to be heard together by consent of proctors, the ct. decides in the cross-action according to the facts pleaded & proved in the original action.—THE VORTIGERN, No. 905, *ante.*

For full anns., *see* S. C. No. 905, *ante.*

975. Counterclaim or set-off—Action for wages.]—In a suit for wages & disbursements by a master who is also co-owner, the other co-owners may, under M. S. Act, 1854 (c. 104), s. 191, set up a counterclaim or set-off in respect of outstanding co-ownership accounts, & claim that the balance (if any) be paid to them. To a petition claiming master's wages & disbursements, & praying a reference of any accounts arising in respect thereof to the registrar & merchants, an answer alleging the master to be also co-owner, & that accounts are outstanding between pltf. & defts., as co-owners, showing a balance on all accounts in favour of defts., & praying a reference to the registrar & merchants of all master's & co-ownership accounts, will be allowed by the Admlty. Ct.—THE CITY OF MOBILE (1873), L. R. 4 A. & E. 191; 43 L. J. Adm. 41; 29 L. T. 406; 22 W. R. 191; 2 Asp. M. L. C. 123.

976. —— —— Necessity for.]—Wages were claimed from the mtgees. in possession of a ship due from her former owners; they claimed to deduct advances made to the master, without going into an account to show they were entitled so to do by way of set-off or counterclaim:—*Held:* under M. S. Act, 1854 (c. 104), s. 191, they were barred from so doing.

If a master sues for wages in this ct. against the ship, the owner may, if he thinks fit, pay him his wages. Any other demand, or any balance which the master is entitled to, is not a demand to be paid out of the ship. The master is left to his ancient remedy. But if the owner, in order to get rid of the demand for wages, thinks fit to make a set-off or counterclaim, then, according to the stat., the ct. may enter into & settle all accounts between the parties; & if it appear that, in addition to wages, there is a balance due to the master, this becomes a lien on the ship itself, & may be recovered by him. With respect to a mtgee., it is abundantly clear he can stand in no better position than the owner himself (DR. LUSHINGTON).—THE CALEDONIA (1855), Sw. 17; 26 L. T. O. S. 177; 2 Jur. N. S. 48; 4 W. R. 183.

Annotations:—**Folld.** The Glentanner (1859), Sw. 115. **Consd.** The Feronia (1868), L. R. 2 A. & E. 65; Hamilton *v.* Baker (1889), 14 App. Cas. 209, H. L. **Refd.** Hawkins *v.* Twyzill (1856), 2 Jur. N. S. 302.

977. —— —— When not allowed.]—In a suit against a vessel for master's wages the ct. cannot entertain a counterclaim on behalf of the owners of part of the cargo pledged by bottomry by the master.—THE DARING (1868), L. R. 2 A. & E. 260; 37 L. J. Adm. 29.

For full anns., *see* SHIPPING & NAVIGATION.

978. —— Not allowed in other cases.]—No set-off is allowed in the Admlty. Ct. save in the exceptional case of suits for mariners' wages.

To a claim for damage to goods imported instituted under Admlty. Ct. Act, 1861 (c. 10), s. 6, a claim of set-off for freight due under the bills of lading was not allowed.—THE DON FRANCISCO (1862), Lush. 468; 31 L. J. P. M. & A. 14; 5 L. T. 460; 1 Mar. L. C. 169. S. C. Nos. 60, 666, *ante.*

Annotation:—**Refd.** Dakin *v.* Oxley (1864), 15 C. B. N. S. 646.

SECT. 8.—PAYMENT INTO COURT AND TENDER.

SUB-SECT. 1.—IN GENERAL.

A. Since the Judicature Acts.

979. Tender—Practice as to.]—A tender, according to the old Admlty. practice, is nothing more than an offer, & it was not intended by R. S. C., O. 22, to alter this practice, or to assimilate it to the technical rules regulating tender at common law. In absence of any express rule regulating in other respects the practice of tender in an Admlty. action, it may reasonably be concluded that, in accordance with R. S. C., O. 72, r. 2, the old procedure & practice of tender in Admlty. actions should remain in force, except in so far as the rules affect the manner in which the money is to be lodged in ct.

In an action of damage by collision defts. admitted their liability, & agreed to pay a certain percentage of pltfs.' proved or agreed damages & taxed costs. The parties being unable to agree as to the amount of damages, the question was, by consent, referred to the registrar & merchants. Before the hearing of the reference defts. tendered & paid into ct. £750 in satisfaction of the claim. Pltfs. did not accept the amount tendered, & the reference proceeded. The registrar, by his report, found that at the agreed percentage the sum due from defts. was £713 16*s.*, with interest at 4 per cent. to the date of tender. Pltfs. applied under R. S. C., O. 22, r. 5, for payment out to them of the amount tendered, viz., £750 :—*Held :* pltfs. only entitled to the amount found due, viz., £713 16*s.* with interest.—THE MONA, [1894] P. 265 ; 63 L. J. P. 137 ; 71 L. T. 24 ; 43 W. R. 173 ; 7 Asp. M. L. C. 478 ; 6 R. 707.

Annotations :—**Refd.** The Vulcan, [1898] P. 222 ; The Chiltonford, [1901] W. N. 48.

980. Payment into court—Salvage action—Not with denial of liability.]—Formerly in the Admlty. Ct. deft. in a salvage action could not pay money into ct. as sufficient to satisfy the claim with a denial of liability.—THE CHILTONFORD (1901), 17 T. L. R. 293.

See, now, R. S. C., O. 22, r. 6.

981. —— —— Costs not necessarily included.]—In a salvage action it is not necessary a tender should be accompanied by an offer to pay pltf.'s costs up to the date of tender.—THE WILLIAM SYMINGTON, No. 998, *post.*

982. Plea of tender — Without payment into court—Bad.]—In a salvage action the mere offer by defts. to pay a sum named in an agreement made before the rendering of the services without payment into ct. is a bad plea.—THE NASMYTH, No. 1325, *post.*

For full anns., *see* S. C. No. 1325, *post.*

983. —— After judgment determining liability.]—Tender by way of defence to an action for damage by collision cannot be made after judgment determining liability. — THE RECEPTA, Nos. 1559, 1609, 1768, 1773, *post.*

For full anns., *see* S. C. No. 1559, *ante.*

984. Payment out of court—Smaller sum awarded to plaintiffs—Balance payable to defendants.]—In an action of salvage, where defts. have tendered & brought into ct. a payment with a denial of liability, R. S. C., O. 22, r. 6, applies, so that if the ct. awards to pltfs. less than the amount paid in, the balance will be repaid to defts.—THE BLANCHE, [1908] P. 259 ; 77 L. J. P. 99 ; 99 L. T. 249 ; 11 Asp. M. L. C. 75. S. C. No. 997, *post.*

B. Before the Judicature Acts.

985. Necessity for formal tender.]—A tender, to save costs, should not be made verbally, with the result of confusion & uncertainty arising ; it should be made formally into ct.—THE VROUW MARGARETHA (1801), 4 Ch. Rob. 103. S. C. No. 1006, *post.*

Annotations :—**Folld.** The Sovereign (1860), 2 L. T. 669. **Consd.** The Hickman (1869), L. R. 3 A. & E. 15 ; The Mona, [1894] P. 265. **Refd.** The General Palmer (1828), 2 Hag. Adm. 176. **Mentd.** The Eugenie (1844), 3 Notes of Cases, 430.

986. Tender—By act in court.]—In salvage or collision cases a tender is not legal unless made in ct.—THE HOPE (1843), 2 Wm. Rob. 8.

987. —— ——.]—THE PERSEVERANCE (1799), 2 Ch. Rob. 239.

Annotation :—**Folld.** The Kierlighett (1800), 3 Ch. Rob. 95.

988. —— Before action—Not valid.]—In salvage cases a tender is not legal if made previous to the action being brought.—THE ALBATROSS (1853), 8 L. T. 613, *Shipping Gazette,* Jan. 25.

989. —— —— How far recognised.]—Where in a cause of salvage an offer out of ct. has been made by defts., & rejected by the salvors, & the salvors subsequently accept a smaller sum tendered by act of ct., they are entitled to their costs up to the date of the formal tender, unless the offer out of ct. was made in gold or bank notes. *Qu :* whether an express offer to pay costs due by law is necessary to a complete tender, either in or out of ct.

The ancient practice of the ct. was, that to constitute a tender, there must be offered a certain sum of money, together with the costs due by law ; & any tender to which a condition was annexed of any description, sort, or kind, was considered as no tender at all. But if the salvors, with a perfect knowledge of all facts & circumstances, have refused a tender in money to the same amount as that which has since been accepted, the. ct will not allow them their costs.—THE SOVEREIGN (1860), Lush. 85 ; 29 L. J. P. M. & A. 113 ; 2 L. T. 669 ; 6 Jur. N. S. 832.

990. —— —— When dispensed with.]—Where the master demands a larger sum for freight than is in fact due & at the same time intimates that it is useless to tender a smaller sum, as it would be refused, the person liable for freight is dispensed from the necessity of making a tender.—THE NORWAY (1865), 3 Moo. P. C. C. N. S. 245 ; Brown. & Lush. 404 ; 13 L. T. 50 ; 11 Jur. N. S. 892 ; 13 W. R. 1085 ; 2 Mar. L. C. 254 ; 16 E. R. 92.

Annotations :—**Consd. & Distd.** Campbell *v.* Commercial Banking Co. of Sydney (1879), 40 L. T. 137, P. C. **Refd.** Huth *v.* Lamport, Gibbs *v.* Lamport (1886), 16 Q. B. D. 735, C. A. **Mentd.** The Figlia Maggiore (1868), L. R. 2 A. & E. 106 ; The Felix (1868), L. R. 2 A. & E. 273 ; The Princess Royal (1870), L. R. 3 A. & E. 41 ; The Madge Wildfire (1872), 41 L. J. C. P. 121 ; Robinson *v.* Knights (1873), L. R. 8 C. P. 465 ; Merchant Shipping Co. *v.* Armitage (1873), L. R. 9 Q. B. 99 ; Pirie *v.* Middle Dock

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PART III. SECT. 8, SUB-SECT. 1.—B.

a. *Tender without costs.*]—A tender of money, by way of compensation, in a suit for collision, when the impugnant admits his default, must include costs of the promovent's proctor incurred up to the time of tender, but must not necessarily include costs of a survey incurred previously, even although the ct. may consider the survey was necessary, & make an order for payment of the expenses attending it.—THE SCOTIA (1859), 4 Ir. Jur. N. S. 156 (Adm.).—**IR.**

b. ——.]—A tender of a sum that is adequate remuneration for salvage services without costs is insufficient.—THE CARMONA (1883), 9 Q. L. R. 286. —**CAN.**

c. *Acceptance by adverse claimants—Joinder of issue.*]—When a tender has been accepted by both promovents & intervenients, whose claims are adverse, the ct. will allow issue to be joined between them upon their respective allegations.—THE CONCHITA (1849), 3 Ir. Jur. O. S. 408 (Adm.).—**IR.**

d. *Payment into court—Admission in pleadings of sum due.*]—In Admlty. pleadings the admission of a sum of money due by resps. to promoter should be followed by its payment into ct., or should be in such a form that an application could be made for its payment into ct.—THE ALBION, No. 363, ii., *ante.*—**AUS.**

Sect. 8.—*Payment into court & tender: Sub-sect.* 1, *B.; sub-sect.* 2, *A. & B.*]

Co. (1881), 44 L. T. 426; The Ettrick (1881), 6 P. D. 127, C. A.; The Xantho (1886), 11 P. D. 170, C. A.; William *v.* Canton Insce. Offices, [1901] A. C. 462; London Transport Co. *v.* Trechmann, [1904] 1 K. B. 635, C. A.; Harrowing S.S. Co. *v.* Thomas, [1913] 2 K. B. 171, C. A.

991. —— Form of—Where salving ship damaged.]—Where damage has been sustained by a ship in rendering salvage service, a tender to stop the action should include all damages sustained.—THE OCEAN (1842), 1 Wm. Rob. 334. S. C. No. 1174, *post*.

992. —— —— Where costs not included.]—A tender in a salvage suit by act in ct. must either state that the sum tendered is tendered in satisfaction of the cause of action & contain an unconditional offer to pay costs, or state that defts. contend they are not liable to pay costs, stating at the same time the grounds upon which they contend & referring the question of costs to consideration of the ct.—THE HICKMAN (1869), L. R. 3 A. & E. 15; 39 L. J. Adm. 7; 21 L. T. 472; 18 W. R. 151; 3 Mar. L. C. 298. S. C. No. 1374, *post*.

Annotation :—**Folld.** The Thracian (1872), L. R. 3 A. & E. 504.

993. —— —— ——.]—A tender which does not contain an offer to pay costs must specify the grounds upon which deft. contends pltf. is not entitled to costs.—THE THRACIAN (1872), L. R. 3 A. & E. 504; 41 L. J. Adm. 71; 25 L. T. 889; 20 W. R. 380; 1 Asp. M. L. C. 207.

994. —— —— Deduction for damages not allowed.]—The owners originally offered £534, but subsequent to completion of the salvage service, having suffered loss by long detention of the ship, which they attributed to the salvors, they deducted £260 for such loss, & tendered in ct. £275 :—*Held :* whether the detention was attributable to the salvors or not, the owners could not compensate themselves for loss out of the sum tendered for the salvage service.—THE HOPEWELL (1855), 2 Ecc. & Ad. 249. S. C. No. 1014, *post*.

995. Payment out of court.]—In the Admlty. Ct., where money has been paid into ct. the practice is not to pay it out to the party entitled until conclusion of the cause. Where, in a cause of foreign mariners' wages, money was paid into ct. before answer filed, in full satisfaction of pltfs.' demand, & pltfs. continued to claim a larger sum as due, a motion to have the money paid out of ct. to pltfs. was refused.—THE ANNIE CHILDS (1862), Lush. 509

996. Effect of non-acceptance.]—A tender, not accepted in due time, may be reduced by the ct., & does not bind the owner in any manner.—THE GENERAL PALMER (1828), 2 Hag. Adm. 176. S. C. No. 1016, *post*.

Annotations :—**Apld.** The Mona, [1894] P. 265. **Mentd.** The Cherubim (1868), 19 L. T. 52.

SUB-SECT. 2.—EFFECT OF TENDER ON COSTS.

A. Since the Judicature Acts.

997. Tender more than sufficient—Costs before & after tender—Costs of separate issues.]—Where, in a salvage action, a sum is tendered & paid into ct. with a denial of liability, & a less amount is awarded, pltfs. are entitled to the whole costs of the action to the date of tender, & defts. to the costs subsequent; subject to this, that pltfs. may be given the costs of the issue as to the liability for salvage, & of any other issue on which they have succeeded, provided that such costs can be severed.—THE BLANCHE No. 984, *ante*.

998. Tender sufficient—Costs up to tender.]—Where in a salvage action defts. with their defence tender & pay into ct. a sum of money in satisfaction of pltfs.' claim, & plead such payment into ct., & the sum paid in is held to be sufficient, the ct. will order defts. to pay pltfs.' costs up to the date of delivery of the defence, unless the circumstances of the case render it just & expedient to order otherwise.—THE WILLIAM SYMINGTON (1884), 10 P. D. 1; 54 L. J. P. 4; 51 L. T. 461; 33 W. R. 371; 5 Asp. M. L. C. 293. S. C. No. 981, *ante*.

999. —— Costs subsequent to tender.]—If defts. have made a tender, which tender is pronounced for & a salvage agreement set aside :—*Semble :* defts. will be entitled to their costs subsequent to the tender.—THE SILESIA, No. 1329, *post*.

Annotation :—**Distd.** The Mark Lane (1890), 39 W. R. 47. For full anns., *see* S. C. No. 1329, *post*.

1000. —— —— No order as to costs—Tender not liberal.]—When a tender in a salvage suit is pronounced for, the usual practice is to condemn pltfs. in the costs incurred since the time of tender, but this practice is not invariable, & where the ct. is of opinion that the tender is not a liberal one it may, in its discretion, make no order with regard to such costs.—THE LOTUS (1882), 7 P. D. 199; 47 L. T. 447; 30 W. R. 892; 4 Asp. M. L. C. 595.

Annotation :—**Refd.** The Vindomora, [1891] A. C. 1.

1001. —— —— ——.]—Where separate salvage actions against the same ship were consolidated, leave being given to various pltfs. to appear separately at the hearing as their interests were conflicting, & defts. with their defence tendered & paid into ct. a sum of money as being sufficient to satisfy all claims, but did not apportion it to separate pltfs.; the ct., having upheld the tender, ordered all parties to pay their own costs incurred subsequent to the tender, defts. paying the costs previous to it.—THE LEE (1889), 60 L. T. 939; 6 Asp. M. L. C. 395.

1002. Offer without tender—Smaller amount recovered.]—The owners of two vessels which had been in collision agreed that both vessels were to blame, & that pltfs. should recover 60 per cent. & defts. 40 per cent. of the damage they had sustained. Before the reference was held pltfs.' solrs. wrote to defts.' solrs. offering to agree defts.' damage at £4,500, but defts.' solrs. refused to recognise the offer unless a formal tender was made. At the reference defts. only succeeded in proving their claim at £4,352. The registrar allowed defts. the costs of proving their claim. Pltfs. appealed :—*Held :* as pltfs. offered to agree defts.' damage at £4,500 for the purpose of saving the costs of inquiry as to the amount of them & defts. had failed to prove that the damage sustained was equal to that sum, pltfs. were entitled to the costs incurred by defts. persisting in proving their claim.—THE READING, [1908] P. 162; 77 L. J. P. 71; 98 L. T. 590; 11 Asp. M. L. C. 35.

Annotation :—**Refd.** The Blanche, [1908] P. 259.

PART III. SECT. 8, SUB-SECT. 2.—A.

a. *Tender conditional—Costs in discretion of judge.*]—A sufficient tender had been made before trial & paid into ct., but with a denial of liability except for towage services. At the trial the services rendered were held salvage services. In these circumstances the C. A. allowed no costs in the C. A., being of opinion that the amount ought to have been accepted in the first instance, & refused to interfere with the order as to costs made in the ct. below, as the tender was not an unconditional tender, & the costs were in the discretion of the judge.—THE WANGANUI (1913), 32 N. Z. L. R. 842, C. A. **N.Z.**

998 i. *Tender sufficient — Defendant entitled to costs.*]—Where, in an action for towage services, defts. paid into ct. an amount sufficient to compensate pltfs. liberally for the services rendered, they were given their proper costs against pltfs.—HINE *v.* THE THOMAS J. SCULLY (1899), 6 Ex. C. R. 318; 20 C. L. T. 54.—**CAN.**

B. Before the Judicature Acts.

1003. Plaintiff entitled to costs—Tender insufficient.]—Where by the articles wages were not payable till the cargo was discharged (within a limited time), & where, after an arrest at the suit of a mariner, the wages were paid within such time, the owners having refused to pay the mariner at the same time as the rest of the crew, but tendered him a less sum than was due "in full of his wages":—*Held:* the owners liable for costs of the arrest.—THE MINSTREL (1826), 2 Hag. Adm. 40.

1004. —— Tender conditional.]—The *M.* arrived at Port Philip, where some of her crew deserted. The master gave promissory notes for £40 each to the remaining part of the crew, in addition to the wages by the ship's articles, to navigate the ship to Bombay. He there engaged additional hands, & arrived at Liverpool. The owners offered the sailors who held the promissory notes the amount of their wages only on their signing a release in full & giving up the promissory notes. The seamen refused to do this, & brought a suit in the Admlty. Ct. for the wages only, which they recovered, the question of costs being reserved. Subsequently, in *Hartley* v. *Ponsonby* (1857), 5 W. R. 659, it was determined the seamen were entitled to recover the £40 as extra wages:—*Held:* (1) the tender of wages as above was not binding on the seamen; (2) the owners were liable to the whole costs incurred in the Admlty. Ct.—THE MOBILE (1857), Sw. 256; 29 L. T. O. S. 283; 3 Jur. N. S. 893; 5 W. R. 830.

1005. —— Tender not legal.]—Costs are always allowed to salvors when a tender made is not a legal one.—THE THOMAS & MARY (1848), 6 L. T. 194; *Shipping Gazette*, July 14.

1006. Defendant entitled to costs—Tender sufficient.]—In the case of a tender made in a regular form, the ct. will consider its sufficiency; if it shall be pronounced sufficient, the ct. will make the party who refuses it liable not only to his own costs, but to those of the other party if it appear proceedings have been vexatiously pursued.—THE VROUW MARGARETHA, No. 985, *ante*.

For full anns., *see* S. C. No. 985, *ante*.

1007. —— ——.]—Pltfs., ship agents, were engaged by defts., owners of the cargo, to discharge a cargo of flour wrecked on the beach. Pltfs. in rendering the service incurred no personal risk, but disbursed for wages, etc., about £119. Defts. tendered to pltfs. £150, which was refused; they afterwards paid them, through the auctioneer who sold the cargo, £50, as part of the commission on the sale. Pltfs. sued for salvage services. Defts. paid £150 into ct., altogether £200—£80 in excess of pltfs.' disbursements:—*Held:* (1) the sum of £80 was sufficient, whether the services were salvage or agency; (2) as defts. had made a sufficient tender in time to prevent litigation they were entitled to costs.—THE HONOR, CARGO EX (1866), L. R. 1 A. & E. 87; 35 L. J. Adm. 113; 15 L. T. 677; 12 Jur. N. S. 773; 15 W. R. 10; 2 Mar. L. C. 445.

Annotations:—**Refd.** The Kate B. Jones, [1892] P. 366; The Solway Prince, [1896] P. 120.

1008. —— ——.]—Where a tender of £2 accepted by twenty-nine co-salvors for towing the *A.* (on fire about 8 miles from Hastings) into port was confirmed, the action having been entered at £300, the ct. condemned the salvor, who had instituted it, in £5 costs.—THE ALBION (1828), 2 Hag. Adm. 180 n.

1009. —— ——.]—In salvage cases, when a tender is made, & money brought into ct., & held to be ample, costs are allowed to the party making the tender from the date when it was made.—THE I. O. (1849), 6 L. T. 194; *Shipping Gazette*, July 10.

1010. *S. P.* THE EMU (1838), 1 Wm. Rob. 16.

1011. —— —— Modification of rule in special cases.]—In ordinary cases, if a tender is made & rejected & is afterwards pronounced sufficient, it ought to be followed by condemnation of the salvors in the costs. Costs are given not with a view to punishment, but as a matter of justice to the other party. This doctrine is not applicable to cases of salvage, with all its rigidity. In the very nature of salvage services, there is something so loose & indefinite, so difficult to be determined by the best constituted minds, when looking at their own case, that the doctrine cannot be pressed to its full extent. To deprive salvors of all reward is not to the interest of the public; it is desirable to hold out a degree of extra encouragement for preservation of property.

Where the tender on the part of the owners was adequate, & the salvors had incurred no risk nor exerted any extraordinary labour or skill, & the time occupied in the service was very brief, the ct., nevertheless, refused to condemn the salvors in the costs.—THE WILLIAM (WILLIAMS) (1847), 2 Wm. Rob. 521; 5 Notes of Cases, 108; 11 Jur. 175.

Annotation:—**Apld.** The Lotus (1882), 7 P. D. 199.

1012. No costs—Where litigation unnecessary.]—A party who does not accept a tender is not entitled to his expenses in case of litigation when he might have had same without it.—THE FREDERICK, No. 1267, *post*.

1013. *S. P.* THE ELEANORA CHARLOTTA (1823), 1 Hag. Adm. 156.

Annotation:—**Refd.** The Dantzic Packet (1837), 3 Hag. Adm. 383.

PART III. SECT. 8, SUB-SECT. 2.—B.

1003 i. *Plaintiff entitled to costs—Tender insufficient.*]—Where the value of barque & cargo was estimated by the ct. at £3,740, &, a cause of salvage having been instituted, a tender of £350 was made, the ct. overruled the tender & gave pltfs. £400 with costs.—THE QUEEN VICTORIA (1873), 7 L. T. 63.—**IR.**

1003 ii. —— ——.]—In a suit where the tender is overruled & the ct. awards a sum within the jurisdiction of an inferior tribunal, it will certify for the salvor's costs, if there are important legal questions, or serious charges of neglect or misconduct to be considered, which magistrates might have some difficulty in dealing with, & on which their decision would hardly be deemed satisfactory.—THE AVENIR (1868), I. R. 2 Eq. 111.—**IR.**

1006 ii. *Defendant entitled to costs—Tender sufficient.*]—A tender for salvage services having been held sufficient, the promovents were ordered to pay the impugnants' costs from the date of the tender.—THE SARSFIELD (1850), 5 Ir. Jur. O. S. 213 (Adm.).—**IR.**

1011 i. —— —— *Modification of rule in special cases.*]—In a salvage suit, in which the shipowner had paid £40 into ct., which pltfs. had refused, there was much conflicting testimony upon the merit of the salvage services rendered:—*Held:* the tender was sufficient, but, in view of the conflict of evidence, the parties should pay their own costs.—THE STELLA MARIE (1866), Y. A. D. 16.—**CAN.**

1012 i. *No costs—Discretion of court.*]—The ct., in deciding in favour of a tender made by the impugnant for salvage services, has a discretional power as to costs, & will, in certain circumstances, let each party abide its own costs.—THE CONSTANTE (1851), 5 Ir. Jur. O. S. 9 (Adm.).—**IR.**

1012 ii. —— —— *Salvage agreement.*]—The ct., in the exercise of its discretion, will not, although decreeing in favour of the tender, give the impugnants their costs, if it appear that the owners of the vessel rendering the service were not informed that a specified amount was offered by the master of the salved vessel at the time the services were rendered & that the salvors by their acts led him to believe that they had accepted it.—THE GREYHOUND (1858), 4 Ir. Jur. N. S. 78 (Adm.).—**IR.**

1012 iii. —— *Merits of defence doubtful.*]—If there be doubt as to the merits of the defence, the ct., in decreeing in favour of a tender for salvage, will let each party pay its own costs.—THE BRITON (1848), 5 Ir. Jur. O. S. 170 (Adm.).—**IR.**

1012 iv. —— *Tender upheld—Proceedings induced by misrepresentation.*]—Costs should, according to the ordinary rule, follow the decree for the tender; but if the captain of the impugnant vessel misrepresent the true, or suppress important, facts, & thereby induce the promovents to institute proceedings for salvage, the ct. will, in its discretion, make a decree, without costs.—THE STEPHANO FLORI (1858), 3 Ir. Jur. N. S. 418 (Adm.).—**IR.**

Sect. 8.—Payment into court & tender: Sub-sect. 2, B. Sect. 9: Sub-sects. 1 & 2.]

1014. —— Tender ample.]—Costs are never allowed when a tender made is considered by the ct. to be ample, & so the salvors might have had full compensation without litigation.—THE HOPEWELL, No. 994, *ante*.

1015. —— —— Though expenses included.]—In a case of salvage, the ct. had decreed that £100 (which had been regularly tendered, together with the expenses of the salvors) was sufficient remuneration. It was contended, upon the ground that the tender included the costs up to the time of making it, that the ct. pronounced for the tender & the expenses it embraced, leaving the salvors to pay those they might subsequently have incurred:—*Held:* the salvors not entitled to any of their costs.—THE JOHN & THOMAS (1822), 1 Hag. Adm. 157 n.

Annotation:—**Consd.** The Sovereign (1860), 6 Jur. N. S. 832.

1016. —— —— Tender refused on counsel's advice.]—Where the salvors had refused, on the advice of counsel, to accept a tender which the ct. found to be sufficient, their application for costs was rejected, but the ct. declined to condemn them in costs.—THE GENERAL PALMER, No. 996, *ante*.

For full anns., *see* S. C. No. 996, *ante*.

1017. —— —— Salvage cases.] — In salvage suits, when a tender is pronounced sufficient, costs do not, as a rule, follow the decision as in a ct. of common law.—THE FAVOURITE (1862), 5 L. T. 773; 1 Mar. L. C. 191.

1018. —— Misapprehension—No power to correct.]—The ct. having pronounced a tender sufficient dismissed defts. & their bail, but made no order as to costs. On an application for costs up to the time of tender it appeared the tender did not include costs:—*Held:* (1) if the ct. had known the tender did not include costs, it would not have pronounced in favour of the tender, but would have declared the sum tendered sufficient remuneration & have given pltfs. their costs; (2) defts. & their bail being dismissed, the ct. was now unable to grant the application.—THE COUNTESS OF LEVEN & MELVILLE (1861), 5 L. T. 290.

Annotation:—**Consd.** The Joseph C. Griggs (1866), 15 L. T. 396.

1019. Defendant refused costs—Tender out of court.]—A tender must be made by act in ct. to entitle the party making it to costs, if it be considered sufficient. An extra-judicial tender does not entitle to costs.—THE PERSEVERANCE (1841), 8 L. T. 613.

SECT. 9.—SECURITY FOR COSTS AND SECURITY TO ANSWER COUNTERCLAIM.

SUB-SECT. 1.—SINCE THE JUDICATURE ACTS.

1020. Plaintiff insolvent.]—Where pltf. has recently executed a deed of assignment of all his property to an assignee, he will be required to give security for the costs of the suit, unless he satisfies the ct. that he is solvent.—THE LAKE MEGANTIC (1877), 36 L. T. 183; 3 Asp. M. L. C. 382.

1021. Foreigner—Intervening as defendant—Counterclaim.]—Foreigners resident out of the jurisdiction, who have intervened as defts. in an action of collision *in rem* instituted on behalf of foreign pltfs. by whom security for costs has been given, must, if they seek relief by way of counterclaim, give security for the whole costs of the action.—THE JULIA FISHER (1877), 2 P. D. 115; 36 L. T. 257; 25 W. R. 756; 3 Asp. M. L. C. 380.

Annotations:—**Consd.** Sykes *v.* Sacerdoti (1885), 53 L. T. 150. **Distd.** Lake *v.* Haseltine (1885), 55 L. J. Q. B. 205.

1022. Security to answer counterclaim—When ordered—Against shipowner, not against cargo-owner.]—Where the owners of a ship which has sunk, & the owners of cargo laden on board her, join as pltfs. in an action against another ship for damages sustained by collision, the ct. will order the claim by the owners of the ship to be dismissed, unless security for the counterclaim is given, but will allow the owner of cargo to proceed without giving security.—THE CARNARVON CASTLE (1878), 38 L. T. 736; 26 W. R. 876; 8 Asp. M. L. C. 607, C. A.

1023. —— —— Foreign Government.] — The Admlty. Ct. has power under Admlty. Ct. Act, 1861 (c. 10), s. 34, to stay proceedings in an action *in rem* until pltfs. have given security to answer defts.' counterclaim, even though pltfs.' ship, because it is owned by a foreign Govt., is by the comity of nations privileged from arrest.—THE NEWBATTLE (1885), 10 P. D. 33; 54 L. J. P. 16; 52 L. T. 15; 33 W. R. 318; 5 Asp. M. L. C. 356, C. A.

1024. —— Not ordered—Against plaintiff in personam.]—A collision occurred in the English Channel between the Dutch tug *H.* & the English s.s. *J.*, causing loss of the *H.* The foreign owners of the *H.* brought an action *in personam* against the owners of the *J.* to recover the damage caused by loss of the tug. The owners of the *J.* defended the action, & counterclaimed for the damage sustained by their vessel, & then applied that the action by the owners of the tug *H.* should be stayed unless they gave security to satisfy any damages found due on the counterclaim:—*Held:* the ct. had no jurisdiction either under Admlty. Ct. Act, 1861 (c. 10), s. 34, or under Jud. Act, 1873 (c. 66), s. 24 (5), (7), to make an order requiring pltfs. suing *in personam* to give security for damages which might be found due to defts. under a counterclaim.—THE JAMES WESTOLL, [1905] P. 47; 74 L. J. P. 9; 92 L. T. 150; 10 Asp. M. L. C. 29, C. A. S. C. No. 847, *ante*.

1025. —— —— Where defendant not required to give bail.]—Where in a damage action the ship proceeded against is not arrested, & pltfs. do not require bail to be given, defts. cannot compel pltfs. to give security to answer a counterclaim in the action under Admlty. Ct. Act, 1861 (c. 10), s. 34, although they voluntarily give bail.—THE ALNE HOLME (1882), 47 L. T. 307; 4 Asp. M. L. C. 591.

PART III. SECT. 9, SUB-SECT. 1.

a. *Security to answer cross-action—Not ordered—Crown.*]—A collision occurred between defts.' ship & a King's ship. The former vessel was arrested & bailed, but the latter could not be arrested, & as the Crown could not be sued for damages, an action *in personam* was brought against the officer in charge. Defts. moved for a suspension of proceedings by the Crown until they had given security to answer the judgment which defts. hoped to recover in their action *in personam*:—*Held:* there was no cross cause to justify such order. *The Comus* (1816), 2 Dods. 464; *The Athol* (1842), 1 Wm. Rob. 374; *Heltihewage Siman Appu* v. *Queen's Advocate* (1884), 9 App. Cas. 571; *H.M.S. Sans Pareil*, [1900] P. 267; *H.M.S. King Alfred* (1913), 30 T. L. R. 102; *H.M.S. Hawke*, [1913] P. 214; *The Lord Hobart* (1815), 2 Dods. 100; *A.-G.* v. *Brookshank* (1827), 1 Y. & J. 439; *Spain (King)* v. *Hullet* (1833), 1 Cl. & Fin. 333; *The Cameo* (1862), Lush. 408; *Prioleau* v. *United States & Andrew Johnson* (1866), L. R. 2 Eq. 659; *The Charkieh* (1873), L. R. 4 A. & E. 120; *Secretary of State for War* v. *Chubb* (1880), 43 L. T. 83; *The Newbattle* (1885), 10 P. D. 33; *Carr* v. *Fracis Times & Co.*, [1902] A. C. 176, cited.—R. *v.* THE DESPATCH (1915), 22 B. C. R. 365; 33 W. L. R. 130; 25 D. L. R. 221.—**CAN.**

b. *Time for application—English practice—Exchequer Court of Canada.*]—Under r. 223 of the General Rules & Orders regulating the practice & procedure in Admlty. cases in the Exch. Ct. of Canada, applying the English practice to cases not provided for by such Rules, an order for security for costs may be granted in Admlty. proceedings on motion of deft. after pltf. has filed particulars of his statement of claim.—MORTEN, DOWNS & CO. *v.* THE LAKE SIMCOE (1905), 25 C. L. T. 147; 9 Ex. C. R. 361.—**CAN.**

1026. —— —— Where action discontinued.]—The power of the Admlty. Div. under Admlty. Ct. Act, 1861 (c. 10), s. 34, to order an action to be stayed until bail has been given to answer a cross-action or counterclaim, does not extend to making an absolute order to give bail, & in a damage action which pltfs. had discontinued after defts. had counterclaimed, the ct. refused to enforce an order, made by the registrar, to give bail to answer such counterclaim.—THE ALEXANDER (1883), 48 L. T. 797; 5 Asp. M. L. C. 89.

1027. —— Effect of—Plaintiff not entitled to security to answer claim.]—Where, owing to the fact that deft.'s ship has been sunk, pltf. has commenced a damage action *in personam*, & deft. has obtained bail from pltf. to answer his counterclaim, the ct. has no power under Admlty. Ct. Act, 1861 (c. 10), s. 34, to stay proceedings on the counterclaim until security has been given by deft. to answer the claim of pltf.—THE ROUGEMONT, [1893] P. 275; 62 L. J. P. 121; 70 L. T. 420; 7 Asp. M. L. C. 437; 1 R. 658.

SUB-SECT. 2.—BEFORE THE JUDICATURE ACTS.

1028. Owner out of jurisdiction.]—In proceedings in the Admlty. Ct. the ct. will require security for costs to be given in cases in which the owners are resident out of the ct.'s jurisdiction.

The fact of a vessel's being under arrest of the ct. in a former suit will not enable the ct. to apply its process for enforcement of payment of costs of a second suit if it should be necessary.—THE SOPHIE (1842), 1 Wm. Rob. 326.

1029. *S. P.* THE DRUID, No. 471, *ante*.

Annotations:—**Consd.** The Bold Buccleugh (1850), 3 Wm. Rob. 220. **Distd.** The Scine (1859), Sw. 411. **Expld. & Distd.** The Ida (1860), Lush. 6. **Expld.** The James Seddon (1866), 35 L. J. Adm. 117. **Consd.** The Lemington (1874), 32 L. T. 69; The Tasmania (1888), 13 P. D. 110; The Ripon City, [1897] P. 226. **Retd.** The Charkieh (1873), L. R. 4 A. & E. 59; The Leon (1881), 6 P. D. 148; Morgan *v.* Castlegate S.S. Co., [1893] A. C. 38.

1030. —— Though foreign Government.]—A foreign Govt., pltf. in the Admlty. Ct., must give security for costs of the suit.—THE BEATRICE (OTHERWISE THE RAPPAHANNOCK), No. 1040, *post*.

1031. —— Time for application.]—Where it is sought to require a foreign owner to give security for costs, that should be asked at the outset of the cause.—THE CONON (1842), 6 Jur. 351.

1032. —— ——.]—Application for security for costs should be made in the earliest stage of the proceedings; & in ordinary cases the ct. will enforce this rule.

In the circumstances of the case security for costs was decreed after the act on petition had been concluded, & both proctors assigned to bring in their proofs.—THE VOLANT, Nos. 472, 806, 816, *ante*; No. 1503, *post*.

Annotations:—**Retd.** The St. Olaf (1869), L. R. 2 A. & E. 360; The Freedom (1871), 25 L. T. 392.
For full anns., *see* S. C. No. 1503, *post*.

1033. —— Security for damages not ordered.]—A foreign pltf. suing *in rem* will be required to give security for costs, but not security for damages as for wrongful arrest of deft.'s vessel, although an affidavit be filed by deft. that pltf. arrested his vessel in mistake for another vessel, & has since had notice of same.—THE D. H. PERI, No. 756, *ante*.

Annotation:—**Refd.** The Mary (or Alexandra) (1867), L. R. 1 A. & E. 335.

1034. —— ——.]—Pltfs. beyond the jurisdiction of the ct. in a cause of possession, though liable to give security for costs, will not be required, as a general rule, to give security for damages.—THE MARY (OR ALEXANDRA) (1867), L. R. 1 A. & E. 335; 16 L. T. 98; 2 Mar. L. C. 477.

1035. Foreign ship—Wages—Master.]—The master of a foreign ship suing for his wages will be required to give security for costs.—THE FRANZ ET ELIZE, Nos. 456, 770, *ante*.

Annotations:—**Distd.** The Nina (1867), L. R. 2 A. & E. 44. **Folld.** The Zufall (1875), 44 L. J. Adm. 16. **Distd.** The Don Ricardo (1880), 5 P. D. 121.

1036. —— —— —— Crew.]—Where a cause of wages was instituted against a foreign ship by her master & crew, also foreigners, & it appeared that, although they were at the time in England, their only place of residence was on board the ship, & the master had stated he had no means & intended to leave England, the Admlty. Ct. ordered pltfs. to give a security for costs in the sum of £130.—THE ZUFALL (1875), 44 L. J. Adm. 16; 32 L. T. 571; 23 W. R. 328; 2 Asp. M. L. C. 587.

1037. —— —— Mate—Discretion of court.]—It is in the discretion of the ct. to allow the mate of a foreign vessel, though not domiciled in England, to prosecute an action for wages without giving security for costs.—THE DON RICARDO, No. 786, *ante*.

1038. —— Limitation of liability.]—THE WILD RANGER (1862), Lush. 553; 1 New Rep. 132; 32 L. J. P. M. & A. 49; 7 L. T. 725; 9 Jur. N. S. 134; 1 Mar. L. C. 275.

Annotations:—**Consd.** The Amalia (1863), Brown. & Lush. 151, P. C.; Submarine Telegraph Co. *v.* Dickson (1864), 15 C. B. N. S. 759; The Scotia (1869), 20 L. T. 375; Varesick *v.* British Columbia Copper Co., Ltd. (1906), 1 B. W. C. C. 446. **Refd.** The Nevada (1872), 27 L. T. 720; The Leon (1881), 6 P. D. 148; Davidsson *v.* Hill, [1901] 2 K. B. 606.

1039. Defendant out of jurisdiction—No security ordered.]—The Admlty. Ct. declined to order security for costs in a collision suit to be given by deft., though a foreigner.—THE ARGO (1855), 5 L. T. 557.

1040. —— ——.]—A foreign deft. is not bound to give security for costs, even though, from the circumstances of the case, it may happen that the burden of proof of the issues in the cause lies upon him.—THE BEATRICE (OTHERWISE THE RAPPAHANNOCK) (1866), 36 L. J. Adm. 10. S. C. No. 1030, *ante*.

1041. Security to answer cross-action—British subject.]—Admlty. Ct. Act, 1861 (c. 10), s. 34, relating to the giving of security in certain cases to answer a cross cause, etc., applies to the case where

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PART III. SECT. 9, SUB-SECT. 2.

1028 i. *Owner out of jurisdiction.*]—In a cause of collision, owners, resident in England out of the jurisdiction of the ct., & not having even a casual residence in Ireland, were ordered to give security for costs.—THE HIBERNIA (1859), 1 L. T. 200.—**IR.**

c. *Plaintiff out of jurisdiction.*]—Where pltf., in an action on a bottomry bond, was resident out of the jurisdiction of the ct., although presumably a British subject:—*Held:* he should be required to give security for costs on deft. making an affidavit of merits, & of the defence being *bonâ fide*.—THE ABBY ALICE (1872), Y. A. D. 112.—**CAN.**

1041 i. *Security to answer cross-action.*]—Three causes of damage by collision were brought respectively by the owners of cargo of a sunken vessel, the owners of the vessel & the master & crew of the vessel, against the owners of the colliding ship; in one of the causes the ship was arrested & liberated on bail; & the causes were consolidated. Pending the hearing, a motion was made that pltfs. in the consolidated causes be compelled to answer the complaint of pltfs. in a cross cause & give security to pay such damage as might be due in the cross cause:—*Held:* (1) Admlty. Ct. (Ireland) Act, 1867 (c. 114), s. 72 (second clause), under which the motion was made, applied only to cases in which the owner of one of the colliding ships was pltf. in the principal cause; (2) though that sect. was applicable in terms to the cause in which the owners of the sunken vessel were pltfs., the ct. ought not to exercise its discretion, since it could not suspend one of the causes without suspending the others, which it had no power to do, & the motion should be refused with costs.—THE ANNA LASSEN *v.* THE LAKE ST. CLAIR (1873), 7 I. L. T. 65.—**IR.**

Sect. 9.—*Security for costs & security to answer counterclaim: Sub-sect.* 2. *Sect.* 10: *Sub-sect.* 1, *A.* (*a*) & (*b*) & *B.* (*a*) & (*b*).]

pltf. suing *in rem* is a British subject, resident in the jurisdiction.

A collision took place off the coast of Norfolk, between two British ships, the *C.* & the *R.*, whereby the *R.* was sunk & lost. On the next day an action was instituted against the *C.* by the owner of the *R.*; the *C.* was arrested, but released on bail for £2,000. A cross-action was afterwards instituted by the owners of the *C. in personam* against the owner of the *R.* On a motion that proceedings against the *C.* & her owners be stayed, until security should be given by pltf. to answer the cross cause, & that the two causes should be heard together:—*Held:* (1) the two parties stood in different & very unequal positions: the one had proved substantial security, the other had only the personal responsibility of his opponent, which might be worthless; (2) the application was within the very purpose of the above sect., the intention of the Act being to put the two contending parties on a fair footing; (3) it made no difference that pltf. was within the jurisdiction of the ct., whatever powers of execution the ct. might possess, for such security could not be considered as at all equivalent to the security of bail; (4) the motion must be granted.—THE CAMEO (1862), Lush. 408; 5 L. T. 773; 1 Mar. L. C. 191.

1042. —— Foreigner.]—Where a cause of damage is instituted in the Admlty. Ct. against a ship in respect of a collision in which pltfs.' ship is totally lost, & defts. institute a cross cause *in personam* against pltfs. in respect of same collision, both parties being foreigners resident abroad, & pltfs. decline to give security to answer judgment in the cross cause, or to enter an appearance, the ct. will apply Admlty. Ct. Act, 1861 (c. 10), s. 34, & order proceedings to be stayed in the principal cause until security is given in the cross cause.—THE CHARKIEH (1873), L. R. 4 A. & E. 120; 42 L. J. Adm. 70; 29 L. T. 404; 22 W. R. 63; 2 Asp. M. L. C. 121.

1043. —— Amount of security.]—When cross causes are instituted in respect of a collision, security cannot be required, under Admlty. Ct. Act, 1861 (c. 10), s. 34, for a greater amount than the value of the vessel of deft. from whom security is demanded, though that may have been sunk & the action against the owners be a personal one.—THE CALCUTTA (1869), 17 W. R. 744.

SECT. 10.—OTHER INTERLOCUTORY PROCEEDINGS.

SUB-SECT. 1.—DISCOVERY.

See, generally, DISCOVERY, INSPECTION & INTERROGATORIES.

A. Interrogatories.

(*a*) *Since the Judicature Acts.*

1044. Time for delivering interrogatories—Not before pleadings closed—Information in preliminary act.]—There is no absolute right to deliver interrogatories as a party chooses.

In an action in the Admlty. Div. for damages in respect of a collision pltf. will not be allowed before close of pleadings to deliver to defts. interrogatories seeking information which would be disclosed by defts.' preliminary act.—THE BIOLA (1876), 34 L. T. 185; 24 W. R. 524; 3 Asp. M. L. C. 125; 3 Char. Pr. Cas. 178.

Annotation:—Reid. The Radnorshire (1880), 49 L. J. P. 48.

1045. When allowed—Collision—Plaintiffs' crew lost.]—In an action of damage arising out of a collision in which pltfs.' vessel was lost, with all of the crew who could give evidence as to the collision, pltfs. were allowed to administer interrogatories to the owners of defts.' vessel as to the circumstances of the collision.—THE ISLE OF CYPRUS (1890), 15 P. D. 134; 59 L. J. P. 90; 63 L. T. 352; 38 W. R. 719; 6 Asp. M. L. C. 534.

1046. —— Though information in preliminary act.]—Interrogatories administered in a collision action, & relating to the circumstances of the collision, will not be struck out under R. S. C., Nov., 1878, r. 3, as scandalous, or unreasonably or vexatiously exhibited, because information sought to be obtained through them would for the most part be afforded by the preliminary acts.—THE RADNORSHIRE (1880), 5 P. D. 172; 49 L. J. P. 48; 43 L. T. 319; 29 W. R. 476; 4 Asp. M. L. C. 338.

1047. —— ——.]—The barge *B.*, belonging to defts., carrying a cargo of maize belonging to pltfs., & in tow of the tug *R.*, belonging to defts., came into collision in the Mersey with the s.s. *M.* Pltfs., as owners of the cargo of maize, commenced an Admlty. action in the Liverpool District Registry against defts. as owners of the *B.* & the *R.*, & in the statement of claim alleged negligence in navigation of the barge. Defts. delivered a defence & counterclaim denying negligence &, in the alternative, alleging that pltfs.' goods were being carried by defts. under a contract between pltfs. & the Mersey Docks & Harbour Board, providing that the Board should not undertake any risks in connection with lighterage of the goods whether arising from their negligence or otherwise, & that the owners of the goods should protect themselves by insurance. By their counterclaim defts. claimed in respect of pltfs.' goods the due proportion in general average for losses, damages, & expenses incurred in & about the preservation of the *B.*, her cargo & freight, from damage & loss during carriage of the goods. Pltfs. applied for leave to deliver interrogatories to be answered by defts., relating to the circumstances of the collision such as were usually contained in the preliminary act required by C. C. R., 1903, O. 39, r. 32, in the case of an action for damage by collision between vessels, & including the following: 12. State if any & what vessel other than the *M.* caused or contributed to the collision or damage, & if any & what vessel hampered the navigation of the *R.* & the *B.* in any way & what way. 13. Do you allege any & what negligence or breach of any & what rule or rules against the *M.*? :—*Held:* from the nature of the case, the interrogatories required to be answered.—THE BERNARD, [1905] W. N. 73.

1048. Deposit—Numerous defendants.]—Where in a co-ownership action, brought by a managing owner against his co-owners for an account to recover a balance, pltf. sought to interrogate defts., who were numerous, & to be dispensed from making the usual deposit, defts. contending a deposit ought to be made in respect of each deft. interrogated, the ct. ordered a deposit of £5 & 10*s.* for each additional folio over five & no more.—THE WHICKHAM (1885), 53 L. T. 236; 5 Asp. M. L. C. 479.

See, now, R. S. C., O. 31, r. 26.

(*b*) *Before the Judicature Acts.*

1049. When allowed—Before petition—Collision—Appearance denying ownership.]—The Admlty. Ct. has power to order interrogatories to be administered to deft. before pltf. has filed the petition. When a cause of collision was instituted *in personam* against deft. as owner of a ship, & deft. entered an appearance, alleging himself to be "improperly sued as one of the owners" of the ship, the Admlty. Ct. allowed interrogatories to be administered by pltf. to deft. for the purpose of ascertaining the ownership before pltf.'s petition was filed.—THE MURILLO (1873), 28 L. T. 374; 1 Asp. M. L. C. 579. S. C. No. 1052, *post*.

1050. —— To support plaintiffs' case—Equity practice followed.]—The practice of the Admlty. Ct. as to interrogatories follows that of the cts. of equity rather than that of the common law cts.

In a cause of possession deft. may be compelled to answer interrogatories if they tend to support pltfs.' case & a complete inquiry into the truth of the issues in the cause.—THE MARY (or ALEXANDRA) (1868), L. R. 2 A. & E. 319; 38 L. J. Adm. 29; 18 L. T. 891; 17 W. R. 551. S. C. No. 1055, *post.*

1051. —— To discover owner.]—Where cargo has been destroyed by negligence of the master, discovery lies to ascertain who are the part-owners of the ship.—MORSE *v.* BUCKWORTH (1703), 2 Vern. 443; 23 E. R. 883.

Annotation:—**Refd.** Bowman *v.* Lygon (1792), 1 Anst. 1.

1052. —— ——.]—THE MURILLO, No. 1049, *ante.*

1053. —— Though inquiring as to documents.]—Pltfs. in a cause applied to the ct. for leave to deliver certain interrogatories to deft. The application was made upon an affidavit of pltfs. & their solr. stating that the deponents believed pltfs. would derive material benefit from the discovery they sought, & that there was good cause of action upon the merits. The interrogatories asked, among other things, whether any & what documents relating to the cause were in possession of deft. Deft. opposed the application upon the ground that the ct. ought not to grant leave to pltfs. to deliver interrogatories for the discovery of documents without an affidavit by pltfs. of their belief that some document, to the production of which pltfs. were entitled, was in possession or power of deft. The ct. overruled the objection & granted the application.—THE MINNEHAHA (1870), L. R. 3 A. & E. 148; 23 L. T. 747; 19 W. R. 304; 3 Mar. L. C. 518. S. C. No. 1054, *post.*

1054. Answers—Sufficiency of—Information & belief.]—In answer to interrogatories delivered by pltfs., deft. stated upon affidavit: "I am personally wholly unacquainted with the facts & unable to answer any of them from my own knowledge, save as hereinafter appears." Upon an application for further & fuller answers:—*Held:* (1) the affidavit in answer was insufficient; (2) deft. was bound to answer according to his information & belief.—THE MINNEHAHA, No. 1053, *ante.*

1055. —— Exposure to penalties.]—A deft. will not be compelled to answer an interrogatory if he swears his answer would subject him to the penalties of Foreign Enlistment Act, 1870 (c. 90).—THE MARY (or ALEXANDRA), No. 1050, *ante.*

B. Discovery of Documents.

(a) Since the Judicature Acts.

1056. Time for discovery—Before defence—Salvage—To obtain material for defence.]—THE LOCH MAREE (1895), cited in Roscoe, Admlty. Practice, 3rd ed., p. 340.

1057. —— Foreign ship.]—In an action *in rem* against a foreign ship whose owners are resident abroad, the ct. will make an order for discovery of documents against such owners, but will always allow a reasonable time for making the affidavit of documents.—THE EMMA (1876), 34 L. T. 742; 24 W. R. 587; 3 Asp. M. L. C. 218; 3 Char. Pr. Cas. 226.

1058. Salvage—Admissions by defendant—Tender—Costs.]—Pltf. in a salvage action in the Admlty. Div., in which defts. admit the allegations in the statement of claim, & tender a sum in satisfaction, is nevertheless entitled to discovery & inspection of documents, but at his own risk & cost if such discovery & inspection should be held at the hearing to have been unnecessary.—THE MARIA (1879), 40 L. T. 295; 4 Asp. M. L. C. 94. S. C. No. 913, *ante.*

1059. Documents to be produced—Collision—Agreement compromising another action.]—In an action by the owners of goods against the owners of a ship, in which the goods had been carried, for damage done to the goods in a collision with another ship, defts. were ordered to produce (1) an agreement whereby they & the owners of the other ship had compromised cross-suits of damage instituted in the Admlty. Ct., & (2) an average statement made on the basis of the agreement.—HUTCHINSON *v.* GLOVER (1875), 1 Q. B. D. 138; 45 L. J. Q. B. 120; 33 L. T. 605, 834; 24 W. R. 185; 3 Asp. M. L. C. 85, 120; 1 Char. Pr. Cas. 120, C. A.

Annotations:—**Expld. & Distd.** Kearsley *v.* Philips (1883), 52 L. J. Q. B. 269, C. A. **Expld.** Vivian *v.* Little (1883), 11 Q. B. D. 370.

1060. —— —— Materials on which value based.]—Pltfs.' lightship, while at her station in the Mersey, was run into & sunk by defts.' steamship. Defts. admitted liability, agreed to a reference, & applied for an order to inspect pltfs.' books with a view to ascertaining the figures upon which pltfs. based the value they set upon their vessel:—*Held:* defts. were entitled to an order for production of the books forthwith, as the only material question was the value of the lightship at the date of the casualty, & it would assist defts. if, before going to the reference, they were in possession of figures relating to the original cost, & subsequent depreciation in value, of the lightship.—THE PACUARE, [1912] P. 179; 81 L. J. P. 143; 107 L. T. 252; 12 Asp. M. L. C. 222, C. A.

1061. Privilege—Depositions before receiver of wreck—Copies in hands of opposite party.]—In a damage action, arising out of a collision between a British & a foreign ship, copies of depositions made before the receiver of wreck by the crew of the British ship, & obtained from the Board of Trade by the owners of the British ship for purposes of the action, are privileged, & inspection of them cannot be obtained by the owners of the foreign ship, even although the Board of Trade, on the ground that no such depositions have been made by any member of the foreign crew, has refused to allow the foreign owners to see them.—THE PALERMO (1883), 9 P. D. 6; 53 L. J. P. 6; 49 L. T. 551; 32 W. R. 403; 5 Asp. M. L. C. 165, C. A.

Annotations:—**Expld.** Land Corpn. of Canada *v.* Puleston, [1884] W. N. 1. **Distd.** Goldstone *v.* Williams, [1899] 1 Ch. 47.

1062. —— Surveyor's reports—Damage to cargo.]—The consignees of a cargo of wheat, after obtaining the reports of surveyors as to the condition of the cargo, instituted an action of damage to the cargo against the vessel in which the cargo had been carried. The owners of the vessel defended the action & obtained an order for discovery of documents. Pltfs. in their affidavit in reply objected to produce the reports of the survey of the cargo on the ground that such reports were prepared solely for the purpose of proceeding in the action. On motion by defts. to direct inspection:—*Held:* the reports were privileged.—THE THEODOR KORNER (1878), 3 P. D. 162; 47 L. J. P. 85; 38 L. T. 818; 27 W. R. 307; 4 Asp. M. L. C. 17.

(b) Before the Judicature Acts.

1063. Application before motion.]—Before moving the ct. for an order for inspection of documents, previous application should be made to the parties in possession of them; unless appct. does so he may be condemned in costs.—THE MEMPHIS

a. *Affidavit on application for.*]—A full affidavit is necessary in applying for discovery of documents.—S.S. BENWICK CO. *v.* BANNATYNE (1893), 27 I. L. T. 137.—IR.

Sect. 10.—*Other interlocutory proceedings: Sub-sect.* 1 *B.* (*b*); *sub-sect.* 2, *A. & B.*; *sub-sects.* 3 & 4, *A. & B.*]

(1869), L. R. 3 A. & E. 23; 21 L. T. 727; 18 W. R. 74; 3 Mar. L. C. 317.

1064. Extent of right.]—On a motion on the part of an American shipmaster, who had claimed some part of the cargo, but had not been able to specify the name of the person for whom he claimed, that he might be at liberty to inspect the papers, & that his claim might be received, the ct. directed the claim to be received *de bene esse* & the party to be permitted to inspect such papers only as might relate to that claim.—THE PORT MARY (1801), 3 Ch. Rob. 233.

1065. ——.]—The Admlty. Ct. will not interfere to compel production of a ship's papers, retained by an agent, upon the *ex p.* affidavit of the owners, the case not being an original cause of possession in which the ct. would have power to make an order for production of the ship's papers as incidental to the cause.—THE LUSITANO (1841), 1 Wm. Rob. 166.

1066. Power of court to inspect.]—Where it appeared doubtful whether certain documents of which discovery was sought were material to the issue:—*Held:* they should be produced to the ct., & if, in the opinion of the ct., on consideration of the arguments & examination of the documents, it was considered fit & proper, inspection would be granted.—THE MCGREGOR LAIRD (1866), L. R. 1 A. & E. 307; 36 L. J. Adm. 10; 15 W. R. 262.

Annotation:—**Refd.** Hill *v.* Campbell (1875), L. R. 10 C. P. 222.

1067. Privilege—H.M. ship in collision—Report to Admiralty privileged—Log book not privileged.]—The owners of an English steamer sunk in a collision with H.M.S. *B.* instituted a cause of damage in the Admlty. Ct. against the captain of the *B.* & the vice-admiral whose flag she was carrying at the time of the accident. By authority of the Admlty. Lords Comrs., the Admlty. proctor entered an appearance in the suit on behalf of defts., & pltfs. made an application to the ct., on motion, to inspect (1) the log books of the *B.*; (2) certain reports relating to the collision which had been received at the Admlty. from defts. prior to institution of the suit. The ct., on an affidavit of the secretary of the Admlty. being filed stating that inspection of such reports would be prejudicial to the public service, refused to grant any part of the motion except so much of it as asked for inspection of the log books of the *B.*—H.M.S. BELLEROPHON (1874), 44 L. J. Adm. 5; 31 L. T. 756; 23 W. R. 248; 2 Asp. M. L. C. 449.

Annotations:—**Consd.** Hennessy *v.* Wright (1888), 21 Q. B. D. 509; *Re* Hargreaves, [1900] 1 Ch. 347, C. A.

1068. —— **Letters containing secrets—Not privileged.**]—In a suit for damage to cargo, it is no answer to a claim for production of letters with reference to shipment of the cargo that those letters disclose the private secrets of their owners.—THE DON FRANCISCO (1862), Lush. 468; 31 L. J. P. M. & A. 205; 6 L. T. 133; 1 Mar. L. C. 203.

For full anns., *see* DISCOVERY, INSPECTION & INTERROGATORIES.

SUB-SECT. 2.—PARTICULARS.

See, generally, PLEADING; PRACTICE & PROCEDURE.

A. Since the Judicature Acts.

1069. Rule as to.]—The rule as to giving the opposite party particulars of any general allegation in pleadings ought to be the same in the Admlty. as in the Queen's Bench Div.

Where, in an action in the Admlty. Div. by cargo-owners against shipowners for delivery of cargo in a damaged condition, the statement of claim alleged that the damage was not occasioned by any of the excepted perils mentioned in the bill of lading under which the cargo had been shipped, but by the defective condition of the vessel, or negligence, or breach of duty of defts., or their servants:—*Held:* defts. were entitled to particulars of the defects rendering the vessel not fit to carry the cargo.—THE RORY (1882), 7 P. D. 117; 51 L. J. P. 73; 46 L. T. 757; 4 Asp. M. L. C. 534, C. A.

Annotation:—**Consd.** Kent Coal Concessions *v.* Duguid, [1910] 1 K. B. 904, C. A.

1070. ——.]—In a cause of damage to cargo, the ct., contrary to the practice of the Admlty. Ct., made an order for particulars of pltf.'s claim, so as to enable deft. to pay into ct. in respect of those items of the claim for which he was prepared to admit liability.—THE WETTERHORN (1876), 34 L. T. 587; 24 W. R. 323; 3 Asp. M. L. C. 168.

1071. Particulars ordered.]—In a cause of damage where pltfs.' vessel had become a total loss, the ct. ordered pltfs. to deliver to defts. particulars of their claim notwithstanding defts. had not admitted liability for the damage proceeded for.—THE N. P. NIELSEN (1876), 34 L. T. 588; 24 W. R. 324; 3 Asp. M. L. C. 169.

1072. Inability to give—Effect of.]—A vessel at anchor was run into & damaged by a vessel in motion. In an action for damages, the owners of the vessel at anchor delivered a statement of claim in which they alleged that those on the vessel colliding with them did not take proper & seamanlike measures to keep clear. A summons for particulars of the measures which should have been taken having been dismissed by the registrar:—*Held:* as pltfs. could give no particulars, the allegation should be struck out, the judge at the trial having power to deal with negligence proved but not pleaded.—THE KANAWHA (1913), 108 L. T. 433; 12 Asp. M. L. C. 317. S. C. No. 907, *post.*

B. Before the Judicature Acts.

1073. Particulars not ordered — Negligence — Damage to cargo.]—In a cause of damage to cargo the petition alleged that certain parcels of oil-cake were not delivered in good order & condition according to the terms of the bills of lading, & that the damages were the consequence of breaches of the contracts in the bills of lading, or that they were occasioned by negligence or breach of duty on the part of the master or crew. On motion by defts. to order pltfs. to give particulars of the allegations:—*Held:* they were not bound to set out the particular acts or the character of the negligence which caused the damage.—THE FREEDOM (1869), L. R. 2 A. & E. 346; 38 L. J. Adm. 25; 20 L. T. 229, 1018; 18 W. R. 48; 3 Mar. L. C. 219, 261.

Annotation:—**N.F.** The Rory (1882), 7 P. D. 117, C. A.

1074. Particulars—Refusal of—By master.]—THE NORWAY, Nos. 525, 534, 558, *ante.*

For full anns., *see* S. C. No. 534, *ante.*

SUB-SECT. 3.—THIRD PARTY PROCEDURE.

See, generally, PRACTICE & PROCEDURE.

1075. Effect of—Position of defendant—Decision in action not binding.]—When in a collision cause

PART III. SECT. 10, SUB-SECT. 3.

b. *Order for third party notice—Alleged indemnity—Persons out of jurisdiction.*]—There is no provision in the Rules of the Admlty. Div. of the Exch. Ct. for an order for issue of third party notice under an alleged indemnity, especially if parties sought to be brought into ct. in that way reside out of jurisdiction.—MACKAY *v.* THE POLLUX (1908), 11 Ex. C. R. 210; 12 O. W. R. 751.—**CAN.**

deft. claims indemnity from a third party, & such third party appears & defends, the ct. may find original deft. solely to blame, notwithstanding he does not plead or appear at the trial, but unless proper issues are directed between deft. & the third party the ct. cannot make a decree deciding questions of liability between them. *Semble:* it is competent to the ct. to order such issues between deft. & a third party to be tried either at the same time as those between pltf. & deft. or after these have been decided. The position of deft. in the original action is the same whether a third party is cited or not.

A collision took place between the *S.* & the *C.*, which was being towed by a tug. The owners of the *S.* brought an action against the owners of the *C.* alleging the collision to have been occasioned by negligence of the *C.* & her tug, or one of them. The owners of the *C.* obtained leave to serve notice on the owner of the tug that they claimed to be entitled to indemnity, & the ct. made an order that the owner of the tug should be at liberty to appear & defend, "being bound as between him & defts. by any decision the ct. may come to in this action as to the cause of collision." At the hearing the owner of the tug appeared, but defts. did not, & the judge of the Admlty. Ct. pronounced that the collision was occasioned by default of the master & crew of the *C.*, & condemned the owners in damages & costs, & declared they were not entitled to indemnity from the owner of the tug. On appeal:—*Held:* (1) the order giving the owner of the tug liberty to appear & defend did not put matters in train for trying any issue between him & defts.; (2) so much of the judgment as negatived the right to indemnity by the owner of the tug must be struck out.—THE CARTSBURN (1880), 5 P. D. 59; 41 L. T. 710; 28 W. R. 378; 4 Asp. M. L. C. 202, C. A.

For full anns., *see* PRACTICE & PROCEDURE.

1076. Notice set aside—Different questions involved.]—Defts. in an action of damage *in rem* brought by owners of a vessel at anchor against a vessel which, at the time of collision, was in tow of a steam tug, obtained leave to serve a notice under R. S. C., O. 16, r. 18, upon the owners of the steam tug, claiming indemnity in respect of damage caused by the collision. On the statement of defence being delivered it appeared it was extremely probable questions would arise between defts. & the owners of the steam tug totally different & distinct from the questions raised in the action between pltfs. & defts.:—*Held:* (1) assuming the ct. had jurisdiction to give directions as to the mode of having the questions in the action determined under R. S. C., O. 16, r. 21, the circumstances were such that the ct. must, in its discretion, decline to give any such directions; (2) the owners of the steam tug must be dismissed from the proceedings & defts. be condemned in costs occasioned by the owners having been brought in as third parties.—THE BIANCA (1883), 8 P. D. 91; 52 L. J. P. 56; 48 L. T. 440; 31 W. R. 954; 5 Asp. M. L. C. 60.

1077. —— No contract of indemnity.]—Pltfs. commenced an action *in rem* for damages sustained by their steamer by collision with defts.' steamer. Defts. served a third party notice on the ship repairers under whose control, it was alleged, defts.' steamer was at the time, & claimed to be indemnified by them against liability. The third parties appeared under protest, & defts. applied for directions as to mode of procedure:—*Held:* the application must be refused, & the third party notice set aside, as (without deciding whether defts. would have a right of action against the third parties in the event of defts.' vessel being found to blame) there was no contract, express or implied, with the third parties involving an indemnity within R. S. C., O. 16, r. 48.—THE JACOB CHRISTENSEN, [1895] P. 281; 64 L. J. P. 92; 72 L. T. 902; 8 Asp. M. L. C. 21; 11 R. 795.

SUB-SECT. 4.—EXAMINATION OF WITNESSES BEFORE EXAMINER.

See, generally, EVIDENCE; PRACTICE & PROCEDURE.

A. Since the Judicature Acts.

1078. Evidence before examiner—Correction of shorthand note.]—In an Admlty. action the transcript of the shorthand notes of the evidence of witnesses directed to be examined before an examiner becomes, on being filed in the registry, evidence in the cause, & such transcript cannot be taken off the file without an order of the ct. In a case where the transcript of the shorthand notes of the evidence of a witness examined before an examiner was shown to be incorrect, the judge in ct. ordered the transcript to be taken off the file & returned to the examiner for amendment. The costs of the amendment, not being due to the fault of either party, to be costs in the cause.—THE KNUTSFORD, [1891] P. 219; 64 L. T. 352; 39 W. R. 559; 7 Asp. M. L. C. 33.

B. Before the Judicature Acts.

1079. Examination of witness—Power of court to order.]—In a cause of salvage the pilot on board the ship to which the service was rendered refused to make an affidavit for the salvors, & in the affidavit which he made on behalf of the owners he left out important facts:—*Held:* where a witness refused to make an affidavit or withheld facts to which he could depose, the ct. would summon & compel him to be examined by word of mouth, under Admlty. Ct. Act, 1840 (c. 65), s. 7.—THE PRINCE OF WALES (1848), 6 Notes of Cases, 39; 12 Jur. 165.

Annotation:—Refd. The Genessee (1848), 12 Jur. 401.

1080. Witnesses going abroad.]—An order may be made for the examination out of ct. of the master & mate of a vessel about to sail for India.—PIRIE *v.* IRON (1832), 8 Bing. 143; 1 Dowl. 252; 1 Moo. & S. 223; 131 E. R. 355.

1081. —— No opportunity for cross-examination.]—The surrogate had admitted A.'s libel in a cause of collision, & allowed witnesses to be examined thereon *de bene esse*, on affidavit that the ship was about to sail for Syria. She sailed in fact, & no opportunity was given to cross-examine. The ct. allowed B.'s allegation in reply to such libel to be brought in & witnesses to be examined & cross-examined thereon, but ordered that the cause should not be heard till A. should have submitted the witnesses on his libel for cross-examination.—THE CHANCE (1857), Sw. 294; 30 L. T. O. S. 219; 6 W. R. 221.

1082. Examination on written interrogatories—Detention of witness for further interrogatories.]—In proceedings in the Admlty. Ct., when interrogatories are put into the hands of the examiner, &

PART III. SECT. 10, SUB-SECT. 4.—B.

a. *Oral examination preferable to affidavit evidence.*]—Where the cause is proceeding in default it is preferable to grant a commission to examine witnesses than to take evidence by affidavit.—THE SARAH (1858), 4 L. T. 92.—IR.

b. ——.]—In collision cases in the Vice-Admlty. Cts. witnesses should as far as possible be examined *vivâ voce* before ct., not upon written interrogatories before an officer of the ct. prior to the hearing.—THE NORMA (1876), 35 L. T. 418.—P. C.

Sect. 10.—*Other interlocutory proceedings: Sub-sect.* 4, *B.; sub-sect.* 5, *A. & B. Sect.* 11: *Sub-sects.* 1 *& 2. Sect.* 12: *Sub-sects.* 1 *& 2.*]

no notice is given at the time of intention to administer additional interrogatories, the examiner is not bound to detain the witness for 24 hours after his examination is completed.

An application to have a witness reproduced who had left London for Liverpool immediately upon completion of his examination was refused.—THE GIPSEY (1842), 1 Wm. Rob. 370.

1083. Commissioner's refusal to proceed—New commission.]—An application was made to the ct. to issue a new commission for examination of witnesses, on a suggestion that the former comrs. had not executed their office; that one comr. had absented himself, & the other had declined to act alone:—*Held:* a new commission would be granted, but solely upon the ground of the comrs.' refusal to proceed. *Semble:* the usual practice if on of the comrs. does not attend is that notice is given to both comrs., & if one absents himself after that notice, the other is at liberty to proceed alone, the powers under the commission being given jointly & severally.—THE CERES (1800), 3 Ch. Rob. 128.

SUB-SECT. 5.—DISCONTINUANCE.

A. Since the Judicature Acts.

1084. Notice of discontinuance—What is.]—An informal letter substantially discontinuing an action *in rem* is sufficient notice within O. 22, r. 1, of Jud. Act, 1875 (c. 77).—THE POMMERANIA, No. 844, *ante*.

Annotation:—**Apld.** Spencer *v.* Waits (1889), 5 T. L. R. 570.

1085. Effect of discontinuance.]—Where pltf. in an action, after succeeding in an interlocutory application, the costs of which are made costs in the cause, gives notice of discontinuance of the action, under R. S. C., O. 23, deft. is entitled to his costs, including costs of such application.

Pltfs. commenced an action of possession to obtain the certificate of registry of a ship. Before pleadings were filed the ct., upon motion, ordered the certificate to be delivered to pltfs. who discontinued the action:—*Held:* pltfs. must pay the costs.—THE ST. OLAF (1877), 2 P. D. 113; 46 L. J. P. 74; 36 L. T. 30; 3 Asp. M. L. C. 341.

1086. ——.]—THE J. H. HENKES, No. 1289, *post*

1087. ——.]—An action for collision commenced by resps., owners of the *K.*, against the owners of the *A.*, was discontinued by consent. In the order, & in the agreement signed by the solrs. on which it was founded, the action was expressed to be discontinued "on the ground of inevitable accident." In a subsequent action for the same collision by applts., owners of the cargo of the *K.*, against the owners of the *A.*, both ships were found to blame, & defts. having obtained a decree limiting their liability, paid the sum for which they were liable into ct. Resps., with consent of the owners of the *A.*, obtained an order setting aside the order for discontinuance, & made a claim against the sum in ct.:—*Held:* (1) the agreement & order for discontinuance did not release or extinguish resps.' claims or bar them from further proceedings; (2) they were entitled to prove against the fund.—THE ARDANDHU (THE KRONPRINZ) (1887), 12 App. Cas. 256; 56 L. J. P. 49; 56 L. T. 345; 35 W. R. 783; 6 Asp. M. L. C. 124—H. L.

1088. ——.]—Where mtgees. intervened in a necessaries action which was discontinued by pltf. before coming to trial, the ct. directed that the marshal's fees occasioned by the sale of the ship, which was ordered on the application of mtgees., should be borne by mtgees., who had received the proceeds of the sale, & for whose benefit it had been made.—THE COLONSAY (1885), 11 P. D. 17; 55 L. J. P. 31; 54 L. T. 338; 5 Asp. M. L. C. 545.

B. Before the Judicature Acts.

1089. Abandonment of suit—Effect on second suit.]—Parties who have abandoned a former suit instituted by them to compel payment of certain alleged bottomry bonds will not be permitted, unless on strong grounds shown, to carry on proceedings a second time to enforce a demand founded on the same bonds.—THE FORTITUDO (1815), 2 Dods. 58.

Annotation:—**Consd.** Nelson *v.* Couch (1863), 15 C. B. N. S. 99.

SECT. 11.—DEFAULT ACTIONS.

SUB-SECT. 1.—DEFAULT OF APPEARANCE.

1090. Practice followed—Former practice.]—Proceedings by default in Admlty. actions *in rem* are regulated by the practice which prevailed in the Admlty. Ct. immediately before the passing of Jud. Act, 1875 (c. 77).—THE POLYMEDE (1876), 1 P. D. 121; 34 L. T. 367; 24 W. R. 256; 3 Asp. M. L. C. 124.

See R. S. C., O. 13, rr. 12a, 13.

1091. Affidavit of service.]—Pltf. in an undefended bottomry action must, before he can obtain judgment by default, in addition to filing an affidavit of service in the registry, as provided by R. S. C., O. 13, r. 2, annex thereto the original writ.—THE EPPOS (1883), 49 L. T. 604; 32 W. R. 154; 5 Asp. M. L. C. 180.

1092. —— **Dispensed with.**]—On July 6, 1904, pltf., on the order of the master of the French ship *B.*, then lying at North Shields, supplied necessaries. The ship was sold in another action, &, on Dec. 6, pltf. issued a specially indorsed writ *in rem* against the *B.*, or the proceeds of sale of the vessel then in ct., claiming £26 for the necessaries supplied, giving particulars & naming £3 3*s.*, or such sum as might be allowed on taxation, for costs. The writ was served on the registrar, who indorsed it with an acceptance of service. On Dec. 30, pltf. filed a notice of trial for Jan. 16, 1905, & also an affidavit verifying the claim with a copy of the account annexed. The action came on by way of motion for judgment by default against the proceeds of the vessel, & a clerk to pltf.'s solr. was called as a witness to give the date when the writ was served on the registrar:—*Held:* an affidavit of service of the writ might be dispensed with.—THE BERENGERE, No. 681, *ante*.

1093. Statement of claim dispensed with—Full particulars on writ.]—Where pltf. in a default action *in rem* for necessaries had complied with all formalities entitling him to judgment save service of a statement of claim, but it appeared the writ, though not specially indorsed, contained particulars of the claim, the ct. gave judgment for pltf.—THE HULDA (1887), 58 L. T. 29; 6 Asp. M. L. C. 244.

1094. Time—Reckoned from service of writ.]—In ordinary default causes *in rem*, the time at which

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PART III. SECT. 11, SUB-SECT. 1.

a. Effect of—Action for wages.]—Where no appearance has been entered in an action *in rem* for seamen's wages, & the ship is in the marshal's hands for sale in another cause, all preliminary proceedings may be waived & judgment entered forthwith. *The Julina* (1876), 35 L. T. 410, refd.—NOSLER *v.* THE AURORA (1913), 18 B. C. R. 449.—CAN.

steps in the action may be taken date from service of the writ of summons, & not, as before Jud. Acts came into operation, from service of the warrant of arrest.—THE MARIA (1878), 39 L. T. 549; 4 Asp. M. L. C. 57.

1095. —— Notice of trial.]—In order to obtain judgment by default of appearance in an action *in rem* under R. S. C., O. 13, r. 12, the 10 days stated in O. 21, r. 6, must elapse, & notice of trial under O. 36, r. 11, must be filed in the registry, unless on a previous application under O. 64, r. 9, notice of trial has been dispensed with, or the time for giving such notice abridged.—THE AVENIR (1884), 9 P. D. 84; 53 L. P. J. 63; 50 L. T. 512; 32 W. R. 755; 5 Asp. M. L. C. 218.

See, now, R. S. C., O. 13, r. 12a.

1096. Reference to registrar.]—In a default action *in rem* the Admlty. Ct. will not before judgment refer pltf.'s claim to the registrar for assessment.—THE TITIA (1891), 64 L. T. 148; 7 Asp. M. L. C. 32.

See, now, R. S. C., O. 13, r. 13.

SUB-SECT. 2.—DEFAULT OF DEFENCE.

1097. Mode of trial.]—R. S. C., O. 29, r. 2, as to signing judgment in default of pleading, does not apply to proceedings *in rem*. Where in an action *in rem* for a liquidated sum for necessaries supplied deft. makes default in delivering his statement of defence, pltf. cannot at once sign final judgment, but must bring the case on for hearing before the judge upon affidavit.—THE SFACTORIA (1876), 2 P. D. 3; 35 L. T. 431; 25 W. R. 62; 3 Asp. M. L. C. 271.

See, now, R. S. C., O. 27, r. 11a.

1098. —— Motion for judgment.]—As under R. S. C., O. 13, r. 12, default actions *in rem* are to proceed as if deft. had appeared, O. 27, r. 11, as to setting down an action on motion for judgment where deft. makes default in pleading, applies to such actions & judgment therein is to be obtained under that rule. Where in an action *in rem* for collision deft. makes default, pltf. should, on moving for judgment, support his claim by affidavit.—THE SPERO EXPECTO (1883), 49 L. T. 749; 32 W. R. 524; 5 Asp. M. L. C. 197.

1099. —— Fatal Accidents Act, 1846 (c. 93)—Interlocutory judgment—Assessment of damages.]—An action for damages under the above Act was commenced in the Admlty. Div., & no application was made to transfer the cause to any other Div.:—*Held:* upon default in pleading by defts., pltfs. were entitled, under R. S. C., O. 27, r. 4, to enter interlocutory judgment & to have damages assessed & apportioned by a jury.—THE ORWELL (1888), 13 P. D. 80; 57 L. J. P. 61; 59 L. T. 312; 36 W. R. 703; 6 Asp. M. L. C. 309.

1100. —— —— —— ——.]—An action *in rem* having been brought against a ship to recover damages for loss of life caused by a collision at sea, the owners filed an admission of liability, praying a reference to the registrar & merchants to assess the damages. Pltfs. took out a summons for an order giving them leave to enter interlocutory judgment & to have the damages assessed by a sheriff's jury. The judge made an order that the action should be tried by a judge with a jury in the Admlty. Div.:—*Held:* (1) the action was an action under the above Act; (2) the order was within the discretion of the judge, & was one with which the C. A. ought not to interfere.—THE KWASIND (1915), 84 L. J. P. 102, C. A.

SECT. 12.—MODE AND PLACE OF TRIAL.

SUB-SECT. 1.—SINCE THE JUDICATURE ACTS.

1101. Mode of trial—Jury.]—*Semble:* an action may be tried, & the issues of fact therein decided, by a jury in the Admlty. Div. as well as in the common law divs. of the High Ct.—THE SEAHAM, No. 874. *ante*.

1102. —— —— Discretion.]—Pltf. in an action *in rem* for disbursements in the Admlty. Div. applied for an order that the action should be tried by a judge with a jury:—*Held:* (1) R. S. C., O. 36, r. 6, gave no absolute right to a jury in actions which before the passing of Jud. Act, 1873 (c. 66), would have been tried without a jury; (2) the case fell within O. 36, rr. 4, 7a; (3) the judge had a discretionary power only to allow trial by a jury.—THE TEMPLE BAR (1885), 11 P. D. 6; 55 L. J. P. 1; 53 L. T. 904; 34 W. R. 68; 2 T. L. R. 73; 5 Asp. M. L. C. 509, C. A.

Annotations:—**Distd.** Fennessy *v.* Rabbits (1887), 56 L. T. 138. **Folld.** Coote *v.* Ingram (1887), 35 Ch. D. 117; Timson *v.* Wilson, Fanshawe *v.* London & Provincial Dairy (1888), 38 Ch. D. 72, C. A. **Apprvd.** Jenkins *v.* Bushby, [1891] 1 Ch. 484, C. A.

1103. Place of trial—Change of.]—In an action against the owners of the *A.* by the consignees of a cargo of corn shipped at Baltimore for Liverpool on board the *A.*, which, as they alleged, arrived in a damaged condition, pltfs. fixed the place of trial at Liverpool but the owners of the *A.* obtained an order removing the action to London on the ground of convenience. On appeal:—*Held:* the appeal must be dismissed.—THE ASSYRIAN (1888), 4 T. L. R. 694, C. A.

Annotations:—**Apld.** Thorogood *v.* Newman (1906), 23 T. L. R. 97, C. A.; Lever *v.* Associated Newspapers (1907), *Times*, June 3.

SUB-SECT. 2.—BEFORE THE JUDICATURE ACTS.

1104. Mode of trial—Case sent to court of common law for jury.]—The Admlty. Ct. has power to send a case to be tried by a jury before a ct. of common law, but should exercise this power only in important cases.—THE FLECHA, No. 320, *ante*.

For full anns., *see* S. C. No. 320, *ante*.

PART III. SECT. 11, SUB-SECT. 2.

1098 i. *Mode of trial—Motion for judgment—Order for sale of res.*]—In Admlty. actions *in rem* where deft. appears, but delivers no statement of defence, pltf. must take out a summons to fix time & mode of trial, & on proof of his claim at the trial may get an order for sale of the *res* under arrest.—M'CARRIGH *v.* SCHOONER BELLE (OWNERS) (1894), 28 I. L. T. 50.—**IR.**

b. *Power to dispute plaintiff's claim.*]—Deft. in a suit for seaman's wages, who has appeared, but not pleaded, will not be permitted to dispute pltf.'s claim.—THE HELEN (1871), 5 I. L. T. 23. **IR.**

PART III. SECT. 12, SUB-SECT. 1.

1101 i. *Mode of trial—Jury.*]—Deft. in an Admlty. action who wishes to have the case tried by a jury must obtain an order to have it so tried on the hearing of the summons to fix the time & mode of trial. It is too late to make any objection or application on this ground at the hearing of the action.—ANGLO-AMERICAN TELEGRAPH CO. *v.* DODD & POWER, p. 142, b, *ante*.—**IR.**

PART III. SECT. 12, SUB-SECT. 2.

1104 i. *Mode of trial—Jury.*]—Although Admlty. Ct. (Ireland) Act, 1867 (c. 114), empowers the judge of the Admlty. Ct. to have questions of fact tried by a jury before himself, yet, by an omission in the Act, the judge has no power given to him to summon a jury, & therefore no such trial can be had.—THE ANDERIDA (1869), 20 L. T. 180.—**IR.**

SECT. 13.—NOTICE OF TRIAL.

See R. S. C., O. 36; PRACTICE & PROCEDURE.

SECT. 14.—THE HEARING.

SUB-SECT. 1.—CONDUCT OF ACTION.

A. Since the Judicature Acts.

1105. Right to begin—Admission that defendant's ship partly to blame—Plaintiff to begin.]—In a collision case pltfs. delivered a statement of claim alleging that the collision was solely caused by negligent navigation of defts.' vessel. Defts. delivered a defence in which they denied this & alleged it was caused solely by negligence of those on pltfs.' vessel. Subsequently the solrs. for defts. wrote to the solrs. for pltfs. that, though they relied on the allegations of fault made against pltfs.' vessel, they admitted the collision was contributed to by fault on the part of defts.' vessel. At the trial counsel for pltfs. submitted that, as defts. had admitted they were negligent, the burden was on defts. to prove negligence on the pltfs.' part, & that defts. should begin:—*Held:* as pltfs. alleged defts. were solely to blame, & defts. only admitted they were in part to blame, the burden was on pltfs. to begin, if they still sought to prove defts. were alone to blame.—THE CADEBY, [1909] P. 257; 78 L. J. P. 85; 101 L. T. 48; 25 T. L. R. 630; 11 Asp. M. L. C. 285.

1106. Pilot—Charged with negligence—Option to give evidence.]—At the trial of an action of damage by collision, where the defence admitted that the cause of collision was negligent navigation of defts.' ship, but pleaded compulsory pilotage & alleged that the only negligence was that of the pilot, both sides closed their cases without calling the pilot as a witness:—*Held:* in such circumstances the pilot should be called by the ct. & offered the option of giving evidence on his own behalf, subject to cross-examination.—THE CARDIFF, [1909] P. 183; 78 L. J. P. 110; 25 T. L. R. 387.

B. Before the Judicature Acts.

1107. Salvage action—Rival salvors—Right to begin.]—In a salvage suit where there are rival salvors, the salvor who first enters his suit has the right to begin, unless special circumstances be shown.—THE MOROCCO, No. 862, *ante;* No. 1109, *post.*

Annotation:—**Consd.** Thomson *v.* S. E. Ry. Co. (1882), 30 W. R. 537, C. A.

1108. —— —— Right to cross-examine.]—On suits by rival salvors being heard together the witnesses called on behalf of one set of salvors will be liable to cross-examination, first on behalf of rival pltfs., & then on behalf of defts.—THE PHILADELPHIA (1863), Brown. & Lush. 28.

1109. —— —— ——.]—Rival salvors have a right to cross-examine each other's witnesses, but only on a point on which they are at issue.—THE MOROCCO, Nos. 862, 1107. *ante.*

For full anns., *see* S. C. No. 1107, *ante.*

1110. —— —— Consolidation — Separate counsel.]—When the interests of one pltf. in a consolidated salvage suit are adverse to the interests of other pltfs., separate counsel on his behalf may be heard at the hearing of the consolidated cause.—THE SCOUT (1872), L. R. 3 A. & E. 512; 41 L. J. Adm. 42; 26 L. T. 371; 20 W. R. 617; 1 Asp. M. L. C. 258. S. C. No. 865, *ante.*

1111. —— Intervention of parties to blame.]—THE DIANA (1842), 4 Moo. P. C. C. 11; 1 Wm. Rob. 131; 1 Notes of Cases, 357; 6 Jur. 157; 13 E. R. 204, P. C.

Annotations:—**Consd.** The George (1845), 9 Jur. 670; The Seringapatam (1846), 5 Notes of Cases, 61; The Gipsey King (1847), 5 Notes of Cases, 282; The Christiana (1850), 7 Moo. P. C. C. 160, P. C.; The Lochlibo (1851), 7 Moo. P. C. C. 427, P. C. **Folld.** The Mobile (1856), 10 Moo. P. C. C. 467, P. C.: The Iona (1867), L. R. 1 P. C. 426, P. C. **Refd.** The Duke of Manchester (1846), 4 Notes of Cases, 575; The Christiana (1849), 7 Notes of Cases, 2.

1112. Collision action—Plaintiff's crew all lost—Plaintiff not bound to call witnesses from defendant's vessel.]—In a collision case, where all the crew of pltf.'s vessel are drowned, the defence being that pltf.'s vessel showed no lights, pltf. is not bound to call witnesses from deft.'s vessel.—THE ALEPPO (1865), 35 L. J. Adm. 9; 14 L. T. 228; 2 Mar. L. C. 131. S. C. No. 1181, *post.*

SUB-SECT. 2.—BURDEN OF PROOF.

A. Since the Judicature Acts.

1113. Collision action—Negligence.]—When a collision occurs between a dumb barge without lights & a steamer on a dark night in the Thames there is no presumption of law that the steamer is to blame. It is in all cases necessary for those who allege negligence, causing a collision on the part of another vessel, to prove it.—THE SWALLOW (1877), 36 L T 231; 3 Asp. M. L. C. 371, C. A. S. C. Nos. 1623. 1686, *post.*

1114. —— Compulsory pilotage — Shifting of burden.]—In an action for damage by collision, as soon as defts. have shown that a pilot whose employment was compulsory was on board the wrongdoing vessel, & his orders were obeyed, the burden of proving that negligence arising from the act of some other person is a cause which contributed to the collision rests on pltf., even though defts. have only given testimony of the pilot as evidence.—THE MARATHON (1878), 48 L. J. P. 17.

Burden of proof, generally, in collision actions where the defence of compulsory pilotage is relied upon, *see, further,* SHIPPING & NAVIGATION.

B. Before the Judicature Acts.

1115. Salvage action—Plaintiff's right to begin.]—In a salvage suit, the right to begin does not shift with the burden of proof, but is almost universally with claimant.—THE MAGDALEN (1861), 31 L. J. P. M. & A. 22.

1116. —— Proof of salvage agreement.]—Where, in salvage, an agreement is set up, the burden of proving such agreement is on those relying on it; & without pronouncing the written agreement a forgery, the ct. will decide against it, as on failure of proof unless clearly established by evidence.—THE RESULTATET (1853), 17 Jur. 353.

PART III. SECT. 14, SUB-SECT. 1.—B.

a. *Duty of court to decline jurisdiction.*]—In an action by a seaman, on a special contract for wages: *Held:* although resps. were bound to have objected to the jurisdiction *in limine*, by appearing under protest, still, where the ct. was of opinion that it had no jurisdiction, it would not only entertain the objection at the hearing, but was bound itself to raise it. THE CITY OF PETERSBURG, No. 402, iii, *ante.*—**CAN.**

PART III. SECT. 14, SUB-SECT 2.—A.

1113 i. *Collision action—Conduct of defendant—Running down ship at anchor.*]—It appeared from the preliminary acts that deft. ship was under way & pltf. ship at anchor at the time of collision: *Held:* the onus was on deft. ship to show that the collision was not caused by her negligence. *The Annot Lyle* (1886), 11 P. D. 114, refd. WARD & PEMBERTON *v.* THE YOSEMITE (1891), 3 B. C. R. 311; 4 Ex. C. R. 311.—**CAN.**

1117. —— **Proof of misconduct.**]—The person charging salvors with misconduct has the burden of proving it.—THE DAHLIA (1857), 8 L. T. 612.

1118. *S. P.* THE COSBREGNAM (1858), 8 L. T. 178.

1119. *S. P.* THE ATLAS (1862), 1 Lush. 518 ; 31 L. J. P. M. & A. 210 ; 6 L. T. 737 ; 8 Jur. N. S. 753 ; 10 W. R. 850 ; 1 Mar. L. C. 235, P. C.

Annotations :—**Consd.** The Marie (1882), 7 P. D. 203. **Reid.** The Avenir (1868), 18 L. T. 157 ; The August Korff, [1903] P. 166.

1120. —— **Loss of salving ship—Presumption.**]—Where the salvor's vessel is injured or lost whilst engaged in the salvage service the presumption is that the injury or loss was caused by the necessities of the service, & the burden of proof is on defts. alleging that the loss was caused by the default of the salvors.—THE THOMAS BLYTH (1860), Lush. 16.

Annotation :—**Apld.** The Baku Standard *v.* The Angele, [1901] A. C. 549, P. C.

1121. Collision action—General rule.]—In collision cases, as an ordinary rule, the burden of proof lies on pltf.—THE HARRIETT (1841), 7 L. T. 441. S. C. No. 1150, *post.*

1122. *S. P.* THE CITY OF LONDON (1845), 7 L. T. 441.

1123. *S. P.* THE PATRIOT (1845), 7 L. T. 441.

1124. *S. P.* THE EUROPA (1850), 14 Jur. 627.

For full anns., *see* SHIPPING & NAVIGATION.

1125. *S. P.* THE CALYPSO *v.* THE EQUIVALENT (1855), 4 L. T. 839.

1126. —— ——.]—When a collision has taken place the burden of proof lies on those who assert that the subsequent damage & expenses are not chargeable to the collision.—THE LINDA (1857), Sw. 306 ; 30 L. T. O. S. 234 ; 4 Jur. N. S. 146.

For full anns., *see* SHIPPING & NAVIGATION.

1127. —— **Inevitable accident — Sole defence.**]—In a cause of damage defts., by their pleadings, made no charge against pltfs., but only denied generally the averments in the petition, & pleaded inevitable accident :—*Held :* defts. ought to begin.—THE THOMAS LEA (1868), 38 L. J. Adm. 37 ; 20 L. T. 1017 ; 3 Mar. L. C. 261.

Annotation :—**N.F.** The Abraham (1873), 28 L. T. 775.

1128. —— —— ——.]—In a cause of damage defts., by their pleading, made no charge of negligence against pltfs., but denied generally the averments in the petition, & pleaded inevitable accident :—*Held :* pltfs. ought to begin. *The Thomas Lea*, No. 1127, *ante*, overd.—THE BENMORE (1873), L. R. 4 A. & E. 132 ; 43 L. J. Adm. 5 ; 22 W. R. 190.

Annotation :—**Folld.** The Otter (1874), L. R. 4 A. & E. 203.

1129. —— —— ——.]—In all causes of damage, the burden being upon pltf. to establish negligence against defts., pltf. must begin ; & this rule applies to cases where the only defence is inevitable accident & pltf.'s vessel is at anchor, contrary to the former practice of the Admlty. Ct.—THE OTTER (1874), L. R. 4 A. & E. 203 ; 30 L. T. 43 ; 22 W. R. 557 ; 2 Asp. M. L. C. 208.

For full anns., *see* SHIPPING & NAVIGATION.

1130. —— —— —— **Shifting of burden.**]—Where in a cause of collision the defence of inevitable accident is raised, the burden of proof lies in the first instance upon pltfs., who must establish that blame attaches to the vessel proceeded against. The burden attaches to defts. only after a *primâ facie* case of negligence & want of due seamanship has been shown against them.—THE MARPESIA (1872), L. R. 4 P. C. 212 ; 8 Moo. P. C. C. N. S. 468 ; 26 L. T. 333 ; 1 Asp. M. L. C. 261 ; 17 E. R. 387, P. C. S. C. No. 927, *ante ;* No. 1305, *post.*

Annotations :—**Folld.** The Abraham (1873), 28 L. T. 775 ; The Benmore (1873), L. R. 4 A. & E. 132 ; The Otter (1874), L. R. 4 A. & E. 203. **Reid.** The Pladda (1876), 2 P. D. 34 ; The Albano (1892), 8 T. L. R. 425, C. A. ; The Merchant Prince, [1892] P. 179, C. A. ; The Schwann, The Albano, [1892] P. 419, C. A. ; The Calderon (1912), *Times*, March 26.

1131. —— **Plaintiff's negligence.**]—A vessel proceeding in a cause of collision, & alleging herself to have been in stays at the time of collision, & therefore helpless, is bound to prove in the first instance such was the fact. The burden of proof then shifts, & the other side must show that the collision was occasioned by the vessel proceeding being improperly put in stays, or was an inevitable accident.—THE SEA NYMPH (1860), Lush. 23.

1132. —— **Compulsory pilotage.**]—In a cause of collision, deft., relying upon the statutory exemption given to the owner of the ship to blame, where the collision is "occasioned by default of the pilot" employed by compulsion of law, is bound to prove his case in the strictest way.

Defts.' vessel was charged with improperly starboarding. Defts. denied starboarding, & gave evidence that the helm was ported only, & by order of the pilot ; they also pleaded the statutory exemption. The ct. found the helm was improperly starboarded, & the collision thereby occasioned :—*Held :* defts. not having proved any order by the pilot to starboard had failed to establish their exemption under the Act.—THE SCHWALBE (1861), Lush. 239 ; 14 Moo. P. C. C. 241 ; 4 L. T. 160 ; 1 Mar. L. C. 42 ; 15 E. R. 295, P. C.

Annotations :—**Folld.** The Carrier Dove (1863), 1 Moo. P. C. C. N. S. 260 ; The Iona (1867), L. R. 1 P. C. 426 ; The Velasquez (1867), L. R. 1 P. C. 494. **Consd.** The Livia (1872), 25 L. T. 887. **Distd.** Oakley *v.* Speedy (1879), 40 L. T. 881. **Folld.** The Benue, [1916] P. 88.

1133. —— ——.]—If a licensed pilot is on board a vessel, in order to exempt the owner from liability for damage occasioned by collision, the *onus probandi* lies upon such owner to establish that the collision was occasioned solely by negligence of the pilot ; & it is the duty of the owner relying upon such defence to call the pilot as a witness.—THE CARRIER DOVE (1863), Brown. & Lush. 113 ; 2 Moo. P. C. C. N. S. 260 ; 8 L. T. 402 ; 1 Mar. L. C. 341, P. C.

Annotations :—**Consd.** The Livia (1872), 25 L. T. 887. **Distd.** Oakley *v.* Speedy (1879), 40 L. T. 881.

1134. *S. P.* THE CHRISTIANA (1850), 7 Moo. P. C. C. 160 ; 15 E. R. 841.

Annotations :—**Consd.** The Mobile (1856), 10 Moo. P. C. C. 468, P. C. **Folld.** The Schwalbe (1860), 14 Moo. P. C. C. 241, P. C. ; The Ocean Wave (1870), L. R. 3 P. C. 205, P. C. **Reid.** The Iona (1867), L. R. 1 P. C. 426, P. C. ; The Benue (1916), 116 L. T. 220. **Mentd.** The Lochiibo (1851), 7 Moo. P. C. C. 427, P. C. ; Rodrigues *v.* Melhuish (1854), 10 Exch. 110 ; The Argo (1859), Sw. 462 ; The Velasquez (1867), L. R. 1 P. C. 494, P. C. ; The City of Cambridge

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PART III. SECT. 14, SUB-SECT. 2.—B.

1121 i. *Collision action—Violation of sailing rules.*]—Where a charge of violating M. S. Act, 1854 (c. 104), s. 296, is made the *onus probandi* is on the vessel making the charge.—THE CORDELIA & OSPREY (1861), 1 Old. 772. —**CAN.**

1131 i. —— *Plaintiff's negligence.*]—It is well settled that the promovent in a suit of collision should, before he has completed his case, show that he did not himself cause or contribute to the mischief of which he complains, & that he did everything in his power to escape or alleviate it ; if he should fail in either requirement, his petition will be dismissed, with costs.—THE JACOB (1860), 5 Ir. Jur. N. S. 379 (Adm.).—**IR.**

b. *Damage to cargo—Excepted perils in bill of lading.*]—In a cause of damage to cargo, the fact of damage being admitted as well as proved & pltf. having given evidence, which, if unrebutted, would establish that due care of the cargo was not taken by deft.'s servants, it lies upon deft. to sustain affirmatively a statement in his answer that such damage was the consequence of the excepted perils in his bill of lading.—THE FORTUNA (1872), 6 I. L. T. 80.—**IR.**

Sect. 14.—*The hearing: Sub-sect.* 2, *B.; sub-sect.* 3, *A. & B.* (*a*), (*b*) & (*c*).]

(1874), L. R. 5 P. C. 451, P. C.; The Tactician (1907), 76 L. J. P. 80, C. A.; Cory *v.* France, Fenwick (1910), 80 L. J. K. B. 341, C. A.

Burden of proof, generally, in collision actions where the defence of compulsory pilotage is relied upon, *see, further*, SHIPPING & NAVIGATION.

1135. —— Conduct of defendant—Shifting of burden.]—When a collision takes place which might endanger life on one ship, it is the duty of the other vessel to stay by until the extent of the danger is ascertained, & if she does not stay by the burden of proof that the collision did not take place by her default is thrown upon the owners.—THE QUEEN OF THE ORWELL (1863), 7 L. T. 839; 11 W. R. 499; 1 Mar. L. C. 300.

1136. —— —— Justified by necessity.]—The burden lies on any party setting up as a defence that he was justified by necessity in departing from an ordinary rule of navigation, to prove the necessity. —THE EDEN (1845), 6 L. T. O. S. 238.

1137. *S. P.* THE TWENTY-NINTH OF MAY (1846), 4 L. T. 774; *Shipping Gazette*, May 28.

1138. —— —— ——.]—If a ship bound to keep her course, under the 18th sailing rule of 1863, justifies her departure from that rule under the 19th rule, she takes upon herself the obligation of showing not only that her departure was at the time it took place necessary, in order to avoid immediate danger, but also that the course adopted by her was reasonably calculated to avoid that danger.—THE AGRA & ELIZABETH JENKINS (1867), L. R. 1 P. C. 501; 4 Moo. P. C. C. N. S. 435; 36 L. J. Adm. 16; 16 L. T. 755; 16 W. R. 735; 2 Mar. L. C. 532; 16 E. R. 382, P. C. S. C. No. 1706, *post*.

Annotation:—**Folld.** The General Lee of Dublin (1868), 19 L. T. 750.

1139. —— —— Running down ship at anchor.]—Where a vessel runs down one at anchor the burden lies upon her to prove, in such case, that some cause exempts her from liability.—THE SARAH (1845), 4 L. T. 839; *Shipping Gazette*, July 9.

Annotation:—**Mentd.** The Victoria (1848), 6 Notes of Cases, 176.

1140. *S. P.* THE GEORGE (1845), 2 Wm. Rob. 386; 4 Notes of Cases, 161; 9 Jur. 670.

Annotations:—**Consd.** The Velasquez (1867), L. R. 1 P. C. 494. **Refd.** The Ripon (1848), 6 Notes of Cases, 245; Netherlands Steamboat Co. *v.* Styles (1854), 9 Moo. P. C. C. 286.

1141. *S. P.* THE VICTORIA (1848), 3 Wm. Rob. 49; 6 Notes of Cases, 176.

1142. *S. P.* THE FINLAND (1850), 4 L. T. 839; *Shipping Gazette*, January 31.

1143. *S. P.* THE NORTON *v.* THE BESSIE (1855), 4 L. T. 839; *Shipping Gazette*, May 16.

1144. *S. P.* THE CHANGE *v.* THE LEGATUS, No. 966, *ante*.

1145. *S. P.* THE GEORGE ARKLE, No. 931, *ante*.

Annotation:—**Mentd.** The Esk & The Gitana (1869), L. R. 2 A. & E. 350.

1146. —— —— —— Absence of lights.]—A vessel at anchor must prove, in cases of collision, that she was properly anchored, & had complied substantially with the regulations respecting lights. The *onus probandi* then shifts.—THE TELEGRAPH (1854), 1 Ecc. & Ad. 427; 8 Moo. P. C. C. 167; 24 L. T. O. S. 11; 14 E. R. 64, P. C.

Annotations:—**Folld.** The Lindisfarne (1896), 12 T. L. R. 267. **Refd.** The Vivid (1856), Sw. 88. **Mentd.** Schroder *v.* Ward (1863), 13 C. B. N. S. 410.

1147. *S. P.* THE LAUREL *v.* THE DIAMOND (1858), 4 L. T. 839; *Shipping Gazette*, May 7.

1148. —— —— —— ——.]—Where it appeared on the pleadings in a cause of damage by collision that at the time of collision pltf.'s vessel, a fishing smack, was riding attached to her nets, & stationary with a single white light exhibited, but one of the charges made against her by defts. in their answer was that she improperly neglected to exhibit the lights required by Sea Fisheries Act, 1868 (c. 45), two lights, one over the other:—*Held:* as it must be implied the neglect to exhibit such lights contributed to the collision, pltf. ought to begin.—THE BOTTLE IMP (1873), 42 L. J. Adm. 48; 28 L. T. 286; 21 W. R. 600; 1 Asp. M. L. C. 571.

1149. —— —— —— Denial of identity.]—In a cause of collision, where deft. admits in the pleadings that his ship when under way ran into a vessel at anchor, but denies the vessel at anchor was pltf.'s vessel, pltf. must begin & prove his case.—THE EARL OF LEICESTER (1863), Brown. & Lush. 188.

1150. Custom—Burden of proof.]—The burden of proof lies on those who allege a particular custom in derogation of ordinary maritime law. They must prove the legality & existence of the custom.—THE HARRIETT, No. 1121, *ante*.

SUB-SECT. 3.—EVIDENCE.

See, generally, EVIDENCE.

A. Since the Judicature Acts.

1151. Entry by deceased mate—Not admissible.]—Two vessels, the *H.* & the *G.*, came into collision on Saturday; on Monday morning the mate of the *H.* made an entry in the ship's log of the circumstances of collision. The master of the *H.* afterwards made a deposition relating to the collision before a receiver of wreck, under M. S. Act, 1854 (c. 104), s. 448. On the hearing of an action of damage brought against the *H.* by the owners of the *G.* it was proved the master & mate of the *H.* had died, & it was sought to render the entry in the log & the deposition evidence on behalf of the *H.*:—*Held:* the documents were not admissible. —THE HENRY (HARRY) COXON (1878), 3 P. D. 156; 47 L. J. P. 83; 38 L. T. 819; 27 W. R. 263; 4 Asp. M. L. C. 18. S. C. No. 1162, *post*.

Annotation:—**Consd.** Ward *v.* Pitt, Lloyd *v.* Powell Duffryn Steam Coal Co., [1913] 2 K. B. 130, C. A.

1152. Engineer's log—Admissible.]—The engineer's log-book kept on board a steamer is admissible as evidence against the shipowner.—THE EARL OF DUMFRIES (1885), 10 P. D. 31; 54 L. J. P. 7; 51 L. T. 906; 33 W. R. 568; 5 Asp. M. L. C. 342.

B. Before the Judicature Acts.

(*a*) *Log Books.*

1153. Convoy's log—Admissible.]—To prove the time of the sailing of a ship under convoy, the log-book of the man-of-war which convoyed the fleet is evidence.—D'IRSAELI *v.* JOWETT (1795), 1 Esp. 427.

Annotation:—**Distd.** Rundle *v.* Beaumont (1828), 4 Bing. 537.

1154. Lightship log—Admissible.]—The Admlty. Ct. will admit in evidence a lightship log, on production by the officer of the Trinity House in whose custody such logs are kept, without requiring the evidence of the person who made the entries.—THE MARIA DAS DORES (1863), Brown. & Lush. 27; 32 L. J. P. M. & A. 163; 7 L. T. 838; 11 W. R. 500; 1 Mar. L. C. 309.

1155. —— ——.]—It has always been the rule in the Admlty. Ct., & the rule has been approved by the P. C., that properly kept logs containing entries as to the form & direction of the wind at places not

too distant from the place of collision should be admitted in evidence.—THE WITHAM *v.* THE JOHN & ELIZA (1864), Holt, Adm. 92.

1156. Coastguard books — Admissible.]—In a cause of collision, the books containing entries made by the coastguard, & sent to the coastguard office, are admissible in evidence to prove the state of wind & weather at the time of the collision, without calling the person who made the entries.—THE CATHERINA MARIA (1866), L. R. 1 A. & E. 53; 12 Jur. N. S. 380.

1157. Ship's log—Admissible against person making entries.]—In a suit for wages, a log book, not pleaded but asserted to be in the mariner's handwriting, was allowed to be brought in by the owners.—THE MALTA (1828), 2 Hag. Adm. 158.

Annotation:—**Expld. & N.F.** The City of Manchester (1879), 5 P. D. 3.

1158. ——.]—In a cause of collision, the log should be brought in as a document common to the ct.—THE EUROPA, No. 744, *ante*.

1159. —— **Effect of erasure.**]—In a cause of collision in the Admlty. Ct., the log book of one of the ships, produced in evidence, contained an erasure as to the wind at the time of the collision, but the alteration was rather adverse to the case on behalf of the ship:—*Held:* the erasure was immaterial, it being adverse to the case on behalf of the ship.—THE CONSTITUTION, No. 1652, *post*.

(b) Depositions before Receiver of Wreck, etc.

1160. Not admissible.]—In an action for collision between two ships deft.'s counsel, in order to show that pltf.'s ship was in fault, proposed to put in evidence the statement of pltf.'s captain made on oath under M. S. Act, 1854 (c. 104), s. 448, before a receiver of wreck:—*Held:* such evidence was inadmissible, notwithstanding s. 449 of the above Act, as the question as to which ship caused damage to the other was not a matter which the receiver had power to examine into under s. 448 of the Act.—NOTHARD (NORTHARD) *v.* PEPPER (1864), 17 C. B. N. S. 39; 4 New Rep. 331; 10 L. T. 782; 10 Jur. N. S. 1077; 2 Mar. L. C. 52; 144 E. R. 16.

Annotations:—**Folld.** The Little Lizzie (1870), L. R. 3 A. & E. 56; The Henry Coxon (1878), 3 P. D. 156. **Distd.** The Solway (1885), 10 P. D. 137. **Refd.** The Emperor, The Zephyr (1864), 12 W. R. 890.

1161. *S. P.* THE LITTLE LIZZIE (1870), L. R. 3 A. & E. 56; 23 L. T. 84; 18 W. R. 960; 3 Mar. L. C. 494.

1162. *S. P.* THE HENRY COXON, No. 1151, *ante*.

Annotation:—**Consd.** Ward *v.* Pitt, Lloyd *v.* Powell Duffryn Steam Coal Co., [1913] 2 K. B. 130, C. A.

1163. Use for cross-examination—Proof—Certified copy not admissible.]—A certified copy of the examination taken before a receiver of wreck under M. S. Act, 1854 (c. 104), ss. 448, 449, cannot be used to discredit the master in the witness-box—the original only can be admitted.

A statement of the appearer as to how the collision happened, or who was to blame for it, is not evidence against the owners, although if the appearer makes subsequently an inconsistent statement, it may be used to impeach his general credibility.—THE EMPEROR, THE ZEPHYR (1864), Holt, Adm. 24; 12 W. R. 890.

1164. —— —— **Certified copy admissible.**]—In a cause of damage, though it may be intended to contradict a witness as to statements made by him before a receiver of wreck, it is not necessary to subpœna him to produce the original deposition as a certified copy will be sufficient for the purpose.—THE OSCAR (1864), 10 L. T. 789; 12 W. R. 872; 2 Mar. L. C. 42. S. C. No. 1530, *post*.

Annotation:—**Refd.** The Emperor, The Zephyr (1864), 12 W. R. 890.

1165. Extract from police record—Not admissible.]—In an action for wages an extract from the police record at St. Helena (beginning with entries in the ship's log), which gave a minute of proceedings before the magistrates under which pltf. had been detained to be sent home in a ship of war, is not admissible as evidence of the misconduct of pltf.—THE SUSAN (1829), 2 Hag. Adm. 229 n.

1166. Report of inquiry—Coroner's jury—Not admissible.]—A copy of the report of the stipendiary magistrate & assessor printed by order of the House of Commons is not evidence in the Admlty. Ct., nor are the sayings or doings of a coroner's jury.—THE MANGERTON (1856), Sw. 120; 27 L. T. O. S. 207.

(c) Admissions and Protests.

1167. General rule—Declarations of master—Declarations of mate.]—The master's declarations are admissible evidence against the owners of a vessel, because he is their agent, but those of the mate & seamen are not. The master's declaration cannot be rejected on the ground that his knowledge of the fact of which he spoke was derived from hearsay, though it may have but little weight. The principle of "declarations by agents" cannot be extended to the mate of a vessel, even when in charge of it.—THE ACTÆON, No. 685, *ante*; No. 1205, *post*.

1168. *S. P.*, THE LORD SEATON (1845), 2 Wm. Rob. 391; 4 Notes of Cases, 164; 9 Jur. 603.

Annotation:—**Refd.** The Europa (1849), 13 Jur. 856.

1169. Declarations of helmsman—Not admissible.]—In a cause of collision, the libel pleaded declarations of the helmsman of the ship proceeded against:—*Held:* the declarations could not be pleaded, the helmsman not being the owners' agent.—THE EUROPA (1849), 14 L. T. O. S. 66; 13 Jur. 856.

1170. Protest — Production — Desirability of.]—The rule of the Admlty. Ct. is that in cases of both salvage & collision the protest should always be produced for the following reasons: (1) because every protest ought to be made *recenti facto*, & contain an account of the transaction when the facts are fresh in the memories of the witnesses; (2) the protest is made *alio intuitu*, the first & primary object of the protest being ordinarily to found a claim against the underwriters for damage done, the object of the parties being to state all the facts, & everything which has happened to the ship, so as to lay the foundation of the most extensive claim.—THE EMMA (1844), 2 Wm. Rob. 315; 3 Notes of Cases, 114; 4 L. T. O. S. 17; 8 Jur. 651.

Annotations:—**Folld.** The Ljubica (1870), 23 L. T. 474. **Mentd.** The Longford (1881), 6 P. D. 60.

1171. —— **Collision action — How far admissible.**]—In a cause of collision the protest of the master of a foreign vessel, which being in distress was in tow by the vessel run foul of, is *res inter alios acta*, & not admissible evidence where no necessity exists.—THE BETSEY CAINES (1826), 2 Hag. Adm. 28.

Annotations:—**Distd.** The Argentino (1888), 13 P. D. 191, C. A. **Mentd.** Remorquage a Helice *v.* Bennetts, [1911] 1 K. B. 243.

1172. —— —— ——.]—In collision cases the protest ought always to be brought into ct. Observations as to the effect given to it in evidence.—THE MELLONA (1846), 10 Jur. 992.

Annotation:—**Refd.** The Midlothian (1851), 15 Jur. 806.

1157 i. *Ship's log—Inspection by judge.*]—The right of the judge upon the hearing of a cause in the Admlty. Ct. to call for & inspect a ship's log is not taken away by Admlty. Ct. (Ireland) Act, 1867 (c. 114), ss. 37, 49.—THE FORTUNA, p. 197 b, *ante*.—IR.

Sect. 14.—*The hearing: Sub-sect.* 3, *B.* (*c*), (*d*) & (*e*); *sub-sect.* 4, *A.* & *B.*]

1173. —— Salvage action.]—In salvage cases the captain's protest is preferable to affidavit for ascertaining the facts of a case, & ought always to be produced. It is often so made, with a view to found a claim against underwriters, that it supports the case of the salvors.—THE ALEXANDER BRANELL (1841), 7 L. T. 866.

1174. *S. P.* THE OCEAN, No. 991, *ante*.

1175. *S. P.* THE DAVID (1842), 7 L. T. 866.

1176. *S. P.* THE CAPE PACKET (1850), 7 L. T. 866.

1177. —— —— Importance of—Report before receiver of droits.]—The protest is always an important document. It is the duty of the notary public who draws it to make it a perfect one.

Report of the facts taken before the receiver of droits, also another important document, should also be carefully drawn, & the copies be correct.—THE HEDWIG (1853), 1 Ecc. & Ad. 19.

Annotation:—Apld. The Racer (1874), 30 L. T. 904.

1178. —— —— ——.]—Where salvage services are rendered to a ship, a protest ought to be speedily noted & extended after the ship is in safety, & it will be received by the ct. with great attention.—THE JAMES MCQUEEN (1855), 7 L. T. 866; 4 W. R. 91.

(*d*) *Evidence as to Lights.*

1179. Affirmative evidence preferred.]—Affirmative evidence is preferred to negative evidence as to lights being hoisted.—THE HOPE *v.* THE RELIANCE (1857), 5 L. T. 147.

1180. *S. P.* THE CHARLES *v.* THE PROGRESS (1858), 5 L. T. 147.

1181. Previous order as to lights—Admissible—Not conversations as to lights.]—Evidence of an order as to the lights given 12 hours before collision is admissible, but not of conversations with respect to them.—THE ALEPPO, No. 1112, *ante*.

(*e*) *Miscellaneous Points.*

1182. Collision action—Presumption that master acted correctly.]—In cases of collision, where evidence on both sides is conflicting & nicely balanced, the ct. will be guided by the probabilities of the respective cases which are set up; *a priori* the presumption is the master of a vessel would do what was right & follow the regular & correct course of navigation.—THE MARY STEWART (1844), 2 Wm. Rob. 244; 2 L. T. O. S. 375.

1183. —— Opinion as to time.]—A mere difference of opinion as to time would not throw discredit on the evidence of a witness in a case of collision.—THE IDE *v.* THE KRON PRINS ERNST AUGUSTE (1856), 6 L. T. 581.

1184. —— Opinion as to distance.]—It being impossible to measure distances with precision at night, the ct. does not bind the witnesses to precise words in regard to such particulars.—THE SHANNON (1842), 1 Wm. Rob. 463; 6 L. T. 581; 7 Jur. 380. S. C. No. 1302, *post*.

1185. —— Evidence of damage.]—In a collision case, the protest is not always the best evidence of damage done, nor are surveys & bills. The best evidence is the testimony of persons who saw the ship & the damage done & are capable from their practical experience in shipping matters of estimating what damage is necessary to be repaired in consequence of the collision & the cost thereof.—THE ALFRED, Nos. 1204, 1397, 1416, 1423, *post*.

For full anns., *see* S. C. No. 1423, *post*.

1186. Proof of ownership—So described in solicitor's undertaking to appear.]—In an action against the owners of a ship, it is sufficient *primâ facie* evidence of ownership to put in an undertaking to appear for them given before commencement of the action by the person who subsequently acted as their attorney in defending it, in which he describes them as owners, without further proof of agency.—MARSHALL *v.* CLIFF (1815), 4 Camp. 133.

Annotation:—Refd. Wagstaff *v.* Wilson (1832), 4 B. & Ad. 339.

1187. Evidence of nautical opinion—Admissible.]—Nautical witnesses may be asked their opinion as to the collision being avoidable by care, truth of the facts being admitted.—DURNFORD *v.* TRATTLES (1843), 5 L. T. 61.

For full anns. *see* PLEADING.

1188. —— Not admissible.]—The ct. will not receive as evidence the affidavits of persons, professing to be skilled in nautical affairs, as to their opinion upon any case.—THE NO (1853), 1 Ecc. & Ad. 184.

1189. General information made use of.]—It is the custom of the Admlty. Ct., where general information has been acquired in one case, to use it in others.—THE RAPID (1854), 3 L. T. 123.

1190. Private inquiries by court.]—Where a question arose in a salvage case as to the nature of the ship's anchorage, the ct., in order to aid its judgment, made private inquiry of persons intimately acquainted with the spot & having nautical experience.—THE HARBINGER (1852), 8 L. T. 612; 16 Jur. 729.

For full anns., *see* SHIPPING & NAVIGATION.

1191. Further evidence required — Transaction suspicious—Bottomry.]—In a bottomry case, where the pleadings & evidence are so far defective that the ct. cannot pronounce upon the validity or invalidity of the bond, & the transaction is in some respects suspicious, it will direct further evidence to be produced for its own satisfaction.—THE BONAPARTE (1849), 13 Jur. 1059.

For full anns., *see* SHIPPING & NAVIGATION.

1192. Witness not to attend consultation—Collision.]—It is a rule of the Admlty. Ct. that a witness should not attend a previous consultation with proctor & counsel in a collision cause.—THE JANE BURROW *v.* THE SOUTHAMPTON (1852), 11 L. T. 159.

1193. Statements signed by persons on board — Collision.] — The obtaining of signatures to statements from persons who were on a ship which has been lost in a collision while they are on board the other ship, the statements being written by other persons, is to be deprecated. In the circumstances of the case: — *Held:* such statement, though signed by the captain, was not to be taken into consideration.—THE JANE *v.* THE GREAT EASTERN (1864), Holt, Adm. 167.

For full anns., *see* SHIPPING & NAVIGATION.

1194. Proof of nationality.]—To prove that a ship is a British ship, it is not necessary to produce the register or a copy thereof; it is sufficient to show orally that she belongs to British owners & carries the British flag.—R. *v.* ALLEN (1866), 10 Cox, C. C. 405.

1195. —— Registration rebuttable.]—A ship's register containing a statement of British ownership, even if by M. S. Act, 1854 (c. 104), s. 107, made *primâ facie* proof of such ownership, may be outweighed by circumstantial evidence to the con-

PART III. SECT. 14, SUB-SECT. 3.—B (*e*).

1188 i. *Evidence of nautical opinion—Not admissible.*]—The ct. will not receive as evidence depositions of persons professing to be skilled in nautical affairs as to their opinion in any case.—THE ATTILA (1879), 5 Q. L. R. 340.—CAN.

a. Value of ship.]—The value of a ship is matter for a shipwright or other skilled witness, rather than for the master, to depose to.—THE RIVOLI, No. 1524 i., *post*.—IR.

trary. *Semble:* the sect. does not make the register *primâ facie* proof of disputed British nationality.—THE PRINCESS CHARLOTTE (1863), Brown. & Lush. 75.

SUB-SECT. 4.—TRINITY MASTERS.

A. Since the Judicature Acts.

1196. Relation of judge & Trinity Masters—Duty of judge to follow own opinion.]—If the judge of the ct. below differs from his assessors, he is bound to decide in accordance with his own opinion (BRETT, M.R.).—THE BERYL (1884), 9 P. D. 137; 53 L. J. P. 75; 51 L. T. 554; 33 W. R. 191; 5 Asp. M. L. C. 321, C. A.

Annotations:—**Refd.** The Oporto, [1897] P. 249, C. A. **Mentd.** The John McIntyre (1884), 9 P. D. 135, C. A.; The Dordogne (1884), 10 P. D. 6, C. A.; The Theodore H. Rand (1887), 12 App. Cas. 247; The Memnon (1888), 59 L. T. 289, C. A.; The Ceto (1889), 14 App. Cas. 670; The Memnon (1889), 62 L. T. 84, H. L.; The Bellanoch, [1907] P. 170, C. A.

1197. —— Trinity Masters present in advisory capacity only.]—The assessors in the Admlty. Ct. & the C. A. when trying Admlty. appeals do not constitute the ct., & whatever the advice or opinion of the assessors may be, the decision of the ct. both in fact & law is the decision of the judge alone, the assessors being only present to assist the ct. with advice on questions of nautical skill, & the ct. cannot be protected by the opinion of the Elder Brethren against responsibility.—THE CITY OF BERLIN, [1908] P. 110; 77 L. J. P. 76; 98 L. T. 298; 11 Asp. M. L. C. 4, C. A.

For full anns., *see* SHIPPING & NAVIGATION.

1198. —— Effect of disagreement—Calling in third assessor.]—*Semble:* where two assessors disagree, the ct. can call in a third, &, after submitting the evidence already given, have the case re-argued before the three assessors. The judgment is that of the judge, & he may decide in accordance with the advice of one or more of the assessors or not as he thinks fit.—THE PHILOTAXE (1877), 37 L. T. 540; 3 Asp. M. L. C. 512.

1199. Duties of—Inspection & report.]—Where Trinity Masters are desired to inspect & report to the ct., their report is not necessarily confined to those matters on which evidence has been given, but may include any circumstance in their opinion affecting the merits of the case.—THE MARATHON, Nos. 541, 552, *ante*.

1200. —— —— When not ordered.]—Upon an application, before trial, by pltfs. in a damage action for an order for inspection by the Trinity Masters of the lights & screens of defts.' ship, there being no suggestion that pltfs. could not obtain evidence as to the lights in the ordinary way, the ct. refused the application.—THE VICTOR COVACEVICH (1885), 10 P. D. 40; 54 L. J. P. 48; 52 L. T. 632; 5 Asp. M. L. C. 417.

1201. Expert evidence rejected.]—Where the ct. is assisted by nautical assessors, evidence of experts on questions of nautical science & skill may properly be rejected.—THE SIR ROBERT PEEL (1880), 43 L. T. 364; 4 Asp. M. L. C. 321, C. A. S. C. Nos. 1222, 1648, *post*.

1202. ——.]—Where the Admlty. Ct. is assisted by Trinity Masters, evidence as to a particular course & mode of navigation at a particular place in a dense fog and in a given state of the tide is not admissible.—THE KIRBY HALL (1883), 8 P. D. 71; 48 L. T. 797; 5 Asp. M. L. C. 90.

Annotations:—**Apprvd.** Kelly *v.* Isle of Man Steam Packet Co. (1894), 71 L. T. 731; The Tynwald, [1895] P. 142 **Mentd.** The Dordogne (1884), 10 P. D. 6, C. A.; The Lebanon *v.* The Ceto (1889), 14 App. Cas. 670.

B. Before the Judicature Acts.

1203. Relation of judge & Trinity Masters.]—The Trinity Masters are merely assessors of the judge of the Admlty. Ct. & assist him with their advice; the sentence is entirely his.—WILLIAMS *v.* CHAPMAN, No. 1643, *post*.

1204. —— Advice not binding on judge.]—In asking the opinion of Trinity Masters it is the custom of the ct. to request them to state their reasons & explanations. If their explanations are not satisfactory, the ct. does not take them.—THE ALFRED, No. 1185, *ante*; Nos. 1397, 1416, 1423, *post*.

Annotations:—**Refd.** The Fred (1895), 72 L. T. 153; The City of Berlin, [1908] P. 110, C. A.
For full anns., *see* S. C. No. 1423, *post*.

1205. —— Advice rejected—If formed on inadmissible evidence.]—If the Trinity Masters seem to have formed their opinion on parts of the evidence which are inadmissible, the ct. will not adopt their advice.—THE ACTÆON, Nos. 685, 1167, *ante*.

1206. —— Difference of opinion—Function of judge.]—The duty of Trinity Masters, sitting as assessors in the Admlty. Ct., is to assist the judge in questions of nautical skill. In case of a difference of opinion between the judge & the assessors, the judge is not at liberty to act upon any inferences which they may draw from the evidence, except they accord with his own. It is the duty of the judge to decide the case on his own responsibility.—THE MAGNA CHARTA (1871), 25 L. T. 512; 1 Asp. M. L. C. 153, P. C.

Annotations:—**Consd.** The Fred (1895), 72 L. T. 153. **Distd.** The City of Berlin, [1908] P. 110, C. A. **Mentd.** Gyessing *v.* The Hansa (1872), 26 L. T. 169.

1207. *S. P.* THE VERNON (1842), 1 Wm. Rob. 316; 1 Notes of Cases, 277; 6 Jur. 67.

For full anns., *see* SHIPPING & NAVIGATION.

1208. —— —— Third Trinity Master.]—The Trinity Masters, having differed in their opinion on

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PART III. SECT. 14, SUB-SECT. 4.—A.

1196 i. *Relation of judge & nautical assessors—Duty of judge to follow own opinion.*]—Where the sole question is whether or not either or both vessels committed a breach of regulations, the ct. must decide regardless of the opinion of assessors. *Mills* v. *Armstrong, The Bernina* (1888), 13 App. Cas. 1; *Cayzer Irvine* v. *Carron Co.* (1884), 54 L. J. P. 18, H. L.; *The Kaiser Wilhelm der Grosse* (1907), 76 L. J. P. 97; *The Harvest* (1886), 11 P. D. 90; *The John O'Scott*, [1897] P. 64; *Thorogood* v. *Bryan* (1849), 18 L. J. C. P. 336; *Englehart* v. *Farrant*, [1897] 1 Q. B. 240; *The Aristocrat* (1908), 77 L. J. P. 57, refd.—BRYCE *v.* CANADIAN PACIFIC RY. CO., p. 203, b, *post*.—**CAN.**

1196 ii. —— ——.]—Where a case is eminently one to be decided by practical seamanship, the judge in Admlty. will adopt the advice of nautical assessors who sit with him.—THE CHARMER *v.* THE BERMUDA (1910), 15 W. L. R. 132.—**CAN.**

1201 i. *Expert evidence rejected.*]—In an action on a collision certain questions were put to a witness, a master, to elicit his opinion as to the management of the ships, & this evidence was objected to on the ground that the case was one in Admlty. & that the judge should be assisted by a nautical assessor:—*Held:* the presence of a nautical assessor was to dispense with nautical evidence as to the management of ships, & the evidence given on this point was inadmissible. *The Kirby Hall* (1883), 8 P. D. 71; *The Assyrian* (1890), 63 L. T. 91; *The Sir Robert Peel* (1880), 43 L. T. 364; *The Mary & Ann* (1843), 2 Wm. Rob. 195; *The Gazelle* (1842), 1 Wm. Rob. 471, refd.—MONTREAL HARBOUR COMRS. *v.* THE UNIVERSE (1906), 10 Ex. C. R. 305.—**CAN.**

1201 ii. *S. P.* THE NAGPORE (1874), 8 I. L. T. 185.—**IR.**

PART III. SECT. 14, SUB-SECT. 4.—B.

1204 i. *Relation of judge & nautical assessors—Advice not binding on judge.*]—The opinion of an assessor is in the nature of advice only; & the ct., in its discretion, may act upon it, or reject it, as it may think proper.—THE AMERICAN UNION *v.* THE OSPREY (1860), 5 Ir. Jur. N. S. 380 (Adm.); 10 L. T. 791.—**IR.**

Sect. 14.—*The hearing: Sub-sect.* 4, *B. Sect.* 15: *Sub-sects.* 1 & 2.]

the facts, will by consent of the parties given have to consult a third brother.—THE LAUREL & THE HOUGHTON (1765), Burrell, 323.

1209. Functions of Trinity Masters—Expert advisers.]—Where the ct. requires the attendance of Trinity Masters, it is for the purpose of taking their opinion upon nautical questions, & then the ct. forms its own judgment as to the amount of remuneration in a salvage action.—THE VESPER *v.* THE PRINCE FREDERICK WILLIAM (1858), 8 L. T. 613.

1210. *S. P.* THE EDWARD ALISON (1863), 8 L. T. 613.

1211. —— ——.]—Trinity Masters are to decide questions depending on the rules & practice of navigation by their own science & experience, & not by the affidavits adduced on such points.—THE GAZELLE (1842), 1 Wm. Rob. 471; 2 Notes of Cases, 39; 7 Jur. 497.

Annotations:—**Refd.** The Kirby Hall (1883), 8 P. D. 71. **Mentd.** The Superior (1849), 6 Notes of Cases, 607.

1212. —— —— **Unusual accident.**]—An allegation that a collision was caused by the chains or any part of the furniture of a vessel getting out of order by accident, without intervention of storms, & when the ship was sailing down the Thames with a fair wind, can never be considered by the ct. to be a good defence, unless so advised by the Trinity Masters.—THE CLUTHA (1846), 4 L. T. 774.

1213. —— —— **Meaning of "meeting end on."**]—The assessors are the best judges of what is "meeting end on."—THE ST. CYRAN *v.* THE HENRY (1864), Holt, Adm. 72.

1214. —— —— **Inability to decide—Evidence evenly balanced.**]—In cross-actions for collision in which the evidence was so balanced that neither the Trinity Masters nor the ct. could decide which vessel was to blame both actions were dismissed.—THE MAID OF AUCKLAND (1848), 6 Notes of Cases, 240.

For full anns., *see* SHIPPING & NAVIGATION.

1215. —— **Inspection of ship.**]—The ct. has power under Admlty. Ct. Act, 1861 (c. 10), s. 18, to order an inspection of a vessel by Trinity Masters, & will direct that they be attended by the proctors & a viewer on behalf of each party.—THE GERMANIA (1868), 37 L. J. Adm. 59; 19 L. T. 20; 3 Mar. L. C. 140.

For full anns., *see* SHIPPING & NAVIGATION.

1216. When called in—Salvage cases.]—As a general rule the ct. will not call in the assistance of Trinity Masters on counsel's suggestion in salvage cases, unless both parties accede to this, or the ct. sees very great nautical difficulties. Application should be made to the ct. for the assistance of the Trinity Masters where there are questions requiring as much nautical knowledge & as difficult as many which arise in collision cases.—THE JAMES DIXON (1860), 2 L. T. 696.

1217. *S. P.* THE EMMY (1848), 3 L. T. 123.

1218. Not called in—Question on pleading.]—An application for the attendance of Trinity Masters as to the admissibility of a plea, namely, to show that as a matter of nautical experience the account of the collision pleaded was impossible, was refused.—THE VARGAS (1851), 3 L. T. 123; 15 Jur. 710.

1219. Expert evidence excluded.]—There may be cases in which it is desirable to have the affidavits of persons possessed of local knowledge, to instruct the mind of the ct., in cases where Trinity Masters do not attend; when they attend the necessity for affidavits of that kind is superseded.—THE NIMROD (1850), 7 Notes of Cases, 570; 14 Jur. 942.

1220. ——.]—In salvage causes the ct., when it has the assistance of Trinity Masters, will not be guided by the opinions of witnesses skilled in nautical matters.—THE MAGDALEN (1861), 31 L. J. P. M. & A. 22; 5 L. T. 807; 1 Mar. L. C. 189.

1221. ——.]—In a cause of damage where the ct. is assisted by Trinity Masters evidence will not be received on a mixed question of law & nautical skill.—THE EARL SPENCER (1875), L. R. 4 A. & E. 431: 23 W. R. 661; *affd.* 33 L. T. 235 P. C.

Annotation:—**Refd.** The City of Brooklyn (1876), 1 P. D. 277 n.

1222. ——.]—Where the ct. is assisted by nautical assessors evidence of experts on questions of nautical science & skill may properly be rejected.—THE SIR ROBERT PEEL, No. 1201, *ante;* No. 1648, *post.*

SECT. 15.—DECREE.

SUB-SECT. 1.—SINCE THE JUDICATURE ACTS.

1223. Agreement—When filed, equivalent to decree.]—Defts.' vessel came into collision with & sank another vessel carrying cargo belonging to pltfs. Actions were commenced by pltfs. & by the owners of the carrying vessel, but in the action between the latter & defts.' vessel the parties filed in the registry an agreement to a decree that both vessels were to blame, & for the usual reference as to damages. Defts. then brought an action for limitation of their liability, & paid into ct. the amount of their liability under M. S. Acts. The usual decree was made for limitation of liability & the staying of pltfs.' action:—*Held:* (1) the agreement between the owners of the two vessels having been filed in the registry was, under R. S. C., O. 52, r. 23, equivalent to a decree of the ct.; (2) the owners of the carrying vessel were not entitled to have such agreement rescinded for the purpose of proving against the fund in ct. for more than half the damage sustained by them.—THE KARO (1887), 13 P. D. 24; 57 L. J. P. 8; 58 L. T. 188; 6 Asp. M. L. C. 245. S. C. No. 911, *ante;* No. 1494, *post.*

Annotation:—**Apld.** The Drumlanrig (1910), 79 L. J. P. 100, C. A.

1224. Judgment by consent—No rescission by consent.]—In an action for damages by collision between the owners of the *A.* & the *B.*, the ct., by consent of the parties, made a decree dismissing the action. Subsequently another action was brought by the owners of the cargo on the *A.* against the *B.* in respect of same collision, & the ct. found both vessels to blame. The owners of the *B.* commenced an action against the owners of cargo on the *A.* for the purpose of limiting their liability in respect of all claims arising out of this collision, & paid the amount of their statutory liability into ct. Subsequently, again by consent of the owners of the *A.* & the *B.*, the assistant registrar rescinded the decree by consent in the first action, & the owners of the *A.* brought in a claim in the limitation action against the fund in ct. The registrar held such claim to be inadmissible. On motion to confirm the report:—*Held:* (1) the report should be confirmed, as the owners of the *A.* & the *B.* could not by consent rescind the decree of the ct.; (2) the decree by consent was a bar to a claim against the fund in ct., as it estopped the owners of the *A.* from bringing any further action against the *B.*—THE BELLCAIRN (1885), 10 P. D. 161; 55 L. J. P. 3; 53 L. T. 686; 34 W. R. 55: 5 Asp. M. L. C. 503, C. A.

Annotations:—**Distd.** The Ardandhu (1886), 11 P. D. 40, C. A.; The Kronprinz *v.* The Kronprinz (1887), 12 App. Cas. 256. **Folld.** Hammond *v.* Schofield, [1891] 1 Q. B. 453.

1225. Variation of decree—Power of court—Conditions of exercise.]—The ct. has power to rehear causes & in its discretion to vary its decrees in cases where it has proceeded on a mistake; but this power ought to be exercised rarely & with great caution, for otherwise much inconvenience & uncertainty would ensue (BRUCE, J.).—THE GEORG, No. 779, *ante*.

For full anns., *see* S. C. No. 779, *ante*.

1226. —— Not where failure to apply for special costs.]—Where an order has been made for judgment with costs, & that order has been drawn up, the ct. has no power to alter its decree by subsequently allowing special costs.—THE TURRET COURT (1901), 84 L. T. 331; 17 T. L. R. 339; 9 Asp. M. L. C. 162. S. C. No. 1523, *post*.

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SUB-SECT. 2.—BEFORE THE JUDICATURE ACTS.

1227. Decree—Final, though reference to registrar.]—Where, in an action of damage to cargo, the ct. condemns the ship, pronounces for the damage, & directs a reference to the registrar & merchants to ascertain the amount of damage, the decree of the ct. is final.—THE SARACEN, Nos. 61, 650, *ante*; No. 1491, *post*.

For full anns., *see* S. C. No. 650, *ante*.

1228. Variation of decree—Error due to defective information.]—The Admlty. Ct. possesses the same discretionary power of varying its decrees as is possessed by other cts. of England. Such variation should be confined to an alteration of an error arising from defect of knowledge or information upon a particular point in the case, & the error must be brought to the ct.'s attention with the utmost possible diligence. THE MONARCH (1839), 1 Wm. Rob. 21.

Annotations:—**Apld.** Dysart *v.* Dysart (1847), 1 Rob. Eccl. 107, 470, 543; The Markland (1871), L. R. 3 A. & E. 340. **Consd.** The Georg, [1894] P. 330. **Refd.** The Orient (1869), 39 L. J. Adm. 10.

1229. —— Mistake.]—Salvage services having been rendered to a ship laden with cargo, a salvage suit was instituted against ship, freight, & cargo. Separate appearances were entered on behalf of the owner of the ship & the owner of the cargo. The owner of the cargo filed an affidavit of value stating the value of the cargo, & the owner of the ship filed an affidavit of value stating the value of the ship & freight. At the hearing the ct., taking these values as accurate, by its decree awarded to the salvors a certain sum as salvage Some time afterwards the owner of the cargo discovered that he had by mistake included in his valuation of the cargo the value of the freight, & that the freight was of more value than appeared by the affidavit of value filed on behalf of the owner of the ship, & he made application to the ct. to reduce the value of the cargo, & to reduce the amount it had previously decreed as salvage. On the mistake being proved:—*Held:* the ct. had power to correct the mistake & to make the necessary alterations in the decree.—THE JAMES ARMSTRONG (1875), L. R. 4 A. & E. 380; 33 L. T. 390; 3 Asp. M. L. C. 46.

Annotation:—**Apld.** The Georg, [1894] P. 330.

1230. —— Delay.]—To entitle a party to amend an error in a decree, the mistake should be brought to the notice of the ct. with the utmost possible diligence. An application to alter a decree 5 months after it was made was rejected.—THE ORIENT (1869), 39 L. J. Adm. 10; 21 L. T. 762.

1231. —— Not in favour of different parties.]—After a restitution *in solidum* to a house of trade in America, a prayer by the assignees of one partner become bkpt. in England, for severance of his share & payment to them, was refused. The ct. in such case is *functus officio*, but it would be otherwise if at the proceedings the whole claim had been made on behalf of the house in America, three-fourths had been restored as claimed, & the fourth share had been bkpt.'s, & claimed by the assignees.—THE JEFFERSON (1799), 1 Ch. Rob. 325.

1232. Decrees by consent.]—Final as well as interlocutory decrees & orders may be obtained in the Admlty. Ct. by consent, without an order of the

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PART III. SECT. 15, SUB-SECT. 1.

1225 i. *Variation of decree—Error due to defective information.*]—A ship having been picked up derelict & brought into port, the values of ship & cargo were appraised by competent persons, in whose estimate the proctors for both salvors & owners acquiesced, at $9,000, & an award was made. Subsequently the proctors for the owners of the vessel obtained a rule to set aside the judgment & award of salvage on the ground that their acquiescence in the appraisement had been given under a misapprehension. The appraisement had not been made at the instance of the ct. The owners refused to pay the amount awarded, thereby rendering a sale necessary, & it appearing that a sum far less than the appraisement would be realised at such sale, & that the award would be excessive & unjust, the ct. set aside its judgment & ordered a sale to be had. At the sale the vessel & cargo realised only $4,128, instead of $9,000, as had been appraised:—*Held:* the decree should be re-opened, & the ct. should take the $4,128 & not the $9,000 as the basis of its award of salvage. Rate of allowances for charges determined. Where an appraisement is ordered by the ct. at the instance of the salvors, with a view to a decree, & has been duly made by reliable parties, the ct. will not allow it to be questioned.—THE S. B. HUME (1881), Y. A. D. 228.—**CAN.**

1225 ii. —— *Mistake.*]—A ship abandoned & towed into port was valued at $8,300, but afterwards it was discovered that the appraisement should have been construed to make the total value only $7,500:—*Held:* although counsel had acquiesced in the appraisement & decree until the error was discovered, yet relief might be applied for & the decree re-opened & award made upon the basis of $7,500.

The exercise of authority to re-open a decree should be used with the greatest caution. The limit is to make such alteration of an error arising from defect of knowledge or information upon a particular point, as the justice of the case requires. It must be an error instantly noticed & brought to the attention of the ct. with the utmost diligence.—THE ROYAL ARCH (1881), Y. A. D. 260.—**CAN.**

1225 iii. —— *Application by parties not represented in conjoined actions in which decree obtained.*]—In conjoined actions for damages for collision in which both ships were found to blame, the owners of the *A.* obtained against the owners of the *O.* decree for a sum which exceeded their total liability as limited by M. S. Act, 1894 (c. 60), s. 503. The owners of the *O.* having presented under that Act a petition for limitation of liability & for distribution, the owners of the *A.* claimed to rank for the sum in their decree; the owners of the *A.*'s cargo, however, having appeared & put in a claim, sought to have such decree opened up, maintaining that the value of the *A.* had been overstated & had not been contested by the owners of the *O.* because they had had little or no interest so to do, but that the finding of such value could not be binding on them when they were not represented in the actions:—*Held:* the owners of the *A.* were bound to try again in the petition the amount of their claim.—VAN EIJCK & ZOON *v.* SOMERVILLE (1906), 43 Sc. L. R. 841; 14 S. L. T. 316; 8 F. 22, H. L.; *sub nom.* OLGA *v.* ANGLIA (OWNERS) (1905), 12 S. L. T. 812; 7 F. 739.—**SCOT.**

b. *Judgment—Antedating—Death of party.*]—In a collision action, when one of the parties died after the argument, but before judgment, the judgment was antedated.—BRYCE *v.* CANADIAN PACIFIC RY. CO. (1908), 8 W. L. R. 230; 13 B. C. R. 446.—**CAN.**

PART III. SECT. 15, SUB-SECT. 2.

1228 i. *Variation of decree.*]—The ct. will, upon motion, & after time for appeal has elapsed, review its definitive sentence, & hear an application made by the promovents for a new distribution of the sum awarded as salvage amongst the salvors. Although the ct. might, perhaps, have made a different distribution of the salvage awarded at the hearing, if fully cognisant of all the facts, it will not, upon motion, alter its original distribution, unless under pressure of most peculiar circumstances.—THE JANE (1850), 5 Ir. Jur. O. S. 226 (Adm.).—**IR.**

Sect. 15.—*Decree: Sub-sect.* 2. *Sect.* 16: *Sub-sects.* 1 & 2.]

judge in person, but the consent must be express.—THE BUENOS AYRES (1869), 17 W. R. 627.

1233. No rescission where full knowledge.]—Where deft. in adequate possession of the facts has given his consent to a decree of the ct., pronouncing for the validity of a bottomry bond, the ct. will not rescind the decree, though the facts might possibly raise a valid defence, according to a decision pronounced subsequent to the decree.—THE GLENBURN (1863), Brown. & Lush. 62 ; 11 W. R. 685.

SECT. 16.—COSTS.

See, generally, PRACTICE & PROCEDURE ; SOLICITORS.

SUB-SECT. 1.—IN GENERAL.

1234. General rule.]—The party who fails in any suit, except in very peculiar circumstances, should pay the whole of the costs, not as a punishment, but upon the principle of indemnification to the party sued, who has been put to the expense of a suit commenced without sufficient ground in fact or in law to warrant its institution.—THE CHRISTINA (1844), 3 L. T. O. S. 20 ; 8 Jur. 321.

1235. ——.]—THE MONKSEATON, Nos. 1683, 1691, *post.*

1236. —— **Costs increased by defendant's conduct.**]—Defts. having occasioned great delay & extra expense, so that the amount in which the action had been entered proved insufficient to cover the amount pronounced to be due to pltf. with his costs of suit, the ct. ordered that the ship should not be released from arrest until payment of pltf.'s claim & costs should have been made.—THE HELEN (1866), 14 W. R. 502.

1237. —— **Applicable to preliminary objection.**]—On an objection to the pleadings, the question for decision involved the whole case :—*Held :* the unsuccessful party must be condemned in costs.—THE TIGRESS, No. 560, *ante.*

For full anns., *see* S. C. No. 560, *ante.*

1238. Costs—Not necessarily following event.]—There is no rule in the Admlty. Ct. to give costs to a party succeeding in a cause of possession. A question of costs depends on the merits of the case.

Where the parties to a cause of possession agreed, after bail given, that proceedings should be discontinued, & the costs in the Admlty. Ct. should abide the event of a trial at law, if the rule in the above ct. was to give costs to a party succeeding in a cause of possession :—*Held :* (1) there was no such rule in the Admlty. Ct. ; (2) the Admlty. proceedings must be dismissed without costs.—THE PARTRIDGE (1822), 1 Hag. Adm. 81.

1239. Successful party—When not entitled to costs—Conduct.]—A successful party is entitled to costs generally subject to the exception of any costs incurred for matters unnecessarily introduced by him.—THE APOLLO, Nos. 202, 225, 239, *ante.*

1240. —— —— ——.]—Where the conduct of the bondholder was such as to give reasonable ground for suspicion, & to justify the opposition to payment of a bond, the ct., although it pronounced for the bond, made no order as to costs.—THE OCEAN, No. 1406, *post.*

1241. —— —— ——.]—THE ST. LAURENCE, No. 1320, *post.*

1242. —— —— ——.]—THE CATALINA, No. 1321, *post.*

1243. —— —— ——.]—In a collision suit pltf. entered the action & took bail for £250. Pltf. succeeded. It subsequently appeared the damage & costs amounted to more than £250. Deft., however, tendered £250. The ct., at the petition of plt.'s proctor, decreed deft. personally liable for the remainder of pltf.'s costs, deft. having unnecessarily compelled pltf. to proceed by the more expensive mode of "plea & proof" instead of "act on petition."—THE TEMISCOUATA (1855), 2 Ecc. & Ad. 208 ; 1 Jur. N. S. 479.

1244. —— —— ——.]—If a master suing for wages & disbursements fails to furnish accounts before bringing his suit, he is not entitled to his costs.—THE FLEUR DE LIS (1866), L. R. 1 A. & E. 49 ; 12 Jur. 379.

1245. —— —— ——.]—THE SUSANNAH, No. 1345, *post.*

1246. —— —— ——.]—THE YAN YEAN, No. 1323, *post.*

For full anns., *see* S. C. No. 1323, *post.*

1247. —— —— ——.]—THE CAPELLA, No. 1324, *post.*

1248. —— —— **New point of law.**]—Costs were not allowed in the Admlty. Ct. when a question of law was decided for the first time, & that on a matter of difficulty.—THE PRINCESS ROYAL, Nos. 375, 540, 554, *ante.*

For full anns., *see* S. C. No. 375, *ante.*

1249. *S. P.* THE FORTITUDE, No. 247, *ante.*

Annotation :—**Refd.** Place *v.* Potts (1853), 1 C. L. R. 679.

1250. —— —— ——.]—A monition extracted by a bondholder called upon P., secretary of the E. & W. India Dock Co., to bring in certain deposits lodged in his hands by the consignees of the cargo of account of freight. P. prayed to be heard on his petition as to the construction of 3 & 4 Will. 4, c. 57, s. 47. Upon the petition being subsequently abandoned, & the freight brought in, P. was dismissed, but without costs, the question being *primæ impressionis.*—THE LORD AUCKLAND (1844), 2 Wm. Rob. 301 ; 3 Notes of Cases, 95 ; 3 L. T. O. S. 223 ; 8 Jur. 478.

Annotation :—**Distd.** The Kaleten (1914), 30 T. L. R. 572, P. D.

1251. —— —— ——.]—Where a collision occurred between two British vessels in Dutch inland waters :—*Held :* (1) the ct. had jurisdiction ; (2) the question being novel, no costs should be given.—THE DIANA, No. 485, *ante.*

Annotations :—**Consd.** The Sylph (1867), L. R. 2 A. & E. 24. **Apld.** R. *v.* City of London Court Judge (1882), 8 Q. B. D. 609.

1252. —— —— **Ignorance of law—Seaman.**]—In a suit for wages, the owners, having pleaded desertion of the mariner from another vessel, & payment of his wages into Greenwich Hospital under 4 Geo. 4, c. 25, s. 11, & the suit having been dismissed, costs

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PART III. SECT. 16, SUB-SECT. 1.

1238 i. *Costs—Not necessarily following event.*]—The discretion given to a judge under the Admlty. jurisdiction of the ct. is exactly the same as a judge has in an ordinary action where the costs follow the result.—THE ROSE CASEY, COASTAL S.S. CO. *v.* MCGREGOR S.S. CO. (1900), 18 L. R. N. Z. 663.—**N.Z.**

1238 ii. *S. P.* THE W. J. AITHENS (1893), 4 Ex. C. R. 7.—**CAN.**

1238 iii. — *Action of account between co-owners—Adoption of rule in partnership actions.*]—In actions of account between co-owners the rule as to incidence of costs followed by cts. of law in partnership actions may be adopted in an Admlty. ct., & where there is a deficiency of assets the ct. may order costs of the proceedings to be borne equally by the co-owners.—SIDLEY *v.* THE DOMINION, SIDLEY *v.* THE ARCTIC (1896), 5 Ex. C. R. 190.—**CAN.**

1239 i. *Successful party—When not entitled to costs—Conduct.*]—Although pltf. fails in his action, if the defence is so misleading as to invite unnecessary controversy, & prolong the trial, the ct. will make no order as to costs.—MCARTHUR *v.* THE JOHNSON (1913), 18 B. C. R. 94.—**CAN.**

were not awarded because there might be ignorance of the law in the mariner, &, although the owners were aggrieved by the proceedings, it would not be an effectual relief to them to decree costs against a mariner who would probably not be in a condition to pay them.—THE VIBILIA (1829), 2 Hag. Adm. 228.

1253. —— —— —— Foreign party.]—A bond given at Buenos Ayres on a ship & freight for the voyage to England to pay a general average contribution due upon adjustment from the ship to the outward cargo was pronounced against, but without costs, the evidence showing that the adjustment of the average at Buenos Ayres was a correct mode of proceeding & had the master's entire sanction, & that the transaction was fair & just, as it passed under the eye of the British consul, & that the consignees were really creditors, & in seeking to protect themselves by means of a bottomry bond they erred only in a misapprehension of English law, of which they could have had little knowledge.—THE NORTH STAR (1860), Lush. 45; 29 L. J. P. M. & A. 73; 2 L. T. 264. S. C. Nos. 314, 656, *ante*.

Annotations:—**Distd.** The Edmond (1861), Lush. 211. **Consd.** The Galam (1863), Brown. & Lush. 167, P. C.; The Karnak (1868), L. R. 2 A. & E. 289. **Mentd.** The Daring (1868), L. R. 2 A. & E. 260.

1254. Motion—Costs of consenting party—Not allowed where not prejudiced.]—The ct. will not give the costs of appearing to consent to a motion where the party so appearing is not prejudiced by the motion.—THE ACHILLES (1871), 25 L. T. 605; 1 Asp. M. L. C. 165.

1255. Jurisdiction of court cannot be disputed.]—The jurisdiction of the ct. cannot be disputed in a question of costs after the litigated question has been determined by the ct.—THE AUDACIOUS *v.* THE ARGO (1856), 8 L. T. 612; *Shipping Gazette*, May 24.

SUB-SECT. 2.—GENERAL LIABILITY FOR COSTS.

1256. Several parties—Each liable.]—Where a decree for costs has been pronounced against several parties, it may be followed out against any one of them separately.—THE WILHELMINE (WHILELMINE), No. 692, *ante;* Nos. 1266, 1509, *post*.

For full anns., *see* S. C. No. 131, *ante*.

1257. Extent of liability—Not limited to value of ship.]—A vessel was sold under a decree of the ct. in a cause of damage, the proceeds proved insufficient, & no bail had been given. The owner of the vessel was personally condemned in payment of costs.—THE JOHN DUNN (1840), 1 Wm. Rob. 159.

Annotation:—**Consd.** The Dictator, [1892] P. 304.

1258. —— ——.]—In a suit in the Admlty. for compensation for damage by collision, deft., the owner of the vessel, appeared & contested his liability; he did not release the vessel, which had been arrested, by giving bail, but allowed it to remain under arrest to answer the suit:—*Held:* the Admlty. Ct. had jurisdiction to give costs beyond the amount of the value of the vessel & freight, notwithstanding 53 Geo. 3, c. 159.—*Ex p.* RAYNE (1841), 1 Q. B. 982; 1 Gal. & Dav. 374; 10 L. J. Q. B. 354; 5 L. T. 185; 113 E. R. 1409.

Annotation:—**Reid.** Stoomvaart Maatschappy Nederland *v.* Peninsular & Oriental Steam Navigation Co. (1882), 7 App. Cas. 795.

1259. —— Not limited to amount of bail.]—In a collision suit bail was taken from a shipowner for damages & expenses in £250, which was not the full value of the property, & the damages & costs were found to exceed that sum; the shipowner having compelled pltf. to proceed by an expensive process of "plea & proof" instead of "act on petition":—*Held:* the shipowner was liable in a further sum to cover the costs.—THE LAWRENCE *v.* THE TEMISCOUATA (1855), 2 Ecc. & Ad. 208; 3 L. T. 419; 1 Jur. N. S. 479.

Annotations:—**Reid.** The Hero (1860), Brown. & Lush. 447; The Freedom (1871), L. R. 3 A. & E. 495; The Dictator, [1892] P. 304.

1260. Crown—Rule as to costs.]—The Crown cannot be condemned in costs.—THE DUKE OF SUSSEX (1841), 1 Wm. Rob. 270; 1 Notes of Cases, 161.

See, now, Crown Suits Act, 1855 (c. 90).

Annotations:—**Consd.** The Leda (1863), Brown. & Lush. 19. **Mentd.** The Friends (1843), 2 Notes of Cases, 92; The Duke of Manchester (1846), 4 Notes of Cases, 575; The Gipsey King (1847), 5 Notes of Cases, 282; The Christina (1848), 6 Notes of Cases, 4; The Hand of Providence (1856), Sw. 107; The Energy (1870), L. R. 3 A. & E. 48; The Mary (1879), 5 P. D. 14.

1261. —— —— Co-plaintiffs.]—In a case of damage instituted on behalf of the Queen in her office of Admlty., & of the commander & crew of one of H.M. ships, against a private shipowner, the ct., on a finding for deft., declined to condemn the Crown in costs, but condemned the commander & crew to pay the whole of the costs.

Crown Suits Act, 1855 (c. 90), authorising costs to be given to or against the Crown, applies only to proceedings in which the A.-G. or Lord Advocate is a party. Co-pltfs. are severally liable to the whole of the costs.—THE LEDA (1863), Brown. & Lush. 19; 32 L. J. P. M. & A. 58; 7 L. T. 864; 9 Jur. N. S. 208; 11 W. R. 302; 1 Mar. L. C. 298.

Annotations:—**Reid.** Mersey Docks & Harbour Board *v.* Turner, [1893] A. C. 468; The Broadmayne, [1916] P. 64, C. A.

1262. —— ——Motion by Crown to stay proceedings.]—Where a motion was made by the Crown asking that the writ & all subsequent proceedings in a salvage action *in rem* should be set aside so long as the salved ship remained in the service of the Crown, & an order was obtained that all further proceedings in the action with a view to the arrest or detention of the ship should be stayed so long as the vessel remained under requisition in the service of the Crown:—*Held:* there would be no order as to costs, as the intervention was direct on behalf of the Crown, & not through the Lords Comrs. of the Admlty. so that Admlty. Suits Act, 1868 (c. 78), did not apply.—THE BROADMAYNE, Nos. 69, 131, 705, *ante*.

For full anns., *see* S. C. No. 1266, *post*.

1263. H.M. ship—Costs given against.]—Costs will be given against a Queen's ship when pronounced in fault.—H.M.S. SWALLOW (1856), Sw. 30.

Annotations:—**Expld.** The Leda (1863), Brown. & Lush. 19. **Mentd.** The Thomas A. Scott (1864), 10 L. T. 726.

1264. Proceedings instituted without authority—Nominal party not liable.]—A claim for salvage had been dismissed with costs:—*Held:* one of the parties, in whose name the suit was brought, & who, if the claim had been successful, might have been entitled to share in the salvage remuneration, was not liable for the costs, the suit having been instituted without his privity or knowledge.—THE WILHELMINE (1842), 2 Notes of Cases, 19; 7 Jur. 134.

1265. —— —— Unless ratified.]—Where a shipowner applied to the ct. to set aside an order condemning him in the costs of unsuccessful legal proceedings taken on his behalf by the managing owner, on the ground that the proceedings had been instituted without his knowledge, consent, or ratification, & the first intimation he had of the proceeding was a notice received about a month

Sect. 16.—*Costs: Sub-sects* 2 *&* 3, *A. & B.* (*a*) *&* (*b*); *sub-sect.* 4, *A.*

previous to the present application condemning him in the costs of such proceeding, the ct. refused to grant the application, as it did not appear that applt., though he had no knowledge of the institution of, was not aware of the pendency of, the proceedings, & because he had not at once applied to the ct. on becoming aware of the proceedings, instead of delaying to take any steps for over a month.—THE BELLCAIRN (1886), 54 L. T. 544; 5 Asp. M. L. C. 583.

1266. —— Proctor personally liable.]—A proctor of the Admlty. Ct. will be personally condemned in the costs of the suit for not setting forth the names of the parties for whom he appeared when directed so to do by a decree of the ct.—THE WHILELMINE (WILHELMINE) (1842), 1 Wm. Rob. 335; 2 Notes of Cases, 213; 7 Jur. 331. S. C. Nos. 692, 1256, *ante*; No. 1509, *post*.

Annotation:—**Consd.** The Euxine (1871), L. R. 4 P. C. 8, C. A.

1267. Unnecessary costs—Proctor personally liable.]—Where costs have been created by introduction of much matter foreign to the real & natural merits of the case as between the parties, the ct. will condemn in costs the proctor who has introduced irrelevant matter & an uncandid representation that has created the necessity of all that followed in contradiction. — THE FREDERICK (1823),1 Hag. Adm. 211. S. C. No. 1012, *ante*.

SUB-SECT. 3.—COSTS ARISING OUT OF ARREST.

A. Since the Judicature Acts.

1268. Commission on bail—Not recoverable as costs—Damages.]—A successful deft. in an action *in rem*, where the action is decided in his favour or discontinued, cannot recover as costs the commission paid by him for bail to release his ship from arrest, though he may in some instances, where the arrest is made *malâ fide* or with gross negligence, recover it as damages.—THE COLLINGROVE, THE NUMIDA (1885), 10 P. D. 158; 54 L. J. P. 78; 53 L. T. 681; 34 W. R. 156; 5 Asp. M. L. C. 483. S. C. No. 710, *ante*.

1269. Bail fees—Allowed, if bail excessive.]—A s.s. ran into another moored alongside a wharf in the Thames, doing damage to the moored vessel & breaking her adrift. The vessel which had been moored damaged others after she was broken adrift. In an action for damage brought by the owners of the vessel broken adrift they demanded bail in £10,000, but ultimately reduced their demand to £9,000. The question of liability having been fought & determined in favour of pltfs., they filed a claim in the registry amounting to £3,451 13*s.* 5*d.* Defts. tendered £3,100, which was accepted by pltfs. On a motion by defts. that pltfs. should bear the cost of the excessive bail fees:—*Held*: (1) the bail demanded was excessive; (2) pltfs. must bear the cost of the fees for the bail demanded above £6,000.—THE PRINCESSE MARIE JOSÉ (1913), 109 L. T. 326; 29 T. L. R. 678; 12 Asp. M. L. C. 360.

B. Before the Judicature Acts.

(*a*) *In General.*

1270. Costs of arrest—Effect of admission of liability.]—The payment of wages after arrest of the ship is an admission of the justice of the claim, & renders the owners liable to expenses of the warrant & arrest.—THE THOMAS HANDFORD (1827), 2 Hag. Adm. 41 n.

1271. Not recoverable—Detention fees—Arrest at outport.]—Where a vessel is arrested in an outport & not by the marshal of the ct., the detention fees are to be paid by the arresting party, though successful in the cause.—THE NORTH AMERICAN No. 1399, *post*.

1272. —— Possession fees—Second arrest in transferred action.]—Where a ship, already under arrest of the Admlty. Ct., is arrested in an Admlty. cause instituted in a cty ct., pltfs. knowing of the previous arrest, & that cause is afterwards transferred to the High Ct., the possession fees charged by the high bailiff in respect of the cty. ct. arrest will not be allowed by the High Ct. upon taxation of pltfs.' costs.—THE RIO LIMA (1873), L. R. 4 A. & E. 157; 43 L. J. Adm. 4; 29 L. T. 517; 22 W. R. 303; 2 Asp. M. L. C. 143.

Annotation:—**Rsfd.** The Montrosa, [1917] P. 1.

(*b*) *Costs of Appraisement.*

1273. Salvors—When entitled to costs.]—Salvors are entitled to costs of a commission of appraisement where there is a substantial difference between the appraised value & that stated by defts.—THE PAUL (1866), L. R. 1 A. & E. 57; 35 L. J. Adm. 16; 14 L. T. 192; 2 Mar. L. C. 325.

1274. —— ——.]—The value of the ship as appraised by the officer of the ct. was less & of the cargo more than the values tendered by defts. The ct. condemned defts. in costs of the appraisement.—THE MAGDALEN (1861), 5 L. T. 692; 1 Mar. L. C. 183.

1275. —— When liable for costs.]—In cases of salvage the ct. is disposed to discountenance the taking out of a commission of appraisement. Where the value of the vessel is disputed, & a commission taken out, unless there be a great disparity between the value stated by the owners & the actual value, the party taking out the commission will be liable to costs of the appraisement.—THE PERSIAN (1842), 1 Wm. Rob. 327; 1 Notes of Cases, 304; 8 L. T. 612.

Annotation:—**Folld.** The Glasgow Packet (1843), 8 Jur. 67.

1276. *S. P.* THE SARAH, No. 794, *ante*.

1277. *S. P.* THE JULIA *v.* THE COMMODORE (1853), 3 L. T. 218.

1278. —— When costs are costs in cause.]—The owner of a ship arrested in a damage suit alleged the value of the ship to be one-fifteenth less than it was afterwards shown to be upon a commission of appraisement obtained by pltfs.; the amount claimed by pltfs. was less than the sum for which the owners were willing to give security; but, assuming the claim to be sustained, the costs would extend the claim greatly beyond that sum. On a motion by pltfs. to condemn defts. in costs of the appraisement:—*Held*: the proper order was that costs should be costs in the cause.—THE RAPID (1869), 18 W. R. 150.

PART III. SECT. 16, SUB-SECT. 3.—A.

a. *Excessive arrest.*]—A party is not entitled to the benefit of the rule dealing with the costs & damages occasioned by an excessive claim, & which refers to costs incurred in obtaining the release of the ship & damages sustained by her detention, unless the amount claimed is so exorbitant & so disproportionate to the damages sustained, or the services rendered, as to indicate that the arrest of the ship was either an act of malice or of negligence so gross that malice will be implied.] Pltfs. instituted an action *in rem* against the T., claiming £300 damages, & had the ship arrested; the registrar held upon inquiry before him that the demand of pltfs. was unreasonable & extortionate:—*Held*: pltfs. must pay the costs occasioned by arrest of the ship.—OLSON & MAHONY S.S. Co. *v.* THE THELMA (1913), 14 S. R. N. S. W. 10.—**AUS.**

b. ——.]—*Re* THE CHAMPION, No. 1323, i., *post*.

SUB-SECT. 4.—COSTS IN COLLISION CASES.

A. Since the Judicature Acts.

1279. Inevitable accident—Admiralty or common law rule.]—*Qu.:* whether in cases of inevitable accident, where the practice of the Admlty. Ct. as to costs before Jud. Acts was different from that of the cts. of common law, the Admlty. Div. will now follow the practice of the cts. of common law. —THE MATTHEW CAY (1879), 5 P. D. 49; 49 L. J. P. 47; 41 L. T. 759; 4 Asp. M. L. C. 224. S. C. Nos. 1288, 1291, *post*.

1280. —— No costs.]—In consequence of the steering apparatus of a steamer suddenly breaking from a latent defect she ran into & damaged a schooner. At the hearing of an action of damage instituted on behalf of the owners of the schooner against the steamer:—*Held:* (1) the collision was an inevitable accident; (2) the action should be dismissed without costs.—THE VIRGO (1876), 35 L. T. 519; 25 W. R. 397; 3 Asp. M. L. C. 285.

1281. —— ——.]—THE OPHELIA, No. 1292, *post*.

1282. —— Costs to defendant.]—Pltfs. in an action for damage by collision admitted on the pleadings that the collision was the result of an inevitable accident. Defts. applied for judgment with costs:—*Held:* unless there are special circumstances to induce the ct. to depart from this rule, costs will be given against pltfs. in an action of damage whenever defts. prove that the collision is the result of an inevitable accident.—THE NAPLES (1886), 11 P. D. 124; 55 L. J. P. 64; 55 L. T. 584; 35 W. R. 59; 6 Asp. M. L. C. 30.

1283. Both to blame—No costs—Maritime Conventions Act, 1911 (c. 57).]—In an action for damage by collision, in which both vessels were found to blame for negligent navigation in fog, the vessel which was found guilty of the initial fault was ordered to pay 60 per cent. of the damage & the other vessel 40 per cent. under s. 1 (1) of the above Act. No order was made as to costs.—THE ROSALIA, [1912] P. 109; 81 L. J. P. 79; 106 L. T. 351; 28 T. L. R. 287; 12 Asp. M. L. C. 166.

1284. —— —— —— Former practice followed.]—When in a collision action both ships are held to be in fault, but in different degrees, the practice in force before the passing of the above Act, that each party to the action should bear his own costs, will be followed unless there are special circumstances in existence to induce the ct. to depart from it.—THE BRAVO (1912), 108 L. T. 430; 29 T. L. R. 122; 12 Asp. M. L. C. 311.

1285. —— Former practice—Where admission by plaintiff.]—In a collision case where both ships are held to blame, pltf. is entitled to his costs if in his statement of claim he admits he is to blame.—THE GENERAL GORDON (1890), 63 L. T. 117; 6 Asp. M. L. C. 533.

1286. —— Action by cargo-owner—Rules as to costs.]—Where an action is brought by the owners of cargo laden on board one ship against another ship for damages sustained by the cargo through collision, & both vessels are found to blame, pltfs. will recover half their damages, in accordance with the practice of the Admlty. Ct. & Jud. Act, 1873 (c. 66), s. 25 (9), but no order will, as a rule, be made as to the costs. *Semble:* if deft. in an action brought by the owners, of cargo laden on board another ship for damages arising from a collision admits his liability, but pleads contributory negligence on the part of the ship on board which the cargo was laden, & both vessels are found to blame pltfs. may be condemned in costs, & where cargo-owners suing alone admit contributory negligence on the part of the ship in which their cargo was, & only claim half their damages & recover them, they will get costs. *The Milan* (1861), Lush. 388, overd.—THE CITY OF MANCHESTER (1880), 5 P. D. 221; 49 L. J. P. 81; 42 L. T. 521; 4 Asp. M. L. C. 261, C. A. S. C. No. 1610, *post*.

Annotations:—**Followed.** Bew *v.* Bew, [1899] 2 Ch. 467, C. A.; Forbes-Smith *v.* Forbes-Smith, [1901] P. 258, C. A. **Approved.** Lever *v.* Masbro' Equitable Pioneer Soc. (1912), 106 L. T. 472, C. A. **Refd.** Adlington *v.* Conyngham, [1898] 2 Q. B. 492, C. A.; Rotch *v.* Crosbie (1909), 54 Sol. Jo. 30, C. A.

1287. Compulsory pilotage—Admiralty rule followed.]—In cases of compulsory pilotage the Admlty. Div. will adhere to the practice of the Admlty. Ct. before Jud. Acts as to costs.—THE PRINCETON (1878), 3 P. D. 90; 47 L. J. Adm. 33; 38 L. T. 260; 3 Asp. M. L. C. 562.

For full anns., *see* SHIPPING & NAVIGATION.

1288. *S. P.* THE MATTHEW CAY, No. 1279, *ante*; No. 1291, *post*.

1289. —— Costs to defendant—Discontinuance.]—In an action for damage by collision defts. pleaded that the collision was caused solely by negligence of the pilot who was compulsorily in charge of defts.' ship. Pltfs. applied for leave to discontinue the action without payment of costs:—*Held:* pltfs. must pay the costs, there being no materials upon which the ct.'s discretion could be exercised, until the facts had come out at the trial. —THE J. H. HENKES (1887), 12 P. D. 106; 56 L. J. P. 69; 56 L. T. 581; 35 W. R. 412; 6 Asp. M. L. C. 121. S. C. No. 1086, *ante*.

1290. —— No costs—Action justifiable.]—Where defts. rely solely on the defence of compulsory pilotage, & are successful, they may not get costs if the ct. is of opinion that in the circumstances pltfs. were justified in bringing the action.—THE HANKOW (1879), 4 P. D. 197; 40 L. T. 335; 28 W. R. 156; 4 Asp. M. L. C. 97.

For full anns., *see* SHIPPING & NAVIGATION.

1291. —— —— Unsuccessful defence on merits.]—When in an action for damages by collision deft. pleads a defence on the merits & also a plea of compulsory pilotage, & succeeds on the plea of compulsory pilotage only, each party will have to pay his own costs.—THE MATTHEW CAY, Nos. 1279, 1288, *ante*.

1292. —— —— ——.]—In an action of damage by collision defts. pleaded inevitable accident, &, alternatively, that if the collision & damage were caused or contributed to by any negligence on the part of any one on board their s.s. (which was denied), such negligence was solely that of a duly licensed pilot who was in charge of their vessel within a district in which the employment of the pilot was compulsory by law. Bargrave Deane, J. found that the collision was occasioned by the fault of the pilot alone & dismissed pltf.'s action; but made no order as to costs. Defts., by leave, appealed on the ground that the judge, in the exercise of the judicial discretion vested in him under Jud. Act, 1873 (c. 66), should, in accordance with the alleged existing admlty. practice, have given defts. the costs of defending the action.—*Held:*

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1283 i. *Both to blame—No costs.*]—Where both vessels are to blame, the costs of the action are in the discretion of the ct.—LEE *v.* THE OLYMPIAN (1892), 2 B. C. R. 84.—**CAN.**

1283 ii. —— ——.]—Where both parties are to blame for a collision, though in different degrees, the costs will be equally divided between them. —WARD *v.* THE YOSEMITE (1894), 3 B. C. R. 311.—**CAN.**

1286 i. —— *Action by cargo-owner.*]—The owners of cargo on board the *H.* sued the owners of the *S.* for damages resulting from a collision which occurred between the *H.* & the *S.* The ct. found that both vessels were to blame for the collision:—*Held:* each party should bear its own costs. *The City of Manchester* (1880), 5 P. D. 221, folld.—OOKERDA ROONSEY *v.* S.S. SAVITRI (1886), I. L. R. 10 Bom. 408.—**IND.**

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the C. A. would not lay down any general rule for the guidance of cts. of first instance beyond what had already been done, viz., that, if there be but one issue in the action, the successful party is, *primâ facie* entitled to costs, as where the defence of compulsory pilotage is the only issue raised; but where, as in the present case, defts. undertake to prove that there was no faulty navigation on the part of anybody, & fail though succeeding upon the issue of compulsory pilotage, the ct. below will be rightly exercising its discretion, apart from special circumstances, in making no order as to costs.—THE OPHELIA, [1914] P 46; 83 L. J. P. 65; 110 L. T. 329; 30 T. L. R. 61; 12 Asp. M. L. C. 434, C. A. S. C. No. 1281, *ante*.

1293. —— —— — Difference between Admiralty & other divisions.]—In an action by pltfs. for damages sustained by their ship in a collision with defts.' ship, defts. set up the defence, among others, that their ship at the time of collision was compulsorily under the charge of a pilot. Upon this defence they succeeded & obtained judgment. No application as to costs was made at the trial, but pltfs. afterwards applied to the ct. under R. S. C., O. 55, for an order to deprive defts. of costs on the ground that in the old Admlty. Ct. & in the present Admlty. Div. the practice was uniform to disallow deft. costs in cases where he succeeded in the defence of compulsory pilotage alone, if besides that he had raised other defences:—*Held:* without deciding whether the ct. had power under R. S. C., O. 55, to make an order as to costs at all, the practice of the Admlty. Div. applied to cases in that div. alone, & could not upset the general & well-established rule that the successful party is entitled to his costs.—GENERAL STEAM NAVIGATION CO. *v.* LONDON & EDINBURGH SHIPPING CO. (1877), 2 Ex. D. 467; 47 L. J. Q. B. 77; 36 L. T. 743; 25 W. R. 694; 3 Asp. M. L. C. 454.

Annotations:—**Refd.** Bowey *v.* Bell, Brooks *v.* Israel, North *v.* Bilton, Siddons *v.* Lawrence (1878), 4 Q. B. D. 95; Morris *v.* Freeman (1878), 3 P. D. 65; Myers *v.* Defries, Siddons *v.* Lawrence (1879), 4 Ex. D. 176, C. A.

1294. —— Counterclaim dismissed with costs.]—In an action of damage arising out of a collision pltfs.' claim was dismissed without costs, the ct. having found that defts.' vessel was alone to blame for the collision, but that they were exempt from liability on the ground of compulsory pilotage. Defts. had counterclaimed:—*Held:* in the circumstances, pltfs. entitled to have the counterclaim dismissed with costs.—THE RUBY (1890), 15 P. D. 139; 63 L. T. 735; 39 W. R. 42; 6 Asp. M. L. C. 577; *affd.* on another point, 15 P. D. 164, C. A.

For full anns., *see* SHIPPING & NAVIGATION.

1295. Co-defendants—Costs of.]—A pilot cutter was made fast to a sailing ship, which was being towed by two tugs. A collision occurred between the cutter & a schooner, causing damage to both. The cutter sued the tugs & the schooner. The schooner counterclaimed against the cutter & the tugs, & the tugs were held solely to blame. On appeal by the tugs:—*Held:* (1) though the cutter was lashed alongside the tow, those in charge of her were not absolved from keeping a look-out, & were negligent in not slipping their towrope & so avoiding collision; (2) there was no contribution between the tugs & the cutter in respect of the judgment obtained by the schooner against the tugs; (3) the tugs & cutter must pay their own costs in the ct. below & of the appeal.—THE HARVEST HOME, [1905] P. 177; 93 L. T. 395; 10 Asp. M. L. C. 118, C. A.

For full anns., *see* SHIPPING & NAVIGATION.

1296. —— Costs of successful defendant.]—The dumb barge *E.*, while in tow of the steam-tug *S.*, was damaged by collision with the steamship *R.* The owners of the *E.* commenced an action, joining the owners of both vessels as defts. At the trial the *R.* was found alone to blame:—*Held:* the owners of the *R.*, having endeavoured to throw the blame on the *S.*, must pay her costs as well as those of pltfs.—THE RIVER LAGAN (1888), 57 L. J. P. 28; 58 L. T. 773; 6 Asp. M. L. C. 281.

Annotations:—**Folld.** The Mystery, [1902] P. 115, D. C.; The Millwall (1904), 91 L. T. 695; The Esrom & The Hopper Wills No. 66, [1914] W. N. 81.

1297. —— ——.]—In an action in the City of London Ct. for damage by collision pltfs. sued the owners of a ketch, the vessel which did the damage, & the dock co. in obedience to the orders of whose dockmaster it was alleged by the first-named defts. that the action which caused the collision was taken. The dock co. alleged that the collision was caused solely by negligence of those on board the ketch. The cty. ct. judge gave judgment against both defts.; but on appeal the Div. Ct. held the dock co. alone responsible, & condemned the dock co. in the costs of the owners of the ketch both in the ct. below & upon the appeal.—THE MYSTERY, [1902] P. 151; 71 L. J. P. 39; 86 L. T. 359; 50 W. R. 414; 9 Asp. M. L. C. 281, P. C.

Annotations:—**Folld.** The Hopper No. 21, [1903] W. N. 114; The Millwall (1904), 91 L. T. 695; The Esrom & The Hopper Wills No. 66, [1914] W. N. 81.

1298. —— ——.]—The usual & modern course is that, where pltf. sues two defts. who mutually throw the blame on the deft. other than himself, the unsuccessful deft. should pay the costs incurred by pltf. & by the successful deft. to them direct.—THE ESROM & THE HOPPER WILLS NO. 66, [1914] W. N. 81.

B. Before the Judicature Acts.

1299. Practice as to costs.]—The law is, if either party is to blame, that party pays the costs of both; if neither is to blame, each pays his own costs; if both are to blame, the costs fall on both, the damages, costs, & expenses of both parties being thrown together, & equally divided.—THE WASHINGTON (1841), 5 Jur. 1067. S. C. No. 1309, *post*.

Annotation:—**Refd.** Stoomvaart Maatschappy Nederland *v.* Peninsular & Oriental Steam Navigation Co. (1882), 7 App. Cas. 795.

1300. Inevitable accident—No costs.]—In a collision action where neither ship was to blame no costs were given.—BAKER *v.* MALIN (1764), Burrell, 322.

1301. —— ——.]—It is the practice of the ct. not to give costs on either side where a collision has occurred from inevitable accident.—THE ITINERANT

PART III. SECT. 16, SUB-SECT. 4.—B.

1299 i. *Practice as to costs.*]—In cross-suits to recover damages for collision between two sailing vessels, if it appear that one of them kept a proper look-out, & did all that was possible to avoid the catastrophe before it took place, & the other did not keep a good look-out, or adopt the proper precautionary measures to avoid it when the danger arose—such as getting all hands on deck, unlashing the helms, etc.—the ct. will make the vessel so in default pay the costs.—THE BILLOW QUEEN (1859), 5 Ir. Jur. N. S. 42 (Adm.).—**IR.**

1299 ii. *S. P.* THE ANNE (1860), 5 Ir. Jur. N. S. 360 (Adm.).—**IR.**

1299 iii. ——.]—Where no blame is attributable to either party the practice of the ct. is in such cases not to award costs on either side.—THE MARGUERITE (1859), 10 L. C. R. 113; 2 S. V. A. C. 19; V. A. C. 254, C. C.—**CAN.**

1300 i. *Inevitable accident—No costs.*]—A petition may be dismissed, with no order as to costs, when it appears that the collision was the result of an accident.—THE G. F. WILLIAMS 1871), 5 I. L. T. 33.—**IR.**

(1844), 2 Wm. Rob. 236; 3 Notes of Cases, 5; 2 L. T. O. S. 374; 8 Jur. 131.

Annotations:—**Folld.** The Margaret (1859), 1 L. T. 340. **Distd.** The London (1863), Brown. & Lush. 82. **Expld. & Folld.** The Marpesia (1872), L. R. 4 P. C. 212, C. A. **Mentd.** The Lord Saumarez (1848), 6 Notes of Cases, 600.

1302. *S. P.* THE SHANNON, No. 1184, *ante.*

1303. *S. P.* THE EBENEZER, No. 924, *ante.*

Annotation:—**Consd.** The London (1863), 9 L. T. 348.

1304. *S. P.* THE ENGLAND (1847), 5 Notes of Cases, 170.

1305. —— —— **Except in special cases.**]—The rule of the Admlty. Ct. in cases where a collision is found to be the result of inevitable accident is to make no order as to costs, unless it can be shown that the suit was brought unreasonably & without sufficient *primâ facie* grounds, & this rule is followed by the C. A.—THE MARPESIA, Nos. 927, 1130, *ante.*

For full anns., *see* S. C. No. 1130, *ante.*

1306. —— —— ——.]—Though costs are not generally allowed in cases of collision caused by accident, cases might occur where they would be allowed, though the collision was accidental.—THE ADLER (1845), 6 L. T. 194.

1307. —— **Costs to defendant—Plaintiff failing to inquire.**]—In ordinary circumstances when it is found that collision was the result of inevitable accident, the general rule is that no costs are given. A collision being the result of inevitable accident, pltfs. were condemned in costs, the ct. being of opinion that they might, before suit brought, have ascertained how the collision arose.—THE LONDON (1863), Brown. & Lush. 82; 9 L. T. 348; 9 Jur. N. S. 1330; 1 Mar. L. C. 398.

Annotation:—**Consd.** The Marpesia (1872), L. R. 4 P. C. 212, C. A.

1308. Both to blame—No costs.]—Costs in a case of damage done by a foreign vessel to a British vessel are to be divided, each party paying its own costs, both parties having been in fault.—THE DE COCK *v.* THE PARMELIA (1839), 4 L. T. 774.

1309. —— **Costs divided.**]—THE WASHINGTON, No. 1299, *ante.*

For full anns., *see* S. C. No. 1299, *ante.*

1310. Negligence of damaged vessel—Costs to defendant.]—In a cause of collision, the owners are only entitled to indemnification if the damage is occasioned by the fault or misconduct of the vessel charged as the wrongdoer.

A collision having arisen from the neglect of the vessel damaged, the owners of the other vessel were dismissed with costs.—THE LIGO (1831), 2 Hag. Adm. 356.

1311. Compulsory pilotage—Costs to defendant.]—In a cause of damage, the only defence was that the collision was caused by the fault of a pilot compulsorily in charge of defts.' vessel. Defts. having proved their case:—*Held:* pltfs. must be condemned in costs.—THE ROYAL CHARTER (1869), L. R. 2 A. & E. 362; 38 L. J. Adm. 36; 20 L. T. 1019; 18 W. R. 49; 3 Mar. L. C. 262.

Annotations:—**Distd.** The Livia (1872), 25 L. T. 887. **Folld.** The Juno (1876), 1 P. D. 135.

1312. —— **No costs—Unsuccessful defence on merits.**]—Where defts. succeeded on the defence of compulsory pilotage, but failed to establish the defence that the other ship was to blame:—*Held:* (1) they could not be allowed costs; (2) if they had relied only on the defence of compulsory pilotage the ct. would have given them costs.—THE BATAVIER (1845), 2 Wm. Rob. 407; 4 Notes of Cases, 356; 10 Jur. 19. S. C. No. 1689, *post.*

Annotation:—**Mentd.** Submarine Telegraph Co. *v.* Dickson (1864), 15 C. B. N. S. 759.

1313. —— —— ——.]—In a collision cause, where deft. raises, together with other defences, that of compulsory pilotage, & his ship is found to blame, but is dismissed on the ground that negligence of the compulsory pilot was the sole cause of collision, each party pays his own costs according to the practice of the Admlty. Ct. It has never been the custom in that ct. to apportion the costs in such cases according to findings on the various issues.—THE SCHWAN (THE ROBERT MORRISON) (1874), L. R. 4 A. & E. 187; 43 L. J. Adm. 18; 30 L. T. 537; 22 W. R. 743; 2 Asp. M. L. C. 259.

1314. —— —— **Other defences pleaded.**]—Defts. in a cause of damage, who rely at the hearing upon the defence of compulsory pilotage only, & succeed on this point, but whose pleadings raise other issues which are not proved, are not entitled to their costs.—THE LIVIA (1872), 25 L. T. 887; 1 Asp. M. L. C. 204.

1315. —— —— **Though only defence.**]—When a suit is dismissed because the owners have established the misconduct of the pilot, no costs will be given.—THE ADMIRAL BOXER (1857), Sw. 193.

Annotations:—**Folld.** The Schwan, The Robert Morrison (1874), 43 L. J. Adm. 18. **Mentd.** Oakley *v.* Speedy (1879), 40 L. T. 881.

1316. *S. P.* THE MURIEL (1874), 30 L. T. 538 n.

1317. —— **Cross-actions.**]—Where in an action & cross-action for collision both parties raise the defence of compulsory pilotage, & it is held that the vessel of pltf. in the principal action is solely to blame, but only because of the pilot's default, the cross-action will be dismissed without costs, but pltfs. in the principal action will be condemned in costs.—THE ANNAPOLIS, THE JOHANNA STOLL (1861), Lush. 295; 30 L. J. P. M. & A. 201; 4 L. T. 417; 1 Mar. L. C. 67.

For full anns., *see* SHIPPING & NAVIGATION.

1318. —— —— **Failure of both parties — No costs.**]—Where there is a cross-action, & both parties fail in proving their case, both must be dismissed, & each pay his own costs.—THE GABRIEL (1855), 4 W. R. 91.

1319. Conduct of plaintiff—Though successful, ordered to pay costs.]—The ship in fault for a collision being totally lost in consequence, the other vessel was condemned in costs of suit for not having rendered assistance to her.—THE CELT (1836), 3 Hag. Adm. 321

Annotation:—**Folld.** The St. Lawrence (1850), 7 Notes of Cases, 556.

1320. —— **No costs.**]—Where the master of an American vessel, held not to be in fault, did not, at the time of the collision, order out a boat & afford assistance to save the life of a seaman who had fallen overboard from the other vessel, & was drowned, the ct., in pronouncing in favour of the American owners, refused to decree their costs.—

1308 i. *Both to blame—No costs.*]—In a collision suit, when both parties are found to be in fault, the ct. will leave them to pay their own costs.—THE AMERICAN UNION (1860), 5 Ir. Jur. N. S. 381 (Adm.).—**IR.**

1308 ii. *S. P.* THE FAVORITE (1853), 5 Ir. Jur. O. S. 118 (Adm.).—**IR.**

1308 iii. *S. P.* THE HIBERNIA (1860), 5 Ir. Jur. N. S. 366 (Adm.).—**IR.**

1308 iv. *S. P.* THE CORDELIA & THE OSPREY (1861), 1 Old. 772.—**CAN.**

1308 v. *S. P.* THE BRIG BYRON (1879), 2 N. S. W. Ad. 1.—**AUS.**

1310 i. *Negligence of damaged vessel.*]—The Admlty. Ct., in dismissing a petition in a collision suit, will not, in the exercise of its discretion, award the impugnant vessel her costs, if it appear that she was acting in any way negligently.—THE IRISHMAN (1858), 4 Ir. Jur. N. S. 24 (Adm.).—**IR.**

1315 i. *Compulsory pilotage—No costs—Though only defence.*]—When an impugnant ship obtains the dismissal of a suit for collision by relying on the legal defence of compulsory pilotage, each party will bear its own costs.—THE MALVINA (1863), 9 Ir. Jur. N. S. 199, (Adm.).—**IR.**

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THE ST. LAWRENCE (1850), 7 Notes of Cases, 556; 14 Jur. 534. S. C. No. 1241, *an e.*

1321. —— ——.]—A Dutch & Spanish vessel coming into collision, the Spanish crew boarded the other vessel & behaved with great violence. The ct. being of opinion that the Dutch ship was to blame for the collision, pronounced for the Spanish vessel, but gave no costs in consequence of the subsequent misconduct of the crew.—THE CATALINA (1854), 2 Ecc. & Ad. 23. S. C. No. 1242, *ante.*

SUB-SECT. 5.—COSTS IN SALVAGE ACTIONS.

Effect of tender upon costs in a salvage action, *see* pp. 186-188, *ante.*

A. Since the Judicature Acts.

(*a*) *In General.*

1322. General costs—Though failure on special issue.]—The *V.* fell in with the *C.* showing signals of distress, with her propeller shaft broken, about 30 miles out of her usual course from America to England, & took her in tow. After the *V.* had towed the *C.* from 8.10 p.m. to 7.45 a.m. the hawser broke, & owing to the danger to the cattle on board the *V.* would not take the *C.* again in tow. By the service of the *V.* the *C.* was brought 10 to 14 miles nearer her proper track, & towed 85 miles on her course, & thus brought into greater comparative safety. The *C.* subsequently arrived safely at Queenstown. The *V.* having been awarded £200: —*Held:* pltfs. were entitled to the general costs of the action, but not to those of a special issue as to damage to machinery on which they had failed.—THE CAMELLIA (1883), 9 P. D. 27; 53 J. P. 12; 50 L. T. 126; 5 Asp. M. L. C. 197.

For full anns., *see* SHIPPING & NAVIGATION.

1323. Salvors to pay costs — Forfeiture of award — Misconduct.] — Where salvors, having taken possession of a derelict vessel, whose crew had taken refuge on board the salvors' vessel, improperly refused to put back the crew or take the proffered assistance of a tug, although they themselves had no local knowledge, & then brought the derelict to anchor in an improper place, in consequence of which she was lost, the ct., although the ship & cargo were subsequently raised, & realised £3,075, refused to give any salvage remuneration, & condemned pltfs. in costs, but dismissed the counterclaim for damages. — THE YAN YEAN (1883), 8 P. D. 147; 52 L. J. P. 67; 49 L. T. 187; 31 W. R. 950; 5 Asp. M. L. C. 135. S. C. No. 1246, *ante.*

Annotation:—**Refd.** The Camellia (1883), 9 P. D. 27.

1324. —— —— ——.]—A vessel drove ashore in a gale of wind. Some of the crew landed in their own boat, whilst others were taken off by a lifeboat, for which service the crew of the lifeboat (pltfs.) were remunerated in the usual way. On landing, the master of the vessel went in search of tugs, leaving the officer of the coastguard, with the mate & crew in charge of the vessel, to watch her. After some hours the weather moderated, & pltfs., in spite of the remonstrances of the officer of the coastguard, put off in a boat to the vessel, at the same time forcibly preventing the mate & two of the crew from going in the boat with them. The pltfs. took possession of the vessel, as if salvors of a derelict, & when the tide ebbed leaving the vessel high & dry they laid two anchors out on the sands. The master of the vessel subsequently arrived with tugs; but on rowing to his vessel & attempting to haul himself up the side he fell back into the boat as one of pltfs. let go of the rope. The tugs then towed the vessel toward a neighbouring port, but, through pltfs.' incapacity, she took the ground & had to be towed to sea again. A pilot subsequently boarded her, but, owing to pltfs.' inefficiency in carrying out his orders, delay occurred before the vessel was brought into a place of safety. In an action of salvage:—*Held:* the suit must be dismissed with costs, as the vessel was not derelict & pltfs.' misconduct was such as to work a total forfeiture of salvage reward.—THE CAPELLA, [1892] P. 70; 66 L. T. 388; 7 Asp. M. L. C. 158. S. C. No. 1247, *ante.*

1325. —— **Action brought unnecessarily.**] — Where seamen instituted a salvage action in the High Ct. & sought to dispute an agreement made by their master for £200, which the ct. upheld, apportioning £40 to the crew, pltfs. were condemned in the costs of the action.—THE NASMYTH (1885), 10 P. D. 41; 54 L. J. P. 63; 52 L. T. 392; 33 W. R. 736; 5 Asp. M. L. C. 364. S. C. No. 982, *ante.*

Annotation:—**Consd.** The Friesland, [1904] P. 345.

1326. —— **Costs of party added.**]—Where in an action for salvage brought against the cargo the shipowners have been summoned to appear under R. S. C., O. 16 & O. 18, & no claim of contribution is made out against them owing to the ship having been lost, they are entitled to their costs.—THE SARPEDON, No. 590, *ante.*

For full anns., *see* S. C. No. 590, *ante.*

1327. No costs—Misconduct.]—Though salvage is awarded, the ct. may deprive the salvors of costs on account of their misconduct.—THE PINNAS (1888), 59 L. T. 526; 6 Asp. M. L. C. 313.

1328. *S. P.* THE CADIZ (1876), 35 L. T. 602; 3 Asp. M. L. C. 332.

1329. —— **Agreement set aside.**]—Where an agreement to pay salvage remuneration is set aside as inequitable, each side must pay its own costs of the action. *Semble:* the fact that pltfs. have claimed, in the alternative of the agreement being set aside, an award of salvage remuneration does not entitle them to the costs when such award is made.—THE SILESIA (1880), 5 P. D. 177; 50 L. J. P. 9; 43 L. T. 319; 29 W. R. 156; 4 Asp. M. L. C. 338. S. C. No. 999, *ante.*

Annotations:—**Refd.** The Mark Lane (1890), 39 W. R. 47; The Rialto (1891), 64 L. T. 540.

1330. Apportionment—Between shipowner & cargo-owner.]—The costs of the salvors payable by

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PART III. SECT. 16, SUB-SECT. 5.—A (a).

1323 i. *Salvors to pay costs—Excessive bail.*]—In an action of salvage in which a ship was arrested & the bail asked for was found to be excessive, the ct. held that the promovents must pay to the impugnants the costs required by the bail being excessive. *The George Gordon,* 1884), 9 P. D. 46, follo.—*Re* THE CHAMPION (1889), I. L. R. 17 Calc. 84.—IND.

1323 ii. *S. P.* WALKER STEAM TRAWL FISHING CO., LTD. *v.* MITRE SHIPPING CO., LTD. (1913), 1 S. L. T. 67 (O. H.).—SCOT.

a. *Costs as though action instituted under Supreme Court Code of Civil Procedure.*]—An abandoned sailing-ship was picked up & salved by pltf. co.'s steamship. The evidence as to the value of the abandoned vessel ranged from £2,000 to £750:—*Held:* in the circumstances costs should be allowed as though the action had been instituted under the Supreme Ct. Code of Civil Procedure.—AORERE S.S. CO., LTD. (No. 2) *v.* COLONIAL SAILING SHIP CO., LTD. (1906), 26 N. Z. L. R. 259.—N.Z.

the owners of the salved ship & cargo respectively must be apportioned between them, in accordance with the rule laid down in *The Peace*, No. 1358, *post*, namely, in proportion to the value of their respective interests.—THE ELTON, No. 838, *ante*.

Annotation :—**Refd.** The Duc D'Aumale (1902), 72 L. J. P. 11, C. A.
For full anns., *see* S. C. No. 838, *ante*.

(b) Consolidation.

1331. Two actions—One set of costs—Apportionment.]—In a case where defts., in two actions of salvage instituted against the same property, were ordered to pay only one set of costs, to be apportioned between pltfs. in the two actions, the ct. directed that the apportionment should be made according to the amount of pltfs.' respective bills of costs.—THE PASITHEA (1879), 5 P. D. 5.

1332. —— Refusal to consolidate—Costs nomine expensarum.]—Where salvage services were rendered to a vessel in distress afterwards towed into safety by other salvors, the ultimate salvors were condemned in an amount of costs *nomine expensarum* for not consenting to consolidation of their action with the action of the first salvors.—THE HESTIA, [1895] P. 193; 64 L. J. P. 82; 72 L. T. 364; 43 W. R. 668; 7 Asp. M. L. C. 599; 11 R. 808.

1333. Consolidated action—Separate representation—When allowed.]—The owners, masters, & crews of the *H.*, a tug which was towing a salved ship under a contract, & the *F.*, a tug which rendered salvage services, in which the *H.* took part, instituted proceedings for salvage, the owners of the *H.* claiming that the towage contract had been superseded by the events which had happened. The salvage suits were consolidated, the conduct of the action being given to the owners of the *F.* At the trial the *H.* was represented by a leading & junior counsel. The *F.* was also represented by two counsel. The ct. awarded each salvor £300. Counsel for the *H.* asked for a certificate for the separate representation of the *H.* by two counsel :—*Held :* as defts. had alleged that the *H.* was not entitled to salvage, but was only fulfilling her agreement, the owners of the *H.* were entitled to be separately represented by two counsel. —THE POLTALLOCH (1906), 94 L. T. 556; 10 Asp. M. L. C. 255.

1334. Separate representation—No separate interest—No costs.]—The solrs. acting for the owners of a salving ship without any direct authority from the crew who numbered thirty-six, & of whom no member had performed any special service, issued a writ on behalf of the owners, master & crew, claiming salvage for services rendered to the *B.*, her cargo & freight, & delivered a statement of claim on behalf of the owners, master & crew of the *L.*, to which the owners of the *B.* delivered a defence. Meanwhile twelve of the crew gave notice to defts.' solrs. of a change of solrs., & a further statement of claim was delivered on their behalf, to which the owners of the *B.* delivered a defence. On hearing of the salvage suits the owners, master & twenty-four of the crew were represented by two counsel, & the remaining twelve of the crew were also separately represented by two counsel : —*Held :* (1) the twelve seamen were not entitled to costs; (2) they were not to be condemned in costs.—THE BREMEN (1906), 94 L. T. 383; 10 Asp. M. L. C. 229.

B. Before the Judicature Acts.

1335. Costs awarded to salvors—No tender.]—It is a rule that, when no tender is made, & salvage is awarded, costs are always given in favour of the salvors.—THE ANN MITCHELL (1852), 6 L. T. 194; *Shipping Gazette*, Feb. 7.

1336. *S. P.* THE ARABIAN (1853), 8 L. T. 613; *Shipping Gazette*, Feb. 7.

1337. —— ——.]—A salvage service was admitted to have been rendered, but no tender had been made, because, as alleged, the sum claimed by the salvors was so disproportioned to the value of their services that there was no probability of its being accepted :—*Held :* the owners were still liable for costs of the salvors, no tender having been made.—THE SHANNON (1847), 10 L. T. O. S. 266; 11 Jur. 1045.

1338. —— Interlocutory proceedings.] — The costs of salvors, incurred in taking affidavits before issue joined, are allowed when defts. have not unreservedly admitted the facts pleaded in the petition & supported by the affidavits.—THE FAIRLINA (1866), 14 W. R. 869.

1339. Proportion of costs—Misconduct—Award not forfeited.]—Where salvors, not employed at the time, prevented further assistance being given, although their services were afterwards accepted, & they salved the ship & cargo, the ct. awarded them £100 instead of £300, & allowed them two-thirds only of their costs.—THE GLORY (1850), 14 Jur. 676.

1340. Salvors to pay costs—Award forfeited for misconduct.]—A ship, laden with lead & iron, sunk on the Ship-wash sand, & was there left by the master & crew :—*Held :* the first finders, though they recovered part of the property, forfeited their claim to salvage, & became liable to the costs of a suit instituted by them as salvors, by reason of their subsequent misconduct towards, & forcible resistance to, the authority of the owners.—THE BAREFOOT (1850), 14 Jur. 841.

1341. —— Excessive bail.]—Excessive bail having been required by salvors, the salvage service being of a very trifling character, performed without risk or difficulty, & with but little labour, the salvors were condemned in the costs up to giving in the act on petition.—THE CHARLOTTE (1848), 3 Wm. Rob. 68; 6 Notes of Cases, 279; 11 L. T. O. S. 473; 12 Jur. 567.

Annotations :—**Folld.** The Cornelius Grinnell (1864), 11 L. T. 278. **Apld.** Towle *v.* The Great Eastern (1864), 11 L. T. 516; The Strathnaver (1875), 1 App. Cas. 58, P. C.

1342. —— Unjustifiable proceedings.]—The ct. condemned the salvors not only in the costs of the appraisement but in all the costs that related to the value, expressing the opinion that the proceedings adopted for obtaining the value were unjustifiable

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PART III. SECT. 16, SUB-SECT. 5.—A (b).

1332 i. *Two actions—Refusal to consolidate—One set of costs.*]—The ct. will not permit owners to be saddled with two sets of costs where the salvors ought to have joined in their suit.—THE C. D. V. CHIPMAN (1877), 6 Nfld. L. R. 132.—**NFLD.**

1333 i. *Consolidated action—No order for separate representation.*]—When two separate salvage actions are consolidated at the instance of the common impugnant, & no order is made giving the conduct of both to one pltf., the promovents are entitled to separate costs.—*Re* THE DRACHENFELS, THE RETRIEVER *v.* THE DRACHENFELS, THE HUGHLE *v.* THE DRACHENFELS (1899), I. L. R. 27 Calc. 860.—**IND.**

PART III. SECT. 16, SUB-SECT. 5.—B.

1335 i. *Costs awarded to salvors—Derelict.*]—In a case of derelict salvage, the ct. awarded a little more than "one-third" of the total value of the property saved, & gave the salvors their costs of the suit.—THE ERIN-GO-BRAGH (1864), 9 Ir. Jur. O. S. 100 (Adm.).—**IR.**

1335 ii. —— ——.]—The *P.*, being on fire, attracted the attention of another vessel which proceeded towards her. She found the master & crew in boats & took them aboard, & learned that there was no one aboard the burning *P.* The master of the *P.* requested that the other vessel should beach her, but, after consultation, the request was declined owing to the heavy risks. The master & crew of the *P.* were landed, & left without intimating any intention of returning to their vessel. The following day the flames from the *P.* were diminishing, & the other vessel went over to her and took her in tow &

Sect. 16.—*Costs: Sub-sect* 5, *B.; sub-sect.* 6, *A.*]

& unheard of.—THE FELIX (1853), unreported, cited 1 Ecc. & Ad. R. 23 n., 175 n.

Annotations:—**Refd.** The Little Joe (1860), 6 Jur. N. S. 783. **Mentd.** The Hedwig (1853), 1 Ecc. & Ad. 19.

1343. —— —— Exaggerated claim.]—In a case of salvage, where the salvors make an exaggerated claim, & support that claim by improper affidavits, the ct. condemns them in costs, as an example to prevent reiteration of such culpable conduct by other parties claiming salvage remuneration.—THE TOWAN (1844), 2 Wm. Rob. 259; 3 Notes of Cases, 25; 2 L. T. O. S. 497; 8 Jur. 220. S. C. No. 805, *ante*.

1344. —— —— Misconduct.]—A petition for salvage on behalf of a pilot, who appeared to have advanced false pretensions, & to have misconducted himself, was dismissed with costs.—THE JOSEPH HARVEY (1799), 1 Ch. Rob. 306.

Annotations:—**Apld.** The Johannes (1835), 6 Notes of Cases, 288. **Refd.** Newmans *v.* Walters (1804), 3 Bos. & P. 612; The Æolus (1873), L. R. 4 A. & E. 29.

1345. —— Claim fraudulent.]—A fraudulent salvage claim was dismissed with costs. — THE SUSANNAH (1837), 3 Hag. Adm. 345. S. C. No. 1245, *ante*.

1346. *S. P.* THE HENRIETTA (1837), 3 Hag. Adm. 345 n.

1347. No costs—Trivial claim.]—A claim for salvage was pronounced for, but without costs, the nature of the claim being so trivial, that in the opinion of the ct. it ought not to have been brought into the Admlty. Ct.—THE RED ROVER (1850), 3 Wm. Rob. 150.

Annotation:—**Consd.** The Ganges (1869), 38 L. J. Adm. 61.

1348. —— Claim partly unsuccessful on ground of misconduct—Expenses.]—A salvage claim was in part sustained & in part dismissed upon the ground that the salvors had misconducted themselves in the latter stages of the alleged service, by continuing to obtrude their services after they had been formally discharged by the owners. Full costs were not allowed, but a sum *nomine expensarum* only was given in consideration of the salvor's misconduct.—THE GLASGOW PACKET (1844), 2 Wm. Rob. 306; 3 Notes of Cases, 107; 3 L. T. O. S. 263; 8 Jur. 674.

1349. —— Salvors unsuccessful in action.]—The general rule with respect to costs, that they should follow the decision of the cause, is modified & relaxed in respect to salvors, a claim of alleged salvors being dismissed without costs.—THE PRINCESS ALICE (1849), 3 Wm. Rob. 138; 6 Notes of Cases, 584.

Annotations:—**Distd.** The Sovereign (1860), Lush. 85. **Apld.** The Strathnaver (1875), 1 App. Cas. 58, P. C. **Distd.** The Jubilee (1880), 42 L. T. 594. **Apld.** The Calyx (1910), 27 T. L. R. 166.

1350. —— ——.]—Where salvors, induced by an ambiguous signal to put off from shore to the assistance of a ship, were held not entitled to salvage reward, as the actual condition of the ship showed that the signal was for a pilot only, the action in such case was dismissed, but without costs.—THE LITTLE JOE (1860), Lush. 88; 2 L. T. 473; 6 Jur. N. S. 783.

1351. —— ——.]—Where the ct. rejected claims for alleged salvage services, no costs were allowed, because claimants had been permitted to remain on board.—THE SISTERS (1850), 8 L. T. 178.

1352. Separate actions—Full costs in second suit—Only in special circumstances.]—Where separate salvage claims are not consolidated full costs in the later suit will not be granted unless in exceptional circumstances.—THE BELLE OF LAGOS (1869), 20 L. T. 1019; 17 W. R. 899; 3 Mar. L. C. 296.

1353. —— Half costs in second suit.]—Where two sets of salvors proceed by separate suits against the ship salved & their respective claims might have been more conveniently prosecuted under one suit, the ct. marks its disapproval of the two suits having been instituted by only giving claimants under the second suit half costs.—THE LLOYDS & ARNANDA *v.* THE HORTENSE (1865), 2 Mar. L. C. 242; *Shipping Gazette*, May 31.

1354. *S. P.* THE BARTLEY (1857), Sw. 198.

1355. *S. P.* THE BALTIC (1859), 8 L. T. 613.

1356. Separate appearance—Half costs.]—On an apportionment of a salvage award between the owners & crew of a salving vessel half costs only were given where separate appearances had been given for the mate & for the owners & the rest of the crew.—THE NICOLINA (1843), 2 Wm. Rob. 175.

1357. Costs of defending salvage suit—Damages in collision action.]—Where the owners of a vessel damaged by collision make no tender in a salvage action arising out of the collision, and an award is made against them, they are, as a general rule, in the Admlty. Ct. entitled to the costs of the salvage suit as part of the collision damages.—THE LEGATUS (1856), Sw. 168; 5 L. T. 121; 5 W. R. 154.

Annotation:—**Consd.** The British Commerce (1884), 9 P. D. 128.

1358. Liability of cargo-owner—Appearing after decree.]—£400 was decreed, in pursuance of an agreement for that sum, for salvage service to ship, cargo & freight. The values of ship & freight only were then known. Afterwards the owners of the cargo were proceeded against, & offered to pay their

beached her:—*Held:* although there was no great danger in the circumstances, the *P.* would have been a total loss but for the action of the salvors, & they awarded one-third of the proceeds of the sale of the vessel and also costs.—THE PROGRESS (1882), 9 Q. L. R. 156.—**CAN.**

1335 iii. THE HERCULE (1854), 1 Ir. Jur. N. S. 412 (Adm.).—**IR.**

1339 i. *Proportion of costs—Exorbitant demand of salvors.*]—Where salvors were offered a sum of £40 by the captain of the salved ship, & refused to accept it, the ct., to mark its disapprobation of the practice of the salvors making exorbitant demands, limited their costs to the sum of £20.—THE ENTERPRISE (1858), 3 Ir. Jur. N. S. 397 (Adm.).—**IR.**

1343 i. *Salvors to pay costs—Unjustifiable proceedings—Exaggerated claim.*]—When salvors, having a claim for a moderate reward, set up an inflated & exaggerated statement of their services, their claim will be wholly dismissed, & themselves condemned in costs.—THE ALMA (1862), 1 Old. 789.—**CAN.**

1349 i. *No costs—Salvors unsuccessful in action.*]—Where persons on shore capable of rendering salvage services go out to a ship which has made an ambiguous signal that may properly be considered as a signal of distress, but fail to render services, though not entitled to salvage, they will not be visited with costs of the suit.—THE WAYFARER (1871), 5 I. L. T. 184.—**IR.**

1349 ii. —— *Salvors indebted to owners.*]—A wrecking co. chartered a tug from owners, who insured for all insurable risks over 5 per cent., the co. to make good all repairs, losses, & damages not insurable under the usual policy, & all injuries, etc., up to 5 per cent. of the estimated value of the vessel. Through the negligence of the co.'s servants the vessel was sunk, & the co. raised her:—*Held:* the co. being largely indebted to the owners, no costs should be given.—THE CONQUEROR, 5 C. L. T. 332.—**CAN.**

1349 iii. —— *Undue pressure to obtain acknowledgment of claim.*]—The ct. will not give costs to the promovent in a salvage action, if it appear that, by undue pressure, he obtained from the captain of a foreign vessel, imperfectly acquainted with English & at the time altogether ignorant of the nature of the document, a written acknowledgment of his claim as a salvor.—THE VESTA (1859), 4 Ir. Jur. N. S. 210 (Adm.).—**IR.**

1352 i. *Separate actions—Refusal to consolidate—No costs.*]—Pltfs. in separate suits for salvage services, who refuse to consolidate when defts. apply to the ct., will not, unless in exceptional circumstances, be allowed their costs.—THE CHARLES (1871), 6 I. L. T. 14.—**IR.**

proportion of the £400, upon the net proceeds of cargo :—*Held :* the costs of the original proceedings must be borne by the owners of the cargo proportionately with the owners of the ship, though the former were not before the ct. when the decree was made.—THE PEACE (1856), Sw. 115 ; 27 L. T. O. S. 255 ; 4 W. R. 635.

Annotation :—**Apld.** The Elton, [1891] P. 265.

SUB-SECT. 6.—COSTS OF PROCEEDING UNNECESSARILY IN THE HIGH COURT.

Cases within county court jurisdiction, *see* pp. 243-248, *post.*

A. Since the Judicature Acts.

1359. Discretion of court—Certificate not necessary.]—Since the passing of Jud. Acts it is not necessary to obtain a certificate to enable pltf. to recover his costs in an action in the High Ct. where such action is within the Admlty. jurisdiction of the cty. ct., but not within its common law jurisdiction. *Semble :* it is necessary in such case to apply to the ct. for directions as to the costs.—THE ENGLISHMAN (1878), 38 L. T. 756 ; 3 Asp. M. L. C. 506. S. C. No. 1443, *post.*

Annotations :—**Apld.** China Merchants Steam Navigation Co. *v.* Bignold (1882), 7 App. Cas. 512, P. C. **Consd.** The Reginald (1907), 97 L. T. 608. **Refd.** The Pitgavenny, [1910] P. 25. **Mentd.** The Argo (1900), 82 L. T. 602, C. A.

1360. —— County Courts Admiralty Jurisdiction Act, 1868 (c. 71), s. 9, repealed by R. S. C., O. 55 (now 65), r. 1.]—The above sect. is inconsistent with & repealed by R. S. C., O. 55, r. 1.—TENANT & Co. *v.* ELLIS & Co. (1880), 6 Q. B. D. 46 ; 50 L. J. Q. B. 143 ; 43 L. T. 506 ; 29 W. R. 121.

Annotations :—**Followed.** Rockett *v.* Clippingdale, [1891] 2 Q. B. 293, C. A. **Apld.** The Dragoman (1895), 11 T. L. R. 428.

1361. —— ——.]—Pltf. sued defts. in the Q. B. Div. for damage by collision, claiming £200, & recovered £100 at the trial before an official referee, who made no order as to costs, "having regard to Cty. Cts. Admlty. Jurisdiction Acts, 1868 (c. 71) & 1869 (c. 51)." The Div. Ct. varied that order by ordering defts. to pay pltf.'s costs :—*Held :* (1) s. 9 of the former Act was impliedly repealed by R. S. C., O. 65, r. 1 ; (2) the costs were in the discretion of the official referee ; (3) the official referee had not exercised his discretion ; (4) such discretion was rightly exercised by the Div. Ct.—ROCKETT *v.* CLIPPINGDALE, [1891] 2 Q. B. 293 ; 60 L. J. Q. B. 782 ; 64 L. T. 641 ; 7 T. L. R. 515, C. A.

Annotations :—**Apld.** The Dragoman (1895), 11 T. L. R. 428. **Refd.** The Saltburn (1892), 69 L. T. 88 ; Bassett *v.* Tong (1894), 71 L. T. 16.

1362. —— Effect of Merchant Shipping Act, 1894 (c. 60), s. 547.]—*Qu. :* whether the general discretion of the judge as to costs under R. S. C., O. 65, r. 1, has been limited by the above Act.

In certifying under s. 547 that the case was a fit one to be tried otherwise than summarily, the ct. will have regard to the amount of property at risk, the unusual character of the services, the circumstances in which they were rendered, & the conflicting nature of the evidence.—THE DRAGOMAN (1895), 11 T. L. R. 428. S. C. No. 1742, *post.*

1363. —— Matters for consideration.]—In an action of damage by collision, the hearing lasted 5 hours, & the decision mainly turned on the inability of defts. to exonerate their s.s. from the charge of not keeping out of the way of pltfs.' steamer, a large vessel in tow of tugs, which defts.' steamer was overtaking in the Thames. Defts.' vessel was held alone to blame, & damages were referred to the registrar & merchants. Pltfs. filed their particulars of claim, amounting to £339 15*s.* 7*d.*, but the parties ultimately agreed the damages at £226 5*s.* On motion on behalf of pltfs. to condemn defts. & their bail in that amount, with interest, & in the costs of the action, defts. contended pltfs. were not entitled to their costs, as the amount recovered was under the statutory cty. ct. limit of £300, & the action ought to have been brought in a cty. ct. :—*Held :* (1) the discretion of the ct. in allowing or refusing costs depended upon whether, considering the facts & circumstances of the particular case, pltfs. had acted properly & reasonably in bringing their action in the High Ct. ; (2) considering the size of the vessels, the nature of the collision, the length of time the hearing lasted, & the judgment pronounced, this was a proper case to be tried in the High Ct. ; (3) pltfs. were entitled to their costs.—THE SALTBURN, [1892] P. 333 ; 69 L. T. 88 ; 7 Asp. M. L. C. 325 ; 1 R. 543.

Annotation :—**Followed.** The Emden (1907), 23 T. L. R. 546.

1364. —— Special circumstances necessary.]—Where successful pltfs. in a collision action instituted in the High Ct. recover less than £300, they will not in absence of special circumstances be allowed costs of the action or reference.—THE ASIA, [1891] P. 121 ; 60 L. J. P. 38 ; 64 L. T. 327 ; 7 Asp. M. L. C. 25.

Annotations :—**Apld.** The Saltburn, [1892] P. 333. **Consd.** Rockett *v.* Clippingdale, [1891] 2 Q. B. 293, C. A.

1365. —— Amount of claim immaterial.]—Where successful pltfs. in a collision action in the High Ct. recovered less than £300 they were allowed no costs although they claimed more than the cty. ct. limit.—THE HERALD (1890), 63 L. T. 324 ; 6 Asp. M. L. C. 542.

Annotations :—**Followed.** The Asia, [1891] P. 121. **Consd.** Rockett *v.* Clippingdale, [1891] 2 Q. B. 293, C. A. **Apld.** The Saltburn, [1892] P. 333.

1366. —— ——.]—In an action of collision in the Admlty. Div. defts. gave bail in the sum of £600, & after the pleadings had been closed they admitted liability. Pltfs. then filed a claim in the registry for £330, & the action was eventually settled for £218. The ct., in its discretion, allowed pltfs. costs on the High Ct. scale, though the amount recovered did not exceed £300, as it thought that the case was rightly brought in the High Ct.—THE EMDEN (1907), 23 T. L. R. 546.

1367. —— Costs of action—Costs of reference.]—Defts. in an action for damage, before any statement of claim had been delivered, admitted their liability for the damage proceeded for, & by consent the question of amount was by an order of ct. referred to the registrar & merchants to report thereon. At the reference before the registrar pltfs. claimed as damages £295 18*s.* 4*d.* The registrar reported to the ct. that there was due to pltfs. £199 18*s.* 6*d.* Afterwards pltfs. moved the judge to condemn defts. in the costs of the action & of the reference. Evidence was given on affidavit in support of the motion to the effect that pltfs. at the time their action was instituted were liable for a claim for salvage in respect of services rendered to their vessel after the collision, & that subsequently & before the reference £60 had been paid & accepted in settlement of such claim :—*Held :* (1) the ct. had juris-

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PART III. SECT. 16, SUB-SECT. 6.—A.

1363 i. *Discretion of court—Matters for consideration.*]—Where difficult questions of law & of fact arise, the case of a collision between a Belgian steam trawler & a British steam trawler is properly tried in the High Ct., even though the damage is under £400, & the judge will certify accordingly under O. 65, r. 10.—HARLEY & MILLER *v.* EMMANUEL (1909), 43 I. L. T. 115.—IR.

Sect. 16.—*Costs: Sub-sect.* 6, *A. & B. Sect.* 17: *Sub-sect.* 1.]

diction to certify that the case was a fit case to be tried before it; (2) the proper order to be made was that pltfs. should have the costs of the action, but each party should bear its own costs of the reference.—THE WILLIAMINA (1878), 3 P. D. 97.

Annotation:—Apld. The Saltburn, [1892] P. 333.

1368. Case outside county court jurisdiction.]—A cty. ct. has no jurisdiction in Admlty. over a claim for a master's disbursements, & in an action for master's wages & disbursements in the High Ct. a certificate under Cty. Cts. Admlty. Jurisdiction Act, 1868 (c. 71), is not necessary to entitle a successful pltf. to his costs, although he recover less than £150, the limit of the cty. ct. jurisdiction over wages under s. 3 of the Act.—THE DICTATOR (1878), 38 L. T. 947; 4 Asp. M. L. C. 19. S. C. No. 68, *ante*.

B. Before the Judicature Acts.

1369. County Courts Admiralty Jurisdiction Act, 1868 (c. 71), s. 9—Amount recovered—Not amount claimed.]—An action was brought in the Ct. of Queen's Bench, in which an amount less than £300 was claimed in the particulars of demand for damage by collision, & a further sum not exceeding £300, for salvage services, & further sums for depreciation in value of the ship & for demurrage, amounting on the whole to more than £300. Deft. paid £254 12*s.* 10*d.* into ct. in respect of the claim for damage by collision, which pltf. accepted in full satisfaction, & entered *noll. pros.* as to the rest:—*Held:* (1) pltf.'s right to costs depended upon the amount recovered, not the amount inserted in the particulars of demand; (2) £254 12*s.* 10*d.* was recovered in the action; (3) pltfs. were not entitled to costs.—HEWITT *v.* CORY (1870), L. R. 5 Q. B. 418; 39 L. J. Q. B. 279; 22 L. T. 666; 18 W. R. 954; 3 Mar. L. C. 425.

Annotation:—Refd. Gunnestad *v.* Price, Fullmore *v.* Wait (1875), L. R. 10 Exch. 65.

1370. —— Proceeding without leave.]—A pltf. proceeding without leave in a superior ct. for damages to his ship by a barge (propelled by oars only) taking judgment by default, & having his damages assessed by a sheriff at an amount under £300, is not entitled to his costs.—PURKIS *v.* FLOWER, No. 478, *ante;* No. 1723, *post*.

For full anns., *see* S. C. No. 478, *ante*.

1371. —— Proceeding with leave.]—When a suit has been already commenced in the Admlty. Ct. for an amount within the cty. ct. jurisdiction, pltf. cannot obtain an order for leave to proceed, so as to relieve him from liability for costs.—THE LORETTA (1871), 40 L. J. Adm. 50; 24 L. T. 447; 1 Asp. M. L. C. 19.

1372. —— —— .]—*Semble:* even where leave is given to proceed in the High Ct. under the above Act the High Ct. is not thereby precluded from condemning pltf. in costs, if at the hearing of the cause it should appear the cause was improperly instituted in the ct.—THE JOHN EVANS, Nos. 1739, 1746, *post*.

1373. —— Certifying for costs of action—Costs of reference.]—A ship was damaged by another outward bound, & the owners of the injured vessel, in the *bonâ fide* belief their damage was greater than it was, instituted a suit in the Admlty. Ct. & arrested the ship for a large amount, but accepted bail & released the ship at once on ascertaining their actual damage; defts. admitted liability, & the damage was referred to the registrar; the claim made by pltfs. was a little over £300, but the registrar reduced the amount claimed by more than one-third, & made no report as to costs. On application by pltfs., the ct. certified for the costs of the suit under the above Act, but condemned pltfs. in the costs of the reference.—THE NAOMI (1875), 32 L. T. 836; 23 W. R. 387; 2 Asp. M. L. C. 588.

1374. —— —— Amount awarded.]—A salvage suit was brought in the Admlty. Ct. & a sum of £282 was recovered. The agreed value of the property saved was £2,200; pltfs.' claim was for £700; there was considerable conflict of testimony as to the degree of meritoriousness of pltfs.' service, & questions of some difficulty arose:—*Held:* having regard especially, but not solely, to the smallness of the difference between the sum awarded & the limit of the jurisdiction of the cty. ct., the case was proper for a certificate to entitle pltfs. to costs.—THE HICKMAN, No. 992, *ante*.

For full anns., *see* S. C. No. 992, *ante*.

1375. —— —— Saving of expense.]—Although a suit for salvage might have been tried in a cty. ct. the judge of the Admlty. Ct. will certify for costs if it be less expensive to try there than in the cty. ct.—THE BEAUMARIS CASTLE (1871), 40 L. J. Adm. 41; 24 L. T. 448; 1 Asp. M. L. C. 19.

1376. —— Application to cases outside Admiralty jurisdiction.]—The jurisdiction given to the cty. cts. by s. 3 of the above Act, & Cty. Cts. Admlty. Jurisdiction Amendment Act, 1869 (c. 51), s. 2, is confined to causes within the jurisdiction of the Admlty. Ct.; & in an action in a superior ct. on a charterparty for freight or demurrage, which is a cause not within the jurisdiction of the Admlty. Ct., a pltf., claiming & recovering a sum between £20 & £300, is entitled to his costs, & cannot be deprived of them by the operation of s. 9 of the Act of 1868, which is not applicable to such case.—GUNNESTAD (GUNESTEAD) *v.* PRICE, FULLMORE *v.* WAIT (1875), L. R. 10 Exch. 65; 44 L. J. Ex. 44; 32 L. T. 499; 23 W. R. 470; 3 Asp. M. L. C. 543, Exch. S. C. No. 1716, *post*.

Annotations:—**Overd.** The Alina (1880), 5 Ex. D. 227, C. A. **Dbtd.** The Theodora, [1897] P. 279, D. C. **Refd.** R. *v.* City of London Court Judge, [1892] 1 Q. B. 273.

1377. County Courts Admiralty Jurisdiction Amendment Act, 1869 (c. 51), s. 4—Collision with pier-head.]—Shipowners brought an action *in personam* against a dock co. to recover a sum within the limits of the cty. ct. jurisdiction in Admlty. for damage occasioned to their ship by the alleged negligence of the co.'s servants in bringing her into collision with a pier-head while moving from one dock to another:—*Held:* as the action might have been brought in a cty. ct., pltfs., though successful in the action, were not entitled to costs.—THE ZETA, No. 480, *ante;* No. 1728, *post*.

Annotations:—**Folld.** The Theta, [1894] P. 280. **Consd.** The Mecca, [1895] P. 95. **Folld.** Davidsson *v.* Hill, [1901] 2 K. B. 606. **Consd.** The Veritas, [1901] P. 304. **Distd.** The Normandy, [1904] P. 187. **Folld.** The Upcerne, [1912] P. 160, D. C. **Refd.** The Englishman & The Australia, [1894] P. 239; S.S. Devonshire *v.* The Leslie, [1912] A. C. 634, H. L.

1378. Merchant Shipping Act, 1854 (c. 104), s. 460—Certifying for costs—Unusual circumstances.]—The ct. will not certify under the above Act, except in unusual circumstances. In circumstances of peculiarity or difficulty, which in the opinion of the ct. make the cause a fit one to be tried in the

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PART III. SECT. 16, SUB-SECT. 6.—B.

1378 i. *Merchant Shipping Act*, 1854 (c. 104), *s.* 460—*Certifying for costs.*]—The misconduct of one of a number of salvors may prejudice the claims of the others as salvors. Under the above Act a pltf. who did not recover more than £200 was not entitled to costs unless the judge certified that the case was fit to be tried in the Superior Ct., but this would be given though the salvors were guilty of misconduct, & the award was diminished.—THE CHERUBIM (1868), 19 L. T. 52; 2 I. L. T. Jo. 183; I. R. 2 Eq. 172.—IR.

Admlty. Ct., *e.g.*, where there is a question of agreement, or a charge of misconduct against the salvors, the ct. will feel at liberty to certify. The ct. will not certify where the service rendered is quite ordinary, & the claim is not complicated by any difficult question; & where the question is one of *quantum meruit* only.—THE JOHN (1860), Lush. 11; 1 L. T. 495. S. C., No. 1387, *post*.

Annotation:—**Consd.** The Cherubim (1868), 19 L. T. 52.

1379. *S. P.* THE FENIX (1855), Sw. 13; 4 W. R. 183.

Annotations:—**Follds.** The John (1860), Lush. 11; The Avenir (1868), 18 L. T. 157; The Cherubim (1868), 19 L. T. 52.

1380. *S. P.* THE JOHN BUNYAN (1856), 8 L. T. 440.

1381. —— —— ——.]—Where the master of a vessel refuses to go on shore, & refers to the local JJ. the amount of salvage due for services rendered in the United Kingdom, & removes the vessel from the local jurisdiction, & an action is thereupon brought in the Admlty. Ct., the ct., awarding only £50, will certify for the salvors' costs under the above Act.—THE ALPHA (1860), Lush. 89; 2 L. T. 521.

1382. —— —— ——.] — The Privy Council awarding a sum less than £200 for salvage services within the United Kingdom, will give costs, if the case was a fit one to be tried in a superior ct.—THE MINNEHAHA, No. 939, *ante*; No. 1703, *post*.

For full anns., *see* S. C. No. 939, *ante*.

1383. —— —— ——.]—An agreement between the salvors & shipowner as to remuneration, though not giving the Admlty. Ct. jurisdiction, may induce the ct. to certify for costs where the suit is duly brought for an amount exceeding £200, & a smaller sum is decreed to the salvors.—THE WILLIAM & JOHN (1863), Brown. & Lush. 49; 1 New Rep. 484; 32 L. J. P. M. & A. 102; 8 L. T. 56; 9 Jur. N. S. 284; 11 W. R. 535.

Annotations:—**Distd.** The Herman Wedel (1870), 39 L. J. Adm. 30. **Refd.** The Avenir (1868), 18 L. T. 157 n.; The Cherubim (1868), 19 L. T. 52; The Empire Queen (1869), 20 L. T. 88; The Dragoman (1895), 11 T. L. R. 428. **Mentd.** Beadnell *v.* Beeson (1868), L. R. 3 Q. B. 439.

1384. —— **When not applicable—Services outside territorial waters.**]—Salvage services commenced 15 miles off the coast of the United Kingdom & terminated in the Humber; an action was entered in £500, £100 being awarded. On the question of costs:—*Held*: (1) the limitation as to costs in the above Act extended only to cases where the service was performed within the limits of the United Kingdom, *i.e.*, within 3 miles of the coast; (2) beyond that distance the ct. would exercise its discretion as to giving costs having regard to the sum awarded.—THE ACTIF (1857), Sw. 237; 29 L. T. O. S. 147; 3 Jur. N. S. 893; 5 W. R. 547.

1385. *S. P.* THE CHECCO (1859), 8 L. T. 613.

1386. —— —— **Limitation of liability—Amount recoverable reduced.**]—THE YOUNG JAMES, No. 1555, *post*.

1387. —— **Effect of tender—Tender under £200.**]—If in an action for salvage services rendered in the United Kingdom a tender under £200 "with such costs (if any) as may be due by law" is accepted, the ct. will not certify for costs under the above Act, except for special cause shown.—THE JOHN, No. 1378, *ante*.

Annotation:—**Consd.** The Cherubim (1868), 19 L. T. 52.

1388. —— —— ——.]—Pltf., one of several salvors, sued for salvage services rendered in the United Kingdom. Defts. tendered, by act of ct., £40, "with costs up to time of tender," which pltf. refused. Defts. then resisted the claim partly on the question of amount, & partly on the ground (which they failed to support) that pltf. had been party to a settlement of the whole claim with one of the co-salvors. The ct. overruled the tender & gave £100:—*Held*: (1) notwithstanding the question of agreement, the case was not a fit one to be tried in the superior ct.; (2) the ct. would not certify for costs under the above Act; (3) notwithstanding the form of tender, pltf. was not entitled to his costs up to the time of tender.—THE COMTE NESSELROOD (1862), Lush. 454; 31 L. J. P. M. & A. 77; 6 L. T. 57; 1 Mar. L. C. 199.

1389. —— —— **Tender of £200.**]—In a suit for salvage, where a tender of £200 for the services was made & accepted:—*Held*: pltf. entitled to costs, notwithstanding the above Act.—THE GERM (1867), 15 W. R. 937.

Tender generally, *see* pp. 185-188, *ante*.

SECT. 17.—REFERENCE TO THE REGISTRAR AND MERCHANTS.

SUB-SECT. 1.—THE REFERENCE.

1390. Matters referred — Bottomry — Excessive charges.]—In all actions of bottomry it is the settled law & practice of the ct. to refer questions of excessive charges, whether for repairs, commissions, or premiums, to the registrar, assisted by merchants, to report upon.—THE PONTIDA (1884), 9 P. D. 177; 53 L. J. P. 78; 51 L. T. 849; 33 W. R. 38; 5 Asp. M. L. C. 330, C. A. S. C. Nos. 1411, 1422, *post*.

1391. —— —— ——.] — Upon the admitted validity of a bottomry bond a question as to the propriety of incidental charges was referred to the Registrar.—THE ALBION (1825), 1 Hag. Adm. 333.

1392. —— —— —— **Premiums.**]—In a cause of bottomry *in ponam* the ct., judging the premium to be excessive, will refer it to the registrar & merchants to be reduced. — THE HUNTLEY (1860), Lush. 24.

1393. —— —— **Rate of interest left blank.**]—In a bottomry bond taken at Calcutta blanks had been left where the rate of interest ought to have been expressed. The ct. pronounced for the bond, with such interest as the registrar should find to have been usual on such risks at the time & place the bond was taken.—THE CHANGE (18 7), Sw. 240; 5 W. R. 547.

1394. —— —— **Validity in question—General reference for report.**]—Where the validity of a bottomry bond was contested upon the grounds (1) there was no necessity for a bond of bottomry, (2) the bond was vitiated *personali exceptione* of the lender, (3) some of the items in the bond consisted of simple contract debts bought up from the ship's creditors at a discount of about 50 per cent., the bond was generally referred to the registrar & merchants to report thereon.—THE OCEAN (1846), 2 Wm. Rob. 429; 4 Notes of Cases, 410; 10 Jur. 504.

1395. —— —— **Scope of reference.**]—A bondholder submitted that it was not usual to refer to the registrar & merchants accounts that had not been exhibited in the cause:—*Held*: (1) it was proper that the accounts should be audited; (2) if the bondholder was affected, it was open to him to make an application to the ct. at a future time.—THE NELSON (1823), 1 Hag. Adm. 169.

For full anns., *see* SHIPPING & NAVIGATION.

1396. —— —— **Reference refused.**]—Where a bottomry bond is admitted to be drawn in legal form & entitled to payment, the parties are bound by the terms of agreement; & the ct. will not refer the matter to the registrar & merchants to make

Sect. 17.—*Reference to the registrar & merchants: Sub-sects.* 1 & 2, *A. B. & C.* (*a*), (*b*) & (*c*).]

such deduction on account of the rate of exchange as is made in ordinary cases of mercantile negotiation.—THE JANE VILET (1827), 2 Hag. Adm. 92.

1397. —— Collision—Duty of registrar.]—In case of collision the owners often avail themselves of the opportunity of doing other repairs, which may then be effected at less expense to themselves. If they attempt to include these other repairs in the amount of damage done, they are guilty of fraud; but if they simply avail themselves of that opportunity, without injury to the persons who pay for the repairs consequent on the collision, no blame is imputable to them; but the registrar & merchants should exercise their vigilance, & see that no greater charge is made against deft. than he is justly entitled to pay.—THE ALFRED, Nos. 1185, 1204, *ante*; Nos. 1416, 1423, *post*.

Annotation:—**Refd.** The Princess (1885), 52 L. T. 932.
For full anns., *see* S. C. No. 1423, *post*.

1398. —— —— Consequential damages—How far referred.]—It is not the invariable practice of the Admlty. Div. in cases of damage to refer questions of consequential damage to the registrar & merchants. The ct. will in each case consider whether the question of consequential damage is one which ought to be decided by the ct. itself, with the assistance of the Elder Brethren of the Trinity House, or referred to the registrar & merchants. The ct. will be influenced in coming to its decision by economical considerations, & by the presence of questions requiring for their decision the nautical knowledge of the Elder Brethren.—THE MAID OF KENT (1881), 6 P. D. 178; 50 L. J. P. 71; 45 L. T. 718; 29 W. R. 897; 4 Asp. M. L. C. 476.

1399. —— —— Defendant's remedy cross-action, not reference in original action.]—Where, in an action of collision, a decree has been made of both vessels to blame, the ct. will not refer the damage of both vessels to the registrar, but will leave deft. to bring his cross-action, notwithstanding the ship of pltf. perished in the collision, & pltf. resides out of the jurisdiction.—THE NORTH AMERICAN (1859), Sw. 466. S. C. No. 1271, *ante*.

1400. Reference not ordered—Unless something clearly due.]—In Admlty. proceedings, where a ship is arrested on a specific demand, before a reference of accounts to the registrar & merchants can be ordered, it must be shown to the ct. that something is due, although the actual amount may be the proper subject of inquiry. The practice differs from a reference by an equity ct. on an unsettled account, where the ct. directs an account to be taken, leaving it to be shown by the result on which side the balance lies.—THE TWENTJE, No. 336, *ante*.
For full anns., *see* S. C. No. 336, *ante*.

1401. —— Where court can dispose of matter.]—A reference to the registrar as to damages will not be ordered in a salvage case, where the ct. can satisfactorily dispose of the question.—THE ELEONORE, Nos. 754, 773, *ante*.

1402. Evidence by affidavit—Cross-examination—Deponent abroad.]—Under R. S. C., O. 37, r. 2, which enables the evidence in references in Admlty. actions to be given by affidavit, it is in the discretion of the registrar to refuse, if he thinks fit, to give weight to such evidence unless & until the deponent has been cross-examined on his affidavit, & where the deponent is a party to the action, he may, though resident abroad, be required to attend in England for such cross-examination.—THE PARISIAN (1887), 13 P. D. 16; 57 L. J. P. 13; 58 L. T. 92; 36 W. R. 704; 6 Asp. M. L. C. 249.

1403. Offer to avoid litigation—Not binding.]—Where a rough & very low estimate has been made of the damage & loss sustained by collision, & offered to be accepted in order to avoid litigation, the registrar & merchants ought not to take this as binding upon the suffering party, but should ascertain the actual amount of a complete indemnity to him.—THE TWO SISTERS (1853), 1 Ecc. & Ad. 99.

SUB-SECT. 2.—REGISTRAR'S REPORT AND OBJECTIONS THERETO.

A. Registrar's Report.

1404. Based on practical knowledge—Not subject to strict rules of evidence.]—The proceedings before the registrar & merchants are summary, not bound by strict rules of evidence.—THE BLACK PRINCE, Nos. 1424, 1427, 1464, 1477, *post*.

For full anns., *see* S. C. No. 1424, *post*.

1405. —— Evidence as to damage—Not conclusive.]—On a reference in a collision action the registrar & merchants are not bound by uncontradicted evidence as to the amount of damage done, but entitled to use their own judgment & experience, & find in accordance therewith. — THE BERNINA (1886), 55 L. T. 781; 6 Asp. M. L. C. 65.

For full anns., *see* SHIPPING & NAVIGATION.

1406. Special report unnecessary—Allowing item to stand sufficient.]—The report of the registrar & merchants need not be special upon every particular matter; it is sufficient when they allow the item to stand.—THE OCEAN (1846), 2 Wm. Rob. 465; 4 Notes of Cases, 566; 10 Jur. 504. S. C. No. 1240, *ante*.

B. Special Case.

1407. When registrar may state.]—The registrar may state a special case on the question whether the evidence before him is sufficient.—THE JOHN BELLAMY (1870), L. R. 3 A. & E. 129; 39 L. J. Adm. 28; 22 L. T. 244; 3 Mar. L. C. 360.

C. Objections to Registrar's Report.

(*a*) *Procedure.*

1408. Time for objection—Extension—Failure to object within time.]—A report of the registrar & merchants does not necessarily stand confirmed by reason of defts. failing to take objection thereto within the time provided for in Admlty. Ct. Rules, 1859, r. 117, so as absolutely to entitle pltfs. to payment to them by defts. of a sum of money which the ct. is of opinion ought not to have been allowed them in the report.

The ct. has power to extend the time within which objection to the report of the registrar & merchants may be taken.—THE THYATIRA (1883), 49 L. T. 713; 32 W. R. 276; 5 Asp. M. L. C. 178.

1409. —— —— Only on special grounds.]—The ct. will not extend the time for objecting to the registrar's report in a co-ownership action without

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PART III. SECT. 17, SUB-SECT. 1.

1397 i. *Matters referred—Collision—Power of registrar to inspect.*]—The registrar has power on a reference to him to ascertain the damages caused by collision to inspect the ships & cargoes concerned. THE STOCKHOLM *v.* THE SPRAY (1909), 14 B. C. R. 191; 10 W. L. R. 448.—**CAN.**

1398 i. —— —— *Consequential damages—How far referred.*]—Upon the liquidation of an account by registrar & merchants in a case of collision for damages done by a ship to a wharf:—*Held*: a claim for consequential damages not asked for in the libel nor awarded by a decree, could not be considered by the registrar & merchants, & if it had been, such damages could not be allowed by art. 1660 (1) of the Code nor by the maritime law.—*Ite* THE BARCELONA, p. 142, c, *ante*.—**CAN.**

special grounds being shown by the party seeking to object.—GOWAN *v.* SPROTT, Nos. 1412, 1434, *post.*

1410. Mode of objection.]—An appeal from a report of the registrar cannot be made by motion, except by consent of both parties.—THE EDMOND (1860), Lush. 211 ; 2 L. T. 521.

For full anns., *see* SHIPPING & NAVIGATION.

1411. Office copy of report necessary.]—When the registrar's report is disputed, the objecting party must take an office copy of the registrar's notes at the reference.—THE PONTIDA, No. 1390, *ante ;* No. 1422, *post.*

1412. Action in district registry—Report of district registrar—Objections—Procedure.]—Where an action is instituted in an Admlty. District Registry by part-owners of a ship against the managing owner thereof for an account, & the writ claims an account under R. S. C., O. 3, r. 8, & an order for the filing of the accounts is made under O. 15, r. 1, & the account is proceeded with pursuant to order, & the district registrar reports thereon, such report is to be treated as the usual report in an Admlty. Ct. action, & if deft. seeks to take objection thereto, he must do so according to O. 56, r. 11, otherwise pltfs. will be entitled to judgment thereon, as it is too late to take objection to the district registrar making such order after he has reported, there having been no appeal against such order.—GOWAN *v.* SPROTT (1884), 51 L. T. 266 ; 5 Asp. M. L. C. 288. S. C. No. 1409, *ante ;* No. 1434, *post.*

1413. Objection in general terms—Right of party objecting.]—*Semble :* where an objection to a registrar's report is taken in general terms as to the whole of an item allowed, it is open to the party objecting to seek to have part of the item disallowed.—THE CITY OF PEKING, No. 1627, *post.*

For full anns., *see* S. C. No. 1627, *post.*

(b) Weight to be given to Report.

1414. Report—Opinion of qualified persons.]—The report of the registrar & merchants is in its nature partly legal & partly mercantile. It is a report proceeding from persons qualified, in both these respects, to form a sound judgment on the subject before them : one of them being, from his connection with cts. of justice, supposed capable of forming his own opinion, & of assisting his associates on all questions of law in the first instance subject to inspection & correction of the ct., whilst the other part of this domestic forum consists of persons acquainted with trade, & exercising their judgment on matters relative to commerce.—THE HAABET (1800), 2 Ch. Rob. 174.

For full anns., *see* PRIZE LAW & JURISDICTION.

1415. *S. P.* THE PACTOLUS (1856), Sw. 173 ; 28 L. T. O. S. 220 ; 5 W. R. 167.

For full anns., *see* SHIPPING & NAVIGATION.

1416. Presumption in favour of report.]—The ct. is disposed in the first instance to receive the report of the registrar & merchants with the strongest desire to believe it is correctly made ; but if the ct. differs from the registrar & merchants, it will follow the dictates of its own mind.—THE ALFRED (1850), Nos. 1185, 1204, 1397, *ante ;* No. 1423, *post.*

For full anns., *see* S. C. No. 1423, *post.*

1417. ——.]—There is a presumption in favour of the report.—THE SIR GEORGE SEYMOUR, Nos. 1435, 1438, *post.*

For full anns., *see* S. C. No. 1438, *post.*

1418. ——.]—The report of the registrar & merchants is not an order of the ct., but is simply a report to the ct., and the ct. is not bound by the decision of the registrar & merchants on a question of fact, *e.g.*, the abandonment of a vessel by the owners.—THE WALLSEND, [1907] P. 302 ; 76 L. J. P. 131 ; 96 L. T. 851 ; 10 Asp. M. L. C. 476.

1419. —— **Until proved to be wrong.**]—The ct. will not interfere with the report of the registrar & merchants unless fully convinced they are in error.—THE CLYDE (1856), Sw. 23 ; 5 L. T. 240. S. C. No. 1476, *post.*

Annotations :—**Mentd.** The Pirro Guerrini *v.* The Cumberland (1860), 5 L. T. 121 ; The Cumberland (1861), 5 L. T. 496 ; The Kate, [1899] P. 165 ; The Racine (1906), 22 T. L. R. 575, C. A. ; The Philadelphia, [1917] P. 101, C. A.

1420. —— —— .]—Great trust is to be reposed in the registrar & merchants, who have greater practical knowledge upon these subjects than the ct. ; & to induce the ct. to support objections to their report, the affirmative of proving the report is wrong must be clearly substantiated by those who object.—THE GLENMANNA (1860), Lush. 115. S. C. No. 1431, *post.*

Annotations :—**Mentd.** The Flying Fish (1865), Brown. & Lush. 436, P. C. ; The Generous (1868), L. R. 2 A. & E. 57.

1421. —— ——.]—Those who take objections to a report of the registrar & merchants are bound to prove their objections by clear & satisfactory evidence. The examination of the accounts is conducted by persons of great experience in those matters, competent to the duty they undertake, & careful in discharge of it.—THE EDMOND (EDMUND) (1860), Lush. 57 ; 59 L. J. P. M. & A. 76.

1422. —— ——.]—The registrar & merchants have a discretionary power to reduce items claimed under a bottomry bond, should they deem them unnecessary or exorbitant, & the ct. will not interfere with this discretion unless it be shown the registrar & merchants have exercised it on an erroneous principle.—THE PONTIDA, Nos. 1390, 1411, *ante.*

(c) Functions of Court.

1423. Court to decide independently.]—In considering objections to the report of the registrar & merchants in a cause of damage, the ct. forms its opinion upon the whole of the evidence, whether laid before the registrar & merchants, or brought in subsequently ; & will, although inclined to confirm the report, especially in matters within the practical knowledge of the merchants, direct the report to be reformed.—THE ALFRED (1850), Wm. Rob. 232 ; 7 Notes of Cases, 352 ; 14 Jur. 155. S. C. Nos. 1185, 1204, 1397, 1416, *ante.*

Annotations :—**Mentd.** The Princess (1885), 52 L. T. 932 ; The Fred (1895), 72 L. T. 153 ; The City of Berlin, [1908] P. 110, C. A.

1424. ——.]—The presumption is always in favour of the report of the registrar & merchants, on account of their special knowledge of mercantile affairs, particularly as to the usual gains made by ships, losses arising from detention & the amount of expenses necessary to be incurred in making good damage received. But a right of appeal exists to the Admlty. Ct., whose duty it is to pass an independent judgment upon the case submitted. —THE BLACK PRINCE (1862), Lush. 568. S. C. No. 1404, *ante ;* Nos. 1427, 1464, 1477, *post.*

Annotations :—**Mentd.** The Argentino (1888), 13 P. D. 191, C. A. ; The City of Peking (1890), 15 App. Cas. 438, P. C. ; The Mediana, [1900] A. C. 113, H. L.

1425. Fresh evidence admissible.]—The ct. is unwilling to disturb the report of appraisement for-

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PART III. SECT. 17, SUB-SECT. 2.—C (b).

1419 i. *Presumption in favour of report—Until proved to be wrong.*]—When in a question of accounts & disbursements a thoroughly competent person has been selected as referee with approval of both parties, & he reports thereon after full examination, objectors to such report must prove their objections by satisfactory evidence, for the report will not be overruled unless there be a case against it which satisfies the ct. that the report ought not to be maintained.—THE JAMES FRASER (1873), Y. A. D. 159.—**CAN.**

Sect. 17.—*Reference to the registrar & merchants: Sub-sect.* 2, *C.* (*c*); *sub-sect.* 3, *A.*]

nished by the registrar & merchants; but it will allow the report to be referred back to him, if fresh evidence is produced, upon the party making the application paying costs of the first inquiry.—THE MATCHLESS (1846), 8 L. T. O. S. 198; 10 Jur. 1017.

1426. ——.]—On an appeal from a report of the registrar & merchants new evidence is admissible.—THE IRON-MASTER (1859), Sw. 441.

For full anns., *see* SHIPPING & NAVIGATION.

1427. ——.]—According to the practice of the ct. fresh evidence may be brought upon appeal, & the ct. may have to pronounce judgment upon a case different, perhaps materially so, from that before the registrar & merchants.—THE BLACK PRINCE, Nos. 1404, 1424, *ante*; Nos. 1464, 1477, *post*.

For full anns., *see* S. C. No. 1424, *ante*.

1428. ——.]—The new rules made pursuant to Admlty. Ct. Acts, 1840 (cc. 65, 66), & Admlty. Ct. Act, 1854 (c. 78) (repealed), do not restrain the judge of the Admlty. Ct. from admitting in his discretion fresh evidence when the case comes before him upon objections to the report of the registrar & merchants upon a reference to them to ascertain the amount of damage.—THE FLYING FISH (1865), 3 Moo. P. C. C. N. S. 77; 16 E. R. 29.

Annotations:—**Consd.** The Generous (1868), 37 L. J. Adm. 37. **Mentd.** The Thuringia (1872), 41 L. J. Adm. 44.

1429. —— **Conditions of admission.**]—The ct. will not hear further evidence in objection to the registrar's report, unless the party making the application can satisfy the ct. that the further evidence could not, by proper diligence, have been produced before the registrar & merchants, or that they asked at the reference for an adjournment to produce it, & were refused. The affidavit in support of a motion for leave to produce further evidence, where the object is to vary the evidence already given, should be clear & precise as to the witnesses it is proposed to call, & the nature of their testimony. The affidavit of a witness, who is not tendered for cross-examination, & deposes to a fact material to the inquiry before the registrar & merchants, should be filed before the hearing. The adjournment of the hearing of a motion for counsel's convenience does not preclude the parties making the motion from filing & using a further affidavit.—THE THURINGIA (1871), 41 L. J. Adm. 20; 25 L. T. 605; 1 Asp. M. L. C. 166.

Annotation:—**Refd.** The Venture, [1908] P. 218, C. A.

1430. Courses open to the court.]—There are three courses open to the ct. with respect to objections to a report: (1) to confirm the report, if the objections are unfounded; (2) to send it back to the registrar & merchants; (3) to make, on its own authority, such alterations therein as it may think fit.—THE HEBE (1847), 5 Notes of Cases, 176.

1431. Objection on ground not taken at reference —Not admissible.]—In an appeal from a report the ct. will not allow a party to set up a case which he did not endeavour to establish at the reference.—THE GLENMANNA, No. 1420, *ante*.

Annotations:—**Consd.** The Generous (1868), L. R. 2 A. & E. 57. **Refd.** The Flying Fish (1865), Brown. *v.* Lush. 436, P. C.

1432. —— ——.]—On appeal from a report of the registrar & merchants, no objection can be made before the ct. to an item which was not questioned before them.—THE PRINCESS HELENA (1861), Lush. 190; 30 L. J. P. M. & A. 137; 4 L. T. 869; 1 Mar. L. C. 108.

For full anns., *see* SHIPPING & NAVIGATION.

1433. Errors not affecting result.]—In an award of damages by a district registrar & merchants, errors had been made on both sides, but after the correction of such errors the registrar might have arrived at substantially the same result as was reached in the award delivered:—*Held*: the award must stand.—THE MARPESSA, [1907] A. C. 241; 76 L. J. P. 128; 97 L. T. 1; 23 T. L. R. 572; 51 Sol. Jo. 530; 10 Asp. M. L. C. 1, H. L. S. C. No. 1646, *post*.

Annotations:—**Mentd.** The Bodlewell, [1907] P. 286; The Astrakhan (1910), 102 L. T. 539; The Tugela (1913), 30 T. L. R. 101, P. D.

1434. Objection to interlocutory order—When appeal against order proper remedy.]—GOWAN *v.* SPROTT, Nos. 1409, 1412, *ante*.

1435. Reference back—Evidence unsatisfactory.]—The evidence on objections to the report of the registrar & merchants being unsatisfactory, the ct. offered to the objecting party to refer the accounts back to the registrar & a merchant & surveyor of shipping to be chosen by the ct., expressing its intention to overrule the objections if this course was not assented to.—THE SIR GEORGE SEYMOUR (1853), 1 Ecc. & Ad. 67; 17 Jur. 402. S. C. No. 1417, *ante*; No. 1438, *post*.

Annotation:—**Mentd.** Anderson *v.* Hoen (1865), 3 Moo. P. C. C. N. S. 77, P. C.

1436. —— **Evidence wrongly rejected.**]—Where the registrar wrongly refused to admit in evidence certain books containing entries in the handwriting of pltf.'s testator, which entries were, in the opinion of the ct., admissible in evidence, the ct. ordered the case to go back to the registrar in order that he might receive them in evidence & draw the proper inferences from them.—THE SWIFTSURE (1900), 82 L. T. 389; 16 T. L. R. 275; 9 Asp. M. L. C. 65.

1437. Correction of report—Erroneous view of evidence.]—In a cause of limitation of liability arising out of a collision, where, the fund in ct. being insufficient to satisfy the claims against it, a reference has been made to the registrar & merchants to assess the damages as to time & rate, the ct. will review the registrar's report & correct it, if it should appear that any portions of the report are founded on what the ct. deems to be an erroneous view of the evidence.—THE CITY OF BUENOS AYRES (1871), 25 L. T. 672; 1 Asp. M. L. C. 169.

1438. —— **On expert advice.**]—In a difficult case of objection to the report of the registrar & merchants partly requiring the knowledge of a shipwright or surveyor of shipping, the judge may select a merchant & surveyor to assist him in reconsidering their report, & give personal attendance.—THE SIR GEORGE SEYMOUR, Nos. 1417, 1435, *ante*.

Annotation:—**Refd.** Anderson *v.* Hoen (1865), 3 Moo. P. C. C. N. S. 77, P. C.

1439. —— **As to quantum only.**]—In an action of damage by collision the damages occasioned to pltfs. by reason of the collision between a submarine

1431 i. *Objection on ground not taken at reference.*]—Where interest on the value of the wreck for the period between the collision & the examination of the vessel was not specifically allowed, there being no direct claim for it, & it appearing that there was an equivalent granted by the registrar & merchants in another form, an act on petition contesting the report in this particular was overruled.—THE QUEBEC (1878), 1 Q. L. R. 101.—**CAN.**

& defts.' s.s. were referred to the registrar, assisted by merchants, to assess the amount thereof on the basis of defts. paying 95 per cent. of the assessed damages. By the schedule to the assistant registrar's report the amount claimed in respect of the "value of the hull, machinery & electric fittings & batteries of the submarine at the time of her loss," was £35,000, of which £26,500 was allowed; but on motion by defts. to vary the report, on the ground that the sum of £26,500 was excessive, the President reduced the amount to £23,850. On appeal:—*Held:* the sum of £26,500 must stand, as it was arrived at by the assistant registrar & merchants upon evidence produced by both sides, & was varied by the President only upon the question of *quantum*, for an appellate tribunal does not review a figure so found unless in very exceptional circumstances, such as the detection of an error of principle, or an obvious mistake in the calculation, or a clear misunderstanding of evidence lying at the root of the assessment.—THE AMERIKA, [1914] P. 167; 83 L. J. P. 157; 111 L. T. 623; 30 T. L. R. 569; 58 Sol. Jo. 654; 12 Asp. M. L. C. 536, C. A.; *affd.* on another point, [1916] A. C. 38, H. L.

Annotation:—**Mentd.** Berry *v.* Humm, [1915] 1 K. B. 627, C. A.

SUB-SECT. 3.—COSTS.

A. Since the Judicature Acts.

1440. Successful party entitled to costs—Reference treated as separate litigation.]—The costs of the reference as to damages in an action of damages do not follow the costs of the action, but are in the discretion of the judge as costs of a fresh litigation. Where an action is brought by the owners of a ship & owners of cargo laden on board it jointly against another ship for damages arising from collision, & both vessels are found to blame, & as a consequence no order is made as to costs of the action, & each ship pays a moiety of the damage of the other, those pltfs. who are owners of the cargo are entitled to costs against defts. of proving their claim in a reference before the registrar & merchants.—THE CONSETT (1880), 5 P. D. 77; 42 L. T. 33; 28 W. R. 622; 4 Asp. M. L. C. 230, C. A.

Annotations:—**Folld.** The Savernake (1880), 5 P. D. 166; The Mary (1882), 7 P. D. 201.

1441. —— ——.]—An action of damage was brought by the owners of the ship *V.* against the ship *S.*, & the owners of the *S.* claimed damages by way of counterclaim against the *V.* At the hearing of the action the ct. found both ships to blame for the collision, condemned the owners of each ship in a moiety of the damage sustained by the other, referred the question of damages to the registrar & merchants, & made no order as to costs. Afterwards the owners of the *S.* brought their counterclaim into the registry. No tender was made by the owners of the *V.*, & the registrar struck off less than one-ninth of the amount claimed, but made no recommendation as to costs of the reference. On application of the owners of the *S.* the ct. condemned the owners of the *V.* in the costs of & incident to the reference.—THE SAVERNAKE (SEVERNAKE) (1880), 5 P. D. 166; 49 L. J. P. 71; 29 W. R. 123; 5 Asp. M. L. C. 34, n.

1442. —— **Claim & counterclaim — Less than one-fourth struck off.**]—In cases of collision, where both vessels are held to blame, & the amount of damage is referred to the registrar, & less than one-fourth is struck off the respective claim & counterclaim of pltfs. & defts., the costs of substantiating pltfs.' claim at the reference will be borne by defts., & of defts.' counterclaim at the reference by pltfs.—THE MARY (1882), 7 P. D. 201; 48 L. T. 28; 31 W. R. 248; 5 Asp. M. L. C. 33.

1443. Excessive claim — More than one-third struck off—Costs awarded to defendant.]—Where more than one third of the claim is struck off at a reference, the ct. will consider itself bound by the rules of practice as to costs, & condemn pltf. in the costs of the reference, notwithstanding hardships in the particular case.—THE ENGLISHMAN, No. 1359, *ante*.

1444. —— —— **Part of original claim withdrawn —No costs.**]—Where pltf. in a reference in a collision action withdraws a large item of his claim at the reference & not before, & he recovers less than two-thirds of the amount originally claimed, but more than two-thirds of the amount which remains after his withdrawal of the above item, the original amount of his claim before withdrawal is the claim upon which costs are to be given & he is not entitled to his costs.—THE EILEAN DUBH (1883), 49 L. T. 444; 5 Asp. M. L. C. 154.

1445. —— —— **Costs awarded to plaintiff.**]—Where pltf claimed unliquidated damages in respect of loss of the remainder of a season's fishing occasioned by a collision, & on a reference to the registrar & merchants defts. objected to the claim altogether, but pltf. recovered, being awarded less than two-thirds of the amount claimed by him as damages, the ct. gave him costs in respect of the reference on the ground of the peculiarity of pltf.'s claim, without prejudice to the general rule as to costs of reference.—THE GLEANER (1878), 38 L. T. 650; 3 Asp. M. L. C. 582.

1446. —— ——.]—In a case of damage to a cargo of maize caused by the heating of a portion of it consequent upon delay, a portion, it was admitted, had been damaged by perils of the seas, & it was impossible to ascertain with accuracy the extent of damage caused by the delay. The amount of damage claimed was £1,056 16*s.* 6*d.*, & the amount allowed by the registrar & merchants on the reference was £600. The ct. gave pltfs. the costs of the reference.—THE ELINA (1880), 5 P. D. 237 n.

1447. —— **No general rule—Discretion.**]—As by R. S. C., O. 65, r. 1, the costs of all proceedings are in the discretion of the ct., the general rule of practice in the Admlty. Ct. as to the costs of reference, namely, that when more than a fourth is struck off a claim, each party pays his own costs, & when more than a third claimant pays the other party's costs, is wrong, & the ct. must exercise its discretion according to the circumstances of each particular case. *The Empress Eugenie*, No. 1471, *post*, overd.—THE FRIEDEBERG (1885), 10 P. D. 112; 54 L. J. P. 75; 52 L. T. 837; 5 Asp. M. L. C. 426; 33 W. R. 687, C. A.

1448. Tender—Effect of—On costs of reference.]—Pltf. claimed as damages for collision the sum of £501 12*s.* 9*d.*, of which £237 4*s.* 3*d.* was claimed in respect of demurrage. Defts. tendered the sum of £385 in satisfaction. On the reference the registrar allowed the sum of £393 1*s.* 3*d.* in respect of the claim, of which £136 represented demurrage, but, on the ground that the amount allowed exceeded the tender by only £8, directed each party to pay a moiety of the reference fees, & to bear its own costs from the time of the tender, pltfs. being entitled to the costs previous thereto:—*Held:* the ct. would not interfere with the registrar's exercise of discretion.—THE DANIA (1901), 18 T. L. R. 159.

1449. Limitation of liability—Costs of reference.]

Sect. 17.—Reference to the registrar & merchants: Sub-sect. 3, A & B.]

—In a collision cause, although deft. is entitled upon admission of liability & payment into ct. of the amount of his liability under M. S. Act Amendment Act, 1862 (c. 63), s. 54, to a stay of proceedings as against himself, pltfs. having separate interests may, at deft.'s cost, proceed to a reference to settle the respective amounts due to them, & may tax their costs.—THE EXPERT (1877), 36 L. T. 258; 3 Asp. M. L. C. 381.

1450. ——— When not allowed.]—In a limitation action shipowners & cargo owners both claimed against the fund in ct. At the usual reference the cargo owners disputed some part of the shipowners' claim, which was in consequence considerably reduced. The cargo owners contended that they were entitled to recover all the costs incurred by them on the reference in disputing the shipowners' claim from the owners of the s.s. as part of the necessary costs of establishing their respective claims. The District Registrar taxed the costs *de bene esse*, but referred the question of the liability of pltfs. for the costs of settling the disputed items of the claims to the judge:—*Held:* pltfs. in the limitation action not liable for such costs.—THE PONCE (1879), 4 Asp. M. L. C. 185 n. (*a*).

1451. —— Discretion of registrar.]—In a limitation of liability suit pltfs. objected to certain items of defts.' claim for damage to cargo sustained in consequence of collision, upon the ground that a large proportion of the damage was owing to defts.' failure to use due diligence after the collision to minimise the damage. The registrar found that pltfs.' objections were well founded & allowed only a portion of defts.' claim, & ordered each party to pay his own costs of the reference. From this order defts. appealed by motion:—*Held:* (1) though there is a general rule of practice that pltf. in a limitation of liability suit must pay the costs, that practice is not invariable; (2) the registrar has discretion in a proper case to make such order as to costs as he thinks just; (3) his order was right. —THE RIJNSTROOM, [1899] W. N. 33; 80 L. T. 422; 8 Asp. M. L. C. 538.

1452. —— Costs of objection to report.]—In an action of limitation of liability, where there were claims for loss of life & personal injury & for loss of or damage to goods, & the claims for loss of life & personal injury exceeded the amount of pltfs.' liability not available for distribution amongst claimants for loss of or damage to goods, the registrar, after marshalling the whole of the claims of all kinds so as to throw on to the amount solely available for loss of life & personal injury claims such equal & proportionate parts of each loss of life & personal injury claim as absorbed the whole of the amount so available, reported that that part of the fund in ct. against which goods claimants were also entitled to claim ought to be distributed rateably between goods claimants & loss of life & personal injury claimants in the same proportions that the claims for loss of or damage to goods bore to the unsatisfied portions of the claims for loss of life & personal injury. The report was objected to by certain defts. on the ground that claimants for loss of life & personal injury ought not, in respect of any portion of their claims, to rank against the fund in ct. available to satisfy *pro tanto* claimants for loss of or damage to goods:—*Held:* (1) the report of the registrar was correct, & must be affirmed; (2) in the special circumstances, the costs of objection to the report must be borne by pltfs.—THE VICTORIA No. 1547, *post.*

For full anns., *see* S. C., No. 1547, *post.*

B. Before the Judicature Acts.

1453. Bottomry—Bondholder entitled to costs—General rule—Exception.]—The rule which applies to references in causes of collision does not apply to causes of bottomry. In a cause of bottomry, where the bond is admitted to be valid, & referred to the registrar & merchants to report the amount due, pltf. is usually entitled to the general costs of the reference, but will be condemned in costs clearly occasioned by improperly persisting in claims which cannot be sustained. Where the reference was adjourned to produce further evidence in relation to certain items on each of which the bondholders subsequently failed:—*Held:* the bondholder must pay costs occasioned by the adjournment.—THE KEPLER (1861), Lush. 201.

1454. —— —— ——.]—In a case in which the ct. was of opinion that the bondholder had acted most meritoriously for the common interest of all parties on the question of costs:—*Held:* no fraud being proved against him & the opposition to the bond being unjust & very ungracious, costs should be given.

The charges that the registrar has disallowed do not give a character of fraud to any part of this transaction. The title of the party therefore to his costs upon the general proceedings is not vitiated, but I shall make no order as to those which may have been incurred by the discussion of the registrar's report; it was fairly brought to my notice, & on the matter of costs the parties must have come before the ct. (LORD STOWELL).—THE TARTAR (1822), 1 Hag. Adm. 1.

Annotations:—**Refd.** The Staffordshire (1871), 25 L. T. 137. **Mentd.** The Atlas (1827), 2 Hag. Adm. 48; Weston *v.* Foster (1836), 5 L. J. C. P. 242; The Emancipation (1840), 1 Wm. Rob. 124; Stainbank *v.* Fenning (1851), 11 C. B. 51.

1455. —— ——.]—A bottomry bond was pronounced valid in part & invalid as to the rest, & was referred to the registrar & merchants to report on certain items which were allowed as claimed. The bondholder claimed the costs of the reference as the report was in favour of the whole sum:—*Held:* the costs must be allowed.—THE HEART OF OAK (1841), 1 Notes of Cases, 114.

1456. —— —— No costs of action.]—*Primâ facie* a bondholder establishing his bond is entitled to his costs. Where, however, the general validity of the bond is established, & upon a reference a large deduction is made, & the report is confirmed by the ct., the bondholder will not be entitled to his costs in the original suit. The party opposing the bond in the original suit, having made various charges against the bondholder which were not established, was held disentitled to his costs in the original suit; but the costs of the reference were decreed to him.—THE GAUNTLET (1849), 3 Wm. Rob. 167; 7 Notes of Cases, 41; 13 Jur. 413.

1457. —— Bondholder liable for costs.]—The holders of a bottomry bond, the amount of which on reference was reduced one-fourth, were condemned in the costs of the reference.—THE ELIZA (1842), 1 Wm. Rob. 328; 1 Notes of Cases, 305.

1458. —— ——.]—Where a bond is pronounced for, & upon being referred to the registrar & merchants large deductions are made in the report, the party setting up the bond will be liable to the costs of the reference. *Semble:* the main consideration in the judgment of the ct. will be the amount of the sum deducted in proportion to the sum claimed.—THE CATHERINE (1847), 3 Wm. Rob. 1; 5 Notes of Cases, 398; 10 L. T. O. S. 35; 11 Jur. 739.

1459. *S. P.* THE SHAMROCK, No. 1468, *post.*

1460. Wages—Rule applicable.]—The rule obtaining in references in causes of collision that if the registrar strikes off more than one-third of pltf.'s claim pltf. shall be condemned in the costs of the reference does not apply to a reference in a cause of master's wages; but the ct. will decide equitably according to the circumstances of the particular case.

In a reference in a cause of master's wages more than one-third was struck off the master's claim, & more than one-third struck off the owner's counterclaim, & a balance declared due to the master:—*Held:* each party should pay his own costs.—THE LEMUELLA (1860), Lush. 147; 30 L. J. P. M. & A. 1.

1461. ——— ———.]—Upon a report made by the registrar in a cause of master's wages, the ct. will not determine the incidence of the costs of the reference by any fixed rule, but according to the circumstances.

Pltf. suing for wages claimed £1,557 10*s.* 6*d.*, & refused a tender by defts. of £150; defts. thereupon set up a counterclaim of £1,571 13*s.* 6*d.*, & the accounts were referred to the registrar & merchants, who found £413 1*s.* 5*d.* due to pltf.:—*Held:* pltf. must pay the costs of the reference.—THE WILLIAM (1861), Lush. 199.

1462. Collision—Plaintiff entitled to costs—Though excessive amount claimed—Special circumstances.]—There is no absolute rule of practice in the Admlty. Ct. that pltf.'s costs of a reference in a collision cause shall be disallowed when more than one-fourth of pltf.'s claim is struck off.

Where pltf.'s claim was reduced by more than one-fourth, but the claim was made out in a fair spirit, & deft. had underestimated the damage much more than pltf. overestimated it, pltf.'s costs of the reference were allowed him.—THE AMELIA (1870), 23 L. T. 544; 19 W. R. 216; 3 Mar. L. C. 505.

1463. ——— ——— ——— ———.]—The claim made by pltfs. involved investigation of salvage expenses to a great amount incurred in consequence of collision. The registrar disallowed more than one-third of pltfs.' claim, the greater portion of the items so disallowed being expenses with reference to the salvage which were not chargeable as between pltfs. & deft.:—*Held:* (1) the usual rule as to costs of reference should not prevail in this case; (2) pltfs. were entitled to their costs.—THE BERBICE (1857), 6 L. T. 106; 1 Mar. L. C. 203.

1464. ——— **No costs—Both parties in wrong.**]—Where at the reference both parties were in the wrong:—*Held:* each party must bear his own costs.—THE BLACK PRINCE, Nos. 1404, 1424, 1427, *ante*; No. 1477, *post*.

For full anns., *see* S. C. No. 1424, *ante*.

1465. ——— ——— **Excessive claim.**]—Costs of reference to the registrar & merchants are not allowed so far as applies to excessive demands.—THE NEW UNION *v.* THE PANTHER (1853), 5 L. T. 240.

1466. ——— ——— ———.]—As a general rule, where one-third is taken by the registrar & merchants off the amount claimed, the party who has the third taken off is condemned in costs of the reference. In this case each party was left to pay his own costs, as the registrar & merchants took off £5 less than one-third of the claim.—THE FIDELIA (1858), 5 L. T. 240; *Shipping Gazette*, May 17.

1467. ——— ——— ———.]—On a reference to the registrar & merchants in a damage cause more than one-fourth & less than one-third of pltf.'s claim having been disallowed:—*Held:* each party must pay his own costs.—THE PEERLESS (1862), 6 L. T. 107; 1 Mar. L. C. 206.

1468. ——— **Plaintiff liable for costs—Excessive claim.**]—The amount of damage had been referred to the registrar & merchants, who reduced pltf.'s claim from £1,375 to £800. On their report being confirmed:—*Held:* pltf. must be condemned in costs of the reference.—THE SHAMROCK (1849), 7 Notes of Cases, 112. S. C. No. 1459, *ante*.

1469. ——— ——— ———.]—Pltf. was condemned in costs of the reference in consequence of large deductions made by the registrar & merchants from his claim for damage sustained by collision.—THE CYNTHIA ANN (1853), 17 Jur. 768.

1470. ——— ——— ———.]—When a large proportion of the damage claimed is disallowed, & the registrar's report is not objected to, claimant must pay the whole costs of reference.—THE J. J. HATHORN (1858), 4 Jur. N. S. 790.

1471. ——— ——— **Though plaintiff fails on point of law.**]—The ordinary rule in causes of collision that pltf. shall pay costs of the reference to the registrar & merchants, if their report disallows more than one-third of his claim, is not to be relaxed, even if pltf. fails in substantiating his entire claim upon a question of law only.—THE EMPRESS EUGENIE (1860), Lush. 138.

Annotation:—**Overd.** The Friedeberg (1885), 10 P. D. 112, C. A.

1472. ——— ——— ——— **Conduct of plaintiffs conducing to loss.**]—*Semble:* where an exorbitant claim is made before the registrar & merchants for the value of the injured vessel, & the abandonment is held unjustifiable, pltfs. will be condemned in costs of the reference.—THE THURINGIA (1872), 41 L. J. Adm. 44; 26 L. T. 446; 1 Asp. M. L. C. 283.

1473. ——— ——— ——— **Effect of insufficient tender.**]—Where the amount of damage in a cause of collision is referred to the registrar & merchants, & a tender is made by deft. but not accepted by pltf., if the amount pronounced to be due is less than two-thirds of pltf.'s claim, but exceeds the tender of deft., pltf. is liable for general costs of the reference, but deft. for costs occasioned by his making an insufficient tender.—THE SEINE (1859), Sw. 513; 1 L. T. 340.

1474. ——— ——— **Costs of particular items.**]—The claim made in a damage cause was £3,121. The report allowed £1,736. A tender was made before the reference of £1,685. The four principal items disallowed amounted to £1,109. The claimants were condemned in costs of the reference as to these four items.—THE NIMROD (1853), 17 Jur. 767.

1475. ——— ——— ———.]—Where, on a reference to ascertain the amount of damages, pltf. included a claim for freight to which he was held not entitled:—*Held:* pltf., though entitled to the rest of the costs, must pay the costs occasioned by the claim for freight.—THE SOUTH SEA (1856), Sw. 141.

1476. Appeal from report—Costs of.]—In a case of doubt as to objections to the report of the registrar & merchants, no costs were allowed, although their report was affirmed.—THE CLYDE, No. 1419, *ante*.

For full anns., *see* S. C. No. 1419, *ante*.

1477. ——— ———.]—The costs of an appeal from the registrar's report follow the result, & do not depend upon the proportion of pltf.'s original claim which is finally disallowed.—THE BLACK PRINCE, Nos. 1404, 1424, 1427, 1464, *ante*.

For full anns., *see* S. C. No. 1424, *ante*.

PART III. SECT. 17, SUB-SECT. 3.—B.

1460 i. *Wages—Rule applicable.*]—As a general rule, upon a reference to the registrar & merchants to take accounts in an Admlty. suit, where one-fourth of promoter's claim is disallowed no costs of the reference will be given, & where one-third is disallowed resp. will be allowed his costs of the reference. But this rule does not apply to a suit for wages. *Semble:* it is not usual to employ counsel in taking accounts before the registrar & merchants, & their costs will seldom be allowde.—THE ALBION, No. 363, ii., *ante*.—AUS.

SECT. 18.—ENFORCEMENT OF JUDGMENT.

SUB-SECT. 1.—IN GENERAL.

Amount recoverable—Collision.]—*See* SHIPPING & NAVIGATION.

1478. No rights given to third parties—Cost of repairs—Repairs not paid for.]—Where in the registrar's report in a collision action it appears that claimant claims, *inter alia*, as part of his damages the cost of repairing his ship, but has not paid the shipwright, & has since the repairs were effected become insolvent, & the registrar allows such item, the ct. has no power to do anything to ensure the money being paid over by claimant to the shipwright, & will not retain the money in the registry until claimant has given satisfactory evidence that he had paid the shipwright.—THE ENDEAVOUR (1890), 62 L. T. 840; 6 Asp. M. L. C. 511.

1479. Satisfaction—What is.]—Payment to seamen by shipowners before a shipping master is no satisfaction of wages pronounced for in a suit in the Admlty. Ct.—THE ARAMINTA (1856), Sw. 81; 26 L. T. O. S. 317; 2 Jur. N. S. 310; 4 W. R. 396, C. A.

For full anns., *see* SHIPPING & NAVIGATION.

SUB-SECT. 2.—INTEREST.

1480. Awarded from date of loss.]—It is the settled practice of the Admlty. Ct. to allow interest upon damages recovered in respect of a collision at sea, in the case of a vessel in ballast, from the date of the collision. The same rule will be followed by an equity ct. in suits instituted under M. S. Act, 1854 (c. 104), s. 514.

A vessel proceeding homewards in ballast was run down by a steamer. The owners of the latter filed their bill, asking protection of the ct. under the above Act:—*Held:* they ought to pay into ct., not only the amount of damages for which they had been held liable by a judgment of the Admlty. Ct., but also interest at 4 per cent. from the date of collision.—STRAKER *v.* HARTLAND (1864), 2 Hem. & M. 570; 5 New Rep. 163; 34 L. J. Ch. 122; 11 L. T. 622; 10 Jur. N. S. 1143; 2 Mar. L. C. 159; 71 E. R. 584.

Annotations:—**Consd.** The Northumbria (1869), L. R. 3 A. & E. 6. **Foll.** Smith *v.* Kirby (1875), 24 W. R. 207. **Refd.** The Crathie, [1897] P. 178.

1481. ——.]—In an action brought in the Admlty. Div. to recover unliquidated damages, pltfs., if successful, are, in accordance with the practice of the Admlty. Div., entitled to interest on the amount recovered from the date of the loss on which their claim is based, even where the claim is one which, before Jud. Acts, could not have been brought in the Admlty. Ct.—THE GERTRUDE (1887), 57 L. T. 883; 6 Asp. M. L. C. 224.

1482. —— Notwithstanding delay.]—In a collision action *in rem* not instituted till 12 years after the collision occurred, the ct., having held that the circumstances of the delay were not such as to preclude pltfs. from recovering, although they might have proceeded earlier, gave pltfs. interest for the 12 years on the damages awarded.—THE KONG MAGNUS, [1891] P. 223; 65 L. T. 231; 7 Asp. M. L. C. 64.

1483. —— On judgment debt.]—Since the incorporation of the Admlty. Ct. in the High Ct. of Justice, an award of salvage is a judgment debt, & as such bears interest from the date of entry of judgment, the taxed costs bearing interest from the date of signing of the allocatur.—THE JONES BROTHERS (1877), 46 L. J. P. 75; 37 L. T. 164; 3 Asp. M. L. C. 478.

1484. —— Costs—Compound interest.]—In a cause of collision where payment of a sum for damage, interest, & costs reported to be due has been delayed by the party liable, the other party is entitled to interest on the whole sum from 15 days after the date of such report, & 53 Geo. 3, c. 159, s. 1, limiting the liability of owners to the value of the ship, appurtenances & freight, applies only to the original claim for damage & does not extend to costs & interest. Where interest is made up, it then becomes principal & bears interest as part of the principal. The costs to which the party is put are a part of his loss.—THE DUNDEE (1827), 2 Hag. Adm. 137.

Annotations:—**Folld.** The Nostra Senora Del Carmine (1854) 1 Ecc. & Ad. 303. **Consd.** The Wild Ranger (1862), 32 L. J. P. M. & A. 49; The Amalia (1864), 34 L. J. P. M. & A. 21; The Northumbria (1869), L. R. 3 A. & E. 6. **Folld.** Smith *v.* Kirby (1875), 24 W. R. 207. **Refd.** *Ex p.* Rayne (1841), 1 Q. B. 982.

1485. *S. P.* THE EUROPA, No. 1489, *post.*

1486. *S. P.* THE DRIVER (1804), 5 Ch. Rob. 145.

Annotation:—**Refd.** Schacht *v.* Otter (1855), 9 Moo. P. C. C. 150.

1487. Interest on bottomry bond.]—Defts. in a bottomry suit having paid into the registry, by order of the ct., a sum of money, which proved larger than the amount finally pronounced due to the bondholder:—*Held:* the bondholder nevertheless was entitled to the full ordinary interest upon the latter sum from the date of the bond becoming due.—THE EDMOND (1861), Lush. 211; 30 L. J. P. M. & A. 128.

Annotation:—**Refd.** The Karnak (1868), L. R. 2 A. & E. 289.

SUB-SECT. 3.—SALE.

Sale in interlocutory proceedings, *see* pp. 171, 172, *ante.*

1488. Sale of ship—Sale of cargo.]—Where in an action *in rem* for collision against ship & freight, in which defts.' ship was held solely to blame, the ship being still under arrest with the cargo on board, was ordered to be sold, the ct. on motion directed the marshal to discharge the cargo, to retain same in his custody as security for payment of the landing & other charges & freight, if any, due from the owners or consignees of the cargo in respect of same, & that in default of any application for delivery of the cargo within 14 days, the marshal should be authorised to sell such part of it as might be necessary to pay the charges & freight, if any, due.—THE GETTYSBURG (1885), 52 L. T. 60; 5 Asp. M. L. C. 347.

PART III. SECT. 18, SUB-SECT. 1.

a. *Rights of Crown.*]—The Crown invoking the aid of a Ct. of Admlty. to enforce a maritime lien, is an ordinary suitor, & its rights must be determined by rules & principles applicable to all claims & suitors alike.

The Crown sued the owners of a steamship for damages to a Govt. canal occasioned by the ship colliding with the gates, but obtained judgment subsequent in date to one obtained by the master of the ship upon a claim for wages & disbursements accrued & made after the collision; such judgment was accorded priority over that of the Crown. *Semble:* when the Crown pursues its remedy by writ of extent against the owners of a ship, it can only take under such writ the property of the debtor at the time the writ issued; & if the debtor assigned his property before that, the Crown can realise nothing under the writ in respect to the *res.*—R. *v.* THE CITY OF WINDSOR, SYMES *v.* THE CITY OF WINDSOR (1896), 5 Ex. C. R. 223.—**CAN.**

PART III. SECT. 18, SUB-SECT. 2.

b. *Awarded from date of suit.*]—A promoter in an Admlty. suit is entitled to interest at 5 per cent. from the date to the final decree.—THE ALBION, No. 363, ii., *ante.*—**AUS.**

1489. —— Deductions from gross proceeds.]—Defts.' vessel having remained under arrest was sold in satisfaction of pltfs.' claim for damage, to discharge which the gross proceeds were insufficient:—*Held:* (1) as against pltfs.' claim the expenses of sale & possession fees formed a proper deduction from the gross proceeds; (2) defts. could not be called upon to repay them; (3) pltfs. were entitled to interest & costs.—THE EUROPA (1863), Brown. & Lush. 210; 3 New Rep. 216; 9 L. T. 781; 1 Mar. L. C. 420. S. C. No. 1485, *ante*.

1490. —— Effect of.]—In cases of sale under a decree of the ct., the transfer of the ship's register is not essential to validity of the purchaser's title. The title conferred by the ct. in the exercise of its authority in decreeing the sale is a sufficient title against the whole world.

A monition against the American consul to bring in the register of an American ship, sold at Liverpool in a cause of bottomry, was refused.—THE TREMONT (1841), 1 Wm. Rob. 163.

1491. —— —— Prior petens.]—In an action by the owner of the damaged ship, & the owners of part of the cargo, the ship was condemned, damage pronounced for, reference to registrar & merchants to ascertain the amount of damage, etc. On same day that that decree was made, the owners of other parts of the damaged cargo applied to be let in to share rateably in the proceeds of the condemned ship:—*Held:* the Admlty. Ct., although it may, in certain cases, give weight to equitable considerations, had no equitable jurisdiction whereby it could, in the present case, decree a rateable distribution, & thereby take away the priority of the *prior petens*.—THE SARACEN, Nos. 61, 650, 1227, *ante*.

Annotations:—**Folld.** The Clara (1855), Sw. 1. **Consd.** The Desdemona (1856), Sw. 158. **Expld.** The Markland (1871), L. R. 3 A. & E. 340. **Consd.** The Africano, [1894] P. 141.

1492. —— —— —— Position of other claimants —Difference between sale & bail.]—Of two pltfs. in a cause of damage the one obtaining the first decree is entitled to priority of payment from proceeds of the ship in ct. If pltf. in a second suit is apprehensive that the value of the ship & freight will not satisfy the whole claim for damage, he must apply to the ct. before any decree is pronounced. If the ship remains in the custody of the ct., & is sold by its decree to pay the damage, the ship is not liable to a second detention, being sold by the ct. free of all demands. *Semble:* (1) if bailed she may be arrested again at the suit of another claimant; (2) another claimant may proceed, either at common law or in the Admlty. Ct., against the person.

Where a second pltf. has kept himself free from liability to costs, he cannot take the benefit of the decree in the first suit to the injury of the first pltf. —THE CLARA (1855), Sw. 1; 26 L. T. O. S. 165; 2 Jur. N. S. 46; 4 W. R. 180. S. C. No. 813, *ante*.

Annotations:—**Consd.** The Africano, [1894] P. 141. **Refd.** The Desdemona (1856), 28 L. T. O. S. 192; The Dictator, [1892] P. 304.

SUB-SECT. 4.—FUND IN COURT.

1493. Claim out of time—Rights of Crown.]—Where there is a fund in ct. which has been paid in under a decree for limitation of liability, the Crown is entitled to come in & prove against the fund like any other suitor. A claim against such fund is not necessarily barred by the fact that the time fixed by the ct. for bringing in claims has expired.—THE ZOE (1886), 11 P. D. 72; 55 L. J. P. 52; 54 L. T. 879; 35 W. R. 61; 5 Asp. M. L. C. 583.

1494. Power to direct issue.]—Defts. in their statement of claim in a limitation action admitted that a collision was in part caused by improper navigation of their vessel, & pltfs. in their defence did not notice this admission or otherwise refer to the cause of the collision. In an action by pltfs., the owners of cargo on board the other vessel, which was sunk in the collision, against defts.:—*Held:* (1) there was no admission on the pleadings by pltfs. as defts. in the limitation action which precluded them from claiming to prove against the fund paid into ct. in that action for the whole amount of their damage; (2) in support of their proof an issue might be directed between them & the owners of the carrying vessel to determine whether defts.' vessel was alone to blame.—THE KARO, Nos. 911, 1223, *ante*.

For full anns., *see* S. C. No. 1223, *ante*.

1495. Payment out of court—Order for payment.]—In an action of necessaries, where necessary moneys were advanced by merchants in England to a foreign ship, partly when the ship was lying in a port of refit out of the jurisdiction of the ct. & partly upon her arrival in England, & pltf. obtained judgment by default, & the owners did not appear to oppose the motion to the ct. to order payment out of the proceeds of the ship in the registry, the ct. made the order.—THE AFINA VAN LINGE, Nos. 325, 357, *ante*.

1496. —— —— Rescinded if made by mistake—Caveat—Costs.]—The rule that a suitor who first obtains a decree shall have priority in order of payment only applies where suitors are in *pari* conditions.

Where the ct. in a suit *in rem* has made, *per incuriam*, an order directing payment out of ct. to satisfy the claim of a suitor, the ct. has power before payment to vary or rescind the order.

Where pltf. in a cause of necessaries obtains a decree, & the mtgees. neglect to enter a *caveat* until after the order for payment out of ct. has been made, the ct. will grant costs to pltf.—THE MARKLAND (1871), L. R. 3 A. & E. 340; 24 L. T. 596; 1 Asp. M. L. C. 44.

Annotations:—**Distd.** The Africano, [1894] P. 141; The Georg, [1894] P. 330.

1497. —— —— Necessity for—Garnishee proceedings.]—Certain moneys, the balance of proceeds of sale of a vessel decreed by the ct., remained in the Bank of England to the credit of the registrar of the Admlty. Ct., & the wages & expenses of the master were pronounced for by the ct. Upon such judgment an order for payment issued to the

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PART III. SECT. 18, SUB-SECT. 4.

1495 i. *Payment out of court—Improper payment to ship's agents—Proper method.*]—The proctor for the owners of a salved vessel paid to the proctor for the salvors the amount awarded to them, which, having been paid by him to the agents of the salving ship, had been by them made subject to a commission of 5 per cent. as against the salvors:—*Held:* this should not have been done, but the whole salvage money should have been paid into ct., & then paid out under its authority to the salvors in person, if they applied therefor, or if not, to their duly authorised agent.—THE RUNEBERG (1867), Y. A. D. 42.—**CAN.**

1495 ii. —— *Balance of fund for which warrant issued—Petition.*]—The master of a ship, who claimed to be part owner, deft. in a suit for breach of contract, having a claim for wages & disbursements on the proceeds of the ship & cargo, which had been sold, moved for payment to him of the balance of the fund, for which the warrant had been issued:—*Held:* the master must file a petition.—THE JOSEPH DEXTER (1869), 3 I. L. T. Jo. 280.—**IR.**

1495 iii. —— *Costs incurred paid before other payments.*]—Where a party in an action *in rem* has incurred costs which have benefited not only himself but parties in other actions against the *res*, the costs so incurred by him will, if the proceeds of the property are insufficient to satisfy all claims in the various actions, be paid to him out of the fund in ct. before any other payment is made thereout.—*R. v.* THE CITY OF WINDSOR, SYMES *v.* THE CITY OF WINDSOR, *ante*.—**CAN.**

Sect. 18.—*Enforcement of judgment: Sub-sects.* 4 & 5, *A. & B. Sect.* 19: *Sub-sect.* 1.]

registrar as of course, but without such order he was not justified in giving his cheque on the bank to the party in whose favour the decree was pronounced. After the wages, etc., were pronounced for as above, but before any order of the ct. had issued in pursuance of the judgment, the moneys were attached in the hands of the registrar in an action in the Mayor's Ct. against the master:—*Held:* the moneys were not so attachable before order issued. —READ *v.* ANGELL (1856), 26 L. T. O. S. 316.

1498. Arrest of ship.]—Salvage having been awarded against a vessel, the ct. issued a warrant of arrest against the ship after judgment, in order to enforce payment of the award.—THE TROUBADOR (1878), cited 5 P. D. 33.

Annotation:—**Refd.** The City of Mecca (1879), 5 P. D. 28.

SUB-SECT 5.—PERSONAL REMEDIES.

A. Since the Judicature Acts.

1499. Liability exceeding amount of bail—Defendant personally liable—Fieri facias.]—In an action *in rem* for salvage services, the writ was directed in the usual form "to the owners & parties interested" in the *res*, & indorsed with a claim for £5,000. As the owners of the salved ship, her cargo & freight, appeared as defts., & through their solr. gave an undertaking to put in bail for the above amount, pltfs. did not arrest the vessel, or interfere with the discharge of the cargo. The value of the salved ship, her cargo & freight, was £179,200, & at the hearing the ct. made an award of £7,500. Pltfs. obtained leave to amend the indorsement on the writ by altering the sum named therein to £8,500 (*see* Nos. 66, 75, *ante*). The amount of the award was affirmed on appeal, & defts. paid the costs, but denied their liability in respect of the amount awarded beyond the amount of the undertaking to put in bail, viz. £5,000. Pltfs. thereupon moved for leave to proceed personally for the full amount awarded:—*Held:* (1) the remedy was not limited by the amount of the undertaking to put in bail; (2) pltfs. were entitled in the present action to sue out writs of *fi. fa.* in order to enforce payment from defts. personally of the full amount of the decree.—THE DICTATOR, [1892] P. 64, 304; 61 L. J. P. 73; 67 L. T. 563; 7 Asp. M. L. C. 251. S. C. Nos. 66, 75, *ante*.

Annotations:—**Consd.** The Ripon City, [1897] P. 226. **Foll.** The Gemma, [1899] P. 285, C. A. **Consd.** The Dupleix, [1912] P. 8. **Refd.** The Port Victor, [1901] P. 243, C. A.; The Veritas, [1901] P. 304; The Burns, [1907] P. 137, C. A.; The Broadmayne, [1916] P. 64, C. A.

1500. —— —— —— Seizure of vessel after release.]—A collision occurred in the Thames between a British & a foreign vessel. The owners of the British vessel commenced an action *in rem* & arrested the foreign vessel, & her owners, domiciled abroad, having appeared, & put in bail for the full value of the vessel & her freight, she was released. The foreign vessel was found alone to blame, & the decree in the usual form, in the case of owners who have appeared, condemned defts. & their bail in damages & costs. The damages proved to be in excess of the amount of the bail, & pltfs. in respect of this balance sued out a writ of *fi. fa.* under which the foreign vessel was seized:—*Held:* (1) the owners of the foreign vessel had, by appearing, rendered themselves personally liable; (2) payment of the balance could be enforced under Admlty. Ct. Act, 1861 (c. 10), s. 15, by a writ of *fi. fa.* against any of their goods & chattels including the released vessel within the jurisdiction.—THE GEMMA, [1899] P. 285; 68 L. J. P. 110; 81 L. T. 379; 15 T. L. R. 529; 8 Asp. M. L. C. 585, C. A.

Annotations:—**Consd.** The Port Victor, [1901] P. 243, C. A. **Distd.** The Burns, [1907] P. 137, C. A. **Apld.** The Dupleix, [1912] P. 8; The Broadmayne, [1916] P. 64, C. A.

1501. —— ——.]—Pltfs., owners of a British ship, commenced an action *in rem* & caused a vessel within the jurisdiction to be arrested in respect of a collision on the high seas. The owners of the vessel arrested were foreigners domiciled abroad. They appeared & obtained the release of their vessel by giving bail to the value of ship & freight. They then defended the action, denying their liability, & counterclaiming for damage they had sustained by reason of the collision. The foreign vessel was found alone to blame, & judgment was pronounced in the usual form condemning defts. & their bail in the amount of the damage sustained by pltfs., together with costs of the claim & counterclaim. Defts. moved to vary the decree by limiting it to the value of their vessel, freight, & costs:—*Held:* apart from any application for a statutory limitation of liability, the appearance of defts. being voluntary & their proceedings in the action amounting to a submission to the jurisdiction of the ct., they were personally liable to the full extent of pltf.'s proved claim.—THE DUPLEIX, No. 766, *ante*.

B. Before the Judicature Acts.

1502. Action in rem—Proceedings in personam in the action—Position of master.]—The value of a vessel condemned in a cause of damage was insufficient to answer the damage. The master was also a part-owner:—*Semble:* it was not competent for the ct. to engraft upon a proceeding *in rem* a personal action against him to make good the excess of damage beyond the proceeds of the ship.—THE HOPE (1840), 1 Wm. Rob. 154. S. C. No. 1508, *post*.

Annotations:—**Expld.** The Volant (1842), 1 Notes of Cases, 503. **Consd.** Nelson *v.* Couch (1863), 15 C. B. N. S. 99; The Dictator, [1892] P. 304. **Refd.** The Bowesfield (1884), 51 L. T. 128. **Mentd.** The Nostra Senora Del Carmine (1854), 1 Ecc. & Ad. 303; R. *v.* City of London Court Judge, [1892] 1 Q. B. 273, C. A.

1503. —— —— ——.]—Where the damage sued & pronounced for exceeds the value of ship & freight, the Admlty. Ct. cannot engraft a personal action against the owners, or against the master part-owner of the vessel doing the damage, upon a proceeding originally *in rem*. When owners appear, they appear only for their interest in the vessel, & no further. To render a master, who is part-owner, liable beyond the value of the ship, he must be sued as master or part-owner in the first instance.—THE VOLANT (1842), 1 Wm. Rob. 383; 1 Notes of Cases, 503; 5 L. T. 185, 525; 6 Jur. 540. S. C. Nos. 472, 803, 816, 1032, *ante*.

Annotations:—**Refd.** The Resolute (1859), 33 L. T. O. S. 80; The St. Olaf (1869), L. R. 2 A. & E. 360; The Mullingar (1872), 26 L. T. 326; The Leon (1881), 6 P. D. 148. **Mentd.** The Mellona (1848), 6 Notes of Cases, 62; The Mary Caroline (1848), 6 Notes of Cases, 536; Harmer *v.* Bell (1850-1), 7 Moo. P. C. C. 267, P. C.; The Nostra Senora Del Carmine (1851), 1 Ecc. & Ad. 303; The Temiscouata (1855), 2 Ecc. & Ad. 208; The Milan (1861), 5 L. T. 590; The Freedom (1874), 25 L. T. 592; Laws *v.* Smith (1884), 9 App. Cas. 356, P. C.; The Heinrich Bjorn (1885), 10 P. D. 44, C. A.; The Cella (1888), 57 L. J. P. 55, C. A.; R. *v.* City of London Court Judge, [1892] 1 Q. B. 273, C. A.; The Dictator, [1892] P. 304; The Africano, [1894] P. 141; Moran, Galloway *v.* Uzielli, [1905] 2 K. B. 555.

1504. —— —— ——.]—In a cause of collision on proof of damage, & insufficiency of proceeds from sale of the ship & from the freight to pay surplus, a monition was decreed against deft., master & part-owner.—THE TRIUNE (1834), 3 Hag. Adm. 114.

Annotations:—**Consd.** The Dictator, [1892] P. 304. **Refd.** R. *v.* City of London Court Judge, [1892] 1 Q. B. 273, C. A.

1505. —— —— ——.]—If the value of deft.'s vessel & freight is not equal to the damage done, pltf. may, after judgment, obtain a monition against deft. personally to satisfy the deficiency. *Qu.:* whether a personal action can be combined with a real action already commenced.—THE ZEPHYR (1864), 11 L. T. 351; 2 Mar. L. C. 146.

Annotation:—**Consd. & Expld.** The Dictator, [1892] P. 304.

1506. —— —— **Separate action in personam.]**—A suit having been brought *in rem*, in which the proceeds of the *res* are insufficient to satisfy pltf.'s claim, a separate suit *in personam* may be brought in the Admlty. Ct. to recover the remainder. *Semble:* a monition might be obtained in the suit *in rem* for the same purpose.—THE PET (1869), 20 L. T. 961; 17 W. R. 899; 3 Mar. L. C. 244.

1507. —— —— ——.]—Where there is a remedy both *in personam* & *in rem*, a person who has resorted to one of these remedies may, if he does not get thereby full satisfaction, resort to the other; but if a person has resorted to one of these remedies, & recovered full compensation & such compensation has been paid, no further proceedings can be taken.—THE ORIENT (1871), L. R. 3 P. C. 696; 8 Moo. P. C. C. N. S. 74; 40 L. J. Adm. 29; 24 L. T. 918; 20 W. R. 6; 1 Asp. M. L. C. 108; 17 E. R. 241, P. C. S. C. No. 945, *ante;* No. 1630, *post.*

Annotations:—**Refd.** The Dictator, [1892] P. 304. **Mentd.** Reiken *v.* Keam *v.* Adelaide Licensing JJ., [1908] A. C. 454, P. C.

1508. —— —— ——.]—A new action against the master is not competent when, a ship having been proceeded against for damage done by collision, the value of ship & freight prove insufficient.—THE HOPE, No. 1502, *ante.*

Annotations:—**Expld.** The Volant (1842), 1 Notes of Cases, 503. **Consd.** Nelson *v.* Couch (1863), 15 C. B. N. S. 99; The Dictator, [1892] P. 304. **Refd.** The Bowesfield (1884), 51 L. T. 128.

For full anns., *see* S. C. No. 1502, *ante.*

1509. Disobedience—Attachment.]—If a party who has instructed a proctor to appear for him in the Admlty. Ct. shall refuse to obey the decree of the ct., on the ground that he has not given a formal proxy authorising such proceedings, the ct. will attach him.—THE WILHELMINE (WHILELMINE), Nos. 692, 1256, 1266, *ante.*

For full anns., *see* S. C. No. 1266, *ante.*

1510. Priorities as between marshal & sheriff—Right to surplus.]—Upon the sale of a ship, in a suit for wages, by Admlty. process issuing after seizure of same vessel by the sheriff under a writ of *fi. fa.*:—*Held:* the claim of the sheriff to the surplus proceeds, in discharge of his execution, was good as against the late owner of the ship. A rule *nisi* to "show cause why the marshal of the Admlty. Ct., or his deputy, should not pay over to the sheriff the surplus proceeds taken in execution by the sheriff by virtue of the writ of *fi. fa.*" will be discharged, because the King's Bench Ct. has no jurisdiction to proceed in such a summary manner against the officer of the Admlty., who acted under competent authority, & it is useless to make an order upon a person not bound to obey it. Although the Admlty. Ct. cannot enter into the contracts of general creditors it may be bound to take a judgment of record as a debt.—THE FLORA (1824), 1 Hag. Adm. 298.

Annotation:—**Refd.** Home Insce. *v.* Prop Concord (1870), 22 L. T. 490.

SECT. 19.—TAXATION OF COSTS.

SUB-SECT. 1.—SINCE THE JUDICATURE ACTS.

See, generally, PRACTICE & PROCEDURE; SOLICITORS.

1511. Costs on higher scale—When allowed—Special cases.]—Costs on the higher scale will only be granted when special grounds of urgency or importance are shown, as it was intended that the lower scale should be the ordinary scale.

An award of £2,400 having been made in a salvage action, an application under R. S. C., O. 65, r. 9, for costs on the higher scale was made to the ct.:—*Held:* this was not a special ground so as to take the case out of the ordinary rule.—THE HORACE (1884), 9 P. D. 86; 53 L. J. P. 64; 50 L. T. 595; 32 W. R. 755; 5 Asp. M. L. C. 218.

1512. —— ——.]—Pltfs., owners of a s.s., brought an action in the Admlty. Div. claiming damages against defts., a port & harbour authority, for injuries sustained by the vessel owing to the alleged negligence of the servants of defts. in not keeping the bed of the harbour in a proper & fit state for the vessel to ground upon at low water. Defts., by their defence, alleged, *inter alia*, that the damage was occasioned by the inherent weakness & unfitness of the vessel to take the ground with the cargo she had on board. The trial of the action lasted the greater part of 4 days, &, owing to the nature of the defence set up, several engineers & surveyors were called on both sides, who produced plans in support of their respective views as to the strength & construction of the vessel. Judgment was given for pltfs. on the ground that the damage sustained by the vessel was due to a ridge of gravel left in the bed of the harbour by the negligence of the servants of defts. On the question of costs:—*Held:* pltfs. were entitled to an order for costs on the higher scale under R. S. C., O. 65, r. 9, inasmuch as the case was special in its nature, involving the calling of a number of scientific witnesses & the preparation of plans, & had been so presented as greatly to facilitate its trial.—THE ROBIN, [1892] P. 95; 67 L. T. 298; 7 Asp. M. L. C. 194.

1513. Solicitor & client costs—Public authority.]—An action for negligence & breach of duty in not providing an efficient coal staith was brought against a port authority, the Tyne Commission, & was dismissed. Defts. applied for costs as between solr. & client on the ground that they were a public authority within Public Authorities Protection Act, 1893 (c. 61), sued in respect of a breach of their public duty:—*Held:* defts. entitled to have their costs taxed as between solr. & client.—THE JOHANNESBURG, [1907] P. 65; 76 L. J. P. 67; 96 L. T. 464; 10 Asp. M. L. C. 402.

1514. Counsel's fees—Refreshers—Retainers.]—The hearing of a consolidated action of salvage,

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PART III. SECT. 19, SUB-SECT. 1.

1514 i. *Counsel's fees—Power to reduce or to increase.*]—An application for increased counsel fees will be refused; rr. 222 & 226 of the Admlty. Rules of Exch. Ct. of Canada give the ct. power to reduce fees but not to increase them.—HEWITT *v.* THE SKEENA (1914), 20 B. C. R. 481.—**CAN.**

1514 ii. —— *Solicitor's fees.*]—Solrs., partners, who act in an action in Admlty. as both counsel & solr., cannot receive fees in both capacities.—BOARD OF TRADE *v.* S.S. GASPESIA, OWNERS (1900), 8 Nfld. L. R. 349.—**NFLD.**

a. *Marshal—Possession fees—Warrants in different actions.*]—When in an Admlty. action a marshal is in possession of a ship simultaneously under warrants issued in different actions, more than one set of possession fees will not be allowed. *The Rio Lima* (1873), L. R. 4 Ad. & Ec. 157, folld.—SUNBACK *v.* THE SAGA (1899), 6 B. C. R. 522; 6 Ex. C. R. 305.—**CAN.**

b. —— *Travelling expenses—Warrant to arrest—Admiralty Rules of Exchequer Court of Canada.*]—To effect an arrest of the *A.* a tug was hired at a cost of $440, but the registrar allowed $50 only, being at the rate of 10 cents per mile, in accordance with note to Part 5 of Table of Fees in Admlty. Rules of Exch. Ct. of Canada. On an application to review the registrar's taxation:—

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commenced on the afternoon of one day, & proceeded with & concluded on the morning of the next day, occupied less than a day's time, & in taxing the costs of the action the Liverpool district registrar disallowed refresher fees to pltf.'s counsel, on the authority of *Harrison* v. *Wearing* (1879), 11 Ch. D. 206. On motion to review the taxation:—*Held:* the registrar had rightly exercised his discretion. The practice which prevailed in the Admlty. Ct. as to the allowance of retainer fees to both senior & junior counsel is in force in the Admlty. Div.—THE NEERA (NEAERA) (1879), 5 P. D. 118; 48 L. J. P. 69; 42 L. T. 743; 28 W. R. 816; 4 Asp. M. L. C. 277.

1515. —— ——.]—A collision case extended over 2¼ hours on the first day, & 5½ hours on the second day. On taxation of costs, between party & party, refresher fees were allowed to the counsel of the successful party in respect of the last 2¾ hours on the second day:—*Held:* the taxing officer under R. S. C., O. 65, r. 27 (48), had a discretion to allow some refresher fee for any time during which the trial was substantially prolonged beyond 5 hours.—THE COURIER, [1891] P. 355; 61 L. J. P. 11; 66 L. T. 386; 55 J. P. 793; 40 W. R. 336; 7 Asp. M. L. C. 157.

Annotations:—**Expld. & Apld.** O'Hara, Matthews *v.* Elliott, [1893] 1 Q. B. 362. **Apld.** The Hestia, [1895] W. N. 100. **Mentd.** The Burma (1899), 80 L. T. 808.

1516. —— Three counsel.]—In a collision action where the trial lasted 4 days & the damage done exceeded £2,000, the ct. refused to interfere with the registrar's discretion in allowing the costs of three counsel.—THE MAMMOTH, No. 1521, *post.*

1517. —— —— Amount of fees.]—In an action for damage by collision, where the damage to one vessel amounted to £20,000 & to the other vessel to £2,000, three counsel were instructed on behalf of pltfs., & the fees marked on their briefs were respectively 75 guineas, 50 guineas, & 30 guineas, & the registrar, on taxation, reduced these fees to 60 guineas, 40 guineas, & 27 guineas; the ct., on appeal from the taxation, allowed the original fees, holding that they were proper fees in a case of that magnitude.—THE CITY OF LUCKNOW (1884), 51 L. T. 907; 5 Asp. M. L. C. 340. S. C. No. 1520, *post.*

1518. Country solicitor—Attendance in London—When allowed.]—The allowance as between party & party of the costs of the attendance of a country solr. at a trial in London is a matter for the discretion of the taxing-master. In Admlty. actions where the statements of the witnesses have been taken by the country solr. & the evidence has been collected by him, his presence may be necessary for the proper conduct of the client's case &, if so, the costs of his attendance should be allowed, although the case is conducted by the London agent; but in such event the costs of the attendance of the London agent must be reduced.—THE SOTO, [1893] P. 73; 62 L. J. P. 17; 69 L. T. 231; 41 W. R. 479; 7 Asp. M. L. C. 335; 1 R. 579, H. L.

Annotations:—**Consd.** *Re* Dixon, Tousey *v.* Sheffield, [1898] 2 Ch. 443, C. A.; The Metropolis (1899), 81 L. T. 236.

1519. ——————.]—In a consolidated salvage suit the two sets of pltfs. were at issue at the trial as to the merits of the services performed by them respectively, & the judge at the trial directed that the costs of two counsel should be allowed to both sets of pltfs. The district registrar, upon taxation, disallowed the costs of the attendance at the trial in London of the country solr. to that set of pltfs. who had not had the conduct of the consolidated suit. Those pltfs. appealed:—*Held:* as the judge at the trial had considered it reasonably necessary for the elucidation of the true state of the facts that both sets of pltfs. should be represented by two counsel, it was also reasonably necessary that the country solr. should be in attendance at the trial & he ought to be allowed costs of attendance.—THE METROPOLIS (1899), 81 L. T. 236; 8 Asp. M. L. C. 583.

1520. Detention of witnesses—Though not called.]—*Semble:* the cost of detaining witnesses on shore may be allowed although such witnesses are not called. This is a matter in the discretion of the registrar.—THE CITY OF LUCKNOW, No. 1517, *ante.*

1521. Printed evidence used by agreement—Costs of counsel's copies.]—In consequence of the negligent navigation of the *M.* the s.s. *P.* came into collision with the *M.* & the *D.* In a damage action, instituted by the owners of the *P.* against the *M.*, pltfs. were successful. In a damage action, instituted by the owners of the *D.* against the *M.* to recover damages arising out of the collision between the *D.* & the *P.*, pltfs. were successful. In this latter action by agreement between the parties the evidence in the first action, which had been printed in the form of a record for the purposes of appeal, was admitted, & supplied to pltfs. by the owners of the *P.*, defts. refusing to provide them with it. The registrar, on taxation, allowed pltfs., the owners of the *D.*, the amount paid by them to the owners of the *P.* for the printed evidence, & 3*d.* per folio for this printed evidence provided for the use of the counsel in ct. in accordance with the terms of R. S. C., Appendix N. On objection to the registrar's taxation the ct. refused to disallow the 3*d.* per folio.—THE MAMMOTH (1884), 9 P. D. 126; 53 L. J. P. 70; 51 L. T. 459; 33 W. R. 172; 5 Asp. M. L. C. 289. S. C. No. 1516, *ante.*

1522. Fees of Trinity Masters.]—There is no fixed scale of fees in the Admlty. Div. for the Trinity Masters. They are to be paid what is just & reasonable.

Five salvage actions, having been consolidated, were heard together, one of pltfs. having the conduct of the consolidated action, & the other pltfs. being allowed to appear by one counsel each & to examine & cross-examine witnesses. The action lasted 5 days, & a total amount of £7,550 was awarded amongst different pltfs. The registrar, on taxation of costs, allowed the Trinity Masters two guineas a day each for each of the consolidated actions, & the judge refused to interfere with the registrar's decision. Defts. having appealed on the ground that only one fee should be allowed for the consolidated action:—*Held:* (1) the matter was one purely of discretion & the C. A. could not interfere; (2) the appeal must be dismissed.—THE

Held: no greater sum than 10 cents per mile could in any circumstances be allowed in executing a warrant to arrest.—MORNSEN *v.* THE AURORA (1914), 20 B. C. R. 210.—**CAN.**

c. Costs of reference—Amount of claim—Amount allowed.]—Pltf., who has succeeded in recovering a substantial sum, though very much less than the amount he claimed, is entitled to costs not only of the action, but also of the reference; but the taxing officer must take into account the fact that the greater part of the claim was disallowed, & tax the costs accordingly.—THE ROSE CASEY, COASTAL S.S. CO. *v.* MCGREGOR S.S. CO. (1900), 18 N. Z. L. R. 663.—**N.Z.**

d. Expenses of witnesses—Detention—Parties.]—The crew of pltfs.' ship were maintained until they gave their evidence on the trial, a period of about one week. Before the trial was commenced, they were added as pltfs. in the cause. Judgment was given in favour of pltfs., condemning deft. ship in damages & costs to be taxed. Upon taxation pltfs. sought to tax the amount expended in maintaining the crew while they waited for the trial, & also their ordinary witness fees during the trial, it having been shown that they were kept for the sole purpose of giving evidence:—*Held:* (1) parties to an action were entitled to the usual witness fees, when they attended the trial to give evidence; (2) pltfs. were entitled to tax a reasonable sum as sustenance fees for the crew while they awaited the trial.—CONWELL *v.* THE RELIANCE (1901), 21 C. L. T. 429; 7 Ex. C. R. 181.—**CAN.**

WILHELM TELL (1892), 8 T. L. R. 504 ; 36 Sol. Jo. 425, C. A.

Annotation :—**Apld.** The Saltburn (1894), 71 L. T. 19.

See, however, Fees of Trinity Masters Rules, 1893.

1523. Special order necessary—Shorthand note.]—The ordinary order of judgment with costs does not include the cost of a transcript of the shorthand writer's notes. Such costs must be applied for at the hearing.—THE TURRET COURT, No. 1226, *ante.*

SUB-SECT. 2.—BEFORE THE JUDICATURE ACTS.

1524. Expenses of witnesses—Though not called.]—In the taxation of costs & allowing expenses of witnesses, the question for the registrar must be whether the evidence was material, & there ought to have been substantive proof of it, & not merely whether the witnesses were put into the box.

Where two witnesses were brought from abroad to prove a material fact, but were not put into the box, because the fact was admitted in cross-examination of a witness on the other side, the registrar was directed to allow their expenses.—THE BIDDICK (1868), 38 L. J. Adm. 24 ; 19 L. T. 705 ; 3 Mar. L. C. 201.

Annotation :—**Apld.** The Rivoli (1870), 23 L. T. 196.

1525. —— Detention.]—The expenses of detaining a witness will not be allowed, unless it can be shown that his detention was absolutely necessary to ensure his attendance as a witness, & was not for any other purpose, *e.g.*, merely to watch the proceedings in a suit.—THE BAHIA (1865), L. R. 1 A. & E. 15 ; 11 Jur. N. S. 1008 ; 14 W. R. 411. S. C. No. 1528, *post.*

Annotation :—**Distd.** The Rivoli (1870), 23 L. T. 196.

1526. —— Foreign witnesses—Interpreter.]—A party in a cause is not bound to examine any of his witnesses before the hearing ; & if judgment is given in his favour with costs, he is in general entitled, with respect to seamen who are reasonably detained by him as necessary witnesses, to the expenses of maintaining them to the time of the hearing. In the case of the witnesses being foreign seamen, a reasonable charge incurred for agency or interpretation may be allowed.—THE KARLA (1864), Brown. & Lush. 367 ; 13 W. R. 295.

Annotations :—**Distd.** The Rivoli (1870), 23 L. T. 196. **Apld.** The City of Brussels (1873), 42 L. J. Adm. 72.

1527. —— Amount allowed.]—In estimating the allowance & compensation for loss of time in the case of a seaman detained to give evidence, the rate of wages is a fair criterion. A master has in all respects the same privileges as a common seaman in a suit for wages under M. S. Act, 1854 (c. 104), & is, *primâ facie*, a necessary witness in his own suit. —THE OLIVE (1857), Sw. 292 ; 6 W. R. 274.

1528. —— —— Master.]—A master's expenses at the rate of £1 a week were allowed from the arrest of the vessel in Mar., 1863, to July, 1864, when defts. applied to have the cause put off.—THE BAHIA, No. 1525, *ante.*

Annotation :—**Distd.** The Rivoli (1870), 23 L. T. 196.

1529. —— —— ——.]—In calculating on taxation the amount due to a master for detention money & board whilst detained ashore as a witness, in a cause for recovery of his wages, the fact that he through his wife carries on a business will not deprive him of his right to be allowed detention money, but if he lives at his place of business during his detention, the fact that he can live more cheaply at home than elsewhere may be taken into consideration in fixing the amount to be allowed for subsistence money.—THE ROYAL FAMILY (1874), 31 L. T. 704 ; 2 Asp. M. L. C. 421.

1530. —— Not allowed—Receiver of droits—Producing document.]—The costs of the receiver of droits, who has been summoned as a witness to produce the original statement of the master of pltf.'s vessel, will not be allowed to the successful deft. in a cause of damage.—THE OSCAR, No. 1164, *ante.*

For full anns., *see* S. C. No. 1164, *ante.*

1531. —— —— Receiver of wreck—Producing documents.]—Pltfs. in a collision suit subpœnaed the receiver of wreck to produce the original depositions at the hearing of the cause, & did not call upon deft. to admit copies. The receiver of wreck obeyed the subpœna. The ct. pronounced deft.'s vessel

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PART III. SECT. 19, SUB-SECT. 2.

e. *Commission on sale.*]—Where, on taxation of the marshal's fees in Admlty., the registrar allowed him a commission of 3 per cent. upon the sale of the vessel & property, the ct. reduced the amount to 2½ per cent.—THE ENVOY (1861), 4 Nfld. L. R. 555.—**NFLD.**

1524 i. *Expenses of witnesses—Though not called—Counsel's advice on proofs.*]—Where a consent to admit certain documents without further proof is tendered & refused, the party tendering such consent is entitled to costs of witnesses rendered necessary by the refusal to enter into the consent, but not to the costs of the consent so tendered. The registrar, as taxing officer of the Admlty. Ct., has discretion to decide whether the witnesses in a cause were material & necessary. This discretion is subject to review of the ct., but only where a legal principle is involved. Direction of proofs by counsel is not binding on the taxing officer, nor on the ct., in measuring costs between party & party.—THE RIVOLI (1870), 23 L. T. 196 ; 4 I. L. T. Jo. 454.—**IR.**

1527 i. —— *Amount allowed.*]—A party to an Admlty. suit will be allowed his expenses as a witness, if he is fairly & properly called as a witness.

In allowing witnesses' expenses only the amount actually expended by the witness will be allowed.

In taxing costs the registrar has no power to reduce the time during which subsistence money is allowed to promoter as a witness, because of his delay in proceeding with his suit ; the delay is a matter for the ct. to consider in awarding costs.

On taxation of costs the ct. will allow the expenses of a witness coming to the place of trial, or who being at the place remains there for the purpose of the trial. But the ct. will not allow promoter his expenses of coming to the place of trial, unless he comes only for the purpose of being a witness.—THE ALBION, No. 363, ii., *ante.*—**AUS.**

f. *Costs of issues.*]—There is no such thing in Admlty. as taking the costs of issues as there is at law, but a sum is allowed by the ct. *nomine expensarum*, where promoter though successful on the whole is not entitled to all his costs. Where the ct. gives promoter costs, the registrar has no power to disallow the costs of issues upon which he has failed.—THE ALBION, No. 363, ii., *ante.*—**AUS.**

g. *Taxation unnecessary—Undefended suit—Insufficient funds.*]—In a suit for master's wages & disbursements, no appearance was entered on behalf of the ship, & the ct. made a decree ; as the fund realised by the sale of the vessel was insufficient to satisfy pltf.'s demand, the ct. directed, with the assent of pltf.'s solr., that after payment of the marshal's taxed expenses the balance of the fund should be paid to pltf., a taxation of pltf.'s costs being superfluous.—THE THOMAS & ELIZABETH (1871), 5 I. L. T. Jo. 196.—**IR.**

h. *Costs of bail bond.*]—Deft. is entitled to have costs of bond of a guarantee co. given as bail in a collision action taxed in the bill of costs against pltf. in proportion to total amount of security given in the bond.—MONTREAL HARBOUR COMRS. *v.* THE UNIVERSE (1907), 11 Ex. C. R. 229.—**CAN.**

j. *Supreme Court practice applicable to Vice-Admiralty Court.*]—The practice in the Supreme Ct. as to taxation & review applies to costs in the Vice-Admlty. Ct. The table of fees in the latter ct. does not exhaust all matters that may occur in a suit. Costs will be allowed in respect of necessary proceedings in a suit, although they may not be mentioned or included in the table.—*Re* THE TAIAROA, 2 J. R. N. S. S. C. 188.—**N.Z.**

k. *Salvage of derelict—Extraction of private warrant.*]—Where the salvors of a derelict have given notice to the Admlty. Proctor & a private warrant is extracted in the interim between such notice & the taking of proceedings by such proctor, the private warrant will be disallowed on taxation.—THE SARAH (1871), Y. A. D. 102. S. C. No. 727, i., *ante.*—**CAN.**

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alone to blame, & condemned deft. in costs of the suit. The registrar, in taxing pltfs.' bill of costs, disallowed the costs of the subpœna, & the expenses of the attendance of the receiver of wreck. On motion to review the taxation the ct. refused to interfere with the registrar's decision.—THE CROMWELL 1870), L. R. 3 A. & E. 316.

1532. Salvage action—Outport charges—Agent not solicitor.]—The practice of bringing in on taxation in salvage suits two separate bills of costs—one containing the expenses incident to the employment of an agent at the outport, & the other the remaining charges incurred in respect of the conduct of the suit—though formerly prevailing among the proctors of the Admlty. Ct., is now no longer to be followed, & in future one bill only, containing all charges, whether outport or otherwise, is to be delivered into the registry. Although a proctor may employ an agent, who is not an attorney or solr., to act as clerk *pro hâc vice* for the purpose of collecting evidence in a cause, etc., in the outports, & may lawfully charge for the expenses incurred in respect of such agent as agency, charges made by such agent for doing work which is essentially the work of a proctor, attorney, or solr., such as "taking instructions for brief & drawing same," etc., will not be allowed upon taxation.—THE CITY OF BRUSSELS (1873), L. R. 4 A. & E. 194; 42 L. J. Adm. 72; 29 L. T. 312; 22 W. R. 71; 2 Asp. M. L. C. 102.

1533. Costs of mortgagee.]—A mtgee.'s costs in a mtge. suit will be taxed as between party & party in accordance with the practice of the Chancery Ct. & not as between solr. & client, where a decree has been made by consent that pltfs. are to receive their "costs, charges, & expenses properly incurred."—THE KESTREL (1866), L. R. 1 A. & E. 78; 16 L. T. 72; 12 Jur. N. S. 713; 2 Mar. L. C. 472.

1534. Counsel's fee—Advising on answer.]—The old practice of allowing in all cases a fee to counsel to advise as to the propriety of opposing the answer in a cause does not still prevail. *Semble:* in many cases the fee may properly be allowed.—THE ROUEN (1862), Lush. 510; 31 L. J. P. M. & A. 132; 6 L. T. 508; 1 Mar. L. C. 221.

Annotation:—Refd. The Sylph (1867), 37 L. J. Adm. 14.

SECT. 20. LIMITATION OF LIABILITY.

SUB-SECT. 1.—SINCE THE JUDICATURE ACTS.

1535. Writ—Description of plaintiffs not sufficient.]—Where the owners of a vessel seek to limit their liability in respect of a collision under M. S. Act, 1894 (c. 60), ss. 503, 504, it is not sufficient to describe pltfs. on the writ as "Owners of the ship or vessel," for, the action being one for personal relief, the names of the owners of the vessel at the time of collision should be set out on the face of the writ.—THE INVENTOR (1905), 93 L. T. 189; 10 Asp. M. L. C. 99. S. C. No. 1543, *post*.

1536. —— —— Unless identity otherwise clear.]—In an action for limitation of liability, though strictly the names of all pltfs. who are seeking to limit their liability should be stated in the writ, it is sufficient in the writ to describe pltfs. as owners of the vessel, provided that the affidavit made in support of the claim & the certified copy of the ship's register exhibited thereto show clearly who are the owners at the date of collision.—THE BLANCHE (1904), 21 T. L. R. 145.

1537. Separate action not necessary—Counterclaim—In alternative.]—Under the system of pleading established by Jud. Acts. & rules, deft., where he admits his liability for the damage done by a collision, but claims to have his liability limited to £8 or £15 per ton of his vessel under M. S. Act Amendment Act, 1862 (c. 63), s. 54, can so claim by counterclaim instead of by instituting a separate suit for limitation of liability. *Semble:* when liability is not admitted a similar course may be adopted in the alternative.—THE CLUTHA (1876), 45 L. J. P. 108; 35 L. T. 36; 3 Asp. M. L. C. 225. S. C. No. 968, *ante*.

1538. —— Defence.]—In defence to an action for improper navigation of a tug, deft. is entitled to plead the statutory limitation of his liability according to tonnage.—WAHLBERG *v.* YOUNG (1876), 45 L. J. Q. B. 783; 24 W. R. 847; 2 Char. Pr. Cas. 54.

1539. Evidence—Affidavit—Proof of ownership.]—Where the owners of a vessel seek to limit their liability in respect of a collision under M. S. Act, 1894 (c. 60), ss. 503, 504, & the evidence in support of their claim is given by affidavit, the affidavit as to whether loss of life or personal injury was occasioned by the collision should be made by some person having knowledge of the facts, & the certified copy of the register proving ownership of the vessel should be a certified copy of the register at the date of collision.—THE ROSSLYN (1904), 92 L. T. 177; 10 Asp. M. L. C. 24.

1540. —— —— Person to make—Railway company.]—A ry. co. instituted proceedigs to limit its liability under M. S. Act, 1894 (c. 60), s. 503. Defts. consented to the evidence in support of the claim being given by affidavit. Pltfs. tendered an affidavit by the general manager of the ry. co. Defts. contended the affidavit should have been made by the managing owner of the s.s., & that he was an owner within the above sect., & that as he was at fault for the loss, pltfs. were not entitled to limit their liability:—*Held:* (1) the affidavit by the general manager was sufficient; (2) the managing owner was not an owner within the above sect.—THE YARMOUTH, [1909] P. 293; 79 L. J. P. 1; 101 L. T. 714; 25 T. L. R. 746; 11 Asp. M. L. C 331.

1541. —— —— Measurement.]—In an action for limitation of liability by the owners of a French s.s., the French certificate of registry supported by affidavit, & the Order in Council of May 5, 1873, extending M. S. Act Amendment Act, 1862 (c. 63), as to measurement to French vessels, were put in. A further affidavit was filed that the double bottom for water ballast was not used for the purpose of carrying cargo stores, or fuel:—*Held:* (1) this was sufficient; (2) it was not necessary that the certificate of a Board of Trade surveyor under M. S. Act, 1894 (c. 60), s. 81, should be also adduced.—THE CORDILLERAS, [1904] P. 90; 73 L. J. P. 13; 89 L. T. 673; 9 Asp. M. L. C. 506.

1542. —— Registered tonnage incorrect.]—In an action of limitation of liability defts. by their defence denied that the registered tonnage of pltfs.' ship was the correct tonnage, & at the hearing tendered evidence in support of their defence:—*Held:* the evidence was admissible.—THE RECEPTA (1889), 14 P. D. 131; 58 L. J. P. 70; 61 L. T. 698; 6 Asp. M. L. C. 433.

1543. Life claims—Bail in lieu of payment into court—Amount below statutory liability.]—Where the owners of a vessel at fault institute a suit for the purpose of limiting their liability in respect of a collision which has caused loss of life, & in respect of which loss of life the claims made do not amount to the total limit of the owners' statutory liability, the ct. may grant a decree on their giving bail for an

amount to be fixed by the ct. & an undertaking to give bail if required for the balance of their statutory liability instead of requiring them to pay into ct. the total amount of their statutory liability in respect of the life claims. — THE INVENTOR, No. 1535, *ante*.

1544. —— —— Interest included.]—By the practice of the Admlty. Div. pltfs. in a limitation of liability suit brought for the purpose of limiting their liability in respect of damage to goods, loss of life, & personal injury arising from a collision for which their vessel is to blame, are required before a decree is pronounced in their favour, in addition to paying into ct. the statutory amount to which their liability for damage to goods is limited, together with interest, to give bail not only for the loss of life & personal injury claims for which they are liable, but also for interest on such claims calculated from the date of collision until payment.—THE CRATHIE, No. 1548, *post*.

1545. —— —— Conditions.]—In an action of limitation of liability, where pltfs. have paid into ct., or are willing to pay in, £8 per ton in respect of damage to ship, goods, & merchandise, but seek in respect of the life claims to pay into ct. or give bail for an amount less than their total liability under M. S. Act Amendment Act, 1862 (c. 63), the ct., before fixing such amount, will require pltfs. to state on affidavit the names of the persons killed & injured, their condition in life, the number of those legally entitled to claim, the number of claims that have been settled, & the amounts paid in settlement.—THE DIONE (1885), 52 L. T. 61; 5 Asp. M. L. C. 347.

1546. Fund already in court.]—A vessel which had been arrested in a cause of damage was released on payment into ct. of the amount to which the liability of her owners was limited by stat., together with a sum to cover interest & costs. Subsequently the vessel was pronounced solely to blame for the collision, & her owners, who had instituted a cause of limitation of liability, moved the ct. to decree for a limitation of their liability, & to order that the sum in ct. should be transferred to the credit of the limitation of liability suit. The ct. decreed a limitation of liability, but considered it unnecessary to order that the amount in ct. should be transferred to the credit of the limitation of liability suit.—THE SISTERS (1876), 1 P. D. 281.

1547. Marshalling of assets.]—Pltfs. in an action to limit their liability paid into ct. the sum of £7,862 0*s.* 10*d.*, the amount of their statutory liability at the rate of £15 per ton. The amount so paid into ct. being insufficient to satisfy in full claims against pltfs. in respect of loss of life & loss of goods, the registrar by his report found that claimants in respect of loss of life were entitled to be paid out of the sum in ct. an amount equal to £7 per ton, & that they & claimants in respect of loss of goods should rank *pari passu* against the balance representing £7 per ton. On objection to the report:—*Held:* (1) the report was right, as the ct. had power to marshal the assets; (2) claimants in respect of loss of goods had no right in priority to claimants in respect of loss of life against the sum representing £8 per ton.—THE VICTORIA (1888), 13 P. D. 125; 57 L. J. P. 103; 59 L. T. 728; 37 W. R. 62; 6 Asp. M. L. C. 335. S. C. No. 1452, *ante*.

Annotations:—**Mentd.** The Crathie (1897), 76 L. T. 534; The Normandy, [1904] P. 187.

1548. —— Amount paid under order of foreign courts—Credit to be given.]—After a collision between a British & a German s.s. in the North Sea the German vessel sank with her cargo, & a large number of her crew & passengers were drowned. The British vessel put into Rotterdam & was there proceeded against by the owners of the German vessel & by two claimants interested in cargo. The British vessel having been found alone to blame, she was sold by order of the ct., & the net proceeds paid out rateably to the three claimants. The owners of the British vessel, as pltfs., having obtained a decree in a limitation action in England under M. S. Act, 1894 (c. 60), s. 503, paid into ct. an amount equal to £8 per ton of their statutory liability with interest to date, & in respect of the life claims gave bail to pay the balance of £7 per ton when required. On the question as to the right of those who had sued in Holland to participate in the distribution of this sum & as to the allowance of interest on the £7 per ton:—*Held:* (1) the owners of the German vessel & claimant in respect of cargo (the other claimant not taking part in the proceedings) were not debarred from proving against the fund in ct. to the full extent of their loss; (2) in ascertaining the proportion receivable by them, credit must be given for the sums they had respectively been paid out of the proceeds of the sale of the ship, & pltfs. were entitled to take out of the fund a sum equal to the amounts received by the three claimants abroad.—THE CRATHIE (THE CRATHIE & THE ELBE), [1897] P. 178; 66 L. J. P. 93; 76 L. T. 534; 45 W. R. 631; 13 T. L. R. 334; 8 Asp. M. L. C. 257. S. C. No. 1544, *ante*.

1549. Effect of death—Action for loss of life—Stayed.]—In an action for limitation of liability, where it appeared that all the claims in respect of loss of life had been settled, the ct. ordered that upon payment in of £8 per ton all persons having any claim either in respect of loss of life or damage to ship, goods, or merchandise, should be restrained from bringing any action in respect of the collision. —THE FOSCOLINO (1885), 52 L. T. 866; 5 Asp. M. L. C. 420.

1550. —— —— Not stayed.]—In an action for limitation of liability in respect of a collision for which pltfs. had admitted liability, & in which loss of life had ensued, the ct. granted a decree limiting pltfs.' liability to £15 per ton upon payment into ct. of £8 per ton & security being given for the balance, but refused to stay life actions which had been instituted in the Admlty. Div., pltfs. in such actions wishing to have their damages assessed by a jury.—THE NEREID (1889), 14 P. D. 78; 58 L. J. P. 51; 61 L. T. 339; 37 W. R. 688; 6 Asp. M. L. C. 411.

Annotation:—**Apld.** Roche *v.* L. & S. W. Ry. Co., [1899] 2 Q. B. 502, C. A.

1551. Claims out of time—Loss of life.]—The usual advertisement calling on all persons who had claims in respect of loss of life or property to make them within a certain time was issued under M. S. Act, 1894 (c. 60), s. 504, with an intimation that if claimants failed so to do in time they would be excluded from sharing in the fund paid into ct. The claims entered in respect of loss of property exceeded the amount paid in under the statutory liability of £8 per ton; but only six out of a possible eleven claims in respect of loss of life were made within the time limit on the fund paid in under the statutory liability of £7 per ton:—*Held:* as a time limit had been fixed for entering claims, the unappropriated balance of the life fund must be paid back to pltfs. in the limitation suit, notwithstanding that all possible life claims had not been entered, & although the year had not elapsed within which, under Fatal Accidents Act, 1846 (c. 93), s. 3, an action in respect of such claim should be commenced.—THE ALMA, [1903] P. 55; 72 L. J. P. 21; 88 L. T. 64; 51 W. R. 415; 19 T. L. R. 149; 9 Asp. M. L. C. 375.

1552. Costs—How far payable by plaintiff.]—Although pltf. in an action for limitation of liability is ordinarily liable to pay the costs of the action,

Sect. 20.—*Limitation of liability: Sub-sects.* 1 *&* 2. *Part IV. Sect.* 1: *Sub-sect.* 1, *A. & B.*]

yet, if defts. raise unnecessary issues on which they fail, he is entitled to the costs of those issues, & will not be ordered to pay costs occasioned by a dispute between rival claimants to the proceeds in ct.—THE EMPUSA (1879), 5 P. D. 6; 41 L. T. 383; 28 W. R. 263; 4 Asp. M. L. C. 185.

Annotation:—**Distd.** The Victoria (1888), 37 W. R. 62.

1553. —— ——.]—In an action for limitation of liability, where defts. raised an issue which was decided against them, the ct. ordered pltfs. to pay all costs of the action, except costs incidental to the raising of such issue, as to which each party was to pay his own.—THE WARKWORTH (1883), 49 L. T. 715; 5 Asp. M. L. C. 194, 326.

Annotations:—**Distd.** Canada Shipping Co. *v.* British Shipowners Mutual Protection Assocn. (1889), 22 Q. B. D. 727. **Apld.** Smitton *v.* Orient Steam Navigation Co. (1907), 96 L. T. 848; The Fanny (1912), 28 T. L. R. 217, C. A.; Asiatic Petroleum Co. *v.* Lennard's Carrying Co. (1913), 109 L. T. 433, C. A. **Refd.** Carmichael *v.* Liverpool Sailing Ship Owners' Mutual Indemnity Assocn. (1887), 19 Q. B. D. 242, C. A.

SUB-SECT. 2.—BEFORE THE JUDICATURE ACTS.

1554. Security for costs—Foreign ship.]—Where in a suit against the owners of a foreign vessel for damage done in collision the owners had filed a petition for a limitation of their liability to the value of their vessel, the ct., following a precedent in Ch., ordered them to give security for costs.—THE WILD RANGER (1862), 31 L. J. P. M. & A. 206; 6 L. T. 164; 1 Mar. L. C. 206.

For full anns., *see* PRACTICE & PROCEDURE.

Security for costs generally, *see* pp. 188-190, *ante*.

1555. Costs—Amount recoverable reduced below county court limit.]—A damage suit was instituted in the Admlty. Ct. in a sum exceeding the amount to which the jurisdiction of the cty. ct. was limited under Cty. Cts. Admlty. Jurisdiction Act, 1868 (c. 71), by pltf. who had sustained damage beyond that amount, but the amount recoverable was reduced by M. S. Act Amendment Act, 1862 (c. 63), s. 54, to a sum within the limit of the jurisdiction of the cty. ct. On a motion to condemn pltf. in costs:—*Held:* pltf. was not within s. 9 of the former Act depriving of costs & rendering liable to be condemned in costs pltfs. who take in the Admlty. Ct. proceedings which they might have taken in a cty. ct.—THE YOUNG JAMES (1869), L. R. 3 A. & E. 1; 39 L. J. Adm. 1; 21 L. T. 397; 18 W. R. 52; 3 Mar. L. C. 297. S. C. No. 1386, *ante*.

1556. Child en ventre sa mère.]—In a suit for limitation of liability instituted on behalf of a child of a sailor drowned in a collision *en ventre sa mère*, the ct. reserved leave to the child *en ventre* if born within due time to prefer its claim for damages sustained by its father's death.—THE GEORGE & RICHARD (1871), L. R. 3 A. & E. 466; 24 L. T. 717; 20 W. R. 245; 1 Asp. M. L. C. 50.

Annotations:—**Refd.** Day *v.* Markham (1904), 6 W. C. C. 115; Williams *v.* Ocean Coal Co., [1907] 2 K. B. 422, C. A.; H.M.S. London, [1914] P. 72, C. A. **Mentd.** Robson *v.* N. E. Ry. Co. (1875), 32 L. T. 551; The Theta (1894), 71 L. T. 25.

Part IV.—Appeals.

SECT. 1.—APPEALS FROM INFERIOR COURTS TO THE ADMIRALTY DIVISION.

SUB-SECT. 1.—FROM COUNTY COURTS AND THE CITY OF LONDON COURT.

A. Jurisdiction.

1557. Jurisdiction to hear appeals.]—Although Jud. Act, 1873 (c. 66), s. 45, provides by s. 40 that cty. ct. appeals may be heard before a div. ct. consisting of two or three judges, the Admlty. Div., having all the exclusive jurisdiction of the Admlty. Ct. before the passing of the Act, still retains jurisdiction to hear & determine cty. ct. Admlty. appeals.—THE TWO BROTHERS (1875), 1 P. D. 52; 45 L. J. P. 47; 33 L. T. 792; 24 W. R. 112; 3 Asp. M. L. C. 99. S. C. No. 1580, *post*.

1558. Detention of ship—Workmen's Compensation Act, 1906 (c. 58), s. 11—Appeal to Divisional Court.]—An order by a cty. ct. judge for detention of a ship under the above Act is made by him in his judicial character, not as an arbitrator under the Act, & an appeal therefrom lies to the Div. Ct., not to the Ct. of Appeal.—PANAGOTIS *v.* PONTIAC (OWNERS), [1912] 1 K. B. 74; 81 L. J. K. B. 74; 105 L. T. 689; 28 T. L. R. 63; 56 Sol. Jo. 71; 5 B. W. C. C. 147; 12 Asp. M. L. C. 92, C. A.

Annotation:—**Distd.** Bonney *v.* Hoyle, [1914] 2 K. B. 257, C. A.

1559. Prohibition—Refused in Admiralty Division—Appeal to Court of Appeal.]—Pltf. issued a plaint, on the Admlty. side of a cty. ct., for damage by collision. Defts. denied their liability; but at the trial judgment was given for pltf. with costs, subject to a reference to the registrar to assess damages. Defts. paid into ct., by way of tender, a sum found sufficient by the registrar to cover the damage. The judge rescinded so much of his judgment as dealt with the costs, & made a decree condemning pltf. in the costs of the action & of the reference. Pltf. applied to a judge of the Admlty. Div. sitting in chambers, in vacation, exercising the jurisdiction of all the divisions of the High Ct., for a writ of prohibition in respect of so much of the decree as dealt with the costs of the action. The application was refused, & the judge did not desire any further argument. Pltf. appealed, & on objection to the jurisdiction:—*Held:* (1) by virtue of Jud. Act, 1873 (c. 66), s. 16, a judge of the Admlty. Div. has all the powers, as to prohibition, of a judge of the High Ct.;

PART III. SECT. 20, SUB-SECT. 2.

s. *Loss of ship—Full amount of statutory liability—Motion for distribution—Interest.*]—In an action of damages by a shipowner for loss of a ship by collision, the jury found for pursuer, & assessed damages at £8 per ton of the tonnage of defenders' ship, the full amount allowed by M. S. Act Amendment Act, 1862 (c. 63), s. 54. A motion by defenders for a new trial was refused. Defenders then presented a petition, under s. 514 of the above Act, for distribution among all parties interested of the amount of damages:—*Held:* in the circumstances, the presentation of the petition, which was unnecessary, should not stop the currency of interest against defenders, from the date when, but for the petition, the verdict might have been applied.—SELIGMANN *v.* FLEMSBURG STEAM SHIPPING CO. (1871), 9 Macp. (Ct. of Sess.) 1011; 43 Sc. Jur. 550.—**SCOT.**

(2) as the judge did not require any further argument, the appeal, in an Admlty. cause, was direct to the Ct. of Appeal, notwithstanding Cty. Cts. Act, 1888 (c. 43), s. 132, which only applied to proceedings in the High Ct., & prevented an application to another judge of the High Ct., or to another Div. Ct., when the first judge, or Div. Ct., had refused to grant a writ.—THE RECEPTA [1893] P. 255; 62 L. J. P. 118; 69 L. T. 252; 42 W. R. 73; 9 T. L. R. 535; 37 Sol. Jo. 580; 7 Asp. M. L. C. 359; 1 R. 644, C. A. S. C. No. 983, *ante;* Nos. 1609, 1768, 1773, *post.*

Annotations:—**Apld.** *Re* London Scottish Permanent Building Soc. (1893), 63 L. J. Q. B. 112; The Theresa (1894). 11 R. 681. **Mentd.** Mowlem *v.* Dunne (1912), 106 L. T. 611, C. A.

B. Right of Appeal.

1560. Appeal on point of law.]—Cty. Cts. Act, 1888 (c. 43), s. 120, which gives a right of appeal on points of law, & rejection or admission of evidence where the amount claimed exceeds £20, applies to cty. ct. Admlty. appeals, & pltf. in an action on the Admlty. side who claims more than £20 & recovers only 1*s.* as nominal damages may appeal to the High Ct. notwithstanding the specific provisions of Cty. Cts. Admlty. Jurisdiction Act, 1868 (c. 71), s. 31.—THE EDEN, [1892] P. 67; 61 L. J. P. 68; 66 L. T. 387; 40 W. R. 415; 7 Asp. M. L. C. 174, D. C.

Annotations:—**Consd.** Copeland *v.* Simister (1892), 68 L. T. 257. **Expld. & Distd.** Pugsley *v.* Ropkins, [1892] 2 Q. B. 184, C. A. **Foll.** Neptune Steam Navigation Co. *v.* Sclater, [1895] P. 40, C. A. **Expld.** The Tynwald, [1895] P. 142. **Consd.** The Theodora, [1897] P. 279, D. C.

1561. ——Question of fact.]—A party to an action brought on the Admlty. side of the cty. ct. has a right, under Cty. Cts. Act, 1888 (c. 43), s. 120 (which to this extent repeals Cty. Cts. Admlty. Jurisdiction Act, 1868 (c. 71), ss. 26, 31), to appeal against a decision on a point of law without any condition or restriction, even though the amount decreed to be due does not exceed £50; but he can only appeal upon a question of fact, subject to the latter Act, under which, if the amount decreed to be due exceeds £50, he must give security for costs of the appeal, but if it is under £50 he cannot appeal at all.—THE DELANO, [1895] P. 40; 64 L. J. P. 8; 71 L. T. 544; 43 W. R. 65; 11 T. L. R. 23; 39 Sol. Jo. 42; 7 Asp. M. L. C. 523; 6 R. 810, C. A. S. C. No. 1577, *post.*

Annotations:—**Consd.** The Tynwald, [1895] P. 142; The Theodora, [1897] P. 279. **Distd.** Williams *v.* Wallis, [1914] 2 K. B. 478.

1562. Appeal on question of fact — Right depending on amount recovered.]—By a decree of the City of London Ct. an action of damage instituted in that ct. in the sum of £30 was, after having been heard on the merits, dismissed with costs. Pltf. appealed. At the hearing of the appeal resp. objected to the jurisdiction of the ct. to entertain the appeal. The ct. dismissed the appeal on the ground that as applt., if successful, could not have recovered more than £30 in the action, he was precluded from appealing by Cty. Cts. Admlty. Jurisdiction Act, 1868 (c. 71), s. 31.—THE FALCON (1878), 3 P. D. 100; 47 L. J. P. 56; 38 L. T. 294; 26 W. R. 696; 3 Asp. M. L. C. 566.

Annotation:—**Foll.** The Burma (1899), 80 L. T. 839.

1563. —— ——.]—Pltf. in a collision action, instituted on the Admlty. side of the cty. ct., whose damages are less than £50 has no right of appeal from a judgment dismissing the suit on a question of fact, although he institutes his action in a sum exceeding £50.—THE BURMA (1899), 80 L. T. 839; 8 Asp. M. L. C. 549.

1564. —— ——.]—THE BRENNER (1908), *Times*, Nov. 19.

1565. —— —— Cross-appeal.]—Cross-causes of damage heard together in a cty. ct. are, as to the right of appeal, to be considered distinct.

Cross-causes of damage each instituted in the sum of £100 were heard in the City of London Ct., at the same time, upon the same evidence. A decree was pronounced in the first cause dismissing the cause; by the decree in the second cause defts.' ship was pronounced solely to blame. By agreement the amount of damage was referred to the assessors of the ct. The owners of the ship pronounced solely to blame entered two appeals in the Admlty. Ct., one against the decree in each cause. On motion to dismiss the appeal in the second cause:—*Held:* on proof that the damage decreed to be due in that cause did not exceed the sum of £50, the appeal must be dismissed.—THE ELIZABETH (1870), L. R. 3 A. & E. 33; 39 L. J. Adm. 53; 21 L. T. 729; 3 Mar. L. C. 320.

Annotations:—**Refd.** The Falcon (1878), 3 P. D. 100; The Brenner (1908), *Times*, Nov. 19. **Mentd.** The Alert (1894), 72 L. T. 124.

1566. —— —— ——.]—Pltfs. sued defts. in the cty. ct. for 5 days 22 hours' demurrage. The cty. ct. judge gave judgment for pltfs. for £22 5*s.* 10*d.*, one day's demurrage only. Pltfs. having unsuccessfully appealed:—*Held:* as the Div. Ct. had only appellate jurisdiction, defts. could not be allowed to argue by way of cross-appeal against the judgment for one day's demurrage, as they had no right to originate an appeal questioning a judgment for an amount under £50 depending upon an issue of fact.—THE ALNE HOLME, [1893] P. 173; 62 L. J. P. 51; 68 L. T. 862; 41 W. R. 572; 9 T. L. R. 364; 7 Asp. M. L. C. 344; 1 R. 607, D. C.

Annotations:—**Distd.** *Re* Lockie & Craggs (1901), 86 L. T. 388. **Mentd.** Smith *v.* Rosario Nitrate Co., [1893] 2 Q. B. 323.

1567. —— —— Effect of tender.]—No appeal lies from the decision of a cty. ct. in a salvage cause where there is a tender of less than £50 & that tender is upheld, the amount tendered being the amount "decreed or ordered" within Cty. Cts. Admlty. Jurisdiction Act, 1868 (c. 71), s. 31.—THE FYENOORD (1876), 34 L. T. 918; 3 Asp. M. L. C. 218.

1568. —— —— Difference between plaintiffs & defendants.]—Cty. Cts. Admlty. Jurisdiction Act, 1868 (c. 71), s. 31, enacting that "no appeal shall be allowed unless the amount decreed or ordered to be due exceeds the sum of £50," applies only to appeals by defts.—THE DOCTOR VAN THUNNEN TELLOW (1869), 20 L. T. 960; 17 W. R. 899; 3 Mar. L. C. 244.

Annotations:—**Apld.** The Elizabeth (1870), L. R. 3 A. & E. 33. **Consd. & Expld.** The Falcon (1878), 3 P. D. 100. **Mentd.** The Alert (1894), 72 L. T. 124.

1569. —— Judge following, but disagreeing with assessors—New trial.]—In a collision action brought in the cty. ct. the judge formed an opinion on the evidence in favour of pltfs., but the nautical assessors took the view that pltfs.' vessel was to blame for a wrong manœuvre. The judge said he felt bound to act upon the assessors' advice, & gave judgment for defts., expressing his dissent therefrom. Pltfs. appealed:—*Held:* on these facts, the ct. had no power to alter the judge's decision. *Semble:* the High Ct. has power in such circumstances to order a new trial.—THE FRED (1895), 72 L. T. 153; 7 Asp. M. L. C. 550.

1570. How far leave to appeal necessary—Interlocutory decree.]—There is no appeal from any interlocutory decree or order of a cty. ct. having Admlty. jurisdiction in an Admlty. cause without permission of the judge of the ct. appealed from, where the decree or order appealed from is not made at the hearing of the suit. Cty. Cts. Act, 1888 (c. 43), s. 120, providing for

Sect. 1.—Appeals from inferior courts to the Admiralty Division: Sub-sect. 1, B. & C.; sub-sect. 2.]

the manner in which, & conditions subject to which, appeals may be brought from the judgment, direction, or decision of a cty. ct. judge where any party is dissatisfied with the determination or direction of the judge in point of law or equity, or upon the admission or rejection of any evidence, has not given a right of appeal from interlocutory orders made in Admlty. actions previous to or after the hearing of the suit.—THE CASHMERE (1890), 15 P. D. 121; 62 L. T. 814; 38 W. R. 623; 6 Asp. M. L. C. 515, C. A. S. C. No. 1770, *post.*

Annotations:—**Apld.** How *v.* L. & N. W. Ry. Co., [1891] 2 Q. B. 496. **Mentd.** How *v.* L. & N. W. Ry. Co. (1892), 61 L. J. M. C. 368, C. A.; Neptune Steam Navigation Co. *v.* Sclater (1894), 71 L. T. 544, C. A.

1571. —— ——.]—There is a right of appeal from a cty. ct. in an interlocutory matter by permission of the cty. ct. judge, although the amount is under £50.—THE ALERT (1894), 72 L. T. 124; 7 Asp. M. L. C. 544; 11 R. 702. S. C. No. 1759, *post.*

Annotation:—**Apld.** The Anne (1914), 30 T. L. R. 544.

1572. —— **Final order.**]—An order of the judge of a cty. ct. having Admlty. jurisdiction refusing the taxation of his costs to a party entitled to the benefit given by Cty. Ct. Admlty. Rules, 1892, O. 39B., r. 50, is a final order within Cty. Cts. Admlty. Jurisdiction Act, 1868 (c. 71), s. 26, & is appealable without the permission of the judge of the ct. appealed from.—THE VULCAN, [1898] P. 222; 67 L. J. P. 101; 47 W. R. 123. S. C. No. 1771, *post.*

1573. —— **Appeal to Court of Appeal.**]—As a general rule the Admlty. Ct. will not grant permission to appeal from a decree or order of the ct. made on appeal from a cty. ct., except in cases where the law is doubtful; or where the facts are such as to leave a substantial doubt on the mind of the ct. whether the conclusion at which it has arrived is right; or where the pecuniary interest involved is large.—THE SAMUEL LAING (1870), L. R. 3 A. & E. 284; 39 L. J. Adm. 42; 22 L. T. 891; 3 Mar. L. C. 463.

Annotations:—**Consd.** The Alexandria (1872), L. R. 3 A. & E. 574; The Argos, The Hewsons (1872), L. R. 3 A. & E. 568; Gaudet *v.* Brown, Brown *v.* Gaudet, Geipel *v.* Cornforth (1873), L. R. 5 P. C. 134.

1574. —— ——.]—In cases raising important points of law the ct. will give leave to appeal to the Ct. of Appeal where, on a proper construction of the Acts governing appeals, such leave is necessary. THE RONA (1882), 7 P. D. 247; 51 L. J. P. 65; 46 L. T. 601; 30 W. R. 614; 4 Asp. M. L. C. 520. S. C. No. 1711, *post.*

Annotation:—**Distd.** The Theodora, [1897] P. 279.

1575. —— ——.]—Notwithstanding Jud. Acts, Cty. Cts. Act, 1875 (c. 50), s. 10, applies to appeals in Admlty. cases from cty. cts. Where a Div. Ct. of the Admlty. Div. alters the judgment of the cty. ct. an appeal lies to the Ct. of Appeal without special leave.—THE LYDIA (1888), 14 P. D. 1; 58 L. J. P. 37; 59 L. T. 843; 37 W. R. 161; 5 T. L. R. 117, C. A.

1576. —— ——.]—An appeal lies without leave from the order of a Div. Ct. in Admlty. upon an appeal from a cty. ct., where the order of the Div. Ct. alters the judgment of the cty. ct.—THE DART, [1893] P. 33; 62 L. J. P. 32; 69 L. T. 251; 41 W. R. 153; 9 T. L. R. 132; 37 Sol. Jo. 114; 7 Asp. M. L. C. 353; 1 R. 572, C. A.

C. Practice on Appeal.

1577. Security for costs—How far required.]—Cty. Cts. Admlty. Jurisdiction Act, 1868 (c. 71), ss. 26 & 31, are by the general words of Cty. Cts. Act, 1888 (c. 43), s. 120, impliedly repealed to the extent of allowing the party aggrieved by the determination of the judge in point of law to appeal, without security for costs being first given, & whether the amount involved is under or over £50; but, in respect of a question of fact, the special provisions of the Act of 1868 are left unaffected.—THE DELANO, No. 1561, *ante.*

Annotations:—**Consd.** The Tynwald, [1895] P. 142; The Theodora, [1897] P. 279. **Distd.** Williams *v.* Wallis, [1914] 2 K. B. 478.

1578. —— **Omission to deposit—Mistake of solicitors.**]—Under Cty. Cts. Admlty. Jurisdiction Act, 1868 (c. 71), s. 27, it is not "sufficient cause" to entitle the ct. to allow an appeal to be prosecuted that applts.' solrs. have, under a mistaken impression that it was unnecessary, omitted to deposit security for the appeal within the proper time.—THE GRATIA (1911), 28 T. L. R. 49.

1579. —— **Mode of giving—Time.**]—An instrument of appeal from a decree of a cty. ct. in an Admlty. cause, under Cty. Cts. Admlty. Jurisdiction Act, 1868, was lodged in the Admlty. Ct. No security for costs had then been given. Security for costs was afterwards given in the Admlty. Ct.: —*Held:* (1) the security required must be given in the cty. ct.; (2) s. 26 of the above Act as to security for costs had not been satisfied; (3) the ct. had no jurisdiction.—THE FOREST QUEEN (1870), L. R. 3 A. & E. 299; 40 L. J. Adm. 17; 23 L. T. 544; 19 W. R. 167; 3 Mar. L. C. 508.

Annotation:—**Folld.** The Ganges (1880), 5 P. D. 247, C. A.

1580. Time for appeal—Extension—Jurisdiction.]—The power of extending the time for appealing from a decree or order of a cty. ct. in an Admlty. suit, conferred on the judge of the Admlty. Ct. by Cty. Cts. Admlty. Jurisdiction Act, 1868, s. 27, may, since the coming into operation of Jud. Act, 1873 (c. 66), be exercised by the judge of the Admlty. Ct. sitting as a judge of the High Ct. of Justice.—THE TWO BROTHERS, No. 1557, *ante.*

1581. —— —— **Absolute discretion.**]—Leave to extend the time for appealing from a cty. ct. in the exercise of its Admlty. jurisdiction is, by Cty. Cts. Admlty. Jurisdiction Act, 1868, s. 27, a matter within the absolute discretion of the judge of the Admlty. Div. & from his decision no appeal lies to the Court of Appeal.—THE AMSTEL (1878), 2 P. D. 186; 47 L. J. P. 11; 37 L. T. 138; 26 W. R. 69; 3 Asp. M. L. C. 488. S. C. No. 1611, *post.*

Annotations:—**Folld.** Kay *v.* Briggs (1889), 22 Q. B. D. 343, C. A. **Mentd.** The Michigan (1890), 59 L. J. Q. B. 427.

1582. —— ——.]—THE EMMY (1905), *Times*, Aug. 12.

Annotation:—**Folld.** Oostzee Stoomvart Maats *v.* Bell (1906), 22 T. L. R. 643.

1583. Arrest—Notice required.]—Where pltfs. appeal from a cty. ct. in a cause *in rem* in which there has been a decree for defts., & the ship been released, the Admlty. Ct. will on the *ex p.* application of pltfs. order a warrant to issue for detention of the ship till bail given or the appeal decided. *Semble:* notice should be given before arrest to defts., so they may come in & apply for suspension of the warrant.—THE MIRIAM (1874), 43 L. J. Adm. 35; 30 L. T. 537; 2 Asp. M. L. C. 259.

Annotation:—**Reid.** The Dictator, [1892] P. 304.

1584. —— **Notice not required—Foreign ship.**]—In an appeal by pltfs. from a cty. ct. in a cause *in rem*, in which there was a decree for defts., & the ship had been released, the Admlty. Ct. on an *ex p.* application of pltfs. ordered a warrant to issue for detenton of the ship, &, as the ship proceeded against was a foreign one, did not require notice of intention to arrest to be given to defts.—THE

FREIR, THE ALBERT (1875), 44 L. J. Adm. 49; 32 L. T. 572; 2 Asp. M. L. C. 589.

Annotation:—**Refd.** The Dictator (1892), 67 L. T. 563.

1585. Notice of motion—Filed before service—Discretion.]—In an appeal to the Admlty. Div. from a cty. ct. applts. filed their notice of motion in the registry before serving resps.' solr. with a copy of the notice. On the appeal coming on, the preliminary objection was taken by resps. that the ct. could not entertain the appeal on the ground that applts. had not complied with R. S. C., O. 52, r. 10, which requires that a copy of the notice of motion shall be served on the adverse solr. before the original is filed in the registry:—*Held:* even if O. 52, r. 10, applied, the case was one in which the ct. should, in the exercise of its discretion, hear the appeal on the ground that sufficient notice had been given to resps. *Qu.:* whether the words "in Admlty. actions" in O. 52, r. 10, are intended to include appeals dealt with by O. 59.—THE GRATIA (1912), 28 T. L. R. 474.

1586. Judge's note—Shorthand note—Discrepancy.—In an appeal to the Admlty. Ct. from a cty. ct. where there is a conflict between the transcript of the notes of evidence & judgment taken by a shorthand writer in the cty. ct. under C. C. R., No. 32, & the cty. ct. judge's own notes, the version given by the latter must be accepted as binding, & if he alters the shorthand writer's notes so as to correspond with his own version, the Admlty. Ct. will order the alterations so made to be carried into effect in the printed copies of the appendix.—THE RAITHWAITE HALL (1874), 30 L. T. 233; 2 Asp. M. L. C. 210.

1587. Examination of witnesses on appeal.]—The ct. may order witnesses to be examined *vivâ voce* at the hearing of an appeal from a cty. ct.; but such order will not be made except in special circumstances.—THE BUSY BEE (1872), L. R. 3 A. & E. 527; 26 L. T. 590; 20 W. R. 803; 1 Asp. M. L. C. 293. S. C. No. 1767, *post*.

1588. ——.]—Where no notes of the evidence are taken in the cty. ct. & the proceedings in the cty. ct. as transmitted to the Admlty. Ct. do not afford any information concerning the evidence given at the hearing or the grounds of the judgment, the Admlty. Ct. may, on the hearing of the appeal, allow evidence to be called; but only those witnesses should be examined who were examined in the cty. ct.—THE C. S. BUTLER (1874), L. R. 4 A. & E. 238; 31 L. T. 549; 23 W. R. 113; 2 Asp. M. L. C. 408.

1589. ——.]—In an Admlty. appeal from a cty. ct., under Cty. Cts. Admlty. Jurisdiction Act, 1868 (c. 71), where there are no shorthand writer's notes of the evidence, & no notes taken by the judge of the cty. ct. available for the purpose of appeal, the Admlty. Div. will order the appeal to be heard on *vivâ voce* evidence.—THE CONFIDENCE, THE SUSAN ELIZABETH (1879), 40 L. T. 201; 4 Asp. M. L. C. 79.

1590. ——.]—Upon an appeal from a cty. ct., where no note of the evidence or proceedings in the ct. below has been taken, a Div. Ct. has jurisdiction to order that the witnesses of both parties called & examined in the ct. below may be produced & examined at the hearing of the appeal. The Div. Ct. in such case should take care to prevent the appeal taking the form of a new trial.—THE CRESCENT (1893), 62 L. J. P. 63; 68 L. T. 556; 41 W. R. 533; 9 T. L. R. 371; 37 Sol. Jo. 372; 7 Asp. M. L. C. 297; 1 R. 613, C. A.

1591. Fresh evidence on appeal.]—The ct. will not, except for special reasons, admit new evidence in the hearing of an appeal from an award of magistrates.—THE GENEROUS (1868), L. R. 2 A. & E. 57; 37 L. J. Adm. 37; 17 L. T. 552; 16 W. R. 619; 3 Mar. L. C. 40.

For full anns., *see* SHIPPING & NAVIGATION.

1592. —— **Surprise.**]—The Admlty. Ct. is very cautious as to admitting fresh evidence at the hearing of an appeal from the cty. cts., & will not do so unless the principles of justice require admission of such evidence. *Semble:* surprise is a ground for admission of fresh evidence.—THE MOORSLEY (1872), 27 L. T. 663; 1 Asp. M. L. C. 471.

1593. *S. P.* THE OSIRIS (1827), 2 Hag. Adm. 135.

1594. —— **To whom application made.**]—An application to allow fresh evidence to be adduced at the hearing of an Admlty. appeal from an inferior ct. may be made to a single judge of the Admlty. Div.—THE ECLIPSE (1889), 14 P. D. 71; 60 L. T. 899; 6 Asp. M. L. C. 409.

1595. Costs of printing record.]—On the hearing of an appeal from a cty. ct., the Admlty. Ct. may, while ordering each party to pay its own costs of the appeal, order the costs of the printing of the record to be divided between the parties.—THE DEERHOUND (1901), 84 L. T. 360; 17 T. L. R. 328; 9 Asp. M. L. C. 189; 6 Com. Cas. 104.

For full anns., *see* SHIPPING & NAVIGATION.

SUB-SECT. 2.—SHIPPING CASUALTY APPEALS AND REHEARINGS AND APPEALS FROM NAVAL COURTS.

1596. No appeal—Shipowner.]—A shipowner, who has appeared as a party at the hearing of an investigation under M. S. Acts into circumstances attending the loss of a ship owned by him, has no right of appeal, notwithstanding that the tribunal investigating the case has given a decision suspending the certificate of the master of the ship, & condemning the shipowner in costs.—THE GOLDEN SEA (1882), 7 P. D. 194; 51 L. J. P. 64; 47 L. T. 579; 30 W. R. 842; 5 Asp. M. L. C. 23.

Annotation:—**Refd.** The Famenoth (1882), 7 P. D. 207.

1597. —— **Refusal by Board of Trade to order rehearing.**]—No appeal lies from the refusal of the Board of Trade to order a rehearing under Shipping Casualties Investigations Act, 1879 (c. 72), s. 2. *Semble:* in such case the Board of Trade may be compelled by mandamus to order a rehearing.—THE IDA (1886), 11 P. D. 37; 55 L. J. P. 15; 54 L. T. 497; 34 W. R. 628; 6 Asp. M. L. C. 57. S. C. No. 117, *ante*; No. 1607, *post*.

1598. Fresh evidence—Application as to.]—On a shipping casualty appeal where it is desired to adduce fresh evidence at the hearing of the appeal, application for leave so to do should be made to the appellate ct. by motion prior to the hearing of the appeal.—THE FAMENOTH (1882), 7 P. D. 207; 48 L. T. 28; 5 Asp. M. L. C. 35. S. C. No. 1603, *post*.

Annotation:—**Mentd.** The Carlisle, [1906] P. 301.

1599. —— **Nautical matters—Trinity Masters.**]—The Admlty. Div., sitting as an appellate ct. under Shipping Casualties Investigations Act, 1879 (c. 72), assisted by nautical assessors, will not grant leave for evidence to be given before it on matters as to which it is the province of the nautical assessors to advise the ct.—THE KESTREL, Nos. 1601, 1605, *post*.

1600. Grounds for allowing appeal.]—Where a ct. of inquiry into a shipping casualty, held under M. S. Act, 1854 (c. 104), Part VIII., orders the suspension of a master's certificate, in pursuance of the powers given by s. 242 of the above Act, & M. S. Act Amendment Act, 1862 (c. 63), s. 23, the appellate ct. having jurisdiction under Shipping Casualties Investigations Act, 1879, will on appeal consider the evidence on which the judgment of the ct. of inquiry proceeded, & reverse the judg-

Sect. 1.—*Appeals from inferior courts to the Admiralty Division: Sub-sect.* 2. *Sect.* 2: *Sub-sects.* 1 & 2.]

ment if the evidence is insufficient to justify suspension of the certificate.

Where a ct. of inquiry ordered a master's certificate to be suspended, & the only ground on which the decision could be supported was that serious damage to a ship had been caused by the wrongful act or default of the master within M. S. Act, 1854 (c. 104), s. 242 (2), & on appeal it appeared to the appellate ct. there was no evidence that the damage had been so caused, the ct. reversed the decision, and restored to the master his certificate. —THE ARIZONA (1880), 5 P. D. 123; 49 L. J. P. 54; 42 L. T. 405; 28 W. R. 704; 8 Asp. M. L. C. 269. S. C. No. 1602, *post.*

Annotation:—**Refd.** The Carlisle, [1906] P. 301.

1601. Materials for appeal—Official shorthand note of judgment.]—Where on an appeal under Shipping Casualties Investigations Act, 1879 (c. 72), applt. had been supplied with the report of the case made to the Board of Trade under M. S. Act Amendment Act, 1862 (c. 63), s. 23, together with their annexe to the report, purporting to contain the reasons for the decision appealed from, the ct. refused to direct that applt. should be furnished with a copy of the official shorthand writer's notes of the judgment delivered on conclusion of the hearing of the case in the ct. below.—THE KESTREL (1881), 6 P. D. 182; 45 L. T. 111; 30 W. R. 182; 4 Asp. M. L. C. 433, D. C. S. C. No. 1599, *ante;* No. 1605, *post.*

1602. Costs of appeal—Liability of Board of Trade.] —Where, on an appeal under Shipping Casualties Investigations Act, 1879 (c. 72), s. 3, against suspension or cancellation of a certificate of competency the decision appealed from is reversed, the Board of Trade will, if the certificate of applt. was dealt with in the ct. below on the invitation of the Board, be directed to pay costs of the appeal, unless it is shown applt. had been guilty of such misconduct as rendered an inquiry into the suspension of his certificate reasonable. The unsuccessful applt. in an appeal against suspension or cancellation of a certificate will, as a general rule, be condemned in costs.—THE ARIZONA, No. 1600, *ante.*

Annotation:—**Refd.** The Carlisle, [1906] P. 301.

1603. —— ——.]—Costs of an appeal will be given against the Board of Trade if the decision of the appellate ct. is against it, & also costs of further evidence produced by the party proceeded against if such evidence is produced merely to confirm the evidence given at the hearing below.—THE FAMENOTH, No. 1598, *ante.*

Annotation:—**Refd.** The Carlisle, [1906] P. 301.

1604. —— ——.] — Where in a Board of Trade inquiry the Board submitted, *inter alia*, the following question for the opinion of the ct., "Was the loss of the s.s. & of life caused by wrongful act or default of the master?" but refused to express an opinion whether the master's certificate should be dealt with, the Admlty. Div., on appeal, reversed the decision of the ct. below, & found there was no wrongful act or default on the part of the master, & ordered the Board of Trade to pay costs of the successful appeal, being of opinion that the Board ought to have assisted the ct. below by intimating whether, in its opinion, the certificate should be dealt with & had, in the circumstances, invited the ct. so to do.—THE CARLISLE, [1906] P. 301; 75 J. P. 97; 95 L. T. 552; 22 T. L. R. 709; 10 Asp. M. L. C. 287, D. C.

1605. —— **No order as to.**]—Where the appellate ct., though affirming the decision of the ct. below, shortened the period for which the master's certificate had been suspended, no order was made as to costs.—THE KESTREL, Nos. 1599, 1601, *post.*

1606. Other remedies—Certiorari.]—A vessel was stranded on Nov. 14, & an inquiry was directed by the Board of Trade under M. S. Act, 1854 (c. 104). On Jan. 2 the inquiry was held, & adjourned to the next day, when the solr. to the Board of Trade announced his intention of not proceeding with it. The magistrate, however, proceeded, & directed the master's certificate to be suspended on the evidence of the master himself. Upon a rule for a *certiorari* to quash the magistrate's order:—*Held:* the proceeding was irregular, & the rule was made absolute to bring up the order to quash it.—R. *v.* YORKE (1877), 41 J. P. Jo. 260.

1607. —— **Mandamus.**]—THE IDA, Nos. 117, 1597, *ante.*

SECT. 2.—APPEALS FROM THE ADMIRALTY DIVISION TO THE COURT OF APPEAL.

SUB-SECT. 1.—WHERE APPEAL LIES.

1608. Registrar's order—Review by judge.]—An order made by a registrar sitting as judge under R. S. C., O. 54, is not, for the purposes of Jud. Act, 1873 (c. 66), s. 50, an order made by a judge in chambers, & where such order has been reviewed by a judge in ct. an appeal from the judge's decision will lie without special leave.—THE VIVAR, Nos. 765, 841, 845, *ante.*

1609. Refusal of prohibition.]—An appeal lies to the Ct. of Appeal from an order of a judge of the Admlty. Div. refusing a writ of prohibition.

An application for prohibition by a party to a cty. ct. Admlty. action was made in chambers under Cty. Cts. Act, 1888 (c. 43), s. 127, to a judge of the Admlty. Div. & refused. The appct. wishing to appeal, the judge granted him leave to appeal direct to the Ct. of Appeal without further argument in ct. On the appeal coming on resp. took the objection that, by s. 132 of the above Act, there was in such case no appeal to the Ct. of Appeal from the decision of the Admlty. Div.:—*Held:* there was an appeal.—THE RECEPTA, Nos. 983, 1559, *ante;* Nos. 1768, 1773, *post.*

Annotations:—**Folld.** *Re* London Scottish Permanent Building Soc. (1893), 63 L. J. Q. B. 112. **Distd.** Mowlem *v.* Dunne (1912), 106 L. T. 611, C. A.
For full anns., *see* S. C. No. 1559, *ante.*

1610. Appeal as to costs — If principle involved.] —A question of the principle on which costs are awarded is subject to appeal, notwithstanding Jud. Act, 1873 (c. 66), s. 49. An addition made to a decree upon motion, giving directions as to costs, is a portion of the decree, not an interlocutory order within R. S. C., O. 58, r. 15; it can be examined in an appeal from the decree.—THE CITY OF MANCHESTER, No. 1286, *ante.*

For full anns., *see* S. C. No. 1286, *ante.*

1611. No appeal — Exercise of discretion.] — Jud. Act, 1873 (c. 66), s. 19, does not give the Ct. of Appeal jurisdiction to entertain an appeal from a judge of the High Ct. with reference to a matter which before the passing of Jud. Acts was in the absolute discretion of the judge.

PART IV. SECT. 2. SUB-SECT. 1.

a. *Appeal on facts.*]—The C. A. in Chancery has jurisdiction to decide on appeal from the Admlty. Ct. on matters of fact, as well as matters of law.—THE JANE (1871), 5 I. L. T. 188.—**IR.**

b. *Claim not for appealable amount—Counterclaim—Appeal limited to judgment on counterclaim.*]—Pltfs.' claim for $408 was dismissed, & defts. on their counterclaim got judgment for $735. Pltfs. appealed:—*Held:* the appeal must be limited to the judgment on the counterclaim, as the claim was not for an appealable amount.—CANADIAN DEVELOPMENT CO. *v.* LE BLANC (1900), 21 C. L. T. 600; 8 B. C. R. 173.—**CAN.**

Leave to extend the time for appealing from a cty. ct. in the exercise of its Admlty. jurisdiction is by Cty. Cts. Admlty. Jurisdiction Act, 1868 (c. 71), s. 27, a matter within the absolute discretion of the judge of the Admlty. Div., & from his decision no appeal lies to the Ct. of Appeal.—THE AMSTEL, No. 1581, *ante*.

For full anns., *see* S. C. No. 1581, *ante*.

1612. Who can appeal—Appellant not party to judgment or subrogated.]—Cargo-owners instructed barge-owners to lighter their goods, & to employ a tug. The tug was so negligently navigated by the tug-owners' servants that the barge containing the goods was brought into collision with another barge, & the goods thereby damaged. In an action by the cargo-owners as pltfs. against the barge-owners & the tug-owners as co-defts., the barge-owners were dismissed from the suit with costs to be paid by the cargo-owners, but the tug-owners were held liable with costs for damage sustained by the cargo-owners, together with costs to be paid by the cargo-owners to the barge-owners. The tug-owners, by a third-party notice, served on the barge-owners, set up a contract of indemnity under which their customers agreed that the tug-owners should "not be answerable for any loss or damage which might happen to, or be occasioned by, any barge, or its cargo, while in tow, however such loss or damage might arise," & undertook to hold them harmless & indemnify them "from any such loss or damage, & against the faults or defaults of their servants or any claim therefor by whomsoever made." Under the issue raised between co-defts. by the third-party notice, the barge-owners were adjudged responsible for the amount of the damage for which the tug-owners had been held liable together with the two sets of costs. Both defts. served notices of appeal; but the appeal of the tug-owners was subsequently withdrawn:—*Held:* the barge-owners could not appeal in respect of the decision in favour of pltfs. against the tug-owners, for they were not parties to that judgment, & not having paid the amount adjudged to be due by tug-owners to pltfs., they were not subrogated to their rights, &, if subrogated, they could not avail themselves of an appeal which the tug-owners had abandoned, nor could they rely on the third-party procedure under Jud. Acts, as no order had been made within R. S. C., O. 16, r. 53, giving directions as to the mode in, or the extent to, which they were to be bound, or made liable, by the judgment against the tug-owners. —THE MILLWALL, [1905] P. 155; 74 L. J. P. 61, 82; 93 L. T. 429; 53 W. R. 471; 21 T. L. R. 346; 10 Asp. M. L. C. 110, C. A.

Annotations:—**Distd.** Colchester Corpn. *v.* Gepp (1913), 11 L. G. R. 349, C. A. **Refd.** The Seacombe, The Devonshire, [1912] P. 21, C. A.; The Devonshire & St. Winifred, [1913] P. 13; The Adriatic, The Wellington (1915), 85 L. J. P. 12.

SUB-SECT. 2.—PRACTICE.

See, generally, PRACTICE & PROCEDURE.

1613. Time—Peremption of appeal.]—In an Admlty. or Vice-Admlty. cause the right of appeal to the Privy Council is perempted by any proceedings being taken by applt. under the decree to be appealed from.—THE BRINHILDA (1881), 45 L. T. 389; 4 Asp. M. L. C. 461, P. C.

1614. Abandonment of appeal.]—Where an appeal is not prosecuted the cause is remitted & applts. condemned in costs.—BROWNLOW *v.* GARSON (1843), 4 Moo. P. C. C. 272; 13 E. R. 306.

1615. —— Continuance of cross-appeal.]—When resp. under R. S. C., O. 58, r. 6, has given notice that he will on the hearing of an appeal contend that the decision of the ct. below should be varied, & applt. withdraws his appeal, such notice entitles resp. to elect whether to continue or withdraw his cross-appeal. If he continues his cross-appeal applt. has the right to give a cross-notice that he will bring forward his original contention on the hearing of resp.'s appeal.—THE BEESWING (1884), 10 P. D. 18; 54 L. J. P. 7; 51 L. T. 883; 33 W. R. 319; 5 Asp. M. L. C. 335, C. A.

1616. Security for costs—Fresh security required.]—Security given in the Admlty. Ct. cannot be made available in the appellate ct. That ct. requires fresh security & a new proxy.—SHEFFIELD *v.* BALL (1756), 2 Lee, 291.

1617. —— ——.]—The form of bail-bond appointed to be given in the Admlty. Ct. by the rules of 1859 to answer judgment "with costs" does not receive a new interpretation from Admlty. Ct. Act, 1861 (c. 10), s. 33, & does not extend to cover costs of an appeal. On an appeal from the Admlty. Ct. to the Privy Council applt. (at least, if resident out of the jurisdiction) will be required by the Privy Council to give security for costs of the appeal.

An applt. will not be required to enlarge any security which he gave as deft. in the Admlty. Ct. to answer judgment & costs in that ct., notwithstanding such security has proved insufficient for that purpose.—THE HELENE, No. 1632, *post*.

1618. —— Not ordered as general rule.]—In appeals from the Admlty. Div. the Ct. of Appeal, following the practice of the Privy Council, will not order an applt. to give security for the costs of the appeal except in special circumstances.

Where, in an action *in rem*, a vessel had been arrested & released on the execution by deft. of a bail bond in the usual form (which, according to the authorities, does not cover the costs of an appeal), & a decree had been made in pltf.'s favour from which deft. had appealed & had obtained an order staying execution pending the appeal:—*Held:* an application by pltf. that deft. might be ordered to give security for the costs of the appeal must be refused.—THE VICTORIA (1876), 1 P. D. 280; 34 L. T. 931; 24 W. R. 596; 3 Asp. M. L. C. 230; 3 Char. Pr. Cas. 460, C. A.

1619. Trinity Masters—Reasons put in writing—Not disclosed.]—Where in a collision action the nautical assessors sitting in the Admlty. Div. reduce their reasons into writing, parties appealing from the decision are not entitled to see these reasons or have copies of them for purposes of the appeal.—THE BANSHEE (1887), 56 L. T. 725; 6 Asp. M. L. C. 130, C. A.

Annotation:—**Consd.** R. *v.* L. G. Board, *Ex p.* Arlidge, [1914] 1 K. B. 160, C. A.

PART IV. SECT. 2, SUB-SECT. 2.

1613 i. *Time—Notice of appeal to Supreme Court of Canada.*]—The judgment in a collision action was handed (not in ct.) by the surrogate to the registrar. The judgment was not drawn up until some days after, but within fifteen days after the judgment was actually drawn up by the registrar notice of appeal was given. Applts. (defts.) sought to quash the appeal for want of notice under r. 269 of the Maritime Ct. of Ontario, which required that notice of appeal must be given within fifteen days from the pronouncement of the decision appealed from:—*Held:* that inasmuch as the notice of appeal was served within fifteen days of the date upon which the order was actually drawn up by the registrar it was within the terms of r. 269.—THE ST. MAGNUS, ROBERTSON *v.* WIGLE (1888), 15 S. C. R. 214.—CAN.

1616 i. *Security for costs—Fresh security required.*]—In an appeal by the impugnant from the decision of the Admlty. Ct. in a suit for derelict salvage, applt. must enter into fresh security in the C. A. to answer the final adjudication, costs, etc.—THE BERLIN (1848), 3 Ir. Jur. O. S. 396.—IR.

1616 ii. —— *How far required.*]—In the case of a vessel registered as British, whose owner resides within the jurisdiction, an order for security for the costs of an appeal brought by him will not, under O. 59, r. 52, in the absence of special circumstances, be made.—SCHOONER B 1 *v.* YOUGHAL U. D. C., [1917] 2 I. R. 633.—IR.

Sect. 2.—*Appeals from the Admiralty Division to the Court of Appeal: Sub-sect.* 2. *Sect.* 3.]

1620. —— Assessors in Court of Appeal—Costs.]—On the hearing of an Admlty. appeal the Ct. of Appeal may call in the aid of nautical assessors, the expense to be paid in the first instance by the successful party who can recover it as part of his costs from the unsuccessful party.—THE DUNKELD (1876), 2 Char. Pr. Cas. 145.

1621. Evidence—Further evidence.]—Application for leave to take the evidence of the crew of a ship before an examiner after judgment & pending appeal was allowed, the ct. expressing no opinion as to whether the evidence should be used at the hearing.—THE CASCAPEDIA (1888), 4 T. L. R. 388, C. A.

1622. —— —— Not admissible—Matters of nautical skill.]—In Admlty. actions, where the ct. is assisted by nautical assessors, evidence as to matters of nautical skill & knowledge is not admissible.

Where in a damage to cargo action the judge found on the advice of his assessors that all screw alleys, however well made, may emit smells which may damage sensitive cargo stowed in the vicinity, the Ct. of Appeal, being assisted by assessors, refused to allow applts., the shipowners, at the hearing of the appeal, to call evidence to show that the particular screw alley did not emit a smell, on the ground that it was a question of nautical skill about which evidence could not be given.—THE ASSYRIAN (1890), 63 L. T. 91; 6 Asp. M. L. C. 525, C. A.

1623. Further appeal from county court—Materials.]—The reasons for judgment of the cty. ct. judge, as well as for that of the High Ct., should be before the Ct. of Appeal when a further appeal is allowed to that ct.—THE SWALLOW, No. 1113, *ante*; No. 1686, *post*.

1624. Stay of execution—Appeal to House of Lords—Bail no ground for stay.]—The practice as to staying execution pending an appeal from the Ct. of Appeal to the House of Lords in actions in the Queen's Bench Div. applies to Admlty. actions. The fact that bail has been given in an Admlty. action *in rem* is not a special ground for staying execution pending an appeal from the Ct. of Appeal to the House of Lords.—THE ANNOT LYLE (1886), 11 P. D. 114; 55 L. J. P. 62; 55 L. T. 576; 34 W. R. 647; 6 Asp. M. L. C. 50, C. A.

Annotations:—**Refd.** The Ratata, [1897] P. 118, C. A. **Mentd.** The Merchant Prince, [1892] P. 179, C. A.; The Schwan, The Albano, [1892] P. 419, C. A.

1625. —— —— Court empowered to grant.]—An application to stay proceedings under an order of the Ct. of Appeal pending an appeal to the House of Lords must be made to the Ct. of Appeal & not to the Div. of the High Ct. to which the action is attached.—THE KHEDIVE (1879), 5 P. D. 1; 41 L. T. 392; 28 W. R. 364; 4 Asp. M. L. C. 182, C. A.

Annotations:—**Distd.** Manks *v.* Whiteley (1913), 57 Sol. Jo. 391. **Refd.** The Annot Lyle (1886), 11 P. D. 114, C. A.; The Ratata, [1897] P. 118, C. A.

1626. —— —— Foreign plaintiff—Repayment of costs incurred below.]—Pltf., a foreigner residing abroad, on instituting his action, deposited £350 by way of security. On judgment being given for defts., £308 13*s.* 10*d.* of this sum was paid over to defts. by way of costs, & the balance returned to pltf., who, on his appeal being successful, claimed return of the costs:—*Held*: in the circumstances a stay would be granted, unless pltf.'s solr. gave an undertaking to refund any costs in the event of deft.'s appeal to the House of Lords being successful.—THE RATATA, [1897] P. 118, C. A.

For full anns., *see* SHIPPING & NAVIGATION.

1627. Reference necessary—Appeal from Vice-Admiralty Court—To whom reference ordered.]—Where, upon the hearing of an appeal to the Privy Council from a judgment upon the report of the registrar of a Vice-Admlty. Ct., the Privy Council is of opinion that the report must be referred back for the finding of other facts & figures, such reference will be to the registrar of Her Majesty in ecclesiastical & maritime appeals, if convenient & less expensive than a reference back to the Vice-Admlty. Ct.—THE CITY OF PEKING (1890), 15 App. Cas. 438; 59 L. J. P. C. 88; 63 L. T. 722; 39 W. R. 177; 6 Asp. M. L. C. 572, P. C. S. C. No. 1413, *ante*.

Annotations:—**Distd.** The Mediana *v.* The Comet, [1900] A. C. 113, H. L. **Mentd.** The Emerald (1896), 80 L. T. 178, n.; The Polynesien, [1910] P. 28.

SECT. 3.—APPEALS TO THE PRIVY COUNCIL.

(NOTE.—*The following cases relating to the appellate jurisdiction of the Privy Council before the Judicature Act* 1873 (*c.* 66), *are retained as being of possible va ue*).

1628. Cases arising out of same occurrence—Notice of appeal in all.]—Where several causes in respect of one collision are heard together & decided in favour of pltfs., & defts. give notice of appeal to the Privy Council in all the causes, the Admlty. Ct. will, upon demand of pltfs. in any one of the causes, require defts. to file their inhibition in that cause (on penalty otherwise of allowing pltfs. to prosecute their claim for damages in ordinary course), & will leave to the Privy Council the question of preventing undue expense arising from multiplicity of causes.—THE AMALIA (1863), 3 New Rep. 217.

1629. Time for appealing—Extension for cross-appeal.]—An action & cross-action having been

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1620 i. *Trinity Masters—Assessors in Court of Appeal—Remuneration.*] —*Semble*: Remuneration at the rate of 5 guineas per diem will be allowed to a nautical assessor sitting in the C. A.—THE RAMBLER (OWNERS) *v.* THE KOTKA (OWNERS), [1917] 2 I. R. 623.—**IR.**

1621 i. *Evidence—Further evidence.*]—The ct. will admit additional evidence upon an appeal, if it appear by affidavit that it was impossible for the party or parties in the ct. below to tender the evidence at the hearing, the witnesses examined being nautical men, whose attendance is not always available.—THE WILLIAM (1854), 7 Ir. Jur. O. S. 354.—**IR.**

PART IV. SECT. 3.

a. *Nautical assessors.*]—On appeal to the Privy Council, where their Lordships name assessors, an opinion on a nautical point given by Canadian assessors may be overruled.—THE ELIZA KEITH & THE LANGSHAW (1877), 3 Q. L. R. 143.—**CAN.**

1629 i. *Time for appealing.*]—Vice-Admlty. Cts. Act, 1863 (*c.* 24), s. 23, which limits the time for appealing from the Vice-Admlty. Cts. abroad to six months, vests, by the same sect., a discretion in the Judicial Committee to admit an appeal, notwithstanding six months have elapsed. Where there was no wilful laches in not lodging a petition of appeal in the Registry of the High Ct. of Admlty. within the prescribed time, & the delay arose from the parties waiting a decision on a pending appeal, which involved a similar question:—*Held*: sufficient for the exercise of the discretion vested in the Judicial Committee to admit an appeal under that sect., upon payment of the costs of the application, & giving security for further costs.—CASSANOVA *v.* R., THE RICARDO SCHMIDT (1866), L. R. 1 P. C. 115; 3 Moo. P. C. C. N. S. 484; 12 Jur. N. S. 127; 16 E. R. 183, P. C.—**SIERRA LEONE.**

1629 ii. ——.]—By r. 35 of the rules respecting appeals from Vice-Admlty. Cts. abroad, made & ordained under 2 Will. 4, c. 51, all appeals from the decrees of Vice-Admlty. Cts. were to be asserted within fifteen days after the date of the decree:—*Held*: the words "after the date of the decree" meant after the date when the decree was pronounced by the Admlty. or Vice-Admlty. Ct., not the date when the decree was reduced to writing & signed. On July 23, 1880, the High Ct. in its appellate jurisdiction, modifying a decree of the High Ct. as a Vice-Admlty Ct. in a cause of damage by collision,

instituted in the Admlty. Ct. in a case of collision, & the two actions having been heard together by consent, upon the same evidence, an appeal was entered against the sentence of the ct. below in the principal action only, without the knowledge of the parties in the cross-action; & 15 days (the time limited for appealing) having elapsed, the parties in the cross-action sought, & in the circumstances obtained, leave to appeal in that action.—THE MÆANDER, THE FLORENCE NIGHTINGALE (1862), 1 Moo. P. C. C. N. S. 42; Lush. 530; 32 L. J. P. M. & A. 1; 6 L. T. 765; 8 Jur. N. S. 1067; 10 W. R. 794; 1 Mar. L. C. 237; 15 E. R. 618; *sub nom.* THE MÆANDER, 6 L. T. 400; 1 Mar. L. C. 221, P. C.

1630. Appeal as to costs—When allowable.]—Though as a general rule no appeal lies on a question of costs, yet, where there has been a mistake on a matter of law that governs or affects costs, the party prejudiced is entitled to have the benefit of correction by appeal.—THE ORIENT, Nos. 945, 1507, *ante*.

Annotations:—**Consd.** Reiken *v.* Yorke Peninsula JJ., Kean *v.* Adelaide Licensing JJ., [1908] A. C. 454, P. C.
For full anns., *see* S. C. No. 1507, *ante*.

1631. Bail in Admiralty Court—Whether available in Privy Council.]—*Qu.*: whether bail given in the Admlty. Ct. holds good in the Privy Council.—THE WILHELMINE (1842), 3 L. T. 217, 419; *Shipping Gazette*, March 4.

1632. Security for costs—How far ordered.]—A suit *in rem* was instituted in the Admlty. Ct. under Admlty. Ct. Act, 1861 (c. 10), s. 6, against a foreign vessel to recover damages to the cargo by negligence. The owners of the vessel were foreigners resident abroad. The ship was arrested for £600, the estimated amount of the damages & costs, & a bail-bond being given for that amount, the ship was released. By the decree of the Admlty. Ct. the damages & costs awarded exceeded the amount of the bail-bond. The foreign owners having appealed to the Privy Council from that decree, resps. applied for further security, (1) for the costs incurred in the ct. below uncovered by the bail-bond, & (2) for costs of the appeal:—*Held:* (1) an appellate ct. could not entertain so much of the application as related to the costs incurred in the ct. below; (2) as s. 33 of the above Act was not yet in operation, & applts. were foreigners resident abroad, the rule requiring foreigners appealing to find security for costs was still in force, & security was directed to be given by applts. for costs of appeal.—THE HELENE (1865), 3 Moo. P. C. C. N. S. 240; Brown. & Lush. 425; 6 New Rep. 279; 35 L. J. Adm. 1; 13 W. R. 931; 16 E. R. 90, P. C. S. C. No. 1617, *ante*.

1633. Right of appeal — Not affected by—Tender in satisfaction.]—An offer made by the agents of applts. to the agents of resps., tendering a specific sum as the full amount in satisfaction of the damages & costs to which resps. were declared entitled by judgment of the ct., made after judgment, but declined:—*Held:* not to perempt applts.' right to appeal.—THE ULSTER (1862), 1 Moo. P. C. C. N. S. 31; Lush. 424; 8 Jur. N. S. 1067; 10 W. R. 794; 15 E. R. 614, P. C.

Annotation:—**Consd.** The Mæander (1862),' 1 Moo. P. C. C. N. S. 42, P. C.

1634. Interlocutory order—Unloading & sale of cargo.]—An order was made by the Privy Council on the application of resps. in a pending appeal for unlivery of the cargo & sale of a mtged. ship, the unlivery & sale of which had been decreed by the Admlty. Ct.—THE JEFF DAVIS (1868), L. R. 2 P. C. 19; 5 Moo. P. C. C. N. S. 25; 16 E. R. 424, P. C.

1635. Rehearing.]—A judgment of the Admlty. Ct. in a cause of collision, which imputed mutual blame, & condemned each party in a moiety of the damages & costs, was reversed by the Privy Council upon a review of the evidence & the opinion of the nautical assessors. A petition was presented for the rehearing of the appeal, before the report of the Privy Council had been confirmed by Her Majesty in Council, stating that evidence had been received at the hearing of the appeal which was not called for or produced in the ct. below, & which petitioner alleged contradicted the case made by the pleadings on both sides. The petition was dismissed, the Privy Council without deciding that they were not competent to grant a rehearing, being of opinion that the grounds relied on in the petition did not bring the case within any principle on which such application could be supported.—THE SINGAPORE & THE HEBE (1866), L. R. 1 P. C. 378; 4 Moo. P. C. C. N. S. 271; Holt, Adm. 124; 16 E. R. 319, P. C.

1636. Evidence—Admissibility of further evidence—Where no appraisement.]—Where the salvors took no step in the Admlty. Ct. to issue a commission of appraisement of the vessel proceeded against, the Privy Council, as the ct. of final appeal, will not admit affidavits as to the value of the vessel.—COLBY *v.* WATSON (1848), 6 Moo. P. C. C. 334; 6 Notes of Cases, 56; 13 E. R. 712, P. C.

1637. —— —— ——.]—Upon an appeal from an award of magistrates in a cause of salvage, the ct. allowed a new appraisement to be made at the prayer & expense of the owners (who had not by themselves or agents objected to the original appraisement).—THE OSCAR (1829), 2 Hag. Adm. 257.

Annotations:—**Refd.** Bird *v.* Gibb (1883), 8 App. Cas. 559; The City of Chester (1884), 9 P. D. 182, C. A.

1638. —— ——.]—Leave to adduce fresh evidence upon appeal was refused, it appearing (1) the matters to which such evidence referred regarded the loss of insurance by reason of the deviation of a vessel from her course in effecting the salvage services, which fact was sufficiently before the ct.

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referred it to the registrar to assess the damages that had been incurred in reference to one of the ships, both of which were in fault. The parties went, without protest, before the registrar for that purpose, impugnants also having taken out process to compel the appearance of promovents before him, & the damages were assessed with the consent of both parties at a certain amount. On Sept. 2, 1880, a notice of appeal was given on behalf of impugnants, & was recorded as asserted pursuant to the above rule:—*Held:* (1) the appeal was not within time, more than fifteen days having elapsed after the decree before the appeal was asserted; (2) the proceedings taken before the registrar were themselves sufficient also to prevent an appeal as of right.—THE BRENHILDA (OWNERS) *v.* BRITISH INDIA STEAM NAVIGATION CO. (1881), I. L. R. 7 Calc. 547.—**IND.**

1632 i. *Security for costs—How far ordered.*] — Upon the application of resps. in chambers for an order under the rules established by Colonial Cts. of Admlty. Act, 1890 (c. 27), fixing bail to be given by them upon an appeal by them to His Majesty in Council to answer the costs of such appeal, it was ordered that resps. should give bail to answer the costs of the proposed appeal in the sum of £300 sterling, to the satisfaction of the Registrar of the Supreme Court of Canada within a specified time, costs of the application to be costs in the cause.—S.S. CAPE BRETON *v.* RICHELIEU & ONTARIO NAVIGATION CO. (1905), 36 S. C. R. 592.—**CAN.**

1632 ii. *S. P.* THE ALBANO *v.* THE PARISIAN (1906), 37 S. C. R. 301.—**CAN.**

1632 iii. —— ——.]—Privy Council Rules, 1865, r. 15, regulating appellate procedure from Vice-Admlty. Cts., by which an applt. is required to give bail in £200 to answer the costs of appeal, is not impliedly repealed by Vice-Admlty. Cts. Rules, 1883, r. 150, by which an applt. may be required to give security not exceeding £300 for the costs of the appeal, but the Judicial Committee has a discretion in fitting cases to dispense applt. from giving security under Privy Council Rules, 1865, r. 15.—THE HESKETH (1891), 66 L. T. 305, P. C.—**AUS.**

1633 i. *Right of appeal.*]—Upon the application of applts. to the full ct. for an order to fix the bail on appeal to His Majesty in Council it was contended by resps. that there was no appeal *de plano*. The ct. granted the application *pro formâ*, but expressed no opinion as to the right of appeal.—THE ALBANO *v.* THE PARISIAN (1906), 37 S. C. R. 284.—**CAN.**

Sect. 3.—*Appeals to the Privy Council. Sect.* 4: *Sub-sects.* 1 & 2]

below to enable it to apportion the amount of salvage, & (2) the further evidence went to meet a charge affecting character, which might have been met with an application to the ct. below, the Privy Council being of opinion that, if requisite, sufficient opportunity would be afforded the parties to produce such evidence at the hearing of the appeal.—THE SCINDIA (1866), L. R. 1 P. C. 241; 4 Moo. P. C. C. N. S. 84, 106; 16 E. R. 248. S. C. No. 1674, *post.*

Annotations:—**Mentd.** The Chetah (1868), 5 Moo. P. C. C. N. S. 278, P. C.; The Glenduror (1871), L. R. 3 P. C. 589, P. C.; The Amerique (1874), L. R. 6 P. C. 468; The Thomas Allen *v.* Gow (1886), 12 App. Cas. 118, P. C.

SECT. 4.—PRINCIPLES ON WHICH THE APPEAL COURT ACTS.

SUB-SECT. 1.—IN GENERAL.

1639. Question of nautical fact—Credibility of witnesses.]—On an appeal from the Admlty. Div., the Ct. of Appeal, when unassisted by nautical assessors, will not reverse a finding of the ct. below upon a question of fact depending upon the credibility of witnesses regarded from a nautical point of view, provided that there is evidence in support of that finding.—THE SISTERS, No. 469, *ante.*

For full anns., *see* S. C. 469, *ante.*

1640. —— ——.]—Though the Privy Council will not lay down any exclusive rule as to appeals from judgments of the ct. below, upon questions which are entirely of facts, yet the ct. is reluctant to come to a conclusion different from that of the judge of the ct. below merely on a balance of testimony, the judge having had the opportunity of seeing & testing the conduct & demeanour of the witnesses.

Where in a cause of collision in which the evidence was entirely oral, & the judge of the ct. below, assisted by Trinity Masters, determined on the evidence which vessel was in fault, & decreed damages accordingly, the Privy Council, approving the finding, affirmed that judgment & dismissed the appeal with costs.—THE ALICE & THE PRINCESS ALICE (1868), L. R. 2 P. C. 245; 5 Moo. P. C. C. N. S. 333; 38 L. J. Adm. 5; 19 L. T. 678; 17 W. R. 209; 3 Mar. L. C. 180; 16 E. R. 541, P. C.

Annotations:—**Consd.** The Glannibanta (1876), 1 P. D. 283, C. A. **Expld.** The Ophelia, [1916] 2 A. C. 206, P. C. **Reid.** The Olympic & H.M.S. Hawke (1913), 83 L. J. P. 113, C. A.

1641. —— ——.]—The Privy Council on appeal, not being quite satisfied with the opinion given to the judge of the Admlty. Ct. by the nautical assessors, but not being able to form so strong a conviction that his judgment was wrong as to warrant them in reversing it, affirmed his judgment with costs.—THE EMPEROR & THE LADY OF THE LAKE (1865), Holt, Adm. 37, 202; 3 Mar. L. C. App. p. 50.

1642. —— —— **Limitations on general rule.**]—The rule that the Ct. of Appeal will not, except in extreme cases, reverse the decision of the ct. below on a question of fact, when the judge of the latter ct. has come to a clear conclusion after sitting & hearing the witnesses, applies only to cases where his decision depends upon the credibility of the witnesses as evinced by their demeanour, & not to cases where it depends upon the drawing of inferences from the facts sworn to.—THE GLANNIBANTA (1876), 1 P. D. 283; 24 W. R. 1033, C. A.; *sub nom.* THE TRANSIT, 34 L. T. 934; 2 Char. Pr. Cas. 18; 3 Asp. M. L. C. 233, C. A.

Annotations:—**Folld.** Bigsby *v.* Dickinson (1876), 4 Ch. D. 24, C. A. **Reid.** The Olympic & H.M.S. Hawke (1913), 83 L. J. P. 113, C. A.

1643. Effect of Trinity Masters advising court below.]—Though the Trinity Masters advise the judge below, the sentence is entirely his, & must, with reference to the facts & the law, be reviewed by the Privy Council, though the ct. would give the greatest attention & respect to the opinions of persons whose advice had been solicited by the judge. Neither the opinion of the assessors nor the decision of the judge is analogous to the verdict of a jury on a question of fact at common law, which is altogether conclusive. — WILLIAMS *v.* CHAPMAN (1846), 4 Notes of Cases, 585. S. C. No. 1203, *ante.*

1644. Decision of court below varied—Where full materials available—Verdict set aside.]—Where on a claim for salvage a jury finds that the services are pilotage, & a Div. Ct. directs a new trial, the Ct. of Appeal will, if it appears that all the materials are before it upon which to decide the case, go farther than the Div. Ct., & set aside the verdict for defts., the owners of the cargo, & enter judgment for pltfs. without another trial.—AKERBLOM *v.* PRICE (1881), 7 Q. B. D. 129; 50 L. J. Q. B. 629; 44 L. T. 837; 29 W. R. 797; 4 Asp. M. L. C. 441, C. A.

For full anns., *see* SHIPPING & NAVIGATION.

1645. Res judicata—Effect of no cross-appeal.]—There were cross-suits respecting a collision between a steamer & a sailing vessel. The Admlty. Ct. held both to blame. The steamer alone appealed in both suits:—*Held:* as the sailing vessel had not appealed from the decree which declared she was in the wrong, such decree operated as *res judicata* that the allegations made in her suit were not substantiated.—THE CITY OF ANTWERP & THE FRIEDRICH (1868), L. R. 2 P. C. 25; 5 Moo. P. C. C. N. S. 33; 37 L. J. Adm. 25; 16 E. R. 427. S. C. No. 925, *ante.*

Annotation:—**Mentd.** The Norma (1876), 35 L. T. 418, P. C.

1646. Trivial errors in accounts.]—The House of Lords will not interpose to correct small mistakes on both sides of an account.—THE MARPESSA, No. 1433, *ante.*

For full anns., *see* S. C. No. 1433, *ante.*

1647. New trial.]—The Admlty. Ct. acts upon the rule established by the House of Lords that when evidence pertinent to the issue is rejected there must be a new trial.—THE FENIX *v.* THE MOBILE (1856), 3 L. T. 123; *Shipping Gazette*, Jan. 8.

1648. ——.]—*Semble:* where objection is taken to the exclusion of evidence by the judge of the Admlty. Ct., the proper course is to apply to the Ct. of Appeal for a new trial on that ground, & not to tender the evidence afresh in the Ct. of Appeal. —THE SIR ROBERT PEEL, Nos. 1201, 1222, *ante.*

SUB-SECT. 2.—GROUNDS FOR REVERSING THE COURT BELOW.

1649. Where satisfied that judgment wrong—Doubts not sufficient.]—Where a disputed fact, in-

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PART IV. SECT. 4, SUB-SECT. 1.

1639 i. *Question of nautical fact.*]—THE MYSTIC *v.* THE NANNA C. R. [1911] 2 A. C. 392.—**CAN.**

1639 ii. —— *Contradictory evidence.*]—In an action for collision the evidence was contradictory. On appeal:—*Held:* the ct. could not reverse the decision on questions of fact unless it was clearly shown that the finding was erroneous.—THE RELIANCE *v.* CONWELL (1901), 31 S. C. R. 653.—**CAN.**

PART IV. SECT. 4, SUB-SECT. 2.

1649 i. *Where satisfied that judgment wrong—Doubts not sufficient.*]—On appeal from a judgment of a local judge in Admlty. under Admlty. Act, 1891 (c. 29), s. 14, the ct. will not interfere with a finding of fact by the local judge unless satisfied beyond a reasonable doubt that the evidence does not warrant such finding. — LANDRY *v.* RAY (1894), 4 Ex. C. R. 280.—**CAN.**

1649 ii. ——.]—On appeal from a decree of the Maritime Ct. of On-

volving nautical questions, is raised by an appeal from the Admlty. Ct., as in the case of a collision, the Privy Council will not reverse the decree appealed from, unless it is conclusively satisfied that the decree is wrong, even though the Privy Council may entertain doubts as to the finding of the Admlty. Ct.—THE JULIA (1860), 14 Moo. P. C. C. 210; Lush. 224; 15 E. R. 284, P. C.

Annotations:—**Folld.** The Schwalbe (1860), 14 Moo. P. C. C. 241, P. C. **Consd.** Ward *v.* M'Corkill (1861), 15 Moo. P. C. C. 133. **Expld.** Grindley *v.* Stevens (1863), 1 Moo. P. C. C. N. S. 379, P. C. **Folld.** Trask *v.* Maddox (1863), 2 Moo. P. C. C. N. S. 243; The Constitution (1864), 2 Moo. P. C. C. N. S. 453. **Apld.** The Thames *v.* The Stork (1866), Holt, Adm. 151, P. C. **Folld.** The Alice & The Princess Alice (1868), L. R. 2 P. C. 245, P. C.; The Esk *v.* The Niord (1870), L. R. 3 P. C. 436, P. C. **Consd.** The Glannibanta (1876), 1 P. D. 283, C. A.; Spaight *v.* Tedcastle (1881), 6 App. Cas. 217; The Ophelia, [1916] 2 A. C. 206, P. C. **Refd.** The Araxes & The Black Prince (1861), 15 Moo. P. C. C. 122, P. C. **Mentd.** The Nightwatch (1862), Lush. 542; The Energy (1870), L. R. 3 A. & E. 48; Brown *v.* Clegg (1871), 23 L. T. 634; Smith *v.* St. Lawrence Tow Boat Co. (1873), L. R. 5 P. C. 308; Johnson *v.* Lindsay (1889), 23 Q. B. D. 508, C. A.; The Altair, [1897] P. 105.

1650. ——— ———.]—The judgment of the Admlty. Ct. in a cause of damage by collision pronounced by the judge, assisted by the Trinity Masters, was reversed upon an examination of the evidence, which was taken on interrogatories, & on the opinion on the nautical points in question of the sailing masters advising the Privy Council on the appeal.—THE JOHN & MARY (1862), 15 Moo. P. C. C. 374; 15 E. R. 536, P. C.

1651. ——— ———.]—The Privy Council, though reluctant to disturb the judgment of the Admlty. Ct. on a question of seamanship, will not shrink from so doing if satisfied by the advice of their nautical assessors that the decision of the ct. below was erroneous.—THE FALKLAND, THE NAVIGATOR (1863), Brown. & Lush. 204; 1 Moo. P. C. C. N. S. 379; 9 L. T. 1; 9 Jur. N. S. 1113; 1 Mar. L. C. 367, P. C.

1652. ——— ———.]—Although there may be considerable doubt in the estimate taken by the Admlty. Ct. in respect of evidence of witnesses upon questions of nautical skill, yet, considering the advantage that ct. has from the assistance of the Trinity Masters, the Privy Council must be satisfied that the ct. below was wrong, to justify a reversal of such finding.—THE CONSTITUTION (1864), 2 Moo. P. C. C. N. S. 453; Brown. & Lush. 324; 10 L. T. 894; 10 Jur. N. S. 831; 2 Mar. L. C. 60; 15 E. R. 972, P. C. S. C. No. 1159, *ante*.

1653. *S. P.* THE WEARMOUTH (1860), 7 L. T. 101.

1654. *S. P.* THE ARAXES & THE BLACK PRINCE, No. 1704, *post*.

1655. ——— ———.]—The question whether ships are meeting so as to involve risk of collision is one of fact, & the Privy Council will not interfere with the decision of the ct. below on that question unless it is conclusively shown to be wrong. — THE THAMES *v.* THE STORK (1866), Holt, Adm. 151, P. C.

1656. Discretion—Exercised on wrong principles.]—In an action for wages & damages for wrongful dismissal by British seamen who had served on a Spanish ship under Spanish articles, the Spanish consul at L. protested against the exercise of the jurisdiction of the ct., & the ct. dismissed the action:—*Held*: to enable the Ct. of Appeal to overrule the discretion of the ct. below as to entertaining the action, the judge must be shown to have exercised it on wrong principles or wrongly or unfairly.—THE LEON XIII., No. 451, *ante*.

1657. Principal question not decided below.]—Where the Admlty. Ct. has given no opinion on a question which in the opinion of the Privy Council is a vital one in the cause, the Privy Council will decide that question on the evidence before it.—THE C. M. PALMER, THE LARNAX (1873), 29 L. T. 120; 2 Asp. M. L. C. 94, P. C.

1658. ———.]—A question not having been properly raised in the ct. below, cannot be entertained by the Privy Council.—THE CHRISTINA (1848), 6 Moo. P. C. C. 371; 6 Notes of Cases, 361; 13 E. R. 726, P. C.

1659. ———.]—Where on appeal in a collision case it appeared that the ct. below had found that applts.' ship was to blame, & had accepted the story told by resps.:—*Held*: it was not open to applts. on the appeal to raise the contention that, assuming applts. to be to blame, resps. were also to blame, as applts. had not raised such question in the ct. below.—S.S. PLEIADES & PAGE *v.* PAGE & S.S. JANE & LESSER, [1891] A. C. 259; 60 L. J. P. C. 59; 65 L. T. 169; 7 Asp. M. L. C. 41, P. C.

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tario in a collision case: *Held*: the judgment of the lower ct. would not be reversed unless it was clearly shown by applt. that the judgment was formed on some mistake either on the law or the facts of the case, & the appeal ct. was most unwilling to reverse the judgment merely upon a balance of testimony. *Khoorshed-ju Manik-ju* v. *Mehrwan-ju Khoorshed-ju* (1837), 1 Moo. Ind. Ap. Cas. 442; *Moore* v. *Clucas* (1850), 7 Moo. P. C. C. 352; *Baboo Utrack Sing* v. *Beny Persad* (1834), 2 Knapp's P. C. C. 265; *The Araxes & The Black Prince* (1861), 15 Moo. P. C. C. 122; *The Constitution* (1864), 2 Moo. P. C. C. N. S. 53; *The Julia* (1860), 14 Moo. P. C. C. 210; *The Alice* (1868), L. R. 2 P. C. 252; *Gray* v. *Turnbull* (1870), L. R. 2 Sc. & Div. 53, folld.—THE PICTON (1879), 4 S. C. R. 648.—**CAN.**

1649 iii. ——— ———.]—In an action for collision through the breaking down of the steering apparatus, the local judge in Admlty. found that the steering gear was in good order when the *S.* started on her voyage, but that the collision was due to want of prompt action by the master & officers when the wheel refused to work. On appeal:—*Held*: only a question of fact was involved, &, though doubtful, if the evidence was sufficient to warrant the finding, the decision was not so clearly wrong as to justify an appellate ct. in reversing it.—THE SANTANDARINO *v.* THE VARWART (1893), 23 S. C. R. 145.—**CAN.**

1649 iv. ——— ———.]—The ct. will not interfere where there was a conflict of testimony on two questions of fact material to the decision of the case, both of which were found by the local judge in Admlty. in favour of defts., the burden of proof being upon pltf., & there being evidence to support the findings. *The Franconia* (1876), 2 P. D. 8, refd.—INCHMAREE S.S. CO. *v.* THE ASTRID (1899), 6 Ex. C. R. 218.—**CAN.**

1651 i. ——— ———.]—The ct. will not in a case involving difficult questions of navigation interfere with the findings of a nautical assessor when adopted by the trial judge unless applt. can literally put his finger on the mistake & show irresistibly that the judgment complained of is not only wrong but entirely erroneous. *Gray* v. *Turnbull* (1870), L. R. 2 Sc. & Div. 53, folld.; *The Khedive* (1880), 5 App. Cas. 876; *The Benares* (1888), 9 P. D. 16; *The Constantia* (1889), 62 L. T. 236, refd.—THE ARRANMORE *v.* RUDOLPH (1906), 38 S. C. R. 176.—**CAN.**

1656 i. *Discretion — Exercised on wrong principles — Adopting expert's opinion.*]—In an action for collision the judge requested the parties to appoint some experienced mariners with whom he might confer. This having been done, the judge adopted their view as to responsibility for the collision. On appeal:—*Held*: as the judge had not merely consulted the assessors as experts for an opinion on an admitted state of facts, but had left the facts of the case to them, & had adopted the conclusions which they had drawn as to the weight of evidence & credibility of witnesses, a new trial must be ordered. *The Beryl* (1884), 9 P. D. 137 cited.—WRIGHT *v.* COLLIER (1892), 19 A. R. 298.—**CAN.**

1658 i. *Principal question not decided below.*]—When a view of the facts is presented which has not been suggested before, that view should be most jealously scrutinised by an appeal ct., which should only decide in favour of an applt. on a view there put forward for the first time if it is satisfied beyond doubt that it has before it all the facts bearing upon the new contention as would have been the case if raised at the trial, & that no satisfactory answer would have been made by the party whose conduct is impugned. An appeal ct. suffers from the disadvantage of lacking skilled nautical advice, which emphasises the importance of having all questions of fact, especially as to seamanship, distinctly raised before the ct. which tries it with the assistance not afforded before the higher ct. *The Tasmania* (1890), 15 App. Cas. 223; *The Anselm*, [1907] P. 151, folld.—THE TORDENSKIOLD *v.* THE EUPHEMIA (1908), 41 S. C. R. 154.—**CAN.**

Sect. 4.—Principles on which the Appeal Court acts: Sub-sect. 3, A. & B. Sect. 5: Sub-sect. 1.]

SUB-SECT. 3.—SALVAGE APPEALS.

A. Since the Judicature Acts.

1660. Appeal as to amount—Presumption in favour of award—Grounds for interference.]—In reviewing an award for salvage made by the judge of the Admlty. Div. & affirmed by the Ct. of Appeal the House of Lords will not interfere with the amount awarded unless it appears that the established principles have not been satisfactorily applied.—THE GLENGYLE, [1898] A. C. 519; 67 L. J. P. 87; 78 L. T. 801; 14 T. L. R. 522; 8 Asp. M. L. C. 436, H. L.

1661. —— —— ——.]—In salvage appeals, the Ct. of Appeal, following the rule of the Privy Council, will not interfere with the amount of the award unless the amount has been estimated on wrong principles or on a misapprehension of the facts, or unless, assuming the principles & facts to be correct, the amount of salvage is, in the opinion of the Ct. of Appeal, exorbitant in the sense of being beyond all reason.—THE LANCASTER (1883), 9 P. D. 14; 49 L. T. 705; 32 W. R. 608; 5 Asp. M. L. C. 174, C. A.

1662. —— **Amount increased or diminished.**]—The Ct. of Appeal will in a salvage action, where it appears that the judge below has misapprehended the evidence & given a wrong award, increase or diminish the award as the justice of the case may require.

The barque *S.*, having taken up a foul berth in bad weather in the Downs, collided with another barque. The tug *C.* towed her clear after an hour's towing, during which time her anchor & chain were slipped. After she had been got clear the tug continued to tow ahead until another anchor had been brought off from the shore by other salvors, & she was ultimately saved. Her value & that of her cargo & freight amounted in all to £23,000. BUTT, J., in a salvage action against the *S.*, having awarded £150:—*Held:* (1) the judge had misapprehended the evidence as to the danger from which the *S.* had been saved; (2) the award must be increased to £300.—THE STAR OF PERSIA (1887), 57 L. T. 839; 6 Asp. M. L. C. 220, C. A.

1663. —— ——.]—The Privy Council is reluctant to review salvage awards which involve the exercise of the discretion of the judge below, & will not do so unless the amount awarded differs to the extent of one-third from that which the Privy Council thinks adequate.

The steamship *T. A.*, of 1,701 tons, laden with a cargo of grain, broke her screw shaft on Oct. 3, 1885, when in the Gulf Stream, about 300 miles from Halifax. On the evening of the same day the *A.*, of about 1,600 tons, laden with cargo & bound from Philadelphia to Bordeaux, took the *T. A.* in tow about 8.30 p.m. & brought her safely into Halifax about 3.30 p.m. on Oct. 5. The weather was fine, & the *A.* ran no danger in rendering the services. The *T. A.* was in no immediate danger when picked up. The value of the *T. A.*, her cargo & freight, was 126,775 dollars; the value of the *A.*, her cargo & freight, was 132,500 dollars. The Vice-Admlty. Ct. of Halifax having awarded 12,000 dollars:—*Held:* the award was excessive, & must be reduced to 7,500 dollars. —THE THOMAS ALLEN (1886), 12 App. Cas. 118; 56 L. T. 285; 3 T. L. R. 188; 6 Asp. M. L. C. 99, P. C.

1664. —— ——.]—There is no rule binding the Ct. of Appeal not to interfere with a salvage award unless the amount is so large or so small that no reasonable man could fairly arrive at the sum awarded. The amount awarded will be increased or diminished if, after carefully considering the facts & giving every possible weight to the view of the previous judge, the amount appears to the Ct. of Appeal so large as to be unjust to the owners of the salved ship or so small as to be unjust to the salvors.—THE ACCOMAC, [1891] P. 349; 66 L. T. 335; 7 T. L. R. 649; 7 Asp. M. L. C. 153, C. A.

Annotations:—**Apld.** The Lindfield, The Challenge & Columbia, The Lady Vita & Granville *v.* The Lingfield (1894), 10 T. L. R. 606, C. A.; The Prince Llewellyn, [1904] P. 83, D. C.; The Port Hunter, [1910] P. 343, C. A.

B. Before the Judicature Acts.

1665. Appeal as to amount—Presumption in favour of award.]—In a salvage case where the appeal is substantially confined to the quantum of compensation for salvage services awarded by the ct. below, the rule which governs the Privy Council is similar to that of the common law cts. in dealing with a verdict as to the amount of damages where the jury have paid attention to the case & been properly directed by the judge.—THE CARRIER DOVE (1863), 2 Moo. P. C. C. N. S. 243; 15 E. R. 893.

Annotations:—**Consd.** The Chetah (1868), L. R. 2 P. C. 205; The Glenduror (1871), L. R. 3 P. C. 589; The Amérique (1874), L. R. 6 P. C. 468. **Refd.** The Thomas Allen (1886), 12 App. Cas. 118, P. C. **Mentd.** Kemp *v.* Halliday (1866), 6 B. & S. 723; Vivian *v.* Mersey Dock & Harbour Board (1869), L. R. 5 C. P. 19; The Gas Float Whitton (No. 2), [1898] P. 301.

1666. —— **Grounds for interference.**]—An appellate ct. in a disputed question respecting the amount of remuneration awarded by the ct. below for salvage service is indisposed, except it appears that the judgment is clearly erroneous, to interfere with the compensation which the ct. below, in its discretion, has awarded.—THE CLARISSE (1856), 12 Moo. P. C. C. 340; Sw. 129; 14 E. R. 940, P. C. S. C. No. 1673, *post.*

Annotations:—**Apld.** The Neptune (1858), 12 Moo. P. C. C. 346, P. C.; The Carrier Dove (1863), 2 Moo. P. C. C. N. S. 243, P. C.; The Chetah (1868), L. R. 2 P. C. 205, P. C.; The England (1868), L. R. 2 P. C. 253, P. C. **Apprvd. & Apld.** The Glenduror (1871), 8 Moo. P. C. C. N. S. 22, P. C. **Apld.** The Amérique (1874), L. R. 6 P. C. 468, P. C.; The Thomas Allen (1886), 12 App. Cas. 118, P. C. **Mentd.** The Zeta (1875), L. R. 4 A. & E. 460.

1667. —— ——.]—The Privy Council will not disturb an award of salvage by the ct. below, on the ground of that ct. having awarded too large a sum, unless the Privy Council is satisfied, beyond all doubt, that the judge has made an exorbitant estimate of the salvage services.—THE FUSILIER (1865), 3 Moo. P. C. C. N. S. 51; Brown. & Lush.

PART IV. SECT. 4, SUB-SECT. 3.—A.

1660 i. *Appeal as to amount—Presumption in favour of award—Grounds for interference.*] — The rule which guides the ct. in dealing with objections to the amount awarded by an Admlty. Ct. of first instance is that, if the ct. cannot say that the judge has misapprehended the facts, or has acted contrary to any principle, it cannot interfere if the amount does not seem to be unreasonable.

A sealing steamer of 197 tons with a crew of one hundred men, while on her way & actually prosecuting the seal fishery fell in with a freight & passenger steamer surrounded by ice. At the request of the captain, she stood by her & aided in bringing her safely into port. The value of the property salved was about $53,000. In a suit instituted for salvage the ct. awarded a sum of $12,000, & $500 for value of coal & provisions supplied. On appeal:—*Held:* the award was excessive & should be reduced to $6,500.—BOWRING BROTHERS & KENT *v.* THE GASPESIA (1899), 8 Nfld. L. R. 290—**NFLD.**

1662 i. —— *Amount increased or diminished.*]—THE NANA *v.* THE MYSTIC (1909), 6 E. L. R. 303; 41 S. C. R. 168. —**CAN.**

PART IV. SECT. 4, SUB-SECT. 3.—B.

1665 i. *Appeal as to amount—Amount increased or diminished.*]—The Admlty. Ct. will review the decision of magistrates in a salvage case heard before them, & may either increase the remuneration awarded below if insufficient, or decrease it if excessive.—THE AMAZON (1858), 5 Ir. Jur. N. S. 111; 8 L. T. 613.—**IR.**

341; 5 New Rep. 453; 12 L. T. 186; 11 Jur. N. S. 289; 13 W. R. 592; 2 Mar. L. C. 177; 16 E. R. 19, P. C.

Annotations:—**Consd.** The Chetah (1868), L. R. 2 P. C. 205, P. C.; The Glenduror (1871), 24 L. T. 499, P. C. **Refd.** The Amérique (1874), L. R. 6 P. C. 468, P. C.; The Sarpedon (1877), 3 P. D. 28. **Mentd.** The Schiller (1876), 1 P. D. 473; The Schiller (1877), 2 P. D. 145, C. A.; The Renpor (1883), 8 P. D. 115, C. A.; Blackpool & Fleetwood Tramroad Co. *v.* Thornton U. D. C., [1907] 1 K. B. 568, C. A.

1668. —— ——.]—In an appeal from the award of magistrates in a claim for salvage applts. must show that the magistrates have grossly miscarried in their decision. The appellate ct. will not alter that award on the consideration that if the question had come originally before itself it would possibly have allotted a smaller sum.—THE CUBA (1860), Lush. 14; 8 L. T. 335; 6 Jur. N. S. 152.

Annotations:—**Refd.** Trask *v.* Maddox (1863), 2 Moo. P. C. C. N. S. 243, P. C.; The Chetah (1868), L. R. 2 P. C. 205; The Glenduror (1871), 24 L. T. 499, P. C.; The Amérique (1874), L. R. 6 P. C. 468, P. C.

1669. *S. P.* THE VESTA (1828), 2 Hag. Adm. 189.

Annotation:—**Consd.** The Brothers (1828), 2 Hag. Adm. 195.

1670. —— ——.]—The Privy Council is unwilling to interfere with the judicial discretion in cases of salvage, where the quantum awarded is alone the subject of appeal. Though there is no precedent for reduction of an amount awarded, yet in principle there can be no difference between increasing & reducing such amounts, both being equally an interference with judicial discretion. The amount must be reduced on appeal when the sum awarded is exorbitant or manifestly excessive.

Where the judge of the Admlty. Ct., acting upon his own unassisted judgment, greatly overrated the value of the services rendered by salvors:—*Held:* the amount of his award must be reduced.—THE CHETAH (1868), L. R. 2 P. C. 205; 5 Moo. P. C. C. N. S. 278; 38 L. J. Adm. 1; 19 L. T. 621; 17 W. R. 233; 3 Mar. L. C. 177; 16 E. R. 520, P. C.

Annotations:—**Followed.** The Glenduror (1871), 24 L. T. 499, P. C.; The Amérique (1874), L. R. 6 P. C. 468, P. C. **Refd.** The Alice & The Princess Alice (1868), L. R. 2 P. C. 245, P. C.; The England (1868), L. R. 2 P. C. 253, P. C.; The Woburn Abbey *v.* The Superb & Conqueror (1869), 21 L. T. 707, P. C.

1671. *S. P.* THE AMAZON (1860), 2 L. T. 140.

1672. —— ——.]—The Privy Council is very unwilling to interfere with the judicial discretion exercised by the judge below with regard to the amount awarded for salvage services, & will not do so unless the sum awarded is other than a reasonable remuneration for services rendered, & unless the difference is very considerable.—THE ENGLAND (1868), L. R. 2 P. C. 253; 5 Moo. P. C. C. N. S. 344; 38 L. J. Adm. 9; 20 L. T. 46; 3 Mar. L. C. 216; 16 E. R. 545, P. C.

Annotations:—**Expld.** The Amérique (1874), L. R. 6 P. C. 468, P. C. **Refd.** The Alice & The Princess Alice (1868), 5 Moo. P. C. C. N. S. 333, P. C.

1673. *S. P.* THE CLARISSE, No. 1666, *ante*.

Annotations:—**Consd.** The Neptune (1858), 12 Moo. P. C. C. 346, P. C. **Refd.** The Carrier Dove (1863), 2 Moo. P. C. C. N. S. 243, P. C.; The Chetah (1868), L. R. 2 P. C. 205, P. C.; The England (1868), L. R. 2 P. C. 253, P. C.; The Glenduror (1871), L. R. 3 P. C. 589, P. C.; The Amérique (1874), L. R. 6 P. C. 468, P. C.; The Thomas Allen (1886), 12 App. Cas. 118, P. C.
For full anns., *see* S. C.

1674. *S. P.* THE SCINDIA, No. 1638, *ante*.

Annotations:—**Refd.** The Chetah (1868), 5 Moo. P. C. C. N. S. 278, P. C.; The Glenduror (1871), L. R. 3 P. C. 589, P. C.; The Amérique (1874), L. R. 6 P. C. 468, P. C.; The Thomas Allen (1886), 12 App. Cas. 118, P. C.

1675. *S. P.* THE JEUNE LOUISE (1868), 37 L. J. Adm. 32.

1676. Reduction of amount.]—The Privy Council will not reduce an award of the Admlty. Ct. in a cause of salvage, unless the amount awarded is so exorbitant & so manifestly excessive that it would be unjust to confirm it. The value of property salved is to some extent to be treated as an ingredient in the calculation of the quantum of salvage remuneration, but that value must not be allowed to raise the quantum to an amount altogether out of proportion to the services actually rendered. An award of £30,000 on a value of £190,000 in the case of a derelict ship was reduced to £18,000, on the ground that the reward was out of proportion to the services rendered.—THE AMERIQUE (1874), L. R. 6 P. C. 468; 31 L. T. 854; 2 Asp. M. L. C. 460, P. C.

Annotations:—**Followed.** The Carranza (1885), 1 T. L. R. 379, C. A. **Refd.** The Glengyle *v.* Neptune Salvage Co., [1898] A. C. 519, H. L.

1677. *S. P.* THE GENERAL PALMER (1830), 2 Hag. Adm. 323.

1678. *S. P.* THE PORT HUNTER, [1910] P. 343; 80 L. J. P. 1; 103 L. T. 550; 26 T. L. R. 610; 11 Asp. M. L. C. 492, C. A.

1679. Increase of amount.]—Salvage services of a highly meritorious character having been performed by salvors in saving the lives of the crew, & the ship & cargo, valued at £46,000, the Admlty. Ct. awarded £1,000 as salvage for such services. On appeal:—*Held:* the sum was insufficient, & the remuneration increased to £2,000 in consideration (1) of the great danger the salvors incurred, (2) the fact of the saving of lives & the value of the ship & cargo.—THE GLENDUROR (1871), L. R. 3 P. C. 589; 8 Moo. P. C. C. N. S. 22; 24 L. T. 499; 1 Asp. M. L. C. 31; 17 E. R. 221, P. C.

Annotations:—**Consd.** The Thomas Allen (1886), 56 L. T. 285, P. C. **Refd.** The Amérique (1874), L. R. 6 P. C. 468, P. C.

1680. *S. P.* CALEDONIAN STEAM TOWING CO. *v.* HUTTON (1847), 5 Notes of Cases, 156, P. C.

1681. *S. P.* THE HARRIETT (1857), Sw. 218.

SECT. 5.—COSTS.

SUB-SECT. 1.—SINCE THE JUDICATURE ACTS.

1682. General rule—Costs following the event.]—The costs in Admlty. appeals, as in all other appeals, follow the event, notwithstanding the former practice of the Privy Council in certain Admlty. appeals.—THE SWANSEA *v.* THE CONDOR (1879), 4 P. D. 115; 48 L. J. P. 33; 27 W. R. 748; *sub nom.* THE CONDOR, 40 L. T. 442; 4 Asp. M. L. C. 115, C. A.

Annotations:—**Followed.** The Naples (1886), 11 P. D. 124. **Apprvd.** The Monkseaton (1889), 60 L. T. 662, C. A. **Refd.** The Matthew Cay (1879), 5 P. D. 49. **Mentd.** The Hector (1883), 8 P. D. 218, C. A.

1683. ——.]—THE MONKSEATON, No. 1235, *ante*; No. 1691, *post*.

1684. —— **Exception.**]—It is a general rule in all cases that, in absence of special circumstances, the successful party obtains costs of an appeal & the unsuccessful party has to pay them.

Where, in an action for collision, the Ct. of Appeal (reversing the Admlty. Div.) held that it was the result of inevitable accident:—*Held:* (1) this fell within the general rule; (2) having regard to the particular manner in which the case had

1676 i. *Reduction of amount—No interference with proportion.*] —When the impugnant appeals from a salvage award, & there is no appeal by the salvors (promovents or intervenients) in the ct. below, the ct., although it may reduce the award, will not interfere with the proportions.—THE BERLIN (1846), 4 Ir. Jur. O. S. 11.—IR.

Sect. 5.—*Costs: Sub-sects.* 1 & 2. *Part V. Sect.* 1: *Sub-sect.* 1.]

been conducted, defts. having alleged facts inconsistent with the defence of inevitable accident & failed to establish their truth, there were such special circumstances as to entitle the ct. to order that each party should pay his own costs in the ct. below.—THE BATAVIER (1889), 15 P. D. 37; 59 L. J. P. 54; 62 L. T. 406; 38 W. R. 522; 6 Asp. M. L. C. 500, C. A.

1685. —— —— **Judgment affirmed on different grounds—No costs.**]—Where the judgment of the ct. below was affirmed, but for reasons other than those given by the judge below, the Ct. of Appeal differing from those reasons:—*Held:* each party must pay his own costs.—THE DUNELM (1884), 51 L. T. 214; 5 Asp. M. L. C. 304, C. A.

For full anns., *see* SHIPPING & NAVIGATION.

1686. —— —— **Appeal with leave.**]—Costs were not allowed when the Ct. of Appeal reversed the decision of the ct. below in an appeal for which permission was necessary.—THE SWALLOW, Nos. 1113, 1623, *ante*.

1687. Cross-appeal—Notice—Effect of.]—Where on an appeal notice has been given by resps. that they intend to apply to have the judgment below varied, & the appeal is then dismissed, applts. will be ordered to pay costs of the appeal except such as were occasioned by the notice.—THE LAURETTA (1879), 4 P. D. 25; 48 L. J. P. 55; 40 L. T. 444; 27 W. R. 902; 4 Asp. M. L. C. 118, C. A.

Annotations:—**Distd.** *Re* Bootham Strays, York I. R. Comrs. *v.* Scott (1891-2), 3 Tax Cas. 134, C. A. **Refd.** Jones *v.* Stott (1910), 102 L. T. 670, C. A.

1688. Collision—Decision varied—Inevitable accident—No costs.]—Where the Ct. of Appeal varies the d cision of the judge of the Admlty. Div., by which he found one vessel wholly to blame for a collision, by finding that the collision was an inevitable accident, the practice of the Privy Council that each party should, except in very exceptional circumstances, pay his own costs will be followed.—THE CITY OF CAMBRIDGE (1876), 35 L. T. 781; 3 Asp. M. L. C. 307, C. A.

For full anns., *see* SHIPPING & NAVIGATION.

1689. —— —— —— —— **Special circumstances.**]—THE BATAVIER, No. 1312, *ante*.

For full anns., *see* S. C. No. 1312, *ante*.

1690. —— —— —— ——.]—THE CHAUCER (1907) (unreported), March 8.

1691. —— —— —— —— **Costs allowed.**]—In an action for damage by collision in which the defence was inevitable accident, pltfs. obtained judgment on the ground that negligence on the part of defts. had been proved. On appeal to the Ct. of Appeal the defence of inevitable accident was established & judgment reversed:—*Held:* (1) as the Admlty. Ct. is a division of the High Ct. of Justice, the general rule in force in the other divisions that, in absence of special circumstances, costs follow the event, ought to be followed in that ct.: (2) on the appeal being allowed, defts. were entitled to costs both of the appeal & in the ct. below.—THE MONKSEATON (1889), 14 P. D. 51; 58 L. J. P. 52; 60 L. T. 662; 37 W. R. 523; 6 Asp. M. L. C. 383, C. A. S. C. Nos. 1235, 1683, *ante*.

Annotation:—**Refd.** The Batavier (1889), 38 W. R. 522, C. A.

1692. —— —— **Both to blame—No costs.**]—Where the Ct. of Appeal varies a decision of the judge of the Admlty. Div., by which he found one vessel wholly to blame for a collision, by finding that both vessels are to blame, each party will bear his own costs, both in the ct. below & in the Ct. of Appeal.—THE CORINNA (1876), 35 L. T. 781; 3 Asp. M. L. C. 307, C. A.

1693. —— —— —— ——.]—Where the Ct. of Appeal varies the decision of the ct. below by finding both vessels to blame for a collision, there will be no order as to the costs, but each party must bear his own costs of the whole litigation.—THE MILANESE (1880), 43 L. T. 107; 4 Asp. M. L. C. 318, C. A.; *affd.* (1881), 45 L. T. 151, H. L.

Annotations:—**Refd.** The Hector (1883), 8 P. D. 218, C. A. **Mentd.** The St. Paul (1908), 100 L. T. 184.

1694. —— —— —— —— **Compulsory pilotage.**]—Where the Ct. of Appeal varies the decision of the Admlty. Ct., finding one vessel solely to blame for a collision, by finding both vessels to blame, each party bears his own costs, both in the ct. below & in the Ct. of Appeal, & the fact that the owners of one vessel are exempt from liability on the ground of compulsory pilotage makes no difference to this rule.—THE HECTOR (1883), P. D. 218; 52 L. J. P. 47, 51; 48 L. T. 890; 31 W. R. 881; 5 Asp. M. L. C. 101, C. A.

Annotations:—**Folld.** The Quickstep (1890), 15 P. D. 196. **Apld.** The Blue Bell, [1895] P. 242; The Devonshire *v.* The Leslie, [1912] A. C. 634. **Consd.** The Seacombe, The Devonshire, [1912] P. 21, C. A.

1695. —— —— —— ——.]—Where the Ct. of Appeal, differing from the ct. below, was of opinion that resps. were guilty of negligence & bad navigation, but applts. failed to establish that they were not to blame, the result being that both parties were found to blame:—*Held:* no costs were to be allowed in the Ct. of Appeal or in the ct. below.—THE HERO, [1911] P. 128; 27 T. L. R. 1; 12 Asp. M. L. C. 10, C. A.

Annotations:—**Refd.** The King Alfred (1913), 109 L. T. 956; The Olympic & H.M.S. Hawke, [1913] P. 214.

1696. —— —— —— **Costs allowed.**]—In the Admlty. Ct. pltfs.' vessel was found alone to blame for a collision with defts.' vessel. Pltfs., admitting their vessel was to blame, appealed on the ground that defts.' vessel was also to blame. The Ct. of Appeal found defts.' vessel also to blame, & with reference to the costs, settled the practice by following *The Ceto* (1889), 14 App. Cas. 670, & giving the successful applts. their costs of the appeal.—THE LONDON, [1905] P. 152; 93 L. T. 393; 53 W. R. 419; 21 T. L. R. 339; 9 Sol. Jo. 350; 10 Asp. M. L. C. 109, C. A.

1697. —— —— **Compulsory pilotage—No costs.**]—When a suit (instituted in the Admlty. Div.) is dismissed, or an appeal succeeds on the ground that the defence of compulsory pilotage is established, no order will be made as to costs either below or on appeal.—THE DAIOZ (1877), 47 L. J. P. 1; 37 L. T. 137; 3 Asp. M. L. C. 477, C. A.

Annotations:—**Consd.** General Steam Navigation Co. *v.* London & Edinburgh Shipping Co. (1877), 2 Ex. D. 467. **Apld.** Morris *v.* Freeman (1878), 3 P. D. 65. **Folld.** The Matthew Cay (1879), 5 P. D. 49. **Refd.** The Condor (1879), 48 L. J. P. 33, C. A.

1698. Salvage—Amount reduced—Practice—Discretion.]—It is the general practice of the ct., where

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PART IV. SECT. 5, SUB-SECT. 1.

1692 i. *Collision—Decision varied—Both to blame—No costs.*]—In a collision action the judge held that one of the vessels was alone to blame. On appeal:—*Held:* both vessels were to blame, & the appeal should be allowed without costs. CANADIAN DEVELOPMENT CO. *v.* LE BLANC (1909), 21 C. L. T. 600; 8 B. C. R. 173.—**CAN.**

1692 ii. —— —— *Damages reduced—No costs.*]—In an action for collision the trial judge found that the *P.* was wholly to blame for a collision which occurred between her & the *R.* during a thick fog, & damages & costs were awarded to the owner of the *R.* On appeal:—*Held:* the finding of the trial judge that the *P.* was to blame must stand, but the assessment of damages must be reduced & the appeal allowed in part. No costs were allowed on appeal.—S.S. PAWNEE *v.* ROBERTS (1902), 32 S. C. R. 509.—**CAN.**

1698 i. *Salvage—High Court of Calcutta—Civil Procedure Code.*]—Where an appeal in a salvage case was held to lie under the High Ct. of Calcutta Charter & the letters patent from the original side in the exercise of Admlty. or Vice-Admlty. jurisdiction & the pro-

the amount awarded for salvage services is reduced on appeal, not to allow any costs of the appeal. There is no fixed rule upon the subject, & the ct. still has a discretion in any particular case to allow costs of the appeal.—THE GIPSY QUEEN, [1895] P. 176; 72 L. T. 454; 43 W. R. 359; 11 T. L. R. 296; 39 Sol. Jo. 344; 7 Asp. M. L. C. 586; 11 R. 766, C. A.

Annotations:—**Apld.** The Prince Llewellyn, [1904] P. 83. **Consd.** The Toscana, [1905] P. 148, C. A.

1699. —— —— —— ——.]—On appeals in salvage actions there is no hard-&-fast rule of practice that applts. who succeed in reducing the award will not get costs.—THE PRINCE LLEWELLYN, [1904] P. 83; 73 L. J. P. 22; 89 L. T. 489; 9 Asp. M. L. C. 505.

Annotation:—**Apld.** The Toscana, [1905] P. 148, C. A.

1700. —— —— **General rule applicable.**]—On appeal in a salvage suit, defts. succeeded in substantially reducing the award, namely, from £5,100 to £3,000:—*Held:* in such cases the ordinary rule in the Court of Appeal, that a successful applt. is entitled to costs of the appeal, would prevail, notwithstanding the general rule to the contrary laid down in *The Gipsy Queen*, No. 1698, *ante*, based on the earlier practice of the Privy Council when exercising jurisdiction in Admlty. cases.—THE TOSCANA, [1905] P. 148; 93 L. T. 392; 53 W. R. 405; 21 T. L. R. 329; 49 Sol. Jo. 350; 10 Asp. M. L. C. 108, C. A.

Annotation:—**Apld.** The Bremen (1906), 94 L. T. 380.

1701. —— **Amount increased.**]—A successful applt. in a cause of salvage will get his costs of appeal, following the ordinary custom of the Ct. of Appeal, notwithstanding the former practice in the Privy Council, in such appeals, to the contrary.—THE CITY OF BERLIN (1877), 2 P. D. 187; 37 L. T. 307; 25 W. R. 793; 3 Asp. M. L. C. 491, C. A.

Annotations:—**Refd.** Hopkinson *v.* St. James & Pall Mall Electric Lighting Co. (1893), 9 T. L. R. 173; The Gipsy Queen, [1895] P. 176, C. A.

1702. —— **Notice by appellants that no relief will be sought against owners.**]—On appeal from a vice-admlty. ct. against apportionment of salvage reward the owners of the salved vessel were cited, & asked for an indemnity for their costs; applts. refused, & gave notice that no relief would be applied for against the owners:—*Held:* the owners were entitled to their costs up to the time of such notice.—THE CASTLEWOOD (1880), 42 L. T. 702; 4 Asp. M. L. C. 278, P. C.

SUB-SECT. 2.—BEFORE THE JUDICATURE ACTS.

1703. Smallness of amount recovered—Costs not affected in proper case.]—Although the sum awarded by the Privy Council for salvage services be under £200, costs will be allowed, if the case be a fit one to be brought before the Privy Council.—THE MINNEHAHA, Nos. 939, 1382, *ante*.

For full anns., *see* S. C. No. 939, *ante*.

1704. Mistakes of court below—Judgment affirmed—Without costs.]—Where material mistakes in respect of certain facts in evidence occurred in the summing up of the judge of the ct. below, the Privy Council upon a review of the evidence, though it sustained the decree appealed from in the circumstances, affirmed the judgment without costs.—THE ARAXES & THE BLACK PRINCE (1861), 5 Moo. P. C. C. 122; 5 L. T. 39; 1 Mar. L. C. 130; 15 E. R. 439, P. C. S. C. No. 1704, *ante*.

1705. Collision—No costs—Both to blame—Appeal unsuccessful.]—Where both parties appeal from a sentence of the ct. below, in a cause of collision, pronouncing both to blame, & the sentence is affirmed, no costs of the appeal will be given.—THE NORTH AMERICAN, No. 958, *ante*.

For full anns., *see* S. C. No. 958, *ante*.

1706. —— —— —— **Appeal successful.**]—In reversing the decree of the Admlty. Ct. in a cause of collision on the ground that both vessels were to blame, the damages were directed to be divided, each party to bear his own costs, both on appeal & in the ct. below.—THE AGRA & ELIZABETH JENKINS, No. 1138, *ante*.

Annotation:—**Folld.** The General Lee of Dublin (1868), 19 L. T. 750.

1707. —— —— **Point not taken below—Appeal successful.**]—Where, in a collision case, the decision of the ct. below is reversed upon a point which was not raised in that ct., no costs of the appeal can be allowed.—THE JAMES (1856), 5 L. T. 241; 4 W. R. 353, P. C.

Annotation:—**Consd.** The Bothnia (1860), Lush. 52.

1708. —— **Appeal successful—Costs awarded.**]—Where in a cause of collision applt. was found in the ct. below solely to blame & condemned in the whole damage, & the Privy Council found both parties to blame & divided the damage, the costs of appeal were given.—THE FYENOORD (1858), Sw. 374; 5 L. T. 462, P. C.

For full anns., *see* SHIPPING & NAVIGATION.

Part V.—Jurisdiction and Practice of other Courts having Admiralty Jurisdiction.

SECT. 1.—COUNTY COURTS HAVING ADMIRALTY JURISDICTION.

SUB-SECT. 1.—JURISDICTION.

1709. Action in rem—Brought after sale of res—Against proceeds.]—Where property which might have been the subject of an action *in rem* under Admlty. jurisdiction has been sold by a private person there is no right of action *in rem* against the proceeds of sale in the hands of such person.

Stores were landed from a vessel by alleged salvors & were delivered by them to an agent for the owners of the vessel, under an agreement, as they alleged, that they should look to the agent for

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cedure was mainly governed by the Civil Procedure Code, the usual practice as to costs on appeal was followed.—*Re* THE CHAMPION (1889), I. L. R. 17 Calc. 84.—**IND.**

1698 ii. *S. P. Re* THE DRACHENFELS, THE RETRIEVER *v.* THE DRACHENFELS, THE HUGHLE *v.* THE DRACHENFELS (1899), I. L. R. 27 Calc. 860.—**IND.**

PART IV. SECT. 5, SUB-SECT. 2.

a. *Salvage—Amount reduced.*]—If the appeal from the decision of magistrates in a salvage case is by the owners of the vessel salved to decrease the salvage award, & the Admlty. Ct. decrees in favour of applts., the order will be made without costs, as resps., the unsuccessful parties, could not expect to get them, & should not be compelled to pay them, as they appeared to support the award of a competent tribunal.—THE AMAZON (1859), 5 Ir. Jur. N. S. 111 (Adm.).—**IR.**

b. —— *Judgment affirmed—No costs.*]—In a suit for salvage, where the property saved was admittedly worth £12,500, the ct. awarded a sum of £400, amounting to nearly "one-thirtieth," at "3 per cent." on the total value, to the salvors, together with their costs, overruling a tender of £150. On appeal:—*Held:* judgment must be affirmed, each party to bear his own costs of appeal.—THE NIMROD (1863), 8 Ir. Jur. N. S. 99 (Adm.).—**IR.**

Sect. 1.—*County courts having Admiralty jurisdiction: Sub-sect.* 1.]

a settlement of their claims for salvage, & the agent sold the stores, they assisting in the sale. The alleged salvors afterwards brought in the cty. ct. what purported to be an action *in rem* against the proceeds of sale of the stores in the agent's hands. On motion for writ of prohibition:—*Held:* the cty. ct. had no jurisdiction to entertain the action.—THE OPTIMA (1905), 74 L. J. P. 94; 93 L. T. 638; 10 Asp. M. L. C. 147. S. C. No. 95, *ante*.

Annotations:—**Consd.** The Kaleten (1914), 30 T. L. R. 572, P. D. **Refd.** The Montrosa, [1917] P. 1.

1710. —— —— —— **Service of summons.**]—An action *in rem* for damages for breach of charterparty was begun in the City of London Ct. against "the owners of the proceeds of sale of the vessel *M.*, now in High Ct. of Justice, Admlty. Div., within the jurisdiction of this Honourable Ct." The summons was served on the Admlty. Registrar as the custodian of the proceeds, & by a summons taken out in the Admlty. Div. of the High Ct. the action was forthwith transferred to that div.:—*Held:* (1) although the ship had been sold before the institution of the action, the proceeds represented the *res*, & the City of London Ct. had jurisdiction to entertain an action against the proceeds notwithstanding that they were in the High Ct.; (2) service on the Admlty. Registrar was good service & in accordance with Admlty. practice; (3) the Admlty. Ct. by transfer acquired jurisdiction to hear & determine the action although it could not have been instituted there originally.—THE MONTROSA, [1917] P. 1; 86 L. J. P. 33; 116 L. T. 383; 33 T. L. R. 33. S. C. Nos. 662, 886, *ante*.

1711. Agreement for hire or use of ship—Bill of lading—Damage to cargo.]—Cty. Cts. Admlty. Jurisdiction Amendment Act, 1869 (c. 51), is not limited to cases in which the Admlty. Ct. had jurisdiction at the time. A ct. having cty. ct. Admlty. jurisdiction under Cty. Cts. Admlty. Jurisdiction Acts, 1868 (c. 71) & 1869 (c. 51), has jurisdiction to try & determine an action at the suit of the holder of a bill of lading against a British ship to recover for a breach of the contract of carriage in the bill of lading, notwithstanding that it is shown to the ct. that at the time of the institution of the suit the owner of the ship proceeded against was domiciled in England or Wales.—THE RONA, No. 1574, *ante*.

For full anns., *see* S. C. No. 1574, *ante*.

1712. —— —— **Demurrage.**]—A cty. ct., exercising Admlty. jurisdiction under Cty. Cts. Admlty. Jurisdiction Acts, 1868 & 1869, has jurisdiction to entertain a claim for demurrage arising out of a bill of lading.—PUGSLEY *v.* ROPKINS, No. 1755, *post*.

Annotation:—**Refd.** The City of Agra, [1898] P. 198.

1713. —— **Charterparty.**]—Cty. Cts. Admlty. Jurisdiction Acts, 1868 (c. 71) & 1869 (c. 51), although they invest certain cty. cts. with a jurisdiction to entertain & determine a limited portion of the cases formerly entertained & determined only in the Admlty. Ct., do not by inference & indirect enactment enlarge the jurisdiction of the Admlty. Ct. or give to cty. cts. a jurisdiction which the Admlty. Ct. never possessed.

A cty. ct. having Admlty. jurisdiction has no jurisdiction to entertain a suit for damages for short delivery of cargo arising out of a charterparty, the Admlty. Ct. having no jurisdiction to entertain such claim.—THE MADGE WILDFIRE (1872), L. R. 7 C. P. 290; 41 L. J. C. P. 121; 26 L. T. 697; 20 W. R. 680; 1 Asp. M. L. C. 326.

Annotations:—**N.F.** The Alina (1880), 5 Ex. D. 227, C. A. **Dbtd.** The Theodora, [1897] P. 279. **Refd.** R. *v.* City of London Court Judge, [1892] 1 Q. B. 273, C. A.; Adam *v.* British & Foreign S.S. Co., [1893] 2 Q. B. 430

1714. —— ——.]—Cty. Cts. Admlty. Jurisdiction Amendment Act, 1869 (c. 51), s. 2, gives the cty. Ct. jurisdiction in cases of claims arising out of charterparties or other agreements for the use or hire of ships, although the Admlty. Ct. may have no original jurisdiction in such cases.—THE ARGOS, CARGO EX, THE HEWSONS (No. 2) (1873), L. R. 5 P. C. 134; 42 L. J. Adm. 1; 28 L. T. 77; 21 W. R. 420; 1 Asp. M. L. C. 519, P. C.

Annotations:—**N.F.** Flower *v.* Bradley (1874), 2 Asp. M. L. C. 489, Exch. **Folld.** The Alina (1880), 5 Ex. D. 227, C. A. **Distd.** Allen *v.* Garbutt (1880), 6 Q. B. D. 165. **Folld.** The Rona (1882), 7 P. D. 247. **Distd.** R. *v.* Southend County Court Judge (1884), 13 Q. B. D. 142. **Folld.** The County of Durham, [1891] P. 1, D. C. **Consd.** R. *v.* City of London Court Judge, [1892] 1 Q. B. 273, C. A. **Refd.** Purkis *v.* Flower (1873), 43 L. J. Q. B. 33; Gunnestad *v.* Price, Fullmore *v.* Wait (1875), L. R. 10 Exch. 65; The Theodora, [1897] P. 279. **Mentd.** G. N. R. Co. *v.* Swaffield (1874), L. R. 9 Exch. 132.

1715. —— ——.]—By a charterparty the master of the *A.* agreed with pltfs. to proceed to a foreign port, & there load a cargo of timber & deliver same in England to pltfs. At the foreign port the master of the *A.* refused to receive the cargo of timber, & pltfs. were compelled to forward the timber to England by steamer at a greatly increased rate of freight. Pltfs. entered an action in a cty. ct. for damages for breach of charterparty, & arrested the vessel; but upon application to a judge in chambers a writ was issued prohibiting the cty. ct. judge from further proceedings in the action, & this was affirmed by a Div. Ct.:—*Held:* the cty. ct. had Admlty. jurisdiction in cases of breach of charterparty under Cty. Cts. Admlty. Jurisdiction Amendment Act, 1869, s. 2, notwithstanding the Admlty. Ct. had not original jurisdiction in such matters.—THE ALINA (1880), 5 Ex. D. 227; 49 L. J. P. 40; 42 L. T. 517; 29 W. R. 94; 4 Asp. M. L. C. 257, C. A.

Annotations:—**Distd.** Allen *v.* Garbutt (1880), 6 Q. B. D. 165. **Folld.** The Rona (1882), 7 P. D. 247. **Dbtd. but Folld.** Pugsley *v.* Ropkins, [1892] 2 Q. B. 184, C. A.; R. *v.* City of London Court Judge, [1892] 1 Q. B. 273, C. A. **Consd.** Mersey Docks & Harbour Board *v.* Turner, [1893] A. C. 468, H. L.; The Theodora, [1897] P. 279, D. C. **Refd.** R. *v.* Southend County Court Judge (1884), 13 Q. B. D. 142; The County of Durham, [1891] P. 1, D. C.; The Normandy, [1904] P. 187, D. C.

1716. —— ——.]—GUNESTEAD *v.* PRICE, FULLMORE *v.* WAIT, No. 1376, *ante*.

For full anns., *see* S. C. No. 1376, *ante*.

1717. —— —— **Freight under £50.**]—Cty. Cts. Admlty. Jurisdiction Acts, 1868 (c. 71) & 1869 (c. 51), do not deprive cty. cts. not having Admlty. jurisdiction of their jurisdiction to try actions to recover freight under charterparties where the amount claimed is less than £50.—R. *v.* SOUTHEND COUNTY COURT JUDGE (1884), 13 Q. B. D. 142, D. C.

Annotation:—**Folld.** Scovell *v.* Bevan (1887), 19 Q. B. D. 428, D. C.

1718. —— **Colliery loading agreement.**]—A loading agreement between a colliery co. & the charterers of a ship, by which the colliery co. undertakes to load the ship in a certain time, & pay the demurrage if that time is exceeded, is not an "agreement made in relation to the use or hire" of a ship within Cty. Cts. Admlty. Jurisdiction Amendment Act, 1869 (c. 51), s. 2, & hence the cty. ct. has no jurisdiction on the Admlty. side to entertain a claim for demurrage against the colliery co.—THE ZEUS (1888), 13 P. D. 188; 59 L. T. 344; 37 W. R. 127; 6 Asp. M. L. C. 312.

1719. —— **Shipbroker's commission.**]—A charterparty made between master & charterers contained a clause providing for payment of commission to the broker for negotiating the charter:—*Held:* the broker could not sue *in rem* under Cty. Cts. Admlty. Jurisdiction Amendment Act, 1869 (c. 51), s. 2 (1), as he was not a party to the charter.—THE NUOVA RAFFAELINA (1871), L. R. 3 A. & E. 483; 41 L. J.

Adm. 37 ; 24 L. T. 321 ; 20 W. R. 216 ; 1 Asp. M. L. C. 16.

Annotations :—**Refd.** The Wilhelm Schmidt (1871), 25 L. T. 34 ; The Madge Wildfire (1872), 41 L. J. C. P. 121 ; Gunnestad *v.* Price, Fullmore *v.* Wait (1875), L. R. 10 Exch. 65.

1720. —— Towage contract.]—A tug owner, engaged to tow a vessel, contracted with another tug owner to provide a tug, which was guilty of negligence in the course of towage occasioning damage to the tow. The owners of the tow recovered this damage from the tug owner with whom they contracted, & deft. in that action instituted the present action *in rem* in the cty. ct. under Cty. Cts. Admlty. Jurisdiction Amendment Act, 1869, against the owner of the wrongdoing tug to recover back this amount :—*Held :* s. 2 (1) of the above Act giving cty. cts. with Admlty. jurisdiction power to try " any claim arising out of any agreement made in relation to the use or hire of any ship " covered the present action.—THE ISCA (1886), 12 P. D. 34 ; 56 L. J. P. 47 ; as reported in 55 L. T. 779 ; 35 W. R. 382 ; 6 Asp. M. L. C. 63.

1721. Bottomry.]—A cty. ct. has no jurisdiction in bottomry.—THE ELPIS, Nos. 663, 888, *ante*.

For full anns., *see* S. C. No. 888, *ante*.

1722. Collision—Between barges propelled by oars.]—Cty. Cts. Admlty. Jurisdiction Acts, 1868 (c. 71) & 1869 (c. 51), do not give the cty. ct., which has an Admlty. jurisdiction under those Acts, jurisdiction to try cases of damage by collision between vessels of a different class from those over which the Admlty. Ct. has jurisdiction. The cty. ct. is not empowered by those Acts to try a question of collision between barges propelled by oars only. —EVERARD *v.* KENDALL (1870), L. R. 5 C. P. 428 ; 39 L. J. C. P. 234 ; 22 L. T. 408 ; 18 W. R. 892 ; 3 Mar. L. C. 391.

Annotations :—**Apld.** The Dowse (1870), L. R. 3 A. & E. 135 ; Simpson *v.* Blues (1872), L. R. 7 C. P. 290. **Consd.** Gaudet *v.* Brown, Brown *v.* Gaudet, Geipel *v.* Cornforth (1873), L. R. 5 P. C. 134 ; Flower *v.* Bradley (1874), 44 L. J. Ex. 1. **Apld.** Allen *v.* Garbutt (1880), 6 Q. B. D. 165. **Distd.** Hedges *v.* London & St. Katharine Docks Co. (1885), 16 Q. B. D. 597. **Expld. & Apld.** R. *v.* City of London Court Judge, [1892] 1 Q. B. 273, C. A. **Expld.** The Normandy, [1904] P. 187, D. C. **Refd.** *Re* Thames Steamer, *Ex p.* Ferguson (1871), 35 J. P. 468 ; The Rona (1882), 7 P. D. 247 ; Robson *v.* The Kate (1888), 21 Q. B. D. 13 ; Turner *v.* Mersey Docks & Harbour Board, [1892] P. 285, C. A. ; The Upcerne, [1912] P. 160.

1723. —— Between ship & barge on river.]—A cty. ct. to which Admlty. jurisdiction is given by Cty. Cts. Admlty. Jurisdiction Act, 1868, has Admlty. jurisdiction over a claim not exceeding £300 for damages for negligence causing a collision between a barge of deft. & a ship of pltf. in a river within the body of a county forming part of its district.—PURKIS *v.* FLOWER, Nos. 478, 1370, *ante*.

Annotations :—**Refd.** R. *v.* Kerr (1882), 30 W. R. 566 ; Turner *v.* Mersey Docks & Harbour Board (1892), 40 W. R. 535, C. A.

1724. —— —— Negligence of pilot.]—A ship in charge of a duly licensed pilot came into collision on the Thames with a barge. The owner of the barge sued the pilot in a cty. ct., & was nonsuited on the ground that the ct. had not Admlty. jurisdiction :—*Held :* the nonsuit was wrong, the case not being one which the Admlty. Ct. could entertain, & could not be brought in the Admlty. side of a cty. ct.—FLOWER *v.* BRADLEY (1874), 44 L. J. Ex. 1 ; 31 L. T. 702 ; 23 W. R. 74 ; 2 Asp. M. L. C. 489.

Annotations :—**Distd.** Turner *v.* Mersey Docks & Harbour Board (1891), 65 L. T. 230. **Consd.** R. *v.* City of London Court Judge, [1892] 1 Q. B. 273, C. A.

1725. —— Liability of pilot.]—Under Cty. Cts. Admlty. Jurisdiction Acts, 1868 (c. 71) & 1869 (c. 51), cty. cts. having Admlty. jurisdiction have no greater jurisdiction in respect of claims for damage to ships than that possessed by the Admlty. Div. of the High Ct. The latter has no jurisdiction to entertain an action against a pilot for damage to a ship arising from a collision caused by his negligence or want of skill, & the City of London Ct. cannot entertain such an action upon its Admlty. side.—R. *v.* CITY OF LONDON COURT JUDGE & PAYNE, [1892] 1 Q. B. 273 ; 61 L. J. Q. B. 337 ; 66 L. T. 135 ; 40 W. R. 215 ; 8 T. L. R. 191 ; 36 Sol Jo. 138 ; 7 Asp. M. L. C. 140, C. A.

Annotations :—**Expld.** Pugsley *v.* Ropkins, [1892] 2 Q. B. 184, C. A. ; Turner *v.* Mersey Docks & Harbour Board, [1892] P. 285, C. A. ; Delobbel Filpo *v.* Varty (1893), 62 L. J. Q. B. 398. **Apprvd.** Mersey Docks & Harbour Board *v.* Turner, [1893] A. C. 468. **Distd.** Dierken *v.* Philpot, [1901] 2 K. B. 380. **Refd.** Guilford *v.* Lambeth, [1894] 2 Q. B. 832 ; The Normandy, [1904] P. 187. **Mentd.** Neptune Steam Navigation Co. *v.* Sclater (1894), 71 L. T. 544, C. A. ; Vacher *v.* London Soc. of Compositors, [1913] A. C. 107 ; R. *v.* Mellor, [1914] 2 K. B. 588 ; *Re* Boaler, [1915] 1 K. B. 21, C. A.

1726. —— —— Joinder of causes.]—The jurisdiction of the cty. cts. in Admlty. extends to suits *in personam* against a pilot causing a collision. An action *in personam* against a pilot may be joined with one *in rem* against the ship.—THE GRANTON (1880), 70 L. T. Jo. 63.

1727. —— Ship in dock.]—A collision occurred in a dock connected with the Thames by channels provided with gates & locks. An action was brought in a cty. ct. having Admlty. jurisdiction in respect of damages arising out of the collision. On an application for a prohibition :—*Held :* (1) the claim was within Admlty. Ct. Act, 1861 (c. 10), s. 7 ; (2) the cty. ct. had jurisdiction.—R. *v.* CITY OF LONDON COURT JUDGE (1882), 8 Q. B. D. 609 ; 51 L. J. Q. B. 305 ; *sub nom.* R. *v.* KERR, 30 W. R. 566. S. C. No. 484, *ante*.

1728. —— Ship fouling pier—Damage to ship.]—Shipowners brought an action *in personam* against a dock co. to recover a sum within the limits of the cty. ct. jurisdiction in Admlty. for damage occasioned to their ship by the alleged negligence of the co.'s servants in bringing her into collision with a pierhead while moving from one dock to another :—*Held :* (1) such damage was damage " by collision or otherwise " within Cty. Cts. Admlty. Jurisdiction Amendment Act, 1869 (c. 51), s. 4 ; (2) as the action might have been brought in a cty. ct., pltfs., though successful in the action, were not entitled to costs.—THE ZETA, [1893] A. C. 468 ; 63 L. J. P. 17 ; 69 L. T. 630 ; 57 J. P. 660 ; 9 T. L. R. 624 ; 7 Asp. M. L. C. 369 ; 1 R. 307, H. L. S. C. Nos. 480, 1377, *ante*.

Annotations :—**Consd.** The Theta, [1894] P. 280. **Distd.** The Normandy, [1904] P. 187, D. C. ; The Upcerne, [1912] P. 160. **Refd.** The Veritas, [1901] P. 304 ; Davidsson *v.* Hill, [1901] 2 K. B. 606, D. C. **Mentd.** The Englishman & The Australia, [1894] P. 239 ; The Mecca, [1895] P. 95, C. A. ; The Devonshire *v.* The Leslie, [1912] A. C. 634.

1729. —— —— Damage to pier.]—Cty. Cts. Admlty. Jurisdiction Act, 1868 (c. 71), s. 3, does not give a cty. ct. jurisdiction over damage done by a ship or vessel to some other object not a ship or vessel (such as a pier) by striking against it.—THE NORMANDY, [1904] P. 187 ; 73 L. J. P. 55 ; 90 L. T. 351 ; 52 W. R. 634 ; 20 T. L. R. 239 ; 9 Asp. M. L. C. 568.

Annotation :—**Folld.** The Upcerne, [1912] P. 160.

1730. —— Machine damaged on land.]—A claim was made in a cty. ct. having Admlty. jurisdiction in respect of an injury to a pile-driving machine, used at a wharf on the bank of the river, which had been fouled & injured by the mainsail gear of a sailing barge, while the barge was sailing in the Thames near Blackwall :—*Held :* (1) the damage in question was not " damage by collision " within Cty. Cts. Admlty. Jurisdiction Act, 1868, s. 3 (3) ; (2) the cty. ct. had no jurisdiction.—ROBSON *v.* THE KATE (OWNER) (1888), 21 Q. B. D. 13 ; 57

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L. J. Q. B. 546; 59 L. T. 557; 36 W. R. 910; 6 Asp. M. L. C. 330.

Annotations:—**Apld.** The Normandy, [1904] P. 187. **Refd.** The Upcerne, [1912] P. 160.

1731. —— Fishing smacks—Trawl gear.]—*Semble:* a cty. ct. having Admlty. jurisdiction under Cty. Cts. Admlty. Jurisdiction Act, 1868, & Cty. Cts. Admlty. Jurisdiction Amendment Act, 1869 (c. 51), has jurisdiction to entertain a cause of collision between the trawl gear of two fishing smacks.—THE WARWICK (1890), 15 P. D. 189; 63 L. T. 561; 6 Asp. M. L. C. 545.

Annotations:—**Apld.** *Re* Margetts & Ocean Accident & Guarantee Corpn., [1901] 2 K. B. 792, D. C. **Distd.** Bennett S.S. Co. *v.* Hull Mutual S.S. Protecting Soc., [1914] 3 K. B. 57, C. A.

1732. —— Collision with gas buoy.]—A s.s. ran into a gas buoy & injured it. The owners of the gas buoy sued the shipowners, bringing their action in the cty. ct. in Admlty. The cty. ct. judge dismissed the action, holding that he had no jurisdiction to try the case:—*Held:* the cty. ct. had no jurisdiction to try the case as the word "collision" in Cty. Cts. Admlty. Jurisdiction Act, 1868 (c. 71), s. 3 (3), only referred to collisions between ships.—THE UPCERNE, [1912] P. 160; 81 L. J. P. 110; 107 L. T. 860; 28 T. L. R. 370; 12 Asp. M. L. C. 281.

1733. —— Damage under £50.]—Cty. Cts. Admlty. Jurisdiction Act, 1868, does not deprive cty. cts. not having Admlty. jurisdiction of their original jurisdiction to try actions to recover damages for injuries caused by collision between vessels where the amount claimed does not exceed £50.—SCOVELL *v.* BEVAN (1887), 19 Q. B. D. 428; 56 L. J. Q. B. 604; 36 W. R. 301, D. C.

1734. Damage to goods—Passengers' luggage.]—Passengers' luggage carried on board a ship is not "goods" within Cty. Cts. Admlty. Jurisdiction Amendment Act, 1869 (c. 51), & the Act does not confer jurisdiction to try a claim arising out of a loss of such luggage on a cty. ct. having Admlty. jurisdiction.—R. *v.* CITY OF LONDON COURT JUDGE (1883), 12 Q. B. D. 115; 53 L. J. Q. B. 28; 51 L. T. 197; 5 Asp. M. L. C. 283; *sub nom.* R. *v.* KERR, 32 W. R. 291.

1735. Necessaries—Proof of facts ousting jurisdiction—Before judgment.]—A ship being in the port of B., which was not the port to which she belonged, a suit was instituted in the cty. ct. for necessaries supplied to her at B., & the ship was arrested the same day, & judgment given for the amount claimed. Afterwards the owner, who was abroad, but was a British subject domiciled in England, applied to the judge of the cty. ct. to stay proceedings, & this was refused. A motion was then made for a prohibition:—*Held:* in order to deprive the Admlty. Ct. of the jurisdiction given to it under Admlty. Ct. Act, 1861 (c. 10), s. 5, & Cty. Cts. Admlty. Jurisdiction Act, 1868 (c. 71), s. 3 (2), it must be shown to the ct. before it pronounced judgment that the owner was domiciled in England. —*Ex p.* MICHAEL (1872), L. R. 7 Q. B. 658; 41 L. J. Q. B. 349; 26 L. T. 871; 1 Asp. M. L. C. 337.

1736. —— Restraining Admiralty proceedings abroad—Judge acting in bankruptcy.]—Where a judge of a cty. ct. acting under Bkpcy. Act, 1869 (c. 83), s. 72, had "deemed it expedient" to restrain a person trading in London from enforcing in a Vice-Admlty. Ct. abroad a claim of lien on a ship (part of bkpt.'s estate) for necessaries supplied abroad on orders of the master after the filing of the petition, & to direct an issue to try the matter in his ct., the ct. refused to grant a prohibition, holding that the cty. ct. had by its decision given itself jurisdiction, subject only to appeal.

The matter was not one which a cty. ct. having no Admlty. jurisdiction ought to have entertained (BRETT, J.).—HALLIDAY *v.* HARRIS (1874), L. R. 9 C. P. 668; 43 L. J. P. 350; 22 W. R. 756; *sub nom.* HARRIS *v.* HALLIDAY, 30 L. T. 680.

Annotations:—**Consd.** *Re* Lowenthal, *Ex p.* Busty (1884), 13 Q. B. D. 238. **Apld.** *Re* Mansel, *Ex p.* Trustee (1888), 4 T. L. R. 410, C. A. **Refd.** *Re* Barnett, *Ex p.* Reynolds (1885), 15 Q. B. D. 169, C. A.; Lea *v.* Thursby (1904), 73 L. J. Ch. 518.

1737. —— British ship—British owner.]—A suit against a ship for the price of necessaries supplied was instituted in a cty. ct. having Admlty. jurisdiction. The ship was a British ship, & at the time of the institution of the suit her owners were domiciled in England:—*Held:* the cty. ct. had no jurisdiction, as Cty. Cts. Admlty. Jurisdiction Act, 1868 (c. 71), conferred upon the cty. cts. only such jurisdiction as the Admlty. Ct. possessed.—THE DOWSE (1870), L. R. 3 A. & E. 135; 39 L. J. Adm. 46; 22 L. T. 627; 18 W. R. 1008; 3 Mar. L. C. 424. S. C. No. 649, *ante*; No. 1788, *post*.

Annotations:—**Consd.** Simpson *v.* Blues (1872), L. R. 7 C. P. 290. **Folld.** Allen *v.* Garbutt (1880), 6 Q. B. D. 165. **Consd.** R. *v.* City of London Court Judge, [1892] 1 Q. B. 273, C. A.; The Normandy, [1904] P. 187. **Refd.** Gaudet *v.* Brown, Brown *v.* Gaudet, Geipel *v.* Cornforth (1873), L. R. 5 P. C. 134; The Rona (1882), 7 P. D. 247. **Mentd.** The Wild Rose *v.* The J. M. Stubbs (1915), 85 L. J. P. 17.

1738. ——————.]—A cty. ct. having Admlty. jurisdiction has no greater jurisdiction in respect of a claim for necessaries than that possessed by the Admlty. Div., & cannot entertain an action for necessaries supplied to a British ship, the owners of which are domiciled in Great Britain.—ALLEN *v.* GARBUTT (1880), 6 Q. B. D. 165; 50 L. J. Q. B. 141; 29 W. R. 287; 4 Asp. M. L. C. 521.

Annotations:—**Consd.** The Rona (1882), 7 P. D. 247; R. *v.* City of London Court Judge, [1892] 1 Q. B. 273, C. A.; The Normandy, [1904] P. 187.

1739. Receiver of wreck.]—*Semble:* a cty. ct. of one district has no jurisdiction over the receiver of wreck in another district.—THE JOHN EVANS, No. 1372, *ante*; No. 1746, *post*.

1740. Salvage—Alternative limits of jurisdiction.] —A cty. ct. having Admlty. jurisdiction under Cty. Cts. Admlty. Jurisdiction Act, 1868 (c. 71), has jurisdiction under s. 3 in claims of salvage wherein the property salved does not exceed £1,000, or, in the alternative, where the amount claimed does not exceed £300.—THE GLANNIBANTA (1876), 2 P. D. 45; 46 L. J. P. 75; 36 L. T. 27; 25 W. R. 513; 3 Asp. M. L. C. 339. S. C. No. 1745, *post*.

1741. —— Value for purposes of jurisdiction—Burden of proof.]—The words in M. S. Act Amendment Act, 1862 (c. 63), s. 49, determining the jurisdiction of the ct. by the value of the property saved, mean the value of the property when first brought into safety by the salvors, and not its value at any subsequent period. The burden of proof is upon defts., who undertake to show that the ct. has not jurisdiction over the case.—THE STELLA (1867), L. R. 1 A. & E. 340; 36 L. J. Adm. 13; 16 L. T. 335; 15 W. R. 936; 2 Mar. L. C. 505.

1742. —— Whether jurisdiction limited to questions of amount.]—*Qu.:* whether the summary jurisdiction under M. S. Act, 1894 (c. 60), s. 547, is confined to cases where the dispute is as to the amount of salvage due, & does not extend to cases where there is a dispute as to whether any salvage services have been rendered. *Qu.:* whether the words "amount claimed" in the above sect. bear the same meaning as in M. S. Act, 1854 (c. 104), s. 460, namely, the amount claimed before the proceedings commenced.—THE DRAGOMAN, No. 1362, *ante*.

1743. —— Article not ship or part of ship.]—WELLS *v.* THE GAS FLOAT-WHITTON (No. 2), No. 90, *ante*.

1744. —— Remuneration agreed.]—A plaint & summons were issued in a cty. ct. by pltfs. against

deft. to answer to a claim, particulars of which were annexed; the particulars being "pltfs. claim £250 amount agreed to be paid by deft. to them for getting deft.'s schooner off the shore, & taking the schooner & cargo into a place of safety, the whole value of the schooner, cargo, etc., not exceeding £1,000." Deft. sought to prohibit the cty. ct. judge from proceeding with the plaint on the ground that he had no jurisdiction, as it was not a salvage claim, but an action of debt for an agreed sum above £50, & also on the ground that the proceeding ought not to have been by plaint in the cty. ct., the jurisdiction being given to the judge & not to the ct. It was not denied that the value of the property saved was under £1,000, nor that there had been salvage services:—*Held:* (1) the fact of there having been a sum agreed did not oust the jurisdiction of the cty. ct. judge; (2) the proceedings were proper in form.—BEADNELL (BEARDNELL) *v.* BEESON (1868), L. R. 3 Q. B. 439; 9 B. & S. 315; 37 L. J. Q. B. 171; 18 L. T. 401; 16 W. R. 1008; 3 Mar. L. C. 78. S. C. No. 1758, *post.*

1745. —— Distribution.]—Where a sum of money under £300 has been paid for salvage services rendered, a cty. ct. having Admlty. jurisdiction has jurisdiction, in an action for distribution in case of dispute between the salvors, to apportion such sum among them, although such sum has been recovered by agreement with the owners of the salved property, & without action brought in the cty. cts.—THE GLANNIBANTA, No. 1740, *ante.*

1746. —— Enforcement of bond—Jurisdiction doubtful—Leave to proceed.]—As it is a matter of doubt whether the cty. cts. having Admlty. jurisdiction have power to enforce salvage bonds given to receivers of wreck under M. S. Act, 1854 (c. 104), s. 468, the Admlty. Ct. will, on the application of a salvor in respect of whose services such a bond has been given, grant leave to proceed in the High Ct. under Cty. Cts. Admlty. Jurisdiction Act, 1868 (c. 71), s. 9.—THE JOHN EVANS (1874), 43 L. J. Adm. 9; 30 L. T. 308; 2 Asp. M. L. C. 234. S. C. Nos. 1372, 1739, *ante.*

1747. —— Concurrent jurisdiction.]—A ship had been in distress off Yarmouth, & was saved by a vessel of that port, & a dispute arose as to salvage, £190 being asked & £150 offered. The salvor went to the cty. ct. under Cty. Cts. Admlty. Jurisdiction Act, 1868, & the owner of the ship saved went to the JJ. under M. S. Act, 1854 (c. 104), s. 460. At 12.10 on Thursday, the attorney for the salvor got a writ out of the cty. ct. & at 12.20 the writ was filed. Immediately afterwards he went to the office of the clerk of the JJ. at Yarmouth & found an application had been made to them by the attorney of the owner of the ship saved to hear the case, but it had not been exhibited to the JJ., so that they had not yet undertaken the case. The application was exhibited to them, & they assumed jurisdiction to hear the case, & in spite of a protest on the part of the other side, they proceeded to hear it, & intimated their intention to determine it upon an affidavit of the facts. On motion by the salvor for a prohibition to restrain the magistrates from proceeding to decide the case, on the ground that before the application to them the cty. ct. had jurisdiction, the ct. granted a rule *nisi.*—THE ANN TAYLOR (1875), 39 J. P. Jo. 85.

1748. —— Amount paid to shipowner—Action by master.]—Where the master's share of a salvage award is received by the shipowner, the action brought by the master to recover it is a common law action for money had & received; & it should not be brought on the Admlty. side of the cty. ct.—THE GLOXINIA (1901), 18 T. L. R. 227.

1749. Wages—Balance claimed—Previous proceedings.]—A claim for seamen's wages, which involved a question of the master's right to disrate claimant, had been adjudicated upon by a magistrate under Merchant Seamen Act, 1844 (c. 112), s. 15. Claimant did not draw up or serve the magistrate's order:—*Held:* a judge of a cty. ct. was right in refusing to try an action of debt for the balance of wages brought in respect of the same matter.—R. *v.* POLLOCK (1852), Cox, M. & H. 585; 18 L. T. O. S. 272; 16 J. P. Jo. 116.

1750. —— Payable under special contract.]—A contract that a master mariner shall take a share of a fishing adventure & bear a share of certain disbursements is a contract of wages by the general law maritime, independent of M. S. Acts Amendment Act, 1873 (c. 85), s. 8; & jurisdiction over such a contract is conferred on cty. cts. having Admlty. jurisdiction by Cty. Cts. Admlty. Jurisdiction Act, 1868 (c. 71), s. 3.

A claim for damages for wrongful dismissal is within the cognizance of a ct. having original Admlty. jurisdiction, &, *semble,* of a cty. ct. having Admlty. jurisdiction by stat. *Qu.:* whether a claim for damages for wrongful detention of personal chattels on board a ship is within the jurisdiction of an Admlty. Ct.—THE BLESSING (1878), 3 P. D. 35; 38 L. T. 259; 26 W. R. 404; 3 Asp. M. L. C. 561.

Annotation:—**Follid.** The Ferret (1883), 48 L. T. 915, P. C.

1751. —— Services rendered in port.]—A ship having arrived in the port of London, which was her destination, her crew, including the mate, were paid off. The mate, after being so paid off & without signing any fresh articles for the outward voyage, remained on board by direction of the owner for the purpose of superintending the discharge of the inward cargo & the loading of a fresh cargo for the outward voyage. After the inward cargo had been discharged & a portion of the outward cargo had been shipped on board, the ship was taken into dock for repairs, & the mate continued on board by the owner's direction to superintend execution of such repairs. The owner having become bkpt., the mate brought an action *in rem* on the Admlty. side of the cty. ct. to recover wages due for services so rendered by him on board the ship while in port:—*Held:* (1) the services so rendered were maritime services; (2) the ct. had jurisdiction to entertain the action.—R. *v.* CITY OF LONDON COURT JUDGE & S.S. MICHIGAN (OWNERS) (1890), 25 Q. B. D. 339; 59 L. J. Q. B. 427; 63 L. T. 492; 38 W. R. 638; 6 T. L. R. 364.

Annotations:—**Consd.** The Ruby, [1898] P. 59; Corbett *v.* Pearce, [1904] 2 K. B. 422. **Reid.** Chislett *v.* Macbeth, [1909] 2 K. B. 811, C. A.

1752. —— Ship's husband.]—A ship's husband employed & acting as such is not a seaman within Admlty. Ct. Act, 1861 (c. 10), s. 10, which gave jurisdiction to the Admlty. Ct. over any claim by a seaman of any ship for wages earned by him on board ship; & he has no maritime lien for wages even though he has performed some of his duties on board ship where such duties were not in fact required to be performed. A cty. ct. has no jurisdiction under Cty. Cts. Admlty. Jurisdiction Act, 1868 (c. 71), s. 3 (2), to entertain an action *in rem* by a ship's husband for wages.—THE RUBY, [1898] P. 59; 67 L. J. P. 28; 78 L. T. 235; 46 W. R. 487; 14 T. L. R. 184; 8 Asp. M. L. C. 421. S. C. No. 433. *ante.*

SUB-SECT. 2.—COURTS EXERCISING JURISDICTION.

1753. Court where vessel is.]—Under Cty. Cts. Admlty. Jurisdiction Acts, 1868 (c. 71) & 1869 (c. 51), an action *in personam* by a shipowner for damage sustained by his vessel may be brought "in the cty. ct. having jurisdiction within the dis-

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trict in which the vessel or property to which the cause relates is at the commencement of the proceedings."—JOBSON BROTHERS *v.* POOLE, BALTIC & QUEBEC TIMBER CO., LTD. (1890), 7 T. L. R. 57.

1754. ——.]—A claim by a shipowner under Cty. Cts. Admlty. Jurisdiction Amendment Act, 1869 (c. 51), s. 2, arising out of an agreement in relation to the use or hire of a ship belonging to him, is properly brought in the cty. ct. having Admlty. jurisdiction within the district of which such ship happens to be at the date of the commencement of the suit; & it is immaterial that the cause of action arose within the district of another cty. ct.—THE COUNTY OF DURHAM, [1891] P. 1; 60 L. J. P. 5; 64 L. T. 146; 39 W. R. 303; 6 Asp. M. L. C. 606.

Annotations:—**Distd.** Pugsley *v.* Ropkins, [1892] 2 Q. B. 184, C. A.; The City of Agra, [1898] P. 198.

1755. Court where owner resides.]—An action was brought in a cty. ct. by shipowners against the indorsees of a bill of lading which incorporated the terms of the charterparty, for demurrage for detention of pltfs.' ship at the port of discharge. At commencement of the proceedings the vessel was on the high seas:—*Held:* (1) the cause related to the vessel only; (2) the proceedings were rightly commenced under Cty. Cts. Admlty. Jurisdiction Act, 1868 (c. 71), s. 21 (2), in the ct. in the district of which the owners of the vessel resided.—PUGSLEY & CO. *v.* ROPKINS & CO., LTD., [1892] 2 Q. B. 184; 61 L. J. Q. B. 645; 67 L. T. 369; 40 W. R. 596; 8 T. L. R. 622; 36 Sol. Jo. 539; 7 Asp. M. L. C. 215, C. A. S. C. No. 1712, *ante*.

Annotation:—**Expld.** The City of Agra, [1898] P. 198.

1756. —— Or his agent — Agency determined by loss of ship.]—In an action *in personam* instituted in the City of London Ct. by pltfs., owners of a barge damaged by collision with deft.'s steamship within the jurisdiction, the summons described deft. as "G. S., of 75, Bothwell Street, Glasgow, owner of the s.s. or vessel *C.*, whose agents in England are M. & W., of 36, Gracechurch Street, E.C., within the jurisdiction of this ct." The summons was served on a member of the firm of M. & W.; but the *C.* had been lost before commencement of the action:—*Held:* the service of the summons must be set aside as "agent in England" in Cty. Ct. Admlty. Jurisdiction Act, 1868 (c. 71), s. 21, meant a person acting for another person in relation to the vessel or property proceeded against at the time the service of the process was effected & at that time the agency had ceased.—THE CITY OF AGRA, [1898] P. 198; 67 L. J. P. 81; 79 L. T. 307; 8 Asp. M. L. C. 457.

1757. Court where defendant carries on business.]—Pltfs., owners of a steamship, brought an action *in personam*, on the Admlty. side of the cty. ct. within the district of which defts., charterers of the vessel, & consignees of the cargo, carried on their business, for damages for detention of the vessel in unloading. The cty. ct. judge dismissed the action for want of jurisdiction, on the ground that, as the ship was not at the time of commencement of proceedings within the district, nor did pltfs. reside there, Cty. Cts. Admlty. Jurisdiction Act, 1868 (c. 71), s. 21 (1), (2), had not been complied with:—*Held:* the cty. ct. had jurisdiction as Cty. Cts. Act, 1888 (c. 43), s. 74, was general in its terms, & included defts. in an Admlty. action who, at the time of commencing the action, carried on their business within the district.—THE HERO, [1891] P. 294; 60 L. J. P. 99; 65 L. T. 499; 40 W. R. 143; 7 Asp. M. L. C. 86.

Annotations:—**Distd.** Pugsley *v.* Ropkins, [1892] 2 Q. B. 184, C. A. **Folld.** The Eden, [1892] P. 67. **Consd.** The Tynwald, [1895] P. 142. **Distd.** The Theodora, [1897] P. 279; The City of Agra, [1898] P. 198.

SUB-SECT. 3.—PRACTICE AND PROCEDURE.

1758. Form of procedure—Plaint—Salvage action.]—BEADNELL *v.* BEESON, No. 1744, *ante*.

1759. Amendment of claim.]—A cty. ct. judge has power, under Cty. Cts. Act, 1888 (c. 43), s. 87, to amend a claim in an Admlty. action of collision after the question of liability has been decided, & before the reference.—THE ALERT, No. 1571, *ante*.

For full anns., *see* S. C. No. 1571, *ante*.

1760. ——.]—In an action of salvage brought in the cty. ct., the judge, having found that no salvage services were rendered, directed the pleadings to be amended on pltfs.' application by substituting the word "towage" for "salvage," & thereupon awarded a sum for towage services:—*Held:* (1) as the amendment involved striking out some of the parties, & introduced a wholly different form of action, it could not be made without defts.' consent; (2) defts. were entitled to judgment.—THE ANNE (1914), 30 T. L. R. 544. S. C. No. 909, *ante*.

1761. Arrest warrant—Person to execute—Contempt.]—A warrant of arrest issued in an action *in rem*, instituted for collision in the City of London Ct., & directed to the high bailiff of the ct. & others the bailiffs thereof, is not duly executed if executed by a clerk in the bailiff's office, who is not a bailiff, & the master of the vessel so arrested is not guilty of contempt of ct. in removing her. *Semble:* if the warrant had been addressed to the clerk as an officer of the ct. it might, under Cty. Cts. Admlty. Jurisdiction Act, 1868 (c. 71), s. 23, have been duly served by him.—THE PALOMARES (1885), 10 P. D. 36; 54 L. J. P. 54; 52 L. T. 57; 33 W. R. 616; 5 Asp. M. L. C. 343.

1762. —— Ship already under arrest in High Court.]—*Semble:* where a ship is under the arrest of the High Ct. & causes are also instituted in the cty. ct. against her, she should not be arrested by the cty. ct. as it is not probable she will be removed out of the jurisdiction of the cty. ct. without satisfaction of pltfs.' several claims within Cty. Cts. Admlty. Jurisdiction Act, 1868 (c. 71), s. 22.—THE TURLIANI, No. 883, *ante*.

1763. Affidavit of value—Salvage action—When conclusive—Appraisement—Tender.]—In an action of salvage in a cty. ct., defts. tendered & paid into ct. £75 & filed an affidavit putting the value of their smack, salved by pltfs., at £140 & the cargo of fish at £42 15*s*. Pltfs. by letter objected to the value, but did not apply for an appraisement &, at the trial, tendered evidence putting a higher value on the smack. The cty. ct. judge held he was bound to admit the evidence, & fixed the value of the smack at £272 & the fish salved at £48, making £320, & he made an award of £80 (to include the £75 in ct.), being £40 or one-eighth for salvage & £40 for loss of fishing on the part of pltfs.' vessel. Defts. appealed:—*Held:* (1) under C. C. R. 1892, O. 39, pltfs., if dissatisfied with the value given in the affidavit, had a right of appraisement for the purpose of determining what the value of the *res* should be taken to be at the trial, so as to avoid the expense of calling experts, & also that defts. might thereby have a value on which to tender; (2) the tender must be upheld, as, in exercise of the discretion, which the cty. ct. judge ought to have exercised, the evidence was, in the circumstances, inadmissible & the affidavit of value conclusive.—THE ARGO, [1895] P. 33; 64 L. J. P. 12; 71 L. T. 640; 43 W. R. 415; 7 Asp. M. L. C. 534; 11 R. 675, D. C.

1764. Mode of trial—Assessors.]—In an Admlty. cause of collision in a cty. ct., where one party asks for a jury & the other demands assessors, the trial must, notwithstanding Cty. Cts. Act, 1888 (c. 43), s. 101, be by judge & assessors.—*Semble:* in salvage & towage causes the same rule applies.—THE TYNWALD, [1895] P. 142; 64 L. J. P. 1; 71 L. T.

731; 43 W. R. 509; 11 T. L. R. 94; 7 Asp. M. L. C. 539; 11 R. 690, D. C.

Annotations:—**Consd.** The Theodora, [1897] P. 279.

1765. —— ——.]—The proper mode of trial in the case of a maritime cause over which a cty. ct. having Admlty. jurisdiction has jurisdiction under Cty. Cts. Admlty. Jurisdiction Amendment Act, 1869 (c. 51), s. 2, is either by the judge alone or by the judge assisted by maritime assessors. The parties in such suit are not entitled to a jury, Cty. Cts. Act, 1888 (c. 43), s. 101, not being by the context applicable to Admlty. or maritime causes tried in a cty. ct. having Admlty. jurisdiction.—THE THEODORA, [1897] P. 279; 66 L. J. P. 50; 76 L. T. 627; 46 W. R. 157; 13 T. L. R. 350; 6 Asp. M. L. C. 259, D. C.

1766. Assessors—Function of.]—Nautical assessors summoned under Cty. Cts. Admlty. Jurisdiction Act, 1868 (c. 71), to attend at the hearing of an Admlty. action tried by a cty. ct. judge, are present merely to advise the judge, & the judge ought to decide the case in accordance with his own opinion as to the law & merits of the case.—THE AID (1881), 6 P. D. 84; 50 L. J. P. 40; 44 L. T. 843; 29 W. R. 614; 4 Asp. M. L. C. 432, C. A.

1767. Shorthand note of evidence.]—Wherever there is a probability of an appeal, notes of the evidence given in the cty. ct. should be taken by a reporter duly appointed according to the provisions contained in the rules for regulating the Admlty. jurisdiction of the cty. ct.—THE BUSY BEE, No. 1587, *ante*.

1768. Judgment—Rescission of.]—Where, in a collision action, the cty. ct. judge includes an order as to costs in his judgment determining the liability, & defts. subsequently tender an amount sufficient to cover the damage, as found by the registrar, the cty. ct. judge has no power to rescind that portion of his judgment dealing with the costs & to condemn pltf. in the costs of the action & of the reference.—THE RECEPTA, Nos. 983, 1559, 1609, *ante;* No. 1773, *post*.

For full anns., *see* S. C. No. 1559, *ante*.

1769. Judgment in rem—Effect of—Sale by high bailiff—Free from incumbrance.]—After judgment in favour of pltf., in an action *in rem* for damage by collision on the Admlty. side of a cty. ct., a warrant of execution issued directing the high bailiff to "levy by distress & sale of the goods & chattels, including the s.s. or vessel *R.* of deft." Under this warrant the vessel was appraised & sold, but the registrar of shipping refused to register the bill of sale signed by the high bailiff except subject to an outstanding mtge.—*Held:* (1) the power given to a cty. ct. by Cty. Cts. Admlty. Jurisdiction Act, 1868 (c. 71), ss. 3 (3), 12, "to try & determine" an Admlty. cause of damage by collision & enforce the decree "against the person or persons summoned," carried with it the power of rendering pltf.'s maritime lien effectual against all persons having an interest in the *res*; (2) in order to obtain payment of the debt out of the proceeds the high bailiff could sell the ship free from incumbrance.—THE RUBY [1898] P. 52; 67 L. J. P. 25; 78 L. T. 267; 46 W. R. 464; 14 T. L. R. 184; 8 Asp. M. L. C. 389.

SUB-SECT. 4.—COSTS.

1770. Practice of particular court—Inconsistent with County Court Rules.]—A cty. ct. judge has no power to establish a practice in the cty. ct. contrary to a general rule of the C. C. R., such as C. C. R., 1889, O. 50, r. 16, relating to the costs of witnesses, & such practice cannot prevail against the general rule.—THE CASHMERE, No. 1570, *ante*.

For full anns., *see* S. C. No. 1570, *ante*.

1771. Payment into court—Accepted in satisfaction—Effect on costs.]—Pltfs. instituted an Admlty. action in a cty. ct. for damages for breach of contract in relation to the use or hire of a ship "in the sum of £30 & costs." Defts. paid into ct. £17 10*s.* "in satisfaction of the whole of pltfs.' claim herein" together with a denial of liability. Pltfs. accepted the £17 10*s.* in satisfaction of the claim in respect of which it was paid in, but their application for taxation, & payment by defts., of the costs of the action was refused without leave to appeal:—*Held:* (1) this being an Admlty. action the special Admlty. rules of the cty. ct., & not the general common law rules, applied; (2) the sum paid into ct. by defts. was to be treated as by way of "tender" under C. C. R., 1892, O. 39B, r. 48; (3) on acceptance of the tender, pltfs. were entitled, under r. 50, to taxation & payment of their costs. THE VULCAN, No. 1572, *ante*

1772. —— —— **Costs independent of amount.**]—In an Admlty. action in the cty. ct. where money is paid into ct. unconditionally by deft. & accepted by pltf. in satisfaction, pltf. is entitled to his costs under C. C. R., O. 39B, r. 50A, & under r. 80 to have them taxed under Column B of the Cty. Ct. Scales of Costs, unless the cty. ct. judge otherwise orders, even where the amount so recovered by him is less than £2.—THE SKUDENAES (SKUDANAES) (1901), 70 L. J. P. 64; 17 T. L. R. 649; 45 Sol. Jo. 653.

1773. Tender—After liability determined—Befor reference—Effect on costs.]—In an action on the Admlty. side of the City of London Ct., in which defts. denied liability, the judge gave judgment for pltf., subject to a reference to the registrar to assess the damages, & ordered defts. to pay pltf.'s costs of action. Defts. then paid £14 14*s.* into ct. by way of tender. The registrar certified that the sum of £14 14*s.* was sufficient to satisfy pltf.'s claim. The judge, on defts.' application, altered his judgment by ordering pltf. to pay defts.' costs of the action:—*Held:* (1) a tender made after the issue of liability had been determined could not affect the costs of deciding that liability, though it might affect the costs of the reference; (2) the judge not having reserved the costs of action, but having included an order as to them in his judgment, could not afterwards rescind that portion of his judgment.—THE RECEPTA, Nos. 983, 1559, 1609, 1768, *ante*.

For full anns., *see* S. C. No. 1559, *ante*.

SECT. 2.—THE COURT OF ADMIRALTY OF THE CINQUE PORTS.

1774. Concurrent jurisdiction of High Court.]—The Admlty. Ct. had a concurrent jurisdiction within the boundaries of the jurisdiction of the Cinque Ports; & this remains unaltered by M. S. Act, 1854 (c. 104), ss. 460, 476 of which sustain the general jurisdiction of the Admlty. Ct. in salvage in the widest terms.—THE MARIA LUISA (1856), Sw. 67; 26 L. T. O. S. 316; 2 Jur. N. S. 264; 4 W. R. 376.

Annotation:—**Folld.** The Jeune Paul (1867), L. R. 1 A. & E. 336.

1775. ——.]—The Admlty. Ct. has a concurrent jurisdiction with the Cinque Ports Admlty. Ct. in suits for salvage claims, although the services were rendered within the boundaries of the Cinque Ports & the value of the property salved is under £1,000, & this jurisdiction is not affected by M. S. Act

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Amendment Act, 1862 (c. 63), s. 9.—THE JEUNE PAUL (1867), L. R. 1 A. & E. 336; 36 L. J. Adm. 11; 16 L. T. 125; 15 W. R. 776; 2 Mar. L. C. 478.

1776. Recognition of Cinque Ports jurisdiction.]—It is a good return to a *habeas corpus* by the Warden of the Cinque Ports that the "body" was under sentence of the Admlty. Ct. there according to martial law & for a matter within the ct.'s jurisdiction.—CINQUE PORT CASE (1620), Palm. 96; 81 E. R. 995.

Annotation:—**Refd.** R. *v.* Broom (1697), 12 Mod. Rep. 134.

SECT. 3.—THE CINQUE PORTS SALVAGE COMMISSIONERS.

1777. Form of award.]—Where salvage is settled by the Cinque Ports Comrs. by 12 Ann., c. 18, s. 2, & 26 Geo. 2, c. 19, s. 10, their award need not be in writing.—THE AMERICAN HERO (1801), 3 Ch. Rob. 323.

1778. Enforcement of award.]—The Admlty. Ct. has not power to enforce an award of salvage by the Cinque Ports Comrs. unappealed.—THE HECTOR (1833), 3 Hag. Adm. 90.

1779. Award—When no bar to action.]—Salvage services had been rendered to a vessel by several sets of salvors off Ramsgate. The owners of the vessel summoned a meeting of the above comrs. to adjudicate the matter. No notice of the intended meeting was given to any of the salvors, & it was proved that it was not usual to give any such notice. At the meeting of the comrs. one set of salvors was unrepresented, but it was proved that they were aware of the meeting, & were at hand. The comrs. made an award upon the whole matter. The salvors so unrepresented refused to accept their share of the money awarded, & brought their action in the Admlty. Ct.:—*Held:* the award was no bar to the action, pltfs. not having been parties to the first decision.—THE ELISE (1859), Sw. 436.

1780. Appeal—Rehearing—Fresh evidence.]—An appeal to the Admlty. Ct. under Cinque Ports Act, 1821 (c. 76), from an award of the above comrs. in a salvage case is in the nature of a rehearing rather than of an appeal, & it is obligatory on the ct. to allow a re-statement of the case & to admit fresh evidence. The ct. will, in the exercise of its discretion as to costs, discourage the giving of fresh evidence unwarrantably.—THE CALEDONIA (1873), L. R. 4 A. & E. 11; 42 L. J. Adm. 13 n.; 28 L. T. 372 n.; 17 W. R. 626.

1781. —— —— —— Tender.]—An appeal from an award of the above comrs. being in the nature of a rehearing, pleadings may be filed & new evidence given by applts., although at the imminent risk of costs; & the question of the value of the salved property, although agreed before the comrs., may be reopened on appeal.

On appeal by the owners of a salved ship from a salvage award made by the above comrs. applts. may, without filing pleadings, place upon the file of the ct. a tender, although no tender was made before the comrs., & resps. are bound to accept or reject a tender so made.—THE ANNETTE (1873), L. R. 4 A. & E. 9; 42 L. J. Adm. 13; 28 L. T. 372; 21 W. R. 552; 1 Asp. M. L. C. 577.

1782. —— Costs.]—In salvage cases, costs are not generally allowed by the Admlty. Ct. where on appeal the award of the above comrs. is reversed, each party being left to pay his own costs.—THE LORD GOODERICH (1841), 10 Month. Law. Mag. Notes of Cases, 217.

Annotation:—**Folld.** The Annette (1873), L. R. 4 A. & E. 9.

1783. *S. P.* THE DAVID LUCKIE (1840), 9 Month. Law. Mag. Notes of Cases, 209.

SECT. 4.—THE COURT OF PASSAGE OF THE BOROUGH OF LIVERPOOL.

1784. Jurisdiction—Action against pilot.]—A ship by compulsion of law in charge of a duly licensed pilot in the Mersey collided with & occasioned damage to another vessel. The owners of the damaged vessel instituted an Admlty. suit in the Ct. of Passage against the pilot:—*Held:* the Ct. of Passage had no jurisdiction to entertain the suit, as an Admlty. suit.—THE ALEXANDRIA (1872), L. R. 3 A. & E. 574; 41 L. J. Adm. 94; 27 L. T. 565; 1 Asp. M. L. C. 464. S. C. No. 505, *ante*.

Annotations:—**Apld.** Flower *v.* Bradley (1874), 44 L. J. Ex. 1. **Distd.** Turner *v.* Mersey Docks & Harbour Board (1891), 65 L. T. 230. **Apld.** R. *v.* City of London Court Judge, [1892] 1 Q. B. 273, C. A.

1785. —— Proceedings pending in High Court—Prohibition.]—Salvage services were rendered by a Liverpool tug to a Spanish vessel of the value of £30,000, & a sum of £3,500 was awarded. The mate of the tug brought an action in the Ct. of Passage for apportionment of the salvage award. On motion by owners of the tug, pltfs. in a salvage action in the Admlty. Div., to restrain the proceedings in the Ct. of Passage:—*Held:* (1) a judge of the Admlty. Div. has power to grant a prohibition with reference to a matter pending before an inferior ct.; (2) he has power to issue an injunction to a party proceeding in an inferior ct. to restrain him from going on with such proceedings.—THE TERESA (1894), 71 L. T. 342; 7 Asp. M. L. C. 505; *sub nom.* THE THERESA, 11 R. 681, D. C.

1786. Rules — Summary judgment — Ultra vires.]—An action *in rem* being brought in the Ct. of Passage to recover a sum of money as wages due to seamen, pltfs. took out a summons in the above ct. calling upon defts. to show cause why they (pltfs.) should not sign final judgment for the amount claimed & costs. The deputy registrar made a decree that defts. should pay £22 6*s.* 10*d.* & costs under an "order" made by the assessor or judge of the ct. on Feb. 10, 1882. This "order" purported to apply a procedure similar to that under R. S. C., O. 14, to Admlty. actions *in rem* or *in personam*, brought in the Ct. of Passage to recover a debt or liquidated demand in money, & to enable a pltf., on showing that there was no defence to the action, to enter up judgment or decree for the amount indorsed on the writ, together with interest (if any) & costs. No affidavit of merits was put in by defts., but they objected to the jurisdiction of the Ct. of Passage to make the "order": On an application by defts. for a writ of prohibition:—*Held:* (1) the "order" made by the assessor or judge of the Ct. of Passage was *ultra vires*, neither Cty. Cts. Admlty. Jurisdiction Act, 1868 (c. 71), nor the Amendment Act of 1869 (c. 51), giving such power; (2) the registrar had no jurisdiction to make the decree.—FELLOWS *v.* THE LORD STANLEY (OWNERS), [1893] 1 Q. B. 98; 67 L. T. 857; 41 W. R. 253; 9 T. L. R. 79; 37 Sol. Jo. 83; 7 Asp. M. L. C. 298; 5 R. 115, D. C.

See, now, Liverpool Court of Passage Act, 1893 (c. 37).

1787. Appeals—Extension of time.]—Cty. Cts. Act, 1875 (c. 50), s. 6, provides an alternative mode

of appeal by way of motion, but does not supersede the old practice with regard to appeals from inferior cts. having Admlty. jurisdiction. The provisions of the Act of 1868, relating to appeals from the Ct. of Passage, are still in force, & the discretionary power of the ct. to allow an appeal after the time for such appeal has expired remains. —THE HUMBER (1883), 9 P. D. 12; 53 L. J. P. 7; 49 L. T. 604; 32 W. R. 664.

Annotation:—**Refd.** The Tynwald, [1895] P. 142, D. C.

1788. —— To what court.]—From the decision of the Ct. of Passage in an Admlty. cause an appeal lies to the Admlty. Ct.—THE DOWSE, Nos. 649, 1737, *ante*.

Annotation:—**Consd.** The Wild Rose *v.* The J. M. Stubbs (1915), 85 L. J. P. 17.
For full anns., *see* S. C. No. 1737, *ante*.

1789. —— ——.]—The appeal from the Ct. of Passage in actions brought under the ct.'s Admlty. jurisdiction lies to the Div. Ct. of the Probate, Divorce, & Admlty. Div., & not to the Ct. of Appeal.—THE WILD ROSE & THE J. M. STUBBS (1915), 85 L. J. P. 17; 32 T. L. R. 164.

1790. —— Rules regulating—Security for costs.] —An appeal from an order made by the Ct. of Passage in an Admlty. cause is subject to the same rules as an appeal from a cty. ct. in an Admlty. cause. Security for costs must be given before lodging the instrument of appeal, otherwise the appeal cannot be entertained.—THE GANGES (1880), 5 P. D. 247; 43 L. T. 12; 4 Asp. M. L. C. 417, C. A.

Annotation:—**Apld.** Tracey *v.* Pretty, [1901] 1 K. B. 444.

1792. Limits of jurisdiction—Private rights.]—Since the Union of England & Scotland the jurisdiction of the Admlty. Cts. in Scotland is restricted to matters relative to private rights which may arise there.—JACKSON *v.* MONRO (1779), 2 Bro. Parl. Cas. 411; 1 E. R. 1031.

1793. Law administered—British law—Not Scottish.]—From the earliest times the cts. of Scotland exercising jurisdiction in Admlty. causes have disregarded the municipal rules of Scottish law & have invariably professed to administer the law & customs of the sea generally prevailing among maritime States. In later times, with the growth of British shipping, the Admlty. law of England has gradually acquired predominance, & resort has seldom been had to the laws of other States for the guidance of the cts. The law administered in English & Scottish Admlty. Cts. is the same law, the maritime code which ought to prevail in both countries being neither English nor Scottish, but British law. There may be conflicting decisions in the cts. of both countries, & a Scottish Admlty. Ct. is no less free to examine the merits of an English authority than an English ct. is to estimate the value of a Scottish decision, & to accept or reject it according to its own view of the law maritime. But it does not follow that the law either is or ought to be different in the two countries (LORD WATSON).—CURRIE *v.* M'KNIGHT, [1897] A. C. 97; 66 L. J. P. C. 19; 75 L. T. 457; 13 T. L. R. 33; 8 Asp. M. L. C. 193, H. L. S. C. Nos. 31, 54, *ante*.

Annotations:—**Refd.** The Blairmore, [1898] A. C. 593. **Mentd.** The Ripon City, [1897] P. 226; The Veritas, [1901] P. 304; The Burns, [1907] P. 137, C. A.

SECT. 5.—ADMIRALTY COURTS IN SCOTLAND.

1791. Extent of jurisdiction—Wider than in England.]—The jurisdiction exercised by Admlty. Cts. in England & Scotland has never been precisely co-extensive. In Scotland the Admiral's jurisdiction, though cumulative with that of the Ct. of Session, extended to all questions arising in regard to policies of maritime insurance & had also been extended by long possession to the right of cognisance in bills of exchange & other mercantile questions which were in no sense maritime. In England, policies of marine insurance were regarded simply as matters of mercantile contract, & actions brought upon them belonged to the jurisdiction, not of the Admlty., but of the common law cts. (LORD WATSON).—THE BLAIRMORE, [1898] A. C. 593; 67 L. J. P. C. 96; 79 L. T. 217; 14 T. L. R. 513; 4 Asp. M. L. C. 429; 3 Com. Cas. 241, H. L.

For full anns., *see* INSURANCE.

SECT. 6.—ADMIRALTY COURTS IN IRELAND.

See cases, *infra*.

SECT. 7.—COLONIAL COURTS OF ADMIRALTY AND VICE-ADMIRALTY COURTS.

SUB-SECT. 1.—IN GENERAL.

1794. Jurisdiction—That of Admiralty Court before 1840.]—Vice-Admlty. Cts. abroad have only the ordinary jurisdiction exercised by the Admlty. Ct. before the passing of Admlty. Ct. Act, 1840 (c. 65); they cannot try causes of title to ships.—THE AUSTRALIA (1859), Sw. 480; 7 W. R. 718, P. C.

1795. —— Wages of master.]—The Vice-Admlty. Cts. in the colonies exercise the same jurisdiction as the Admlty. Ct., with one exception, namely, where

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PART V. SECT. 5.

a. *Arrestment to found jurisdiction.*]—Arrestments *jurisdictionis fundandæ causa* used, & action raised, at the instance of an American, his attorney resident in England & a Scotch mandatory, appointed by the attorney:—*Held:* the proceedings were well taken, & objection that they were inept for want of a mandatory duly appointed by the principal pursuer should be repelled.—KNIGHT *v.* FREETO (1863), 2 M. 386.—**SCOT.**

PART V. SECT. 6.

b. *Effect of proceedings in English Court of Admiralty.*]—A vessel on a voyage to L. was arrested at Q., at the instance of pltf., for necessaries supplied to her. Bail was procured by the assignees of a bottomry bond upon the ship, freight, & cargo, given on the voyage, & payable twenty days after her arrival at the port of discharge, & the vessel proceeded to L., where she was arrested in a cause of wages, & again arrested by warrant of the English Admlty. Ct. in a cause of necessaries, instituted by pltf., in respect of same claim as that on which the arrest at Q. was founded. The vessel was subsequently sold under an order of the Admlty. Ct. in England, made at the suit of the assignees as bondholders, but a considerable sum remained due to them. Decree had not been obtained in the suits in England. Pltf. proceeded with his suit in Ireland & obtained a decree for the amount of necessaries & costs. Pltf. instituted a motion for an order for a monition against the bail to compel the payment by them of the damages & costs:—*Held:* the motion should be granted. *Semble:* a cause instituted in the Irish Admlty. Ct. will not be superseded or suspended by proceedings subsequently taken in the English Admlty. Ct.—THE ONWARD (1872), 6 I. L. T. 150.—**IR.**

PART V. SECT. 7, SUB-SECT. 1.

c. *Jurisdiction — Vice-Admiralty Courts — Colonial Acts.*]—An action brought under Navigation Law Amendment Act, 1881 (No. 6), s. 7, cannot be brought in Vice-Admlty., but shall be tried before the Chief Justice, or a deputy judge appointed by him, sitting as in Vice-Admlty. The jurisdiction of the Vice-Admlty. Ct. having been determined by an Imperial Act, *i.e.*, Vice-Admlty. Cts. Act, 1863 (c. 24), cannot be extended by a Colonial Act.—AUSTRALIAN BANKING CO. *v.* BURNS (1889), 10 N. S. W. 214.—**AUS.**

Sect. 7.—Colonial Courts of Admiralty & Vice-Admiralty Courts: Sub-sects. 1 & 2.]

particular powers are conferred upon the Admlty. Ct. by name & not upon the Vice-Admlty. Cts.

M. S. Act, 1854 (c. 104), applies to Vice-Admlty. Cts. & confers on them jurisdiction in cases of a master's wages. No distinction is to be drawn in this respect between colonies acquired by conquest & settled colonies.—THE RAJAH OF COCHIN (1859), Sw. 473.

1796. —— Wages of seamen.]—By an Order in Council, passed in pursuance of 2 Will 4, c. 51, the Vice-Admlty. Ct. has jurisdiction to entertain a suit brought by any number of seamen, not exceeding six, to recover their wages. M. S. Act, 1854 (c. 104), s. 189, does not take away such right of suit so long as the total aggregate amount claimed by such seamen exceeds £50.

Where, in a suit brought by six seamen in the Vice-Admlty. Ct., the judge found that a total amount of £203 19*s.* 8*d.* was due to them, partly for wages & partly for wrongful dismissal, but that the amount due to each was less than £50:—*Held:* (1) the judge was wrong in dismissing the suit for want of jurisdiction; (2) a decree for £203 19*s.* 8*d.* should be made.—THE FERRET (1883), 8 App. Cas. 329; 52 L. J. P. C. 51; 48 L. T. 915; 31 W. R. 869; 5 Asp. M. L. C. 94, P. C.

1797. Sale of ship — Under order of court—Invalid where unnecessary.]—The Vice-Admlty. Cts. abroad have no authority, upon the mere petition of the master of a ship bound on a foreign voyage, to decree the sale of such ship, reported upon survey to be seaworthy, or repairable so as to carry the cargo to its place of destination but at an expense exceeding the value of the ship when repaired.—REID *v.* DARBY (1808), 10 East, 143; 103 E. R. 730.

Annotations:—**Distd.** Idle *v.* Royal Exchange Assce. (1819), 8 Taunt. 755. **Folld.** Cannan *v.* Meaburn (1823), 1 Bing. 243; Morris *v.* Robinson (1824), 3 B. & C. 196. **Consd.** Hunter *v.* Parker (1840), 7 M. & W. 322; The Catharina (1851), 17 L. T. O. S. 43; The Segredo, *otherwise* Eliza Cornish (1853), 1 Ecc. & Ad. 36. **Refd.** Hunter *v.* Prinsep (1808), 10 East, 378; Thompson *v.* Leake (1815), 1 Madd 39; Freeman *v.* East India Co. (1822), 5 B. & Ald. 617; Robertson *v.* Clarke (1824), 1 Bing. 445.

1798. Sale of cargo—Under order of court—Invalid where unnecessary.]—The master of a ship which was injured by perils of the sea put into the Mauritius, & there abandoned ship & cargo, which were afterwards sold under an order of the Vice-Admlty. Ct. there & the proceeds paid into that ct. The cargo was not damaged or perishable, nor was there any pressing necessity for the sale of it. The owners of the cargo brought an action on the case against the owners of the ship for wrongfully selling the cargo instead of carrying it to London, according to their contract, with a count in trover, & recovered a general verdict for the value of the ship & freight, which was one-fifth of the value of the cargo. They also sent out a power of attorney to an agent at the Mauritius to procure from the Vice-Admlty Ct. there the proceeds of the sale which had been paid in. The agent demanded them, but they had been previously remitted to the Admlty. Ct. in England. In an action for money had & received by the owners against the purchaser of the goods:—*Held:* (1) the master had not any authority to sell the cargo, although acting *bonâ fide* & under the order of the Vice-Admlty. Ct.; (2) the recovery against the owners of the ship was no answer to the present action; (3) the proceeds of sale at the Mauritius not having been paid when demanded, pltfs. were in the same situation as if no such demand had been paid, & entitled to recover the value of the goods from deft.—MORRIS *v.* ROBINSON (1824), 3 B. & C. 196; 5 Dow. & Ry. K. B. 34; 107 E. R. 706.

Annotations:—**Apld.** Knight *v.* Legh (1828), 1 Moo. & P. 528; Valpy *v.* Sanders (1848), 5 C. B. 886. **Consd.** Rice *v.* Reed, [1900] 1 Q. B. 54, C. A. **Refd.** Cammell *v.* Sewell (1860), 6 Jur. N. S. 918, Exch. **Mentd.** Brinsmead *v.* Harrison (1871), L. R. 6 C. P. 584.

1799. Revenue offences—If committed within territorial jurisdiction.]—The Vice-Admlty. Cts. in the West Indies have no jurisdiction over offences committed against revenue laws out of their respective islands.—THE FABIUS (1800), 2 Ch. Rob. 245.

Annotation:—**Refd.** The Argos, The Hewsons (1872), L. R. 3 A. & E. 568.

1800. ——.]—In an appeal from the Vice-Admlty. Ct. of Jamaica in respect of proceedings for an offence against the revenue laws, the jurisdiction of that ct. was objected to as incompetent in proceedings for penalties under the Act; but the sentence of the ct. below was affirmed, the jurisdiction being thus upheld.—R. *v.* O'HARA (1819), unreported, cited 1 Hag. Adm. 150.

1801. Law applicable.]—A moiety of the property saved with costs is the maximum of remuneration that can be allowed to salvors; this rule applies to Vice-Admlty. Cts. abroad.—THE INCA (1858), 12 Moo. P. C. C. 180; Sw. 370; 14 E. R. 882, P. C.

Annotations:—**Refd.** The Woosung (1876), 1 P. D. 260, C. A. **Mentd.** The Amérique (1875), L. R. 6 P. C. 468, P. C.

1802. Practice applicable.]—The usual practice in the Admlty. Ct. as to proxies is for proctors to proceed without the exhibition of any proxy until called upon to produce it, & when they are called upon they satisfy the law by stating the names of the parties for whom they appear. In the Vice-Admlty. Cts. proctors are not bound to do more than this under the Vice-Admlty. Rules & Regulations, r. 40, unless upon a strict order of the ct.—THE EUXINE (1871), L. R. 4 P. C. 8; 8 Moo. P. C. C. N. S. 189; 41 L. J. Adm. 17, 40; 25 L. T. 516; 20 W. R. 561; 1 Asp. M. L. C. 155; 17 E. R. 283, P. C. S. C. No. 693, *ante*.

1803. Concurrent jurisdiction of Admiralty Court.]—The Admlty. Ct. of England has concurrent jurisdiction with Vice-Admlty. Cts. abroad.—THE PEERLESS, Nos. 44, 62, 111, *ante*.

For full anns., *see* S. C. No. 111, *ante*.

1804. Enforcement of decree—Where jurisdiction not exercised.]—The Admlty. Ct. declined on application of claimant, & without letters of request, to interfere to enforce a monition to compel obedience to a decree made many years before by a Vice-Admlty. Ct. for payment of a small sum as demurrage against a master who had ceased to be within the jurisdiction of the Vice-Admlty. Ct., & was resident in England.—LA MADONNA DELLA LETTERA (1829), 2 Hag. Adm. 289.

1805. Setting aside decree—Fraud.]—Fraud sufficient to set aside in the Admlty. Ct. the decree of a competent Ct. of Vice-Admlty. must be fraud in procuring the decree.

Suit between mtgees. of the vessel & subsequent purchaser. Replication by mtgees. that a bottomry bond had been fraudulently executed by the co-operation of the bondholder & the master, with a view to a sale of the vessel under the decree of a Vice-Admlty. Ct., & that these facts were fraudulently suppressed from the ct. on the application for a decree of sale:—*Semble:* (1) such facts, if proved, would be sufficient to invalidate the sale; (2) in such circumstances a decree of sale fraudulently obtained in order to pay a valid bottomry bond would be invalid.—THE JUSTYN (1862), 6 L. T. 553; 11 W. R. 44; 1 Mar. L. C. 225.

1806. Funds transmitted from abroad—Payment out.]—Certain proceeds arising from the sale of a ship & cargo at the Mauritius had been transmitted to the registry of the Admlty. Ct. for the sake of security by order of the Vice-Admlty. judge there. An application for payment out to

the consignees was granted with the consent of the purchaser of the cargo.—THE LADY BANKS (1824), 1 Hag. Adm. 306.

1807. —— Liability of Vice-Admiralty registrar.]—The registrar of a Vice-Admlty. Ct. is not responsible for money transmitted under proper precautions & in the usual course of business for the purpose of being invested in the funds, & afterwards lost by failure of the consignee.—THE PRIMA VERA (1808), Edw 23.

1808. Appeal—None, if court not duly appointed.]—The Admlty. Ct. cannot entertain an appeal from the sentence of a Vice-Admlty. Ct. not duly appointed.—THE JOHN (1814), 1 Dods. 380.

1809.—— Leave refused.]—Petitioner, a mariner on board a ship, was wrecked near the Cape of Good Hope; the crew succeeded in saving a great part of the cargo, most of the rigging, sails, & provisions, & the hull of the ship which were ultimately sold in the Vice-Admlty. Ct. A suit was instituted at the Cape, in which wages were pronounced due as far as freight had been received. Petitioner being deprived of relief, entered on board another ship & continued in her service; the owners of the wrecked vessel had refused payment of his wages. The petitioner eighteen months afterwards applied for leave to enter an appeal. The ground of the petition being that owing to some trifling informality in the proceedings of the professional persons employed by the mariners at the Cape, in not interposing an appeal, his only remedy was to apply to the Admlty. Ct. for its permission to appeal:—*Held:* the motion must be refused.—THE MARY (1826), 2 Hag. Adm. 26.

1810. —— Desertion of appeal.]—An appeal from the Vice-Admlty. Ct. at the Cape not being duly prosecuted, a motion that the ct. should pronounce the appeal to be deserted, & to condemn applts. in costs, was granted.—THE ELIZABETH (1824), 1 Hag. Adm. 226.

SUB-SECT. 2.—ADMIRALTY COURTS IN CANADA AND NEWFOUNDLAND.

1811. Jurisdiction—Wider in Canada & United States of America.]—*Semble:* the Admlty. juris-

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PART V. SECT. 7, SUB-SECT. 2.

a. *Exchequer Court of Canada.*]—Colonial Cts. of Admlty. Act, 1890 (c. 27), ss. 2, 3, vest the jurisdiction of the Vice-Admlty. Cts. in any colonial Ct. of Admlty., & by Admlty. Act, 1891 (c. 29), the Parliament of Canada made the Exch. Ct. the Ct. of Admlty. for the Dominion, & by s. 9 thereof conferred upon the local judges in Admlty. all the powers of the judge of the Exch. Ct. with respect to the Admlty. jurisdiction thereof.—*R. v.* THE ANNIE ALLEN (1895), 5 Ex. C. R. 144.—**CAN.**

b. —— *Extent of jurisdiction.*]—The Exch. Ct. of Canada has, in Admlty., as large a jurisdiction as the High Ct. of Admlty.—COPE *v.* THE RAVEN (1905), 9 Ex. C. R. 404.—**CAN.**

c. —— ——.]—The Exch. Ct. of Canada was constituted by Exch. Ct. Act (c. 16) (Dominion) for the purpose of dealing with matters in which the Crown was concerned (ss. 15 & 16), & has no general common law jurisdiction. It has also under Colonial Cts. of Admlty. Act, 1890 (c. 27), & Admlty. Act, 1891 (c. 29) (Dominion), jurisdiction in Admlty., including its statutory extensions.—BOW, MCLACHLAN & CO., LTD. *v.* THE CAMOSUN, [1909] A. C. 597; 101 L. T. 167; 25 T. L. R. 833, P. C.—**CAN.**

d. —— —— *Power to suspend proceedings.*]—On motion by deft., made under Admlty. Ct. Act, 1861 (c. 10), s. 34, an order was made suspending the proceedings by the Crown against deft. ship for damages for collision to a Canadian Government tug, until the Crown had given security to answer a judgment in a cross-cause *in personam* by deft. against the master of the tug. On appeal:—*Held:* the above sect. is one which gives or defines the right under consideration, which is one of those more extensive powers conferred upon the High Ct. of Admlty. which it did not formerly possess, & therefore the Exch. Ct. of Canada falls heir to the same jurisdiction. It is no objection to the conferring of jurisdiction that the statute which does so at the same time denotes the mode of proceedings by which the legal right is enforced; & even if this opinion were wrong, r. 228 would cover the case. *Poyser* v. *Minors* (1881), 7 Q. B. D. 329; *The Seringapatam* (1848), 3 Wm. Rob. 38; *The Rougement*, [1893] P. 275; *The Charkieh* (1873), L. R. 4 A. & E. 120; *The Carnarvon Castle* (1878), 38 L. T. 736; *The Newbattle* (1885), 10 P. D. 33, refd.—*R. v.* THE DESPATCH, p. 188, a, *ante*.—**CAN.**

e. —— —— *Seaman's wages—Claim below* $200.]—In 1887 A. sold a vessel to M. & S. under an agreement that the vessel was to remain in the name & under the control of A. until the purchase-money was fully paid, & that, in the event of the terms of the contract not being performed by the vendees, A. might take possession. Vendees having failed to perform the terms of the agreement, A. resumed possession of the vessel. In an action *in rem* in the Exch. Ct. for wages due to a seaman employed by vendees & which were earned during their possession of the vessel:—*Held:* (1) the amount of the claim being below $200, the Exch. Ct. had no jurisdiction under Inland Waters Seamen's Act, s. 2; (2) if summary proceedings had been taken as provided by Inland Waters Seamen's Act, a direction might have been made to provide for the realisation of the seaman's claim against the vessel, & she might have been tied up by the ct. on his showing that vendees who employed him were then the supposed owners of the vessel, & when the action was brought were insolvent within s. 34 of the above Act.—THE JESSIE STEWART (1892), 3 Ex. C. R. 132.—**CAN.**

f. —— —— —— ——.]—When the exceptions in Seamen's Act, R. S. C. c. 74, s. 56, do not apply, the Exch. Ct., on its Admlty. side, has no jurisdiction to entertain a claim for seamen's wages under the amount of $200, earned on a ship registered in Canada. Admlty. Act, 1891 (c. 29), being a general law, & enacting general provisions as to jurisdiction, does not repeal by implication the special provisions of the above sect., limiting the jurisdiction of the ct. in proceedings for seamen's wages. The ct. has no jurisdiction to entertain a claim for seamen's wages under an amount of $200 earned on a ship registered in England, & to which M. S. Act, 1894 (c. 60), s. 165, applies.—GAYNON *v.* THE SAVOY, DION *v.* THE POLINO (1904), 25 C. L. T. 87; 9 Ex. C. R. 238.—**CAN.**

g. —— —— *Bond to minority owners for safe return of ship.*]—HEATER *v.* ANDERSON (1910), 13 Ex. C. R. 41.—**CAN.**

h. —— *Concurrent jurisdiction—Supreme Court of Ontario.*]—SHIPMAN *v.* PHIN, p. 253, l, *post*.

i. —— —— *Supreme Court of North West Territories.*]—KELLY *v.* ALASKA TRADING CO., p. 254, r, *post*.

k. *Court of Equity—Extent of jurisdiction—Suit for account between co-owners.*]—The jurisdiction of the Ct. of Eq. in a suit for account between co-owners of a ship has not been taken away by Admlty. Act, 1891 (c. 29), which confers a like jurisdiction upon the Exch. Ct. in Admlty.; any discretion the Ct. of Eq. may have as to the exercise of its jurisdiction must depend upon the circumstances of each suit.—PENRY *v.* HANSON (1901), 21 C. L. T. 358.—**CAN.**

l. *Ontario — Supreme Court of — Concurrent jurisdiction — Exchequer Court of Canada.*]—By Judicature Act, R. S. O., 1897 (c. 51), s. 25, the Ontario High Ct. was given all the jurisdiction of the cts. of common law in England, & by R. S. O., 1914 (c. 58), s. 3, the jurisdiction of the Ontario High Ct. was vested in the Ontario Supreme Ct. The Exch. Ct. has very wide jurisdiction under Colonial Cts. of Admlty. Act, 1890 (c. 27), but the jurisdiction is only concurrent, & therefore the Supreme Ct. of Ontario has jurisdiction over all cases in negligence resulting in collision in inland waters.—SHIPMAN *v.* PHIN (1914), 31 O. L. R. 113; 6 O. W. N. 73; 19 D. L. R. 305; 7 O. W. N. 353; 32 O. L. R. 329; 20 D. L. R. 596.—**CAN.**

m. —— *Marine Court of.*]—THE KATE MOFFATT, 15 C. L. J. 284.—**CAN.**

n. —— ——.]—British North America Act, 1867 (c. 3), s. 91, gives the Dominion Parliament the exclusive legislative authority over all subjects relating to navigation & power to establish cts. of law; & 40 Vict. c. 21 establishes the Maritime Ct. of Ontario with jurisdiction over all proceedings *in rem* or *in personam* with regard to navigation, shipping, etc., on any river within the Province.—THE PICTON (1879), 4 S. C. R. 648.—**CAN.**

o. —— ——.]—*Re* THE GARLAND, MONAGHAN *v.* HORN, p. 254, x, *post*.

p. —— —— *Jurisdiction in rem—Dredge.*]—THE NITHSDALE, 15 C. L. J. 268.—**CAN.**

q. —— —— *Sale of salved vessel—Bonâ fide purchaser—Destruction of lien.*]—An action *in rem* against a tug was brought claiming $800 for salvage under an alleged agreement made in the Province of Ontario with the master of the tug at the time of the salvage services. Before action the tug was sold by the Q. Bank, under a mtge. held by it, to a purchaser who, it was alleged, had notice of the claim for salvage. The purchaser paid part cash & gave a mtge. on the vessel to the bank for the balance which remained unpaid. The action was not begun until after ninety days from the time when the alleged claim accrued. The purchaser

Sect. 7.—Colonial Courts of Admiralty & Vice-Admiralty Courts: Sub-sects. 2, 3, 4 & 5.]

diction in the United States of America & in British North America is less restricted than that of the Admlty. Ct. in England.—THE ROYAL ARCH, Nos. 276, 278, 288, 291, *ante*.

For full anns., *see* S. C. No. 291, *ante*.

1812. Right of appeal.]—Notwithstanding Canadian Supreme & Exchequer Cts. Act, 1875 (c. 2), s. 47, with respect to the finality of the judgments of the Supreme Ct., an appeal lies as of right under Colonial Cts. of Admlty. Act, 1890 (c. 27), s. 6, from a judgment of the ct. when pronounced in an appeal thereto from a decree of the Colonial Ct. of Admlty. constituted in pursuance of, & exercising jurisdiction under, the Act.—RICHELIEU & ONTARIO NAVIGATION CO. *v.* S.S. CAPE BRETON, [1907] A. C. 112; 76 L. J. P. C. 14; 95 L. T. 896; 23 T. L. R. 185, P. C.

claimed the benefit of Maritime Ct. Act, R. S. C., c. 137, s. 14 (5), re-enacted by Admlty. Act, 1891 (c. 29), s. 3 (4), as a bar to pltf.'s claim:—*Held:* as against a *bonâ fide* purchaser, pltf.'s claim (if any) was barred, & the lien on the vessel (if any) destroyed, even though the purchaser had actual notice of the claim at the time of or before his purchase.—THE C. J. MUNRO & THE HOME RULE (1894), 4 Ex. C. R. 146.—**CAN.**

r. *North West Territories—Supreme Court of.*]—Pltf. brought an action for wages due to him as a seaman, & asked for an order declaring him entitled to a lien on the ship, & a receiver & injunction order:—*Held:* (1) the jurisdiction conferred upon the Supreme Ct. of the North West Territories by North West Territories Act, R. S. C., c. 50, s. 48, was that used, exercised & enjoyed by the superior cts. of law, or by the Ct. of Chancery or by the Ct. of Probate in England on July 15, 1870, & the Ct. of Chancery had concurrent jurisdiction with the Ct. of Admlty. at that date in cases of wages creating liens; (2) the order asked for must be granted.—KELLY *v.* ALASKA MINING & TRADING CO. (1899), 4 Terr. L. R. 18.—**CAN.**

s. *Manitoba—Admiralty jurisdiction in—Master's wages.*]—The master of a vessel registered at W. & trading upon Lake Winnipeg had, in 1888, 1889, & 1890, no lien upon the vessel for wages earned by him as such master, there being no ct. in the Province of Manitoba in which it could have been enforced; & it could not be enforced under Colonial Cts. of Admlty. Act, 1890 (c. 27), or Admlty. Act, 1891 (c. 29).—BERAMAN *v.* THE AURORA (1893), 3 Ex. C. R. 228.—**CAN.**

t. *Quebec—Admiralty district of—Transfer of action for consolidation.*]—There is at present only one registry in the Admlty. District of Quebec, & Admlty. Act, 1891 (c. 29), as amended by 63 & 64 Vict. c. 45, s. 3 (now R. S. C., 1906, c. 141, s. 18 (2)), which enact that when a suit has been instituted in any registry no further suit shall be instituted in respect of same matter in any other registry of the ct., do not prevent an order for transfer of an action for the purpose of consolidation from the Quebec Registry to the office of the Deputy Registrar at Montreal. The deputy judge has jurisdiction equally with the local judge in Admlty., in cases instituted within Quebec Admlty. District, to order consolidation of such cases for purposes of trial.—BOUCHARD *v.* MONTREAL GRAIN ELEVATOR CO., MONTREAL GRAIN ELEVATOR CO. *v.* GASPESEIN (1906), 11 Ex. C. R. 220.—**CAN.**

u. —— *Court of King's Bench—Appellate jurisdiction.*]—Certain fees were paid by pltf. to deft. as judge of the Vice-Admlty. Ct. in a suit pending before him for subtraction of mariners' wages. Later pltf. brought an action against the judge to recover back the fees paid to him, & contested deft.'s right to exact them:—*Held:* (1) the K. B. Ct. for the district of Quebec had no appellate jurisdiction over the decisions of the Vice-Admlty. & could not try that which the judge had done within scope of his jurisdiction, although he should have proceeded erroneously; (2) the action must be dismissed & pltf.'s remedy was to appeal to the High Ct. of Admlty. in England or to the Privy Council; (3) the judge's right of receiving fees was established by an immemorial usage & nothing but an Act of Parliament could derogate from this usage.—WILSON *v.* KERR (1828), Stuart, 341.—**CAN.**

w. *Toronto—Admiralty District of—Transfer of action from one registry to another.*]—Pltf. applied to the local judge of the Admlty. District of Toronto for an order allowing him to remove the suit against a ship from the registry at Toronto to the registry at Quebec. The local judge held he had no such jurisdiction. On appeal:—*Held:* under Admlty. Act, R. S. C., 1906, c. 141, s. 19 (2), providing that "any party to a suit may, at any stage of such suit by leave of the ct., etc. . . . remove such suit pending in any registry to another registry," pltf. was entitled to remove the suit from the Toronto to the Quebec Registry. — MONTREAL TRANSPORTATION CO. *v.* NORWALK (1908), 11 Ex. C. R. 321.—**CAN.**

x. *Vice-Admiralty Courts—Extent of jurisdiction.*] — *Re* THE GARLAND, MONAGHAN *v.* HORN (1881), 7 S. C. R. 409.—**CAN.**

y. —— ——.]—Vice-Admlty. Cts. Act, 1863 (c. 24), was repealed by Colonial Cts. of Admlty. Act, 1890 (c. 27), & that Act was given effect to by Admlty. Act, 1891 (c. 29), so that the jurisdiction of the High Ct. of Admlty. in England is in force.—HALL *v.* THE SEAWARD (1892), 3 Ex. C. R. 268.—**CAN.**

z. —— —— *Power of Dominion Parliament to extend.*]—The Parliament of Canada has exclusive power to legislate on the subject of Inland Revenue & to declare in what cts. penalties for breaches of Dominion Inland Revenue Act, 1867 (c. 8), can be prosecuted; & in selecting the Vice-Admlty. Cts. as having jurisdiction in the Province of Nova Scotia it has not exceeded its powers. *Valin* v. *Langlois* (1879), 5 App. Cas. 115, folld.—A.-G. OF CANADA *v.* FLINT (1884), 16 S. C. R. 707; 4 Cart. 288.—**CAN.**

a. —— ——.]—By British North America Act, 1867 (c. 3), exclusive legislative authority extends to the Parliament of Canada with regard to navigation & shipping within the territorial limits of the Dominion; as an incident to this power the Cts. of Vice-Admlty. come under the control of the Canadian Parliament, & under 28 & 29 Vict. c. 63, any colonial law repugnant to the provisions of an Imperial Act is valid only to the extent it is in agreement with the Imperial Act.—THE FAREWELL (1881), 7 Q. L. R. 380; 2 Cart. 378.—**CAN.**

b. —— —— *Collision in harbour.*]—Where a collision occurred inside Halifax Harbour, & within the body of the county of Halifax:—*Held:* under Admlty. Ct. Act, 1861 (c. 10), & Vice-Admlty. Cts. Act, 1863 (c. 24), the ct. had full jurisdiction in the matter.—THE WAVELET (1867), V. A. D. 34.—**CAN.**

c. —— —— *Timber cut on Crown lands—Action in rem by Crown.*]—On motion for a prohibition to the Vice-Admlty. Ct.:—*Held:* that ct. had jurisdiction under 8 Geo. 1, c. 12, & 2 Geo. 2, c. 35, to entertain a suit *in rem*, instituted by the Crown against pine timber seized as cut on Crown land without licence, & to proceed to adjudge the forfeiture & condemnation thereof, although there had been no prosecution for the pecuniary penalties imposed by the Acts on persons cutting or carrying away same. A prohibition was accordingly refused.—R. *v.* ONE HUNDRED & SIXTY-TWO PIECES OF TIMBER (1839), Ber. [612] 410.—**CAN.**

d. —— —— *Action for compensation for salvage services.*]—The Supreme Ct. will grant prohibition restraining the prosecution of a suit instituted in the Vice-Admlty. Ct. for the recovery of a compensation for services rendered a vessel in distress.—CONARD *v.* DRISCOLL (1820), 1 Nfld. L. R. 201.—**NFLD.**

e. —— —— *Services not strictly salvage.*]—THE COSTA RICA (1891), 3 Ex. C. R. 23.—**CAN.**

f. —— —— *Contempt — Magistrate.*]—A motion was made to the Vice-Admlty. Ct. for an attachment to issue against a justice for contempt of ct. on the ground that a seaman was at the time of his arrest the promoter in a cause before the ct.:—*Held:* the justices had statutory powers to imprison seamen for desertion, & though the Vice-Admlty. Ct. would protect its suitors *eundo morando et redeundo*, it would not interfere with the authority of another tribunal; & on the facts the party arrested was at the time not attending the ct. in a suit there pending, but was attending his proctor for the purpose of bringing a suit, & the warrant of the justice was executed before the warrant issued from the Vice-Admlty. Ct., & the justice having been seized of the cause & the arrest having been made before suit brought in the Vice-Admlty. Ct., the application must be rejected.—THE ISABELLA (1837), 1 S. V. A. C. C. 134.—**CAN.**

g. —— *Judge's right to fees.*]—WILSON *v.* KERR, p. 254, u, *supra*.

h. —— *Marshal—Appointment—Enrolment.*]—The office of marshal of the Vice-Admlty. Ct. is not in the grant of the Crown in its regal character, & cannot be in the appointment of the Governor unless he holds a civil commission as Vice-Admiral. The title of an individual appointed to this office by the Governor, as the King's representative, does not derive support from that recognition of him in that capacity by the Lords of Appeal & the High Ct. of Delegates. On the other hand, a person appointed to this office by an Admlty. patent holds that office not from the period of his assuming the duties of it, but from the enrolment in the registrar's office in London.—STEWART *v.* HUTCHING (1817), 1 Nfld. L. R. 58.—**NFLD.**

j. *Judge—Power to instruct parties.*]—It is competent for a judge of an Admlty. Ct. to indicate, *ex officio*, to the parties any views which may seem to have an important bearing on their rights.—R. *v.* THE CHESAPEAK (1864), 1 Old. 797.—**CAN.**

SUB-SECT. 3.—ADMIRALTY COURTS IN AUSTRALIA AND NEW ZEALAND.

See cases, *infra*.

SUB-SECT. 4.—ADMIRALTY COURTS IN INDIA.

See cases, *infra*.

SUB-SECT. 5.—ADMIRALTY COURTS ELSEWHERE AND CONSULAR COURTS.

1813. Jurisdiction of Consular Court.]—The effect of 6 & 7 Vict. c. 94 is to make the jurisdiction of the British consular authority in the Ottoman Empire liable to be regulated by Order in Council; & the Order in Council, Aug. 27, 1860, provides for the exercise of such jurisdiction in suits between British subjects & the subjects of foreign States. The nature & extent of the consular jurisdiction must be solved by reference to usage. The Consular Ct. has exercised a customary jurisdiction *in rem* in cases of bottomry, whence the right to exercise a similar jurisdiction in cases of collision may be inferred. The jurisdiction being *in rem*, the rules applying to actions *in rem* apply rather than the rules of the English common law in personal actions; & if both parties are to blame for a collision, the damages ought to be divided. The Order in Council, Jan. 9, 1863, confirms rather than confers the Admlty. jurisdiction of the Consular Ct.—THE LACONIA (1863), Brown. & Lush. 117; 2 Moo. P. C. C. N. S. 161; 3 New Rep. 219; 33 L. J. P. M. & A. 11; 9 L. T. 37; 9 Jur. N. S. 1160; 12 W. R. 90; 1 Mar. L. C. 378, P. C.

Annotations:—**Refd.** The Brothers *v.* The Fingal (1869), 21 L. T. 621. **Mentd.** Messina *v.* Petrococchino (1872), L. R. 4 P. C. 144; The Vera Cruz (1884), 9 P. D. 88.

PART V. SECT. 7, SUB-SECT. 3.

k. *Jurisdiction of Supreme Court—Salvage.*]—Shipping & Seamen Act, 1903, s. 272, provides that actions for salvage shall be determined by the Supreme Ct.; but this means the Supreme Ct. in its Admlty. jurisdiction & under the rules made under Vice-Admlty. Cts. Act, 1863 (c. 24). — AORERE STEAMSHIP CO., LTD. *v.* COLONIAL SAILING SHIP CO., LTD. (No. 1) (1906), 26 N. Z. L. R. 257.—**N.Z.**

PART V. SECT. 7, SUB-SECT. 4.

l. *Practice applicable—Supreme Court of Bombay.*]—The Bombay Charter, Dec., 1823, established the Admlty. jurisdiction of the Supreme Ct., "as the same is used & exercised in that part of Great Britain called England, together with all & singular their incidents, emergents, & dependencies annexed & connexed causes whatsoever; & to proceed summarily therein with all possible despatch, according to the course of our Admlty. in that part of Great Britain called England": —*Held:* the rules & practice of the High Ct. of Admlty. in England prevailed & governed the proceedings in the Supreme Ct. at Bombay in maritime causes.—LOUGHNAN *v.* JOOSUB BHULLADINA, THE HYDROOS (1851), 5 Moo. I. A. 137. —**IND.**

m. *Jurisdiction—High Court of Bombay.*]—Admlty. Ct. Act, 1840 (c. 65), & Admlty. Ct. Act, 1861 (c. 10), do not extend to India. The jurisdiction of the High Ct. on its Admlty. side is the same as that exercised in the Ct. of Admlty. in England before the passing of the above Acts.—*Re* THE ASIA PROCEEDS, *Ex p.* HORMASJI (1868), 5 Bom. O. C. 64.—**IND.**

n. *S. P.* BARDOT *v.* THE AUGUSTA, *ante*.—**IND.**

o. —— *High Court of Bengal.*]—Admlty. Ct. Act, 1861 (c. 10), & Vice-Admlty. Cts. Act, 1863 (c. 24), extend to India. The High Ct., as constituted by the Charter of 1862, had not, by virtue of Admlty. Ct. Act, 1861, or otherwise, any jurisdiction over claims for disbursements by the master. But after the passing of the Charter of 1865, Vice-Admlty. Cts. Act, 1863, applied to the High Ct., as being "a Vice-Admlty. Ct. established after the passing of that Act in a British possession," & the High Ct. had jurisdiction, as a Vice-Admlty. Ct., to entertain the claim of a master for wages & disbursements on account of the ship.—*Re* THE PORTUGAL (1870), 6 B. L. R. 323.—**IND.**

p. —— *Charges of incompetency or misconduct against Board of Trade certificate holders.*]—The powers conferred on Cts. of Admlty. by Act IV. of 1875, s. 5, of investigating charges of incompetency or misconduct against holders of Board of Trade certificates is totally distinct from the power of inquiry into wrecks or casualties conferred on tribunals by same Act. In investigating charges of incompetency or misconduct under the above sect. it is not necessary, in order to give the ct. jurisdiction, that such incompetency or misconduct should have occurred on or near the coasts of India.—*Re* THE AVA & BRENHILDA, BENGAL GOVT. *v.* WHITTARD (1879), I. L. R. 5 Calc. 453; 5 C. L. R. 307.—**IND.**

q. —— *Objections—Application of Privy Council Rules.*]—In Vice-Admlty. cases, the effect of appearance, the mode of objecting to jurisdiction & of questioning a pleading, are matters governed by a settled practice under the Code of Civil Procedure. The Privy Council rules issued under 2 & 3 Will. 4, c. 51, have no operation, except in case of suits *in rem* in which no appearance has been entered, & other matters to which the Code cannot be applied.—*Re* THE FANNIE SKOLFIELD (1889), I. L. R. 17 Calc. 337.—**IND.**

PART V. SECT. 7, SUB-SECT. 5.

r. *South African Courts—Attachment ad fundandam jurisdictionem.*]—The South African Cts. will not order the arrest of goods of a *peregrinus ad fundandam jurisdictionem* at the suit of another *peregrinus* in respect of a tort committed outside the Union. The British ship *H.* & the German ship *A.* collided off the mouth of the Elbe, & the *H.* foundered with all her cargo. The *A.* thereafter put into Durban, whereupon the owners of the *H.* applied to the Natal Provincial Division for the arrest of the ship to found jurisdiction in an action they proposed to institute against her owners:—*Held:* no action *in rem* under Colonial Cts. of Admlty. Act, 1890 (c. 27), would lie unless the ship were attached under the discretionary powers conferred by M. S. Act, 1894 (c. 60), & attachment *ad fundandam jurisdictionem* could not avail pltfs. for that purpose.—THE HUMBER (OWNERS) *v.* THE ANSWALD (OWNERS) (1912), A. D. 546; S. A. Law Journal, vol. 30, Pt. II., p. 212.—**S. AF.**

s. *Court without British territory established by treaty—Supreme Court for China & Corea.*]—A ct. established by treaty in a place not within British territory has no jurisdiction to adjudge a ship forfeited under M. S. Act, 1894 (c. 60), s. 76.—THE MAORI KING (OWNERS) *v.* SHANGHAI CONSUL-GENERAL (1909), 78 L. J. (P. C.) 138; 100 L. T. 787; 25 T. L. R. 545; 53 Sol. Jo. 519. P. C.—**CHINA & COREA.**

t. *Constantinople—Supreme Consular Court of—Law applicable—Salvage.*]—In an action for salvage services, a plea was put in claiming exclusive jurisdiction for the Turkish authorities:—*Held:* the law administered in the Constantinople Consular Ct. was the law of England modified by the custom of the Levant, & the civil law, the Rhodian law, & the laws of Oberon governed the English Admlty. Cts., & in certain cases the ct. was guided by principles which also guided Cts. of Admlty.—HAMILTON *v.* AQUILINA (1860), 2 L. T. 90.—**CONSTANTINOPLE CONSULAR CT.**

u. —— —— *Practice applicable—Collision.*]—The Constantinople Supreme Consular Ct. being constituted a Ct. of Vice-Admlty. by Order in Council of Nov. 20, 1864, s. 41, the only procedure which can be followed in it is that of the High Ct. of Admlty. in England.

In a suit for damage by collision, a ship was arrested which was in the course of a voyage with a cargo of corn on board:—*Held:* (1) the ship was not protected from the effects of its own wrong because it had cargo on board, & as the law of England gave the remedy of arrest to pltf., the registrar of the ct. had no discretionary power to refuse the warrant; (2) in opposition to the usual practice of the High Ct. of Admlty. in England, pltf. must give security for deft.'s costs & the damages arising from detention.—THE BROTHERS *v.* THE FINGAL (1869), 21 L. T. 621.—**CONSTANTINOPLE CONSULAR CT.**

ADMISSIONS.

See COPYHOLDS; CRIMINAL LAW AND PROCEDURE; EVIDENCE; PRACTICE AND PROCEDURE.

ADOPTION.

See INFANTS AND CHILDREN.

ADULTERATION.

See FOOD AND DRUGS.

ADULTERY.

See HUSBAND AND WIFE.

ADVANCEMENT.

See DESCENT AND DISTRIBUTION; INFANTS AND CHILDREN; TRUSTS AND TRUSTEES; WILLS.

ADVERSE POSSESSION.

See REAL PROPERTY AND CHATTELS REAL.

ADVERTISEMENTS.

See COMPANIES; CONTRACT; CRIMINAL LAW AND PROCEDURE; TRADE MARKS, TRADE NAMES AND DESIGNS.

ADVOWSON.

See ECCLESIASTICAL LAW.

AFFIDAVIT.

See EVIDENCE; PRACTICE AND PROCEDURE.

AFFILIATION.

See BASTARDY.

AFFIRMATION.

See EVIDENCE.

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Shipmaster and Owner *See* SHIPPING & NAVIGATION.
Solicitor and Client . „ SOLICITORS.
Stockbroker and Client „ STOCK EXCHANGE.
Wife and Husband . „ HUSBAND & WIFE.
Architects and Surveyors „ BUILDING CONTRACTS, ENGINEERS & ARCHITECTS.
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Trust, Liability of Agent Joining in Breach of . ,, TRUSTS & TRUSTEES.

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Part I.—The Relation of Agency.

1. In general.]—No one can become the agent of another person except by the will of that person. His will may be manifested in writing, or orally, or simply by placing another in a situation in which, according to ordinary rules of law, or perhaps it would be more correct to say, according to the ordinary usages of mankind, that other is understood to represent & act for the person who has so placed him; but in every case it is only by the will of the employer that an agency can be created (LORD CRANWORTH).—POLE *v.* LEASK (1863), 33 L. J. Ch. 155; 8 L. T. 645; 9 Jur. N. S. 829, H. L.

2. ——.]—The word "agency" in its *primâ facie* sense seems to imply the relation of principal & agent, & not of vendor & purchaser; but there is no magic in the word "agency." It is often used in commercial matters where the real relationship is that of vendor & purchaser (JAMES, L.J.).—*Re* NEVILL, *Ex p.* WHITE (1871), 6 Ch. App. 397; 40 L. J. Bcy. 73; 24 L. T. 45; 19 W. R. 488, C. A.; *affd. sub nom.* TOWLE & Co. *v.* WHITE (1873), 29 L. T. 78, H. L.

Annotations:—**Consd.** *Re* Smith, *Ex p.* Bright (1879), 10 Ch. D. 566, C. A. **Reid.** *Re* Watson, *Ex p.* Atkins, [1904] 2 K. B. 753, C. A.; Gabriel *v.* Churchill & Sim, [1914] 1 K. B. 449. **Mentd.** *Re* Cheeseborough, *Ex p.* Blackburn (1871), L. R. 12 Eq. 358.

3. ——.]—Confidence in the particular person employed is at the root of the contract of agency (THESIGER, L.J.).—DE BUSSCHE *v.* ALT (1878), 8 Ch. D. 286; 47 L. J. Ch. 381; 38 L. T. 370; 3 Asp. M. L. C. 584, C. A.

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4. ——.]—The relation of principal & agent requires the consensus of both parties (JAMES, L.J.), —MARKWICK *v.* HARDINGHAM (1880), 15 Ch. D. 339; 43 L. T. 647; 29 W. R. 361, C. A.

For full anns., *see* LIMITATION OF ACTIONS.

5. ——.]—A person may use expressions calling himself an agent, but however true or applicable they may have been in a popular sense, if in point of law & in their legal sense they are meaningless, they may be treated as such.

No word is more commonly & constantly abused than the word "agent." A person may be spoken of as an agent & no doubt in the popular sense of the word may properly be said to be an agent, although when it is attempted to suggest that he is an agent under such circumstances as create the legal obligations attaching to agency that use of the word is only misleading (LORD HERSCHELL).—

PART I.

1 i. *In general—Essential characteristics.*]—A person does not become the agent of another merely because he gives him advice in matters of business. The essence of the matter is that the principal authorises the agent to represent or act for the principal in bringing him, or aid in bringing him, into contractual relation with a third person, that is to say, there must be a recognition of the derivative authority of the agent.

Pltf. jointly with R., a pleader, advanced money on insufficient security, but pltf. knew & approved of the security:—*Held:* pltf. was not entitled to be recouped by R. for any loss, even though he might have obtained the advice of R. as pleader. *Dooby* v. *Watson* (1888), 39 Ch. D. 179, cited.—MOHESH CHANDRA BOSA *v.* RADHA KISHORE BHATTACHARJEE (1908), 12 C. W. N. 28.—**IND.**

5 i. —— *Form of transaction immaterial.*]—A. gave B. a general power of attorney to enable B. to trade as a general dealer without a licence. B. thereafter became insolvent, & his stock-in-trade was seized by deft. as trustee of B.'s estate. A. claimed restoration of the goods:—*Held:* neither A. nor B. intended to create the relation of principal & agent or to invest A. with the ownership of the goods. *Semble:* the transaction between A. & B. was void on the ground of illegality, its object being to enable B. to trade without a licence, which was an offence forbidden by law.

No matter in what form such transaction is cast, the ct. will inquire into the real nature & the real intentions of the contracting parties, & will adjudicate accordingly.—MAHOMED ABDULLAH *v.* LEVY, S. A. L. R. (1916), C. P. D. 302.—**AUS.**

KENNEDY *v.* DE TRAFFORD, [1897] A. C. 180 ; 66 L. J. Ch. 413 ; 76 L. T. 427 ; 45 W. R. 671, H. L.

Annotations :—**Mentd.** Field *v.* Debenture Corpn. (1896), 12 T. L. R. 469 ; Nutt *v.* Easton, [1899] 1 Ch. 873 ; *Re* Biss, Biss *v.* Biss, [1903] 2 Ch. 40, C. A. ; Griffith *v.* Owen, [1907] 1 Ch. 195 ; Flower *v.* Pritchard (1908), 53 Sol. Jo. 178 ; Birkin *v.* Smith, [1909] 2 K. B. 112, C. A.

6. ——.]—An agent in the general sense of the word is "any person who happens to act on behalf of another" (LORD ALVERSTONE, C.J.).—R. *v.* KANE, [1901] 1 K. B. 472 ; 70 L. J. K. B. 143 ; 84 L. T. 240 ; 65 J. P. 26 ; 17 T. L. R. 181 ; 19 Cox, C. C. 658, C. C. R..

7. "Agency" may be fiduciary in character.]—An agent dealing with any property obtains no interest himself in the subject-matter beyond his remuneration ; he is dealing throughout for another, & though he is not a trustee according to the strict technical meaning of the word, he is *quasi* a trustee for that particular transaction for which he is engaged (LORD COTTENHAM, C.).—FOLEY *v.* HILL (1848), 2 H. L. Cas. 28 ; 9 E. R. 1002.

Annotations :—**Consd.** *Re* Gibson & Sturt, *Re* St. Alban's Bank (1850), 15 L. T. O. S. 95. **Distd.** Pennell *v.* Deffell (1853), 23 L. J. Ch. 115. **Consd.** Padwick *v.* Hurst (1854), 23 L. J. Ch. 657 ; Jackson *v.* Ogg (1859), 5 Jur. N. S. 976. **Distd.** St. Aubyn *v.* Smart (1867), L. R. 5 Eq. 183. **Consd.** A.-G. *v.* Edmunds (1868), L. R. 6 Eq. 381 ; South Australian Insce. *v.* Randell (1869), 6 Moo. P. C. C. N. S. 341, P. C. **Consd. & Apld.** Burdick *v.* Garrick (1870), 5 Ch. App. 233 ; Banner *v.* Berridge (1881), 18 Ch. D. 254. **Distd.** *Re* Tidd, Tidd *v.* Overall (1893), 62 L. J. Ch. 915. **Consd.** Royal Bank of Scotland *v.* Tottenham, [1894] 2 Q. B. 715, C. A. ; *Re* Derbyshire, Webb *v.* Derbyshire, [1906] 1 Ch. 135 ; Kerrison *v.* Glyn, Mills, Currie (1911), 81 L. J. K. B. 465, H. L. **Refd.** Teed *v.* Beere (1859), 33 L. T. O. S. 26 ; Smith *v.* Leveaux (1863), 2 De G. J. & Sm. 1 ; Hill *v.* South Staffordshire Ry. Co. (1865), 11 Jur. N. S. 192 ; Garnett *v.* McKewan (1872), 21 W. R. 57 ; Summers *v.* City Bank (1874), L. R. 9 C. P. 580 ; *Re* Palmer, *Ex p.* Richdale (1882), 19 Ch. D. 409, C. A. ; Marten *v.* Rocke, Eyton (1885), 53 L. T. 946. **Mentd.** Blower *v.* Blower (1858), 5 Jur. N. S. 33 ; Moxon *v.* Bright (1869), 4 Ch. App. 292 ; Seagram *v.* Tuck (1881), 44 L. T. 800 ; Atkinson *v.* Provident Society (1890), 25 Q. B. D. 377, C. A.

8. ——.]—BURDICK *v.* GARRICK (1870), 5 Ch. App. 233 ; 39 L. J. Ch. 369 ; 18 W. R. 387, C. A.

9. ——.]—*Re* MOLINE, *Ex p.* DYSTER, No. 108, *post.*

For full anns., *see* S. C. No. 108, *post.*

10. ——.]—WILSON *v.* SHORT (1848) 6 Hare, 366 ; 17 L. J. Ch. 289 ; 12 Jur. 301 ; 67 E. R. 1207.

11. ——.]—ROBINSON *v.* MOLLETT, No. 317, *post.*

For full anns., *see* S. C. No. 317, *post.*

12. Agent distinguished from—Arbitrator.]—An indenture between H. & a ry. co., after reciting that the co. was desirous of being supplied with 350,000 ry. sleepers, & that H. was willing to supply them according to the terms of a specification & tender, contained a covenant by H. that he would supply the sleepers within the time specified "as & when, & in such quantities, & in such manner" as the engineer of the co., by order in writing, "from time to time, or at any time within the period limited by the specification, should require." The specification stated that the number of sleepers required was 350,000 ; & that one half would have to be delivered in 1847, & the remainder by Midsummer, 1848. The deed also contained provisoes that the engineer might vary the times of delivery ; that the co. should retain £2,000 in its hands as security for the performance of the contract, & should pay it over within 2 months after all the sleepers had been delivered ; & that the contract might be put an end to in certain events :—*Held :* the engineer, as to matters in which he had a discretion, *e.g.*, as to varying the time of delivery of the sleepers, stood in the position of arbitrator between the parties ; as to giving the order for the delivery he was a mere agent of the co.—GREAT NORTHERN RY. CO. *v.* HARRISON (1852), 12 C. B. 576 ; 22 L. J. C. P. 49 ; 19 L. T. O. S. 259 ; 16 Jur. 565 ; 138 E. R. 1032, Ex. Ch.

Annotations :—**Refd.** Glenn *v.* Leith (1853), 1 C. L. R. 569 ; M'Intyre *v.* Belcher (1863), 14 C. B. N. S. 654 ; Clarke *v.* Watson (1865), 18 C. B. N. S. 278.

13. —— ——.]—It is not uncommon for a person, appointed arbitrator, to consider himself as agent for the person appointing him. How that is so common I wonder ; as it is against good faith (LORD THURLOW, C.).—CALCRAFT *v.* ROEBUCK (1790), 1 Ves. 221 ; 30 E. R. 311.

14. —— ——.]—PAPPA *v.* ROSE (1871), L. R. 7 C. P. 525 ; 41 L. J. C. P. 187 ; 27 L. T. 348 ; 20 W. R. 784, Ex. Ch.

15. —— ——.]—STEVENSON *v.* WATSON (1879), 4 C. P. D. 148 ; 48 L. J. C. P. 318 ; 40 L. T. 485 ; 27 W. R. 682.

16. —— ——.]—CHAMBERS *v.* GOLDTHORPE, [1901] 1 K. B. 624 ; 70 L. J. K. B. 482 ; 84 L. T. 444 ; 49 W. R. 401.

17. —— **Bailee.**]—A person who takes a furnished house is not an agent intrusted with the furniture, but a bailee (MARTIN, B.).—SHEPPARD (SHEPHARD)

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a. *Agent distinguished from—Consignee — Use of words "sole agent."*]—P., "sole agent" for sale of pltf.'s ale, shipped to him by pltf. in Scotland, sold a quantity in the ordinary course of business to deft., the invoice bearing the words "Bought of P.," & in the corner "agents for A. & Co.": —*Held :* according to the usage of business & the principle of convenience, the relation between pltf. & P. was not that of principal & agent, but of consignor & consignee.—AITKEN & Co. *v.* STEWART & Co. (1887), 8 N. S. W. 279.—**AUS.**

b. —— *Debtor—Test of agency.*]—The best test whether a person is an agent or only an ordinary debtor is to inquire whether it is his duty to keep money deposited with him so ear-marked that, in the event of his death, it could be said, this is the depositor's money, or was the alleged agent warranted by all the previous transactions between the depositor & himself in receiving the money & treating himself merely as a debtor to the depositor to that amount. —*Re* NANTES (1861), 1 W. & W. 11.—**AUS.**

c. —— *Grantee of option.*] — An owner listed his property with an agent for sale on certain terms, & then, without notice to the agent, gave an option for sale to a third party. The latter, when the time for taking up the option arrived, had the property conveyed to a party originally found by the agent. The purchase price was the same in both cases :—*Held :* there was no agency on the part of the option-holder, & his position as purchaser was not affected by his selling to the purchaser with whom the agent was negotiating.—WHITE *v.* MAYNARD & STOCKHAM (1910), 15 B. C. R. 340.—**CAN.**

d. —— ——.]—An agreement (commonly called an option), by which the owner of real estate promises to sell it to a party, at a stated price, within a stated delay enlarged by another promise within such enlarged delay, to sell to a third party at an advanced price, the difference to be shared between the owner & the first promisee, but which is not carried out, does not create a relation of principal & agent between the owner & the first promisee that entitles the latter to a reward or commission on a subsequent sale made by the former.—REDDY *v.* RUTHERFORD (1912), 43 Que. S. C. 289.—**CAN.**

e. —— *Manager of joint family property.*]—The manager of a joint family property is not the agent of the members of the family so as to make them liable to be sued as if they were his principals ; and the residence within the jurisdiction of such a manager does not enable British Indian cts. to enforce a foreign judgment obtained against a member of the family. The relation of such persons resembles that of trustee & *cestui que trust* rather than that of principal & agent.—ANNAMALAI CHETTY *v.* MURUGASA CHETTY (1903), 72 L. J. P. C. 89 ; 88 L. T. 712 ; I. L. R. 26 Mad. 544 ; 7 C. W. N. 754.—**IND.**

f. —— *Owner—Use of words "sole agent."*]—Pltf., patentee of a lamp, appointed deft. "sole agent for the sale," deft. to have the lamps manufactured in England & imported into South Africa at his own risk & expense. The premises for the sale were supplied by deft., who was assisted in effecting sales by pltf. ; & in circulars approved by pltf. deft. was referred to as owner of the lamps imported :—*Held :* notwithstanding the use of the words "sole agent," the transaction constituted a joint enterprise, under which deft. was owner, but was liable to account to pltf. for a half-share of the profits.—SHEARER *v.* SHIMWELL (1910), A. D. 157.—**S. AF.**

v. UNION BANK OF LONDON (1862), 7 H. & N. 661; 31 L. J. Ex. 154; 5 L. T. 757; 8 Jur. N. S. 265; 10 W. R. 299; 158 E. R. 635.

Annotations:—**Expld.** Baines *v.* Swainson (1863), 4 B. & S. 270; Heyman *v.* Flewker (1863), 13 C. B. N. S. 519. **Mentd.** Cole *v.* North-Western Bank (1875), L. R. 10 C. P. 354; Cahn *v.* Pockett's Bristol Channel Steam Packet Co., [1899] 1 Q. B. 643, C. A.; Oppenheimer *v.* Frazer & Wyatt, [1907] 1 K. B. 519.

18. —— Banker.]—FOLEY *v.* HILL, No. 7, *ante*.

For full anns., *see* S. C. No. 7, *ante*.

See, further, BANKERS & BANKING.

19. —— Cestui que trust.]—Copyhold lands were devised to pltfs. in trust for F. for life, but pltfs. were never admitted to the copyhold. At the time of testator's death the lands were in the possession of deft., to whom F., with pltfs.' assent, afterwards re-let them in her own name. Pltfs. then gave notice to deft. to pay the rent to them:—*Held:* (1) in letting the premises F. did not do so as pltfs.' agent, but as being the person interested in the property, & as having general management & control of it in her own hands; (2) no contract could be implied between pltfs. & deft., there having been an existing contract between deft. & F., & the occupation having been by permission of F.; (3) an action for use & occupation would not lie by pltfs. against deft.—CHURCHWARD & BLIGHT *v.* FORD (1857), 2 H. & N. 446; 26 L. J. Ex. 354; 5 W. R. 831; 157 E. R. 184.

For full anns., *see* LANDLORD AND TENANT.

20. —— ——.]—A *cestui que trust* is not the agent of the trustee, even in the case of a bare trustee (NEVILLE, J.).—STAIT *v.* FENNER, [1912] 2 Ch. 504; 81 L. J. Ch. 710; 107 L. T. 120; 56 Sol. Jo. 669.

For full anns., *see* SALE OF LAND.

21. —— Director.]—A director of a co. is certainly not a mere agent. It is his duty, amongst other things, to protect the co. & to enforce its rights even against himself (LINDLEY, L.J.).—*Re* SHARPE, *Re* BENNETT, MASONIC & GENERAL LIFE ASSURANCE CO. *v.* SHARPE, [1892] 1 Ch. 154; 61 L. J. Ch. 193; 65 L. T. 806; 40 W. R. 241; 36 Sol. Jo. 151, C. A.

For full anns., *see* COMPANIES.

22. —— ——.]—Although the directors of a co. are properly described as its agents & act as such, there is a broad distinction of degree between them & ordinary agents arising out of the fact that, so far as knowledge & intention are concerned, the co. is an abstraction. Where directors actually perform their part in the management of the co. they are both the brains & hands of the co. (FLETCHER MOULTON, L.J.).—BATH *v.* STANDARD LAND CO., LTD., [1911] 1 Ch. 618; 80 L. J. Ch. 426; 104 L. T. 867; 27 T. L. R. 393; 55 Sol. Jo. 482; 18 Mans. 258, C. A.

23. —— ——— Managing committee.]—The managing committee of a projected ry. co. are, as well as the directors after its formation, not mere agents of shareholders, but their trustees, & liable to account as such.—WILLIAMS *v.* PAGE (1858), 24 Beav. 654; 27 L. J. Ch. 425; 30 L. T. O. S. 360; 4 Jur. N. S. 102; 53 E. R. 510.

See, further, COMPANIES.

24. —— Independent contractor.]—Deft., a landowner, contracted with a co. for drainage of his estate, & it was agreed that pltf. (his steward) should, at a fixed sum, execute the same as the co.'s agent. The sum agreed upon had, after completion of the works, been paid by the co. to deft. Pltf. claimed from deft. the profits on the works, being the difference between what the works had cost out of pocket, & what had been charged for them, on the ground that he was in the position of an ordinary contractor:—*Held:* (1) although on the face of the deeds executed pltf. appeared to be an ordinary contractor, in reality he acted solely as deft.'s agent, the arrangement being merely a contrivance by the co. to allow a landowner to execute drainage works under superintendence of his own agent; (2) the claim could not be allowed.—WATERS *v.* SHAFTESBURY (EARL) (1867), 2 Ch. App. 231; 15 L. T. 489; 15 W. R. 289, C. A.

25. —— One co-tenant acting in own right.]—Where one tenant in common of real estate was left by his co-tenant with the management of the property, & the mtgees. required him to pay over the rents to them in reduction of the mtge. debt & payment of interest in place of keeping them or paying them to his co-owner:—*Held:* he nevertheless collected these rents in his own right, & the right he had as owner & not as agent of the mtgees.—KENNEDY *v.* DE TRAFFORD, No. 5, *ante*.

Annotations:—**Refd.** Field *v.* Debenture Corpn. (1896), 12 T. L. R. 469.
For full anns., *see* S. C. No. 5, *ante*.

26. —— Partner.]—A fire insurance society being an unincorporated assocn. under its powers entered into treaties with other cos., appointing them its agents in foreign lands, & agreeing to accept & enter upon the risk of one-eighth of every fire insurance policy of such cos. in force at the date of the treaty or effected or renewed after that date, & agreed to be on all risks simultaneously with the other cos., the other cos. agreeing to pay a proportion of the premiums, 20 per cent. commission to be allowed on such premiums to the agents for the expenses of conducting the agency. The fire assurance society having gone into liquidation, the chief clerk allowed the claim of another co. for sums due to it in respect of guarantee & treaty business. On a summons by the liquidator to vary the certificate:—*Held:* the

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26 i. —— *Partner.*]—An agreement by several persons stipulated that one of them should furnish the premises in which to carry on the business & capital for carrying on the business, & that he should receive a stipulated sum annually for his time & expenses, & the others stipulated sums together with a proportion of the net profits:—*Held:* this contract created a special agency, not a partnership, between the parties.—MUNSON *v.* HALL (1863), 10 Gr. 61.—**CAN.**

26 ii. —— ——.]—Pltfs. agreed with B. that he should purchase & ship to pltfs. such lumber as they should direct—in consideration whereof pltfs. were to furnish B. with the necessary funds for purchasing, shipping, & other expenses connected therewith, & out of the profits when the lumber was sold to allow & pay to B. a percentage for his services, & to apply the remainder of the profits in payment of B.'s prior indebtedness to pltfs. An execution creditor of B. seized the lumber purchased by him:—*Held:* (1) there not being a community of profit & loss between pltfs. & B. there could be no partnership; (2) B. was the mere agent of pltfs.—CLARK *v.* MCKELLAR (1862), 12 C. P. 562.—**CAN.**

26 iii. —— ——.]—Pltf. sold half his interest in certain land to deft., & they agreed to build houses thereon at their joint cost, raising the necessary money by mtge. & contributing the remainder in equal shares. Deft. collected the rents on their joint account, & out of them paid mtge. interest & outgoings, rendering accounts to pltf. In an action by pltf. alleging that deft had not contributed his just share & had not properly accounted for rents:—*Held:* the accounts could not be gone into beyond six years from date of writ, as the dealings did not constitute a partnership, the parties being co-owners only, & in collecting the rents, paying outgoings, & rendering accounts, deft. had acted as an ordinary agent & not as an express trustee. *Burdick* v. *Garrick* (1870), 5 Ch. App. 233; *Lyell* v. *Kennedy* (1889), 14 App. Cas. 437; *Re Hindmarsh* (1860), 1 Dr. & Sm. 129; *Watson* v. *Woodman* (1875), L. R. 20 Eq. 721; *Friend* v. *Young*, [1897] 2 Ch. 421, cited.—ROSS *v.* ROBERTSON (1904), 24 C. L. T. 228; 7 O. L. R. 413; 30 W. R. 158, 513.—**CAN.**

g. —— *Pledgee.*]—Where a power of sale over another's goods is exercisable irrespective of any failure to pay sums due by that other to the holder of the power, the latter is an agent for sale & not a pledgee.—MITCHELL *v.* SYKES (1883), 4 O. R. 501.—**CAN.**

treaty agreements did not constitute an amalgamation between the contracting cos., nor a partnership either *inter se* or as regarded third persons, but were agreements of agency.—*Re* NORWICH EQUITABLE FIRE ASSURANCE SOCIETY, ROYAL INSURANCE CO.'s CLAIM (1887), 57 L. T. 241; 3 T. L. R. 781.

See, further, PARTNERSHIP.

27. ——Purchaser.]—T. & Co. consigned goods to N. at an invoice price. N. dealt with the goods as owner, & sold them at such prices & in such manner as he thought fit. He sent regular monthly statements of the goods sold, & every month paid the invoice price of the goods comprised in the previous monthly statement. N. was partner in a firm of N., J. & Co., & by arrangement with his partners used the partnership as his bankers in reference to the above business, which he carried on for his special benefit, & an account of the moneys paid in & drawn out was regularly kept. N., J. & Co. having executed a deed of arrangement with their creditors, at a time when the account of N. showed a balance of £2,035 1*s.* 2*d.* in his favour, the account of N. with T. & Co. at that time showed a balance in favour of T. & Co. of £2,035 11*s.* 8*d.* T. & Co. sought to prove against the partnership for the amount of this balance, as being trust moneys held by N. as his trustee:—*Held:* the nature of the business carried on between T. & Co. & N. was that of vendor & purchaser, & not principal & agent, & there was no trust.

A consignee who is at liberty, according to the contract between him & his consignor, to sell at any

27 i. —— *Purchaser.*]—C. consigned goods to a co. on terms they should remain the property of C., the co. undertaking their storage & not to sell below certain prices & to account each year for the goods sold:—*Held:* the co. was not a purchaser of the goods from C., but merely an agent to sell on his behalf.—*Re* WARD, FARMERS' ASSOCN., LTD. (1897), 15 N. Z. L. R. 480. —N.Z.

27 ii. —— ——.]—Pltf., a commission merchant, acting on a telegram from defts., distillers, bought a cargo of corn, which he shipped on a schooner, & drew on defts. for the amount. Pltf. insured the cargo in his own name. He then transferred the draft to a bank & procured its discount, indorsing the bill of lading to the bank & handing them the insurance policy, these documents to be regarded as collateral security. The bank was instructed not to deliver the bill of lading until after payment of the draft. On arrival it was found that the corn was damaged, & defts. refused delivery & declined to pay the draft. Pltf. retired the draft, & the corn was sold for the best price obtainable, & pltf. sued for the balance:—*Held:* the contract was one of sale & purchase & not of agency.—CORBY *v.* WILLIAMS (1881), 7 S. C. R. 470.—CAN.

27 iii. —— ——.]—B. & G. agreed that B., Transvaal agent for certain beer syphons, should order one hundred syphons from Germany, G. to pay B. £300 for such syphons & no more, & to allow B. to purchase them from him on arrival for £425, & B. to order the syphons in his own name & pay all charges. On arrival B. was in any event to have the use of the syphons, & no delivery to G. was contemplated. In the event of B. purchasing, it was agreed that the ownership in the syphons should remain in G. till the whole of the £425 had been paid by B.:—*Held:* under this agreement, B. was not G.'s agent to import but the purchaser of the syphons from the manufacturer, the arrangement between B. & G. being merely an attempt to effect a pledge, in the guise of a sale, in favour of G. in security of an advance of £300.—GROSS *v.* BECK'S TRUSTEE (1906), Transvaal Supreme Court, 167. —S. AF.

27 iv. —— ——.]—D., traveller of pltfs., a carriage manufacturing co., having been approached by the manager of W. Co. with a view to the purchase of carriages, & having declined the offer on the ground that W. Co.'s credit was not sufficiently good, was taken by the latter's manager to defts., who then signed a guarantee addressed to pltfs. in the following terms: "We hereby oblige ourselves . . . to the amount of $1,000 for purchases they (W. Co.) may now make from you at any time." Pltfs. then supplied W. Co. with carriages to the value of $1,824, subject to the condition that the title to the goods should not pass till they had been paid for. This amount being unpaid, pltfs. sued defts. on the guarantee:—*Held:* the contention that the transaction was not a sale to W. Co., but an authority to them to sell as agents of pltfs., could not stand, because W. Co. were to sell for themselves & the purchase-money was to be theirs.—E. N. HENRY CO. *v.* BIRMINGHAM (1908), 6 E. L. R. 385; (1909) 7 E. L. R. 163.—CAN.

27 v. —— ——.]—Pltfs. shipped machines to deft., accompanied by invoices which contained an item "to balance of account rendered" followed by charges for new merchandise sold & giving credit for amounts received. They supplied deft. with a book of lien notes which stipulated that the goods should remain the property of pltfs. until paid for by purchasers, but no instructions were given as to selling price, nor did pltfs. receive information regarding sales made by deft. The lien notes were filled in by customers, & deft., after indorsing them, sent them to pltfs. for his credit. He also gave them a promissory note for balance due from him on his account, & had at times made payments in cash. Deft. had never made a charge for commission:—*Held:* the transactions represented genuine sales intended & expected to be paid for by deft.—RICHARDSON *v.* ELDRIDGE (1908), 34 Que. S. C. 424.—CAN.

27 vi. —— ——.]—Pltfs., carriage manufacturers & sellers, desired S., a manufacturers' agent, to handle their goods, & arranged with him to "cut out" a rival firm for which S. acted as agent, & deal with pltfs. S. gave a signed order for some buggies, which provided that they were to be paid for by draft & that the property was to remain in pltfs. until actually paid for. S. sold two of the buggies to defts., who gave a draft & two other buggies in payment, & shortly after the sale, pltfs. drew on S. for the amount of the invoice. The draft was accepted, but not paid at maturity by S. S. had not handed over defts.' note to pltfs. Pltfs. made a demand on S. for payment, who said he had no money, & that the buggies were in possession of defts. On the day that the pltfs. made their demand on S., they appointed him their agent to sell, & agreed that the terms should apply to all goods sold & unsettled for, but this arrangement did not include the buggies sold to defts. which had been settled for:—*Held:* the transaction between pltf. & S. was one of sale & not of agency.—DOMINION CARRIAGE CO. *v.* WILSON (1910), 17 O. W. R. 363.—CAN

27 vii. —— ——.]—In an action for price of goods supplied, the facts were that from the commencement of the dealings pltf. had sent to deft. every week an invoice for goods "sold" showing the price, & had kept an accurate account of the sales. Pltf. made no request for an account, but would not have continued sending goods without receiving an account had he regarded deft. as an agent. Deft. had kept no account of the transactions for the purpose of his commission. Deft. had submitted a draft agency agreement to pltf., but pltf. did not agree to its terms & had refused to sign it:—*Held:* the course of the dealings showed the relation of vendor & purchaser, & not that of principal & agent. *Re Watson & Co., Ex p. Atkin Brothers*, [1904] 2 K. B. 753; *Re Nevill, Ex p. White* (1871), 6 Ch. App. 397, apprvd.—GALLAGHER *v.* FREEDMAN (1913), 23 W. L. R. 389; 10 D. L. R. 436.—CAN.

27 viii. —— ——.]—Pltf. ordered a tractor from defts., sellers of agricultural machinery, who were appointed agents by the manufacturers, & supplied by them with tractors at English prices. Defts., & not their customers, were responsible for the purchase price, defts., however, agreeing not to charge their customers more than a certain price:—*Held:* relations between the manufacturers & defts. were those of purchaser & seller & not of principal & agent.—SEGGIE *v.* PHILIP BROS., S. A. L. R. (1915), C. P. D. 292.—AUS.

27 ix. —— ——.]—Manufacturers supplied goods to a retail firm under agreements in which the latter were described as "stockists," "consignees" & "stockists or agents." The property in the goods was to remain in the manufacturers till actually sold & paid for. The goods were to be supplied at wholesale prices, & the retailers were to sell at prices fixed by the manufacturers & to get the difference between the wholesale & retail prices. The retailers sold the goods to their own customers, & debited them with the retail price in their own books, & rendered accounts to them in their own name. The customers' names were not disclosed to the manufacturers, & the retailers used the money received for the goods for their own purposes. The manufacturers rendered accounts to the retailers showing the amounts due in respect of goods supplied which were settled by the retailers. The amounts received by the retailers from their customers were never appropriated in a separate account to the manufacturers. The accounts rendered to their customers by the retailers contained items other than the manufacturers' goods:—*Held:* the relation was that of seller & buyer, not that of principal & *del credere* agent.—MICHELIN TYRE CO., LTD. *v.* MACFARLANE (GLASGOW), LTD. (1916), 2 S. L. T. 221; 54 Sc. L. R. 1.—SCOT.

27 x. —— ——.]—A co-operative dairy co. received butter-fat from suppliers to be manufactured into butter & cheese. The butter-fat went into bulk, & the identity of each supplier's property was lost. The suppliers were consulted each year as to the mode of disposal of the butter & cheese, &, as the co. had deducted the cost of manufacture according to a fixed scale, the proceeds were divided proportionately among the suppliers:—*Held:* (1) the relation between the suppliers & the

price he likes & to receive payment at any time he likes, but is bound, if he sell his goods, to pay the consignor for them at a fixed price & at a fixed time, is not a *del credere* agent, but a principal; it is immaterial that the parties designate their relationship by the term "agency" (MELLISH, L.J.).—TOWLE (JOHN) & Co. *v.* WHITE (1873), 29 L. T. 78; 21 W. R. 465, H. L.; *affg.* 6 Ch. App. 397, C. A.

Annotations:—**Distd.** *Re* Cheesebrough, *Ex p.* Blackburn (1871), L. R. 12 Eq. 358. **Expld.** *Re* Smith, *Ex p.* Bright (1879), 10 Ch. D. 566, C. A. **Distd.** Gabriel *v.* Churchill & Sim, [1914] 1 K. B. 449. **Refd.** *Re* Watson, *Ex p.* Atkin, [1904] 2 K. B. 753, C. A.

28. —— ——.]—The fact that the principal agrees to pay his agent for sale a commission varying according to the amount of profit obtained by the sale, or depending upon the surplus which the agent can obtain over & above the price which will satisfy his principal, does not alter the nature of their relation & turn the agent into a purchaser. The fact that by the contract the agent guarantees all accounts shows that he is not the real purchaser, but a *del credere* agent.—*Re* SMITH, *Ex p.* BRIGHT (1879), 10 Ch. D. 566; 48 L. J. Bcy. 81; 39 L. T. 649; 27 W. R. 385, C. A.

Annotation:—**Refd.** *Re* Watson, *Ex p.* Atkin, [1904] 2 K. B. 753, C. A.

29. —— ——.]—The bkpts. carried on business as East India agents, & sold goods upon commission. Upon the invitation of bkpts. appcts., wholesale silversmiths, sent certain goods to bkpts.' office as samples, & the goods were to remain at appcts.' risk. The usual practice of bkpts. was to introduce their customer to appcts., who supplied him with goods corresponding to the samples, but in cases of urgency bkpts. sold the samples themselves:—*Held:* the parties were not in fact vendors & purchasers, but principals & agents.—*Re* WATSON & Co., *Ex p.* ATKIN BROTHERS, [1904] 2 K. B. 753; 73 L. J. K. B. 854; 91 L. T. 709; 20 T. L. R. 727; 48 Sol. Jo. 673; 11 Mans. 256, C. A.

Annotations:—**Apld.** *Re* Young, Hamilton, *Ex p.* Carter, [1905] 2 K. B. 381. **Refd.** Hollinshead *v.* Egan, [1913] A. C. 564.

30. —— **Servant.**]—Prisoner, who kept a refreshment house, was employed by the prosecutors to get orders for their goods, collect the money & pay it over. He was paid by commission. He was to go about among farmers to get orders, but no definite time was to be spent in so doing. He was styled by them their agent for the particular district. The prosecutors had a store at B., under control of prisoner, who supplied customers from the stores pursuant to orders he obtained. In order to obtain the security of a guarantee society for prisoner's conduct, & in compliance with their regulations, it was arranged that prosecutors should pay prisoner a salary of £1 a year. Prisoner having got into arrear was treated by prosecutors as a debtor for the amount. Prisoner fraudulently appropriated money which he received from customers & gave a false account:—*Held:* a conviction for embezzlement could not be sustained, as the above facts did not establish that prisoner was servant of prosecutors, their relation being rather that of agent & principal.—R. *v.* WALKER (1858), Dears. & B. 600; 27 L. J. M. C. 207; 31 L. T. O. S. 137; 4 Jur. N. S. 465; 6 W. R. 505; 8 Cox, C. C. 1, C. C. R.

Annotation:—**Folld.** R. *v.* Bowers (1866), L. R. 1 C. C R. 41.

See, further, CRIMINAL LAW & PROCEDURE.

31. —— ——.]—Where the person employed to receive money is a clerk or servant, he must receive it himself & must hand it over as he receives it. But where the authority given is to receive the money & then not to hand it over in specie but to pay over an equivalent sum, the case is very different. If a servant intrusted with his master's money becomes bkpt. the money would not belong to his creditors. But where an attorney or commercial agent is employed to receive money to be paid over to his principal the next day, it would in the event of the bkpcy. of the attorney or agent, whilst the money remained in his hands, form part of his general assets. Where the person to whom the money is paid stands in the relation of a clerk or servant, the payment to him, whether in cash or by a cheque which is afterwards paid, is a good payment to the principal (BLACKBURN, J.).—BRIDGES *v.* GARRETT (1870), L. R. 5 C. P. 451; 39 L. J. C. P. 251, 22 L. T. 448; 18 W. R. 815, Ex. Ch.

Annotations:—**Expld. & Distd.** Pearson *v.* Scott (1878), 9 Ch. D. 198. **Distd.** Crossley *v.* Magniac, [1893] 1 Ch. 594; Papè *v.* Westacott, [1894] 1 Q. B. 272, C. A.; The Netherholme, Glen Holme, & Rydal Holme (1895), 72 L. T. 79, C. A. **Folld.** Walker *v.* Barker (1900), 16 T. L. R. 393. **Refd.** *Re* Heath, Parker & Brett (1898), 43 Sol. Jo. 98, C. A.

32. —— ——.]—The name of defts., a Scotch firm of manufacturers, was put up outside M.'s office & the address of M.'s office was placed at the top of defts.' notepaper as being the address of their London offices. M. was only employed by defts. as their agent for the special purpose of procuring & forwarding to them specifications & drawings as instructed by them from time to time; they paid him no wages, nor any rent for his office; they did not manufacture, or sell, or exhibit any goods at his office, & he had no authority to take orders for them:—*Held:* (1) M. was agent, & not servant, of defts.; (2) defts. were not carrying on business at his office within R. S. C., O. 9, r. 6.—BAILLIE *v.* GOODWIN (1886), 33 Ch. D. 604; 55 L. J. Ch. 849; 55 L. T. 56; 34 W. R. 787.

Annotation:—**Refd.** Wood *v.* Anderston Foundry Co. (1888), 4 T. L. R. 708; Singleton *v.* Roberts (1894), 70 L. T. 687.

See, further, MASTER & SERVANT.

33. —— **Stevedore.**]—A ship was chartered by the owner to A. for a voyage with cargo to Port L. & back for a stipulated rate of freight per ton on the homeward cargo,—the cargo to be taken to & tendered alongside at the charterer's risk & ex-

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co. was that of principal & agent & not that of vendor & purchaser, & the property in the butter remained in the suppliers. — BRUCE *v.* GOOD, GOOD *v.* BRUCE (1917), N. Z. L. R. 515.—**N.Z.**

27 xi. —— —— *Use of words "sole agent."*]—A. agreed with a co. that he should be its "sole agent" for the sale of certain machines. The agreement provided that A. should sell twenty-five machines yearly & that, upon the determination of the agency, he might collect on his own account all moneys due in respect of machines which he had sold. It was also provided that the price at which the machines should be invoiced to A. should be £37 10s. net duty paid, c.i.f. Wellington, & should be paid for in cash against documents:—*Held:* the relation was that of vendor & purchaser & not that of principal & agent, & the co. was liable for failure to supply machines during the currency of the agreement. — FRASER-RAMSAY (NEW ZEALAND), LTD. *v.* DE RENZY (1913), 32 N. Z. L. R. 553, C. A.—**N.Z.**

30 i. —— *Servant.*]—A. made an agreement appointing B. his sole agent for 3 years on a commission & expenses basis. B. made secret profits out of the sales:—*Held:* A. was justified in revoking the contract, as such an arrangement did not constitute a hiring of services, but was a mandate revocable at any time without cause or notice, subject to payment of damages.—HUDON *v.* COOL (1912), 42 Que. S. C. 228.—**CAN.**

30 ii. —— ——.]—An agreement whereby the owner of property appoints another as his agent for a period of three years to effect the sale thereof in consideration of a commission & expenses is a contract of agency & not a hiring of services.—HUDON *v.* COOL (1912), 42 Q. S. C. 228.—**CAN.**

h. —— *Vendor.*]—Pltf. entered into a written agreement with B. to supply him with logs. B. transferred his right to defts., who entered into an agreement with pltf. to pay him the balance that might be due him by B. Pltf. & B. afterwards made a settlement without the knowledge of defts., on which a balance was struck in favour of pltf.:—*Held:* B. was not the agent of defts. for the purpose of this settlement. —SUTHERLAND *v.* GILMOUR (1846), 3 Kerr, 165.—**CAN.**

pense, the ship to be consigned to the charterer's agents at ports of loading & discharge, & a stevedore for the outward cargo to be appointed by the charterer, but to be paid by & to act under the captain's orders. The charterer put up the ship as a general ship for Port L. & appointed a stevedore, who with his men went on board for the purpose of stowing the vessel, in the usual course of his business. The master gave no orders to or in any way interfered with the stevedore, only looking into the hold occasionally to see how the cargo was being stowed for the safety of the ship. Pltfs.' agent arranged with the broker of the charterer for the freight & carriage to Port L. of certain sugar-pans, & sent them alongside the ship. Whilst the pans were being hoisted on board from the lighter by the stevedore & his men, two of them were by their negligence damaged:—*Held:* in these circumstances the stevedore was not the servant or agent of the master so as to render him responsible.—BLAIKIE (BLAKIE) *v.* STEMBRIDGE (1859), 6 C. B. N. S. 894; 29 L. J. C. P. 212; 2 L. T. 570; 6 Jur. N. S. 825; 8 W. R. 239; 141 E. R. 703, Ex. Ch.

Annotations:—**Distd.** Sack *v.* Ford (1862), 13 C. B. N. S. 90. **Expld.** Roberts *v.* Shaw (1863), 4 B. & S. 44. **Distd.** The Helene (1866), L. R. 1 P. C. 231, P. C. **Folld.** The Catharine Chalmers (1874), 32 L. T. 847. **Mentd.** Sandeman *v.* Scurr (1866), L. R. 2 Q. B. 86; British Columbia & Vancouver's Island Spar, Lumber & Saw Mill Co. *v.* Nettleship (1868), 37 L. J. C. P. 235.

34. —— ——.]—Stevedores are not servants of the shipowner; they are persons having a special employment, with entire control over the men employed in the work of loading & unloading. They are altogether independent of the master or owner. In one sense they may be said to be agents of the owner; but they are not in any sense his servants. They were not put in his place to do an act which he intended to do for himself.—MURRAY *v.* CURRIE (1870), L. R. 6 C. P. 24.

Annotations:—**Distd.** Turner *v.* Great Eastern Ry. Co. (1875), 33 L. T. 431. **Apld.** Hall *v.* Lees, [1904] 2 K. B. 602, C. A. **Refd.** Walker *v.* Crabb (1916), 33 T. L. R. 119. **Mentd.** Rourke *v.* White Moss Colliery Co. (1876), 1 C. P. D. 556; Jones *v.* Liverpool Corpn. (1885), 14 Q. B. D. 890; Moore *v.* Palmer (1886), 2 T. L. R. 781, C. A.; Oldfield *v.* Furniss, Withy & Ronaldson (1893), 58 J. P. 102.

35. —— **Tenant in common.**]—One tenant in common is not an agent for another (BRETT, M.R.).—LEIGH *v.* DICKESON (1884), 15 Q. B. D. 60; 54 L. J. Q. B. 18; 52 L. T. 790; 33 W. R. 538, C. A.

Annotations:—**Expld.** Bonner *v.* Tottenham & Edmonton Permanent Investment Bldg. [Soc., 1899] 1 Q. B. 161, C. A. **Consd.** *Re* Coulson's Trusts, Prichard *v.* Coulson (1907), 97 L. T. 754. **Mentd.** *Re* Jones, Farrington *v.* Forrester, [1893] 2 Ch. 461; *Re* Cook's Mortgage, Lawledge *v.* Tyndall (1896), 65 L. J. Ch. 654; Hill *v.* Hickin, [1897] 2 Ch. 579; Kenrick *v.* Mountsteven (1899), 48 W. R. 141.

36. —— ——.]—KENNEDY *v.* DE TRAFFORD, No. 5, *ante*.

For full anns., *see* S. C. No. 5, *ante*.

Distinction between managing owner of ship & agent.]—*See* SHIPPING & NAVIGATION.

Distinction between party acting under deed of inspectorship & agent.]—*See* BANKRUPTCY & INSOLVENCY.

Distinction between receiver & agent.]—*See* RECEIVERS.

Part II.—Competency of Parties.—Acts which can be done by an Agent.

SECT. 1.—PRINCIPALS.

SUB-SECT. 1.—PERSONS INCOMPETENT TO ACT AS PRINCIPALS.

Alien enemy.]—*See* ALIENS.

Convict.]—*See* CRIMINAL LAW & PROCEDURE.

SUB-SECT. 2.—PERSONS WITH LIMITED CAPACITY TO ACT AS PRINCIPALS.

Company.]—*See* COMPANIES.

Corporation.]—*See* CORPORATIONS.

Drunkard.]—*See* CONTRACT.

Infant.]—*See* INFANTS & CHILDREN.

Lunatic.]—*See* LUNATICS & PERSONS OF UNSOUND MIND.

Married woman.]—*See* HUSBAND & WIFE.

SUB-SECT. 3.—OTHER PERSONS.

A. General Rule.

37. A person may do by an agent what he can do himself.]—Whatever a person who is *sui juris* can do personally he can do through his agent. No doubt there are some exceptions (STIRLING, L.J.).—BEVAN *v.* WEBB, [1901] 2 Ch. 59; 70 L. J. Ch. 536; 84 L. T. 609; 49 W. R. 548; 17 T. L. R. 440; 45 Sol. Jo. 465, C. A.

Annotation:—**Folld.** Norey *v.* Keep, [1909] 1 Ch. 561.

38. ——.]—If a copyholder may surrender his estate in ct. by general custom of the realm, which is the common law, from thence it follows that he may do it by attorney as a thing incident by the common law.—COMBES' CASE, No. 42, *post*.

Annotation:—**Refd.** Compton *v.* Collinson (1790), 1 Hy. Bl. 334.

For full anns., *see* S. C. No. 42, *post*.

39. ——.]—At common law where a person authorises another to sign for him, the signature of the person so signing is the signature of the person authorising (BLACKBURN, J.).—R. *v.* KENT JJ. (1873), L. R. 8 Q. B. 305; 42 L. J. M. C. 112; 37 J. P. 644; 21 W. R. 635.

Annotations:—**Distd.** Wilson *v.* Wallani (1880), 5 Ex. D. 155. **Consd.** *Re* Whitley Partners (1886), 32 Ch. D. 337, C. A. **Folld.** France *v.* Dutton, [1891] 2 Q. B. 208. **Refd.** De Beauvais *v.* Green (1906), 22 T. L. R. 816.

40. ——.]—Permission accorded to a specified person to do an act is *primâ facie* accorded to him or his agents (COLLINS, L.J.).—BEVAN *v.* WEBB, No. 37, *ante*.

Annotation:—**Folld.** Norey *v.* Keep, [1909] 1 Ch. 561.

Right of a person to appoint an agent to examine books & documents, *see* DISCOVERY, INSPECTION & INTERROGATORIES.

41. A person may not do by an agent what he cannot do himself.]—The powers of an agent are

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PART II. SECT. 1, SUB-SECT. 3.—A.

37 i. *A person may do by an agent what he can do himself.*]—A trustee, resident in England, appointed by the English will of a testator, who was resident in England, of lands in British Guiana, may appoint an attorney to act there in the trust, if the will does not provide to the contrary.—STUART *v.* NORTON (1861), 3 L. T. 602; 9 W. R. 320, P. C.—**BRITISH GUIANA.**

41 i. *A person may not do by an agent what he cannot do himself.*]—D. sued as A.'s constituted attorney for an injunction restraining defts. from causing any obstruction to his possession of land. The land belonged to A.'s hus-

limited by the limitation of the powers of the principal. Contracts not binding on the principal, as being *ultra vires*, do not become binding because they were entered into through the medium of an agent.—MONTREAL ASSURANCE CO. *v.* M'GILLIVRAY (1859), 13 Moo. P. C. C. 87; 8 W. R. 165; 15 E. R. 33.

Annotation:—**Mentd.** The Singapore, & The Hebe (1866), 4 Moo. P. C. C. N. S. 271, P. C.

B. Exceptions arising from Custom.

42. Surrender of copyhold.]—By the custom of a manor the right to surrender in a particular way may by custom be limited to a surrender by the copyholder himself.—COMBES' CASE (1613), 9 Co. Rep. 75a; 77 E. R. 843.

Annotation:—**Consd.** Compton *v.* Collinson (1790), 1 Hy. Bl. 334. **Mentd.** Parker *v.* Kett (1701), Holt, K. B. 221; Hunter *v.* Parker (1840), 7 M. & W. 322.

C. Exceptions arising from inherent Nature of Act.

43. Admission of copyholder.]—A copyholder cannot be admitted by attorney, for he must swear fealty in person.—FLOYER *v.* HEDGINGHAM (1669), 2 Rep. Ch. 56; 21 E. R. 614.

D. Exceptions arising from Official Position.

44. Magistrate.]—A magistrate can have no assistant nor deputy to execute any part of his employment. The right is personal to himself & a trust that he can no more delegate to another than a justice of the peace can transfer his commission to his clerk (LORD CAMDEN, C.J.).—ENTICK *v.* CARRINGTON (1765), 19 State Tr. 1029; 2 Wils. 275.

For full anns., *see* CONSTITUTIONAL LAW.

45. Quarter sessions.]—Mandamus to remove obstructions on a highway. Return showing that proceedings were taken under Highway Act, 1835 (c. 50), for diverting the highway; that two JJ. viewed the highway & the proposed new highway, & certified under s. 85 that they had done so, & that the proposed highway was more commodious to the public, which certificate was laid before quarter sessions; that no appeal was made, & the proceedings were regular up to the order of quarter sessions; that the order directed the surveyors to stop the old highway, &, before doing so, to make the new one, & in doing this not to pull down any house or building, or take away the ground of any yard, etc. The return then showed that the proposed line passed over a building & a yard, & that the surveyors *bonâ fide* made the new line as near to the line as could be without pulling down the building & taking the yard, & then stopped up the old way. On demurrer:—*Held:* (1) either the order of quarter sessions was bad, as delegating to the surveyors a discretion as to the line of new highway to be made, or, if the words to this purport were rejected, it did not appear that the order was obeyed; (2) the old highway was not shown to have been effectually stopped.—R. *v.* NEWMARKET RY. CO. (1850), 15 Q. B. 702; 4 New Sess. Cas. 241; 19 L. J. M. C. 241; 16 L. T. O. S. 298; 14 J. P. 798; 117 E. R. 625.

For full anns., *see* HIGHWAYS, STREETS & BRIDGES.

46. Judge.]—A judge cannot delegate the nomination of an official liquidator.—*Re* GREAT SOUTHERN MYSORE GOLD MINING CO. (1882), 48 L. T. 11.

47. Holder of warrant of distress.]—A warrant of distress for sewers rates issued under Sewers Act, 1849 (c. 50), s. 7, can only be lawfully executed by the person to whom such warrant is directed & who is named in the warrant.—SYMONDS *v.* KURTZ (1889), 61 L. T. 559; 53 J. P. 727; 5 T. L. R. 511; 16 Cox, C. C. 726.

48. Metropolitan local authority.]—A metropolitan local authority cannot delegate to their officers their power under Metropolis Management Acts of ordering drainage of a group or block of houses by a combined operation. To prove that a pipe draining a group or block of houses in London is a drain, as having been laid pursuant to an order of the proper local authority for drainage of the group or block by a combined operation, it is generally enough to produce from the records of that authority an application for their sanction to the laying of the pipe marked by the proper officer of the authority as approved, for the proper inference in such a case is that the application received the sanction of the authority. It is otherwise if at the time of application the authority had purported to delegate their power of sanctioning such applications to the officer in question, for then the proper inference is that the matter was dealt with by the officer himself & not brought before the authority.—HIGH *v.* BILLINGS (1903), 89 L. T. 550; 67 J. P. 388; 1 L. G. R. 723.

For full anns., *see* SEWERS & DRAINS.

49. Act merely ministerial.]—A public officer whose duty is purely ministerial may always appoint a deputy (PARKE, B.).—WALSH *v.* SOUTHWORTH (1851), 6 Exch. 150; 16 L. T. O. S. 391; 15 J. P. 452; 155 E. R. 492.

Annotation:—**Refd.** Baker *v.* Wicks (1904), 20 T. L. R. 382.

50. —— Removal of paupers.]—Although a complaint of chargeability must be the complaint of the overseers, it need not be made by them in person & may be made by their lawfully authorised agent.—R. *v.* SPOTLAND (1849), 3 New Mag. Cas. 240; 14 L. T. O. S. 175; 13 J. P. Jo. 744.

51. —— Powers under London Building Act, 1894.]—Where a public duty vested in a public body is not discretionary but merely ministerial, the public body may delegate it to one of its officers. The duties of the L. C. C. as to dangerous structures under London Building Act, 1894 (c. ccxiii.), part ix., are merely ministerial, & may be delegated to the council's superintending architect.—LONDON COUNTY COUNCIL *v.* HOBBIS (1896), 75 L. T. 687; 61 J. P. 85; 45 W. R. 270; 41 Sol. Jo. 143.

52. —— Powers under Sale of Food & Drugs Act Amendment Act, 1879 (c. 30), s. 3.]—An officer authorised by the above sect. to procure samples of milk in course of delivery may procure such samples by his agent.—TYLER *v.* DAIRY SUPPLY CO. (1908), 98 L. T. 867; 72 J. P. 132; 21 Cox, C. C. 612; 6 L. G. R. 422.

53. Consent of parties.]—Consent of parties that

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band, who was alleged to be a lunatic, but there was no adjudication of his lunacy, nor was A. appointed a manager of his estate under Lunatic Act XXXV. of 1858:—*Held:* A. having herself no right to sue in respect of a disturbance of her husband's possession, she could not authorise her agent to sue on her behalf.—NEMAVA *v.* DEVANDRAPPA (1890) I. L. R. 15 Bom. 177.—**IND.**

41 ii. —— *Agent of mortgagee purchasing property of mortgagor.*]—INGALLS *v.* MCLAURIN (1886) 11 O. R. 380.—**CAN.**

PART II. SECT. 1, SUB-SECT. 3.—D.

46 i. *Judge.*] — A winding-up order was made by a master in chambers who referred the whole action to a master in ordinary to take usual accounts & do everything necessary for winding up of the co. By 45 Vict. c. 23, as amended by 47 Vict. c. 39, s. 5, certain judicial powers of the ct. were conferred upon the master in chambers & other named officers:—*Held:* (1) the judicial powers were conferred upon each of the officers named in the Act as a *persona designata* & were a trust which he was unable to delegate to another; an individual clothed with judicial functions cannot delegate unless expressly empowered in specified circumstances so to do; (2) the jurisdiction which the master in ordinary would exercise under this order would be a delegated jurisdiction as the deputy of the master in chambers.—*Re* QUEEN CITY REFINING CO. (1884), 10 P. R. 415.—**CAN.**

46 ii. ——.]—It is a delegation of the judicial functions of a trial judge in the Admlty. Ct. for him to consult & accept the advice of the master mariners, even if he do so with consent of the parties to the case.—WRIGHT *v.* COLLIER (1892), 19 A. R. 298.—**CAN.**

Sect. 1.—*Principals: Sub-sect.* 3, *D. E. & F.*]

quarter sessions shall delegate their authority concludes such parties, & gives validity to all acts of the sessions done in consequence of such consent.—R. *v.* NORTHAMPTON (MAGISTRATES) (1777), 1 Cald. Mag. Cas. 30.

Annotation:—**Refd.** Thorp *v.* Cole (1835), 4 Dowl. 457.

54. Delegation authorised by statute.]—Where a cty. ct. judge, purporting to act under Cty. Cts. Act, 1888 (c. 43), s. 18, appointed upon the same day, with the approval of the Lord Chancellor, two deputies to act each for a different ct. within the district:—*Held:* such appointment was not *ultra vires*, & it was open to appoint more than one deputy for the same judge at the same time.—R. *v.* LLOYD, *Ex. p.* DAY, [1906] 1 K. B. 552; 75 L. J. K. B. 406; 94 L. T. 498; 54 W. R. 464; 22 T. L. R. 390; 50 Sol. Jo. 359, C. A.

E. Exceptions arising from Terms of Document under which Party acts.

Company's articles of association.]—*See* COMPANIES.

Power of appointment.]—*See* POWERS.

F. Where Power to act through Agent depends on Construction of Statute.

55. In general.]—An enactment simply referring to signature is in general satisfied by signature by means of an agent (COTTON, L.J.).—*Re* WHITLEY PARTNERS, No. 133, *post.*

Annotations:—**Consd.** Bevan *v.* Webb, [1901] 2 Ch. 59, C. A.; Dennison *v.* Jeffs, [1896] 1 Ch. 611. **Refd.** Jackson *v.* Napper, *Re* Schmidt's Trade Mk. (1886), 35 Ch. D. 162.

56. ——.]—Where the signature of a person is required by stat., the common law rule *qui facit per alium facit per se* applies, & a signature by an agent is sufficient, unless the stat. makes a personal signature indispensable.—R. *v.* KENT JJ., No. 39, *ante.*

Annotations:—**Distd.** Wilson *v.* Wallani (1880), 5 Ex. D. 155. **Consd.** France *v.* Dutton, [1891] 2 Q. B. 208. **Refd.** *Re* Whitley Partners (1886), 32 Ch. D. 337, C. A.; De Beauvais *v.* Green (1906), 22 T. L. R. 816.

57. ——.]—Subject to certain well-known exceptions, every person who is *sui juris* has a right to appoint an agent for any purpose whatever, & can do so when he is exercising a statutory right no less than when he is exercising any other right. In order that a right conferred by stat. has to be exercised personally, & not by an agent, there must be something in the Act, either by way of express enactment or necessary implication, which limits the common law right of any person who is *sui juris* to appoint an agent to act on his behalf (STIRLING, J.). —JACKSON & CO. *v.* NAPPER, *Re* SCHMIDT'S TRADE MARK (1886), 35 Ch. D. 162; 56 L. J. Ch. 406; 55 L. T. 836; 35 W. R. 228; 3 T. L. R. 238.

Annotations:—**Folld.** *Re* Kensington Assmt. Com., *Ex p.* Trickett, *Ex p.* Preston (1891), 7 T. L. R. 186; R. *v.* St. Mary Abbotts Assmt. Com., [1891] 1 Q. B. 378, C. A. **Mentd.** *Re* Verity's Trade Mk., *Re* Hall & Woodhouse's Trade Mk. (1901), 18 T. L. R. 214; Boord *v.* Thorn & Cameron (1907), 24 R. P. C. 697.

58. Bills of Sale Act (1878) Amendment Act, 1882 (c. 43), s. 10.]—A valid bill of sale may be executed by attorney.—FURNIVALL *v.* HUDSON, [1893] 1 Ch. 335; 62 L. J. Ch. 178; 68 L. T. 378; 41 W. R. 358; 3 R. 230.

Annotations:—**Apld.** *Re* Wilson, [1916] 1 K. B. 382. **Refd.** Dennison *v.* Jeffs, [1896] 1 Ch. 611.

54 i. *Delegation authorised by statute.*] —A deputy sheriff appointed under Consol. Stat. N. B. 1903, c. 25, has power to deputise an officer to execute a writ of *fi. fa.*, and the sheriff is liable for the acts of such officer.—MORICE *v.* CHAPMAN (1889), 28 N. B. R. 224.—**CAN.**

PART II. SECT. 1, SUB-SECT. 3.—F.

l. *Crown Lands Act*, 1884 (*No.* 18), *s.* 17—*Crown Lands Act*, 1889 (*No.* 21), *s.* 83.]—A notice of appeal to the Land Appeal Ct. may be signed by the agent of applt., but if called for proof must be addressed to the ct. of the agent's authority to sign.—THOMPSON *v.* TIMMINS (1902), 2 S. R. (N. S. W.) 1; 19 N. S. W. W. N. 44.—**AUS.**

m. *Edinburgh Royal Infirmary Act*, 1870 (*c. xlviii.*).]—The charter of the Edinburgh Royal Infirmary, granted in 1736, incorporated into a body politic all contributors & constituted them into a general ct. The above Act provided that every person who was prior to the Act a member should continue so to be, & that in future every person who contributed not less than £5 in one sum, or the continuous annual sum of £1 after such annual contribution had been made during three consecutive years, should be a member of the corpn. & of the general ct.:—*Held:* in respect of the terms of the charter & Act of Parliament & the usage which had followed thereon, firms contributing the necessary amount were entitled to be represented at the meeting of the general ct. by one, but only one, of their partners, & no written mandato from the firm was required by such partner.—WALKER *v.* LAW (1872), 11 Macph. (Ct. of Sess.) 199; 45 Sc. Jur. 122.—**SCOT.**

n. *General Dealers (Ireland) Act*, 1903 (*c.* 44).]—A licensed general dealer under the above Act may deal by an agent not only upon his licensed premises but also outside them.—DUNNE *v.* LEE, [1913] 1 I. R. 205.—**IR.**

o. *King's Bench Act*, 1902 (*c.* 40), *r.* 242 (*b*).]—Pltf. was in a partnership business with C., who absconded, & for whose debts the partnership property was wrongfully seized. Pltf. brought an action for damages &, in order to join C. in the proceedings, signed a consent in name of C., relying on his implied authority as a partner:—*Held:* (1) this consent did not comply with the above rule, which provided that no person should be added or substituted as pltf. suing without a next friend, or as the next friend of a pltf. under any disability, without his consent in writing, thereto to be filed; (2) the words "his own consent in writing must be taken to mean "under his own hand."—WATT *v.* POPPLE (1906), 4 W. L. R. 519; 16 Man. L. R. 348.—**CAN.**

p. *Landlord & Tenant Act*, 1890 (*No.* 1108), *s.* 92.]—Where a tenant holds over a tenement owned by a corpn., a notice by it to apply to recover possession in the form prescribed by the above sect. may be given by the manager authorised so to do signing the name of the co. & his own name as manager & agent. *Jackson & Co. v. Napper, Re Schmidt's Trade Mark* (1886), 35 Ch. D. 162, apprvd.—EQUITY TRUSTEES', EXECUTORS', & AGENCY CO., LTD. *v.* HARSTON (1908), V. L. R. 23.—**AUS.**

q. *Licensing Act.*] — *Semble:* there is nothing in the above Act preventing the licensee being merely an agent for the real proprietor of the licensed premises.—*Re* BRICK, OFFICIAL ASSIGNEE *v.* BRICK (1899) 18 L. R. 496.—**N. Z.**

r. *Limitation Act XIV. of* 1859, *s.* 4.]—Under the above Act, an acknowledgment in writing, signed by the agent or constituted attorney of the debtor, is not sufficient.—PURSHOTAM MANCHARAM *v.* ABDUL LATIF (1869), 6 Bom. O. C. 67.—**IND.**

s. *Limitation Act XV. of* 1877, *s.* 19.] —A balance of account was written by a person at the request of an illiterate debtor in debtor's name, & signed by the writer in his own name:—*Held:* a binding acknowledgment by a duly authorised agent within the above sect.—HEMCHAND KUBER *v.* VOHORA RAJI HAJI (1883), I. L. R. 7 Bom. 515.—**IND.**

t. *Public Works Act.*] — Signature of a claim for compensation by agents of trustees, being authorised by the trustees, is good. Trustees, having exercised their discretion, can delegate the formal duty of making the claim to their agents.—*Re* LLOYD *v.* WELLINGTON (MAYOR, ETC.) (1901), 19 L. R. 733, C. A.—**N. Z.**

u. *Statute of Frauds*, 1677 (*c.* 3), *s.* 4.] —A marriage contract was entered into by the parties before two notaries. They could not write, & the notaries, duly authorised, signed the contract, the parties touching the pen at the time:—*Held:* the contract was within the above sect., which required a writing duly signed by the party to be charged, or his agent.—TAILLEFER *v.* TAILLEFER (1881), 21 O. R. 337.—**CAN.**

v. *Statute of Frauds*, 1903-4 (*c.* 20), *s.* 4.]—An agent "thereunto lawfully authorised" within the above sect. cannot delegate his authority.—STEVENSON *v.* SMITH (1907), 13 B. C. R. 213.—**CAN.**

w. 13 *& 14 Vict. c.* 62, *Canada.*]—The above Act required that the mtgee. of personal property in Upper Canada himself must make the affidavit, & a mtge. filed upon an affidavit of his agent was held void.—HOLMES *v.* VANCAMP (1853), 10 U. C. R. 510.—**CAN.**

x. 22 *& 23 Geo.* 3, *c.* 39, *Ireland*, *s.* 2.] —The affidavit required by the above sect. might be made by an agent cognisant of the facts connected with the planting of the trees which the tenant desired to register under the Act.—MOUNTCASHELL (EARL) *v.* O'NEILL (VISCOUNT) (1856), 20 L. T. O. S. 361; 2 Jur. N. S. 1030; 4 W. R. 818, H. L. —**IR.**

59. Building Societies Act, 1874 (c. 42), s. 32 (3).]—On the dissolution of a building society under the above Act, the instrument of dissolution may be signed on behalf of a member by his duly authorised agent.—DENNISON *v.* JEFFS, [1896] 1 Ch. 611; 65 L. J. Ch. 435; 74 L. T. 270; 44 W. R. 476; 12 T. L. R. 251; 40 Sol. Jo. 335.

Annotation:—**Distd.** Rudd *v.* James (1896), 74 L. T. 714, C. A.

60. Companies Act, 1862 (c. 89).]—A person's name may be subscribed to the memorandum of assocn. of a co. by his authorised agent, since there was nothing in the above Act to show that Parliament intended anything special as to the mode of signature of the memorandum & the ordinary rule applied that signature by an agent is sufficient.—*Re* WHITLEY PARTNERS, No. 133, *post.*

Annotations:—**Consd.** Dennison *v.* Jeffs, [1896] 1 Ch. 611; Bevan *v.* Webb, [1901] 2 Ch. 59, C. A. **Refd.** Jackson *v.* Napper, *Re* Schmidt's Trade Mk. (1886), 35 Ch. D. 162.

61. Companies Act, 1862—General Order, Rule 4.]—Where a winding-up petition was presented under a power of attorney executed by three petitioners, resident in Western Australia, to solrs. in this country, & it was impossible in the circumstances to comply with the above rule, requiring a petition to be verified by an affidavit to be made by a petitioner & sworn after & filed within 4 days after the petition was presented, an affidavit was allowed to be read which had been filed by the solr., deposing of his own knowledge to the facts stated in the petition.—*Re* FORTUNE COPPER MINING CO. (1870), L. R. 10 Eq. 390; 40 L. J. Ch. 43; 22 L. T. 650.

62. Companies Winding-up Rules, 1890.]—Where petitioners for a winding-up were absent on the Continent, the ct. allowed the statutory affidavit to be made by a clerk to the solrs. acting for them, who had full knowledge of the proceedings, to obtain judgment for the debt on which the petition was founded.—*Re* CARRARA MARBLE CO., [1896] W. N. 87.

63. ——.]—Where an affidavit verifying a winding-up petition presented by an individual & not by a co. is made by petitioner's manager acting under a power of attorney & not by petitioner himself, as required by r. 36 of the above rules, the case is not within r. 177 (1), & the ct. cannot accept the affidavit as sufficient evidence.—*Re* CHARTERLAND STORES & TRADING CO., [1900] 2 Ch. 870; 69 L. J. Ch. 861; 83 L. T. 674; 49 W. R. 75; 45 Sol. Jo. 11; 8 Mans. 94.

Annotation:—**N.F.** *Re* African Farms, [1906] 1 Ch. 640.

64. Companies Winding-up Rules, 1903, r. 29.]—Where a petition was presented praying that a co. might be ordered to be wound up by the ct., & it was objected on behalf of the co. that the affidavit verifying the petition was made by the attorney or agent of petitioner & not by petitioner himself, who in fact resided in South Africa:—*Held:* (1) the attorney knew the material facts, which petitioner did not, & the attorney's evidence was of more value than that of petitioner; (2) it is open to the ct. in a proper case to accept an affidavit which in an ordinary case coming before the ct. would be accepted as sufficient evidence; (3) objection overruled.—*Re* AFRICAN FARMS, LTD., [1906] 1 Ch. 640; 75 L. J. Ch. 378; 95 L. T. 403; 54 W. R. 490; 50 Sol. Jo. 343; 13 Mans. 123.

65. County Courts Act, 1846 (c. 95), s. 121.]—The declaration required by the above sect. may be verbally made by the attorney in the cause, & it may be made by one of several defts., or by his agent.—MUNGEAN *v.* WHEATLEY & SMITH (1851), 6 Exch. 88; 20 L. J. Ex. 108.

66. County Courts Act, 1888 (c. 43), ss. 98, 99.]—Under the above sects. the registrar cannot enter up judgment for pltf. upon a statement admitting the debt or demand which has been signed by the agent of the party against whom the plaint has been entered; the registrar can only act upon a statement which has been signed by the party himself.—R. *v.* MULLIGAN (1909), 25 T. L. R. 341.

67. C. C. R. 1889, Appendix—Scale of costs.]—By the above scale of costs certain sums may be allowed to a solr. for preparing particulars of claim & copies thereof "provided that such particulars & copies are signed by the solr." Particulars were signed in the name of a solr. by his clerk, in pursuance of a general authority for this purpose:—*Held:* the signature was sufficient.—FRANCE *v.* DUTTON, [1891] 2 Q. B. 208; 60 L. J. Q. B. 488; 64 L. T. 793; 39 W. R. 716.

68. Deeds of Arrangement Act, 1914 (c. 47), s. 5 (1), (2).]—A debtor gave his sister a power of attorney authorising her to execute a deed of arrangement for the benefit of his creditors & to make any affidavit necessary for registering the deed It was executed by her as his attorney under the power, & she also made the affidavit required by s. 5 (1) of the above Act to be made "by the debtor" on the registration of the deed stating the total estimated amount of property & liabilities included under the deed & the names & addresses of the creditors. The debtor escaped bkpcy. proceedings by the execution of the deed & afterwards recognised it & concurred in the trustee acting under it. He subsequently made an application for a declaration that the deed was void:—*Held:* (1) execution of the deed by debtor personally was not necessary, & it could be executed by the donee of the power of attorney given by debtor for that purpose; (2) the affidavit required by s. 5 (1) could not be made by the donee of the power, but must be sworn by debtor personally, & the deed was void under s. 2 for non-registration.

A man may give a power of attorney to file an affidavit on his behalf, but he cannot give one to make an affidavit (ROWLATT, J.).—*Re* WILSON, [1916] 1 K. B. 382; *sub nom. Re* WILSON'S DEED, 85 L. J. K. B. 329; 60 Sol. Jo. 91, C. A.

Annotation:—**Apld.** *Re* Wilson, *Ex p.* Jones (1916), 85 L. J. K. B. 1408, C. A.

69. Dramatic Copyright Act, 1888 (c. 15), s. 2.]—The "consent in writing of the author or other proprietor" of a dramatic piece to representation need not be in the handwriting of or signed by the author or other proprietor, but may be in the handwriting of an agent properly authorised.—MORTON *v.* COPELAND (1855), 16 C. B. 517; 24 L. J. C. P. 169; 25 L. T. O. S. 216; 1 Jur. N. S. 979; 3 W. R. 593; 3 C. L. R. 1448 n.; 139 E. R. 861.

70. Fine Arts Copyright Act, 1862 (c. 68), s. 4.]—Where copyright belongs to A. it cannot be properly registered in the name of his nominee or agent unless the property is actually vested in such person as trustee for A. The conjunction in such a case of the unregistered proprietor as co-pltf. with the improperly registered nominee or agent will not render an action for infringement sustainable.—PETTY *v.* TAYLOR, [1897] 1 Ch. 465; 66 L. J. Ch. 209; 75 L. T. 545; 45 W. R. 299.

71. Habeas Corpus.]—*Qu.:* whether the ct. will allow an application for the custody of a child to be made by a person acting under a power of attorney from the parents.—*Ex p.* TEMPLER (1847), 11 J. P. Jo. 805, 856.

72. ——.]—On an application by *habeas corpus* by a father, a foreigner, for the custody of his children, the ct. refused to hand over the children to the father's agent, no valid reason being shown why appct. did not personally attend to receive them.—R. *v.* SCHERSCHEWSKY (1892), 8 T. L. R. 571.

73. Limitation Act, 1623 (c. 16).]—*Qu.:* whether a part payment by an agent operates as an

Sect. 1.—*Principals: Sub-sect.* 3, *F. Sect.* 2: *Sub-sects.* 1 & 2.]

acknowledgment so as to take a case out of the above Act.—IRVING *v.* VEITCH (1837), 3 M. & W. 90; Murp. & H. 313; 7 L. J. Ex. 25.

For full anns., *see* LIMITATION OF ACTIONS.

74. Lunacy Regulation Act, 1853 (c. 70).]—The words of s. 116 of the above Act merely enable the committee to exercise such powers as can be properly exercised by the lunatic's representative or attorney; so, if the conveyance be made in the name & on behalf of a married woman with the consent of her husband the acknowledgment which the law requires to be made by the married woman before the proper authority appointed by Fines & Recoveries Act, 1833 (c. 74), cannot be made by the committee of the married woman vicariously.—*Re* STABLES (1864), 4 De G. J. & Sm. 257; 3 New Rep. 620; 33 L. J. Ch. 422; 10 L. T. 1; 10 Jur. N. S. 245; 12 W. R. 513; 46 E. R. 917, C. A.

75. Metalliferous Mines Regulation Act, 1872 (c. 77), s. 35.]—An information against the owner or agent of a mine for an offence under the above sect. which can be prosecuted before a ct. of summary jurisdiction may, if the inspector of mines of the district has determined to prosecute, be laid in his name by an agent duly authorised by him in that behalf.—FOSTER *v.* FYFE, [1896] 2 Q. B. 104; 65 L. J. M. C. 184; 74 L. T. 784; 60 J. P. 423; 18 Cox, C. C. 364; *sub nom.* LE NEVE FOSTER *v.* FYFE, 44 W. R. 524; 12 T. L. R. 433; 40 Sol. Jo. 546.

76. Patents, Designs & Trade Marks Act, 1883 (c. 57), s. 61.]—A petition for revocation of a patent cannot be presented by an attorney in his own name.—*Re* AVERY'S PATENT (1887), 36 Ch. D. 307; 56 L. J. Ch. 586.

For full anns., *see* PATENTS & INVENTIONS.

77. ——.]—G. was an agent in this country of an American firm for the sale of certain goods. He was authorised by the firm to register the designs, which he did in his own name:—*Held:* (1) G. was not proprietor of the designs within the above sect., he being neither the author of the designs, nor a person for whom they had been executed for good & valuable consideration, nor a person who had acquired for good & valuable consideration a new & original design, or the right to apply the same to any article or substance, nor a person in whom the property in such design had devolved; (2) his name must be removed from the register.—*Re* REGISTERED DESIGNS, *Exp.* WILD (1885), 2 T. L. R. 174.

78. ——.]—There is nothing in the above Act to take away the common law right of an appct. for registration who is *sui juris* to appoint an agent for all the purposes of his application, & if he does so the notices required by the Act may be properly sent to him through such agent (STIRLING, J.).—JACKSON *v.* NAPPER, *Re* SCHMIDT'S TRADE MK., No. 57, *ante*.

Annotations:—**Refd.** R. *v.* St. Mary Abbotts Assmt. Com., [1891] 1 Q. B. 378, C. A.
For full anns., *see* S. C. No. 57, *ante*.

79. Quarter Sessions Act, 1849 (c. 45), s. 1.]—By the above Act a notice of appeal to a ct. of quarter sessions "shall be in writing, signed by the person giving the same, or by his attorney on his behalf":—*Held:* a notice of appeal signed in applt.'s name by the clerk to his attorney with applt.'s authority was sufficient.—R. *v.* KENT JJ., No. 39, *ante*.

Annotations:—**Distd.** Wilson *v.* Wallani (1880), 5 Ex. D. 155. **Consd.** France *v.* Dutton, [1891] 2 Q. B. 208. **Refd.** *Re* Whitley Partners (1886), 32 Ch. D. 337, C. A.; De Beauvais *v.* Green (1906), 22 T. L. R. 816.

80. Real Property Limitation Act, 1833 (c. 27), s. 7.]—A letter written by his land agent who managed deft.'s property acknowledging pltf.'s title is not an acknowledgment of title within the above sect., as not being signed by the person in possession, but only by an agent.—LEY *v.* PETER (1858), 3 H. & N. 101; 27 L. J. Ex. 239; 30 L. T. O. S. 367; 6 W. R. 437; 157 E. R. 403.

81. R. S. C.—O. 14, r. 1.]—An application under O. 14, r. 1, that deft. may be called upon to show cause why final judgment should not be signed must be made on an affidavit that in pltf.'s belief there is no defence to the action:—*Held:* the affidavit must be made by pltf. himself (GROVE & DENMAN, JJ.). *Qu.:* whether any one else can make such an affidavit (COCKBURN, C.J.).—FREDERICI *v.* VANDERZEE & Co. (1877), 2 C. P. D. 70; 46 L. J. Q. B. 194; 35 L. T. 889; 25 W. R. 389, C. A.

Annotations:—**Expld.** Bank of Montreal *v.* Cameron (1877), 2 Q. B. D. 536, C. A.; *Re* Wilson, [1916] 1 K. B. 382.

82. —— ——.]—Where a writ is specially indorsed under O. 3, r. 6, but pltfs. are a corpn., an order calling upon deft. to show cause why final judgment should not be signed under O. 14, r. 1, cannot be obtained because that rule requires an affidavit to be made by pltf. himself as to his own belief that there is no defence to the action, & an affidavit by an officer of the corpn. is not sufficient.—BANK OF MONTREAL *v.* CAMERON (1877), 2 Q. B. D. 536; 46 L. J. Q. B. 425; 36 L. T. 415; 25 W. R. 593, C. A.

Annotations:—**Expld.** Shelford *v.* Louth & East Coast Ry. Co. (1879), 4 Ex. D. 317, C. A.; *Re* Wilson, [1916] 1 K. B. 382.

See, now, R. S. C., O. 14, r. 1 (*a*).

83. —— **O. 16, r. 11.**]—The above rule provides that no person shall be added as pltf. or as next friend of pltf. in an action "without his own consent in writing thereto":—*Held:* (1) the consent must be the consent of the party himself in writing & signed by him; (2) the consent in writing of his solr. on his behalf, signed by his solr., though written & signed in his presence, would not be sufficient to bind him.—FRICKER *v.* VAN GRUTTEN, [1896] 2 Ch. 649; 65 L. J. Ch. 823; 75 L. T. 117; 45 W. R. 53; 40 Sol. Jo. 701, C. A.

For full anns., *see* SOLICITORS.

84. Sale of Food & Drugs Act, 1875 (c. 63), s. 6.]—The complainant's servant purchased gin adulterated with water:—*Held:* complainant was a "purchaser" within the above sect.—GARFORTH *v.* ESAM (1892), 56 J. P. 521; 8 T. L. R. 243.

Annotation:—**Refd.** Holt *v.* Morris (1893), 57 J. P. 441.

85. 55 Geo. 3, c. 68, s. 2.]—By the above Act the consent in writing for turning a footpath must be under the hand & seal of the owner of the land through which the new path was proposed to be made; & where an order of JJ. for turning a footpath was founded upon a consent, signed & sealed by the attorney of one of the parties interested, & there being nothing to bind the principal:—*Held:* ill & quashed by this ct. after confirmation by the sessions.—R. *v.* CREWE (1823), 3 Dow. & Ry. K. B. 6; 1 Dow. & Ry. M. C. 464.

86. Statute of Frauds Amendment Act, 1828 (c. 14).]—By s. 1 no acknowledgment or promise shall be sufficient to take a case out of Stat. Limitations unless it be in writing, "& signed by the party chargeable thereby":—*Held:* an acknowledgment contained in a letter written by the wife of deft., in his name & at his request, was insufficient, because the Act gives no authority to an agent to make the acknowledgment.—HYDE *v.* JOHNSON (1836), 2 Bing. N. C. 776; 2 Hodg. 94; 3 Scott, 289; 5 L. J. C. P. 291; 132 E. R. 299.

Annotations:—**Apld.** West Riding Yorkshire Case (1843), 2 L. T. O. S. 5. **Folld.** Clark *v.* Alexander (1844), 8 Scott, N. R. 147. **Apld.** Toms *v.* Cuming (1845), 7 Man. & G.

88. **Distd.** Grant *v.* Maddox (1846), 15 L. J. Ex. 104. **Apld.** Francis *v.* Hawksley (1859), 33 L. T. O. S. 182; General Steam Printing & Publishing Co., Richardson's Case (1861), 4 L. T. 589. **Consd. & Folld.** Williams *v.* Mason (1873), 28 L. T. 232. **Distd.** R. *v.* Kent JJ. (1873), L. R. 8 Q. B. 305; *Re* Whitley Partners (1886), 32 Ch. D. 337, C. A. **Refd.** Davies *v.* Hopkins (1857), 3 C. B. N. S. 376; Ley *v.* Peter (1858), 27 L. J. Ex. 239; Swift *v.* Jewsbury (1874), L. R. 9 Q. B. 301.

See, now, MERCANTILE LAW AMENDMENT ACT, 1856 (c. 13).

87. ——.]—The signature of an authorised agent is not a sufficient signature within s. 6 of the above Act whereon to charge a person making a false representation as to credit of another. Where the representation is signed by one of two partners in the firm's name, such representation does not bind the other partner.—WILLIAMS *v.* MASON (1873), 28 L. T. 232; 37 J. P. 264; 21 W. R. 386.

Annotations:—**Apld.** Swift *v.* Jewsbury (1874), L. R. 9 Q. B. 301; Hirst *v.* West Riding Union Banking Co., [1901] 2 K. B. 560, C. A.

88. ——.]—By the above sect. a false representation as to credit of another, in order to maintain an action, must be signed by the person making it & not by an agent. Hence a banking co. is not liable for a fraudulent representation as to the solvency of a customer signed by the manager of one of its branches.—SWIFT *v.* JEWSBURY (JEWESBURY) & GODDARD (1874), L. R. 9 Q. B. 301; 43 L. J. Q. B. 56; 30 L. T. 31; 22 W. R. 319, Ex. Ch.

Annotations:—**Folld.** Hosegood *v.* Bull (1876), 36 L. T. 617; Hirst *v.* West Riding Union Banking Co., [1901] 2 K. B. 560, C. A. **Expld.** Banbury *v.* Bank of Montreal, [1917] 1 K. B. 409, C. A. **Refd.** Mackay *v.* Commercial Bank of New Brunswick (1874), L. R. 5 P. C. 394; Pearson *v.* Seligman (1883), 48 L. T. 842, C. A.; Bishop *v.* Balkis Consolidated Co. (1890), 2 Meg. 207, 292, C. A.; Hamlyn *v.* Houston (1902), 72 L. J. K. B. 72, C. A. **Mentd.** Richardson *v.* Silvester (1873), L. R. 9 Q. B. 34; Weir *v.* Bennett (1877), 3 Ex. D. 32; Cargill *v.* Bower (1878), 10 Ch. D. 502; Houldsworth *v.* City of Glasgow Bank (1880), 5 App. Cas. 317; Barnetts Hoares *v.* South London Tramways Co. (1886), 2 T. L. R. 848; British Mutual Banking Co. *v.* Charnwood Forest Ry. Co. (1887), 18 Q. B. D. 714, C. A.; Whitechurch *v.* Cavanagh, [1902] A. C. 117; Malcolm Brunker *v.* Waterhouse (1908), 24 T. L. R. 854; Kettlewell *v.* Refuge Assce., [1908] 1 K. B. 545, C. A.; Parsons *v.* Barclay & Goddard (1910), 103 L. T. 196, C. A.

89. ——.]—The word "person" in the above sect. includes a corpn., & an incorporated co. is, under the terms of that sect., not liable for a false representation of the kind contemplated by the sect. made in a letter written & signed by their agent.—HIRST *v.* WEST RIDING UNION BANKING CO., LTD., [1901] 2 K. B. 560; 70 L. J. K. B. 828; 85 L. T. 3; 49 W. R. 715; 17 T. L. R. 629; 45 Sol. Jo. 614.

Annotation:—**Refd.** *Re* Royal Naval School, Seymour *v.* Royal Naval School, [1910] 1 Ch. 806.

90. Union Assessment Committee Act, 1862 (c. 103).]—A householder objected to a valuation list, & at the hearing before the assessment committee did not appear personally, but was represented by another person, who claimed to be heard as his agent in support of the objections. The committee refused to hear such person, on the ground that their rule was not to hear any one other than the objector himself, or a member of his family or household, or of the legal profession. The ct. granted a mandamus to compel the committee to hear the agent, on the ground that the above Act gave the objector the right to appear & be heard in support of his objections, & did not prohibit him from appearing by an agent.—R. *v.* ST. MARY ABBOTTS', KENSINGTON, ASSESSMENT COMMITTEE, [1891] 1 Q. B. 378; 60 L. J. M. C. 52; 64 L. T. 240; 55 J. P. 502; 39 W. R. 278; 7 T. L. R. 248; Ryde's Rat. App. (1891—93) 276, C. A.

Administration granted to agent.]—*See* EXECUTORS & ADMINISTRATORS.

Matters connected with bankruptcy procedure.]—*See* BANKRUPTCY & INSOLVENCY.

Service on agent.]—*See* PRACTICE & PROCEDURE.

Agent's right to employ sub-agent.]—*See* Part VI., *post.*

SECT. 2.—AGENTS.

SUB-SECT. 1.—PERSONS INCOMPETENT TO ACT AS AGENTS.

Alien enemy.]—*See* ALIENS.

Convict.]—*See* CRIMINAL LAW & PROCEDURE.

91. Crown.]—The Crown in its capacity as party to a treaty with another sovereign can be neither agent nor trustee for a subject.—RUSTOMJEE *v.* R. (1876), 2 Q. B. D. 69; 46 L. J. Q. B. 238; 36 L. T. 190; 25 W. R. 333, C. A.

Annotations:—**Refd.** Burnand *v.* Rodocanachi (1880), 5 C. P. D. 424. **Mentd.** R. *v.* Income Tax Comrs. for Special Purposes, *Ex p.* Cape Copper Mining Co. (1888), 59 L. T. 455, C. A.; West Rand Central Gold Mining Co. *v.* R., [1905] 2 K. B. 391.

Lunatic.]—*See* LUNATICS & PERSONS OF UNSOUND MIND.

SUB-SECT. 2.—PERSONS INCOMPETENT TO SIGN SO AS TO SATISFY THE STATUTE OF FRAUDS.

92. One contracting party may not sign as agent for other.]—A memorandum of the sale of goods under s. 17 of the above Act cannot be signed by one of the contracting parties as authorised agent of the other; the agent must be a third person.—WRIGHT *v.* DANNAH (1809), 2 Camp. 203.

Annotations:—**Folld.** Farebrother *v.* Simmons (1822), 5 B. & Ald. 333. **Distd.** Bird *v.* Boulter (1833), 4 B. & Ad. 443. **Folld.** Sharman *v.* Brandt (1871), L. R. 6 Q. B. 720. **Refd.** Bank of Bengal *v.* Macleod (1849), 5 Moo. Ind. App. 1; Durrell *v.* Evans (1861), 7 Jur. N. S. 585.

93. ——.]—It is irregular that the real buyer or real seller should make the other party his agent to sign a memorandum under the above sect.; but when that is done through a third person the objection is removed (LITTLEDALE, J.).—BIRD *v.* BOULTER (1833), 4 B. & Ad. 443; 1 Nev. & M. 313; 110 E. R. 522.

Annotations:—**Distd.** Graham *v.* Musson (1839), 5 Bing. N. C. 603. **Folld.** Durrell *v.* Evans (1862), 1 H. & C. 174, Exch.; Sharman *v.* Brandt (1871), L. R. 6 Q. B. 720. **Expld.** Peirce *v.* Corf (1874), L. R. 9 Q. B. 210. **Consd.** *Re* Roberts, Evans *v.* Roberts (1887), 36 Ch. D. 196. **Distd.** Bell *v.* Balls, [1897] 1 Ch. 663. **Refd.** Murphy *v.* Boese (1875), 44 L. J. Ex. 40.

94. ——.]—Pltf., a broker carrying on business as S. & Co., was authorised by defts. to buy for them a quantity of hemp. He sent them the note of a contract as follows:—"Bought for Messrs. B. & H., pltfs., of our principals, 200 tons of hemp, at £37 a ton. Signed S. & Co., brokers." He had, in fact, no principal:—*Held:* he could not sue on the contract, for being really a contracting party, his signature could not bind defts. as agent within the above sect.—SHARMAN *v.* BRANDT (1871), L. R. 6 Q. B. 720; 40 L. J. Q. B. 312; 19 W. R. 936, Ex. Ch.

Annotations:—**Consd.** Harper *v.* Vigers, [1909] 2 K. B. 549. **Refd.** Tetley *v.* Shand (1871), 25 L. T. 658.

95. ——.]—Where an auctioneer wrote down deft.'s name by his authority opposite to the lot

y. Sheriff selling as assignee may not sign as agent for purchaser.]—McINTYRE *v.* LAMBERT (1895), 26 O. R. 427.—**CAN.**

Sect. 2.—*Agents: Sub-sects.* 2, 3, & 4.]

purchased, in an action brought in the name of the auctioneer:—*Held:* the entry in such book was not sufficient to take the case out of the above sect.—FAREBROTHER *v.* SIMMONS (1822), 5 B. & Ald. 333; 106 E. R. 1213.

Annotations:—**Distd.** Bird *v.* Boulter (1833), 4 B. & Ad. 443. **Folld.** Sharman *v.* Brandt (1871), L. R. 6 Q. B. 720. **Refd.** Wethered *v.* Calcutt (1842), 4 Man. & G. 566.

SUB-SECT. 3.—OTHER PERSONS.

May act as agent—Infant.]—*See* INFANTS & CHILDREN.

—— **Married woman.**]—*See* HUSBAND & WIFE.

96. —— **Person unable to read.**]—Consignment note held binding on pltf. though only signed by his agent, who could not read & was ignorant of the contents.—KIRBY *v.* GREAT WESTERN RY. CO. (1868), 18 L. T. 658.

Annotation:—**Consd.** Foreman *v.* G. W. Ry. Co. (1878), 38 L. T. 851.

97. *S. P.* FOREMAN *v.* GREAT WESTERN RY. Co. (1878), 38 L. T. 851; 42 J. P. 648.

98. —— **One contracting party signing as agent for other.**]—A bill of sale may be executed by the grantee as attorney for the grantor.—FURNIVALL *v.* HUDSON, No. 58, *ante*.]

Annotations:—**Consd.** Dennison *v.* Jeffs, [1896] 1 Ch. 611; *Re* Wilson, [1916] 1 K. B. 382.

99. —— —— **Unless prevented by terms of contract.**]—By agreement under seal, three persons agreed to purchase a mine, & bills for £2,000 were to be paid as a deposit, & it was stipulated that the sum of £2,000 was a conditional payment, to be returned "to the said purchasers," should the property, upon inspection "by an agent to be sent out by the purchasers," prove to have been misrepresented in the description:—*Held:* (1) the agent to be sent out must be a person distinct from purchasers & not one of themselves; (2) no evidence was receivable to show that the vendor assented to one of purchasers going out as agent, except objection had been waived by some instrument under seal.—ENGLISH *v.* BLUNDELL (1837), 8 C. & P. 332.

SUB-SECT. 4.—PARTICULAR CLASSES OF AGENTS REQUIRING SPECIAL QUALIFICATIONS.

Auctioneer.]—*See* AUCTION & AUCTIONEERS.

Bailiff.]—*See* DISTRESS; SHERIFFS & BAILIFFS.

100. Broker.]—By an agreement between A. & B., a London colonial broker, made in Jan., 1865, it was agreed for certain considerations that, on Jan. 1, 1866, B. should take A. into partnership for fourteen years. This agreement B. refused to fulfil, upon the ground that A. had not become a colonial broker, & by 6 Anne, c. 16, & 57 Geo. 3, c. lx., it would have been a breach of the law to have allowed A. to act as broker, not being admitted & licensed. Upon demurrer to a plea setting up these facts in answer to a declaration for not taking A. into partnership:—*Held:* the plea was an answer to the action.—HUNTER *v.* WYKES (1866), 15 L. T. 210; 15 W. R. 125.

But see London Brokers Relief Acts, 1870 (c. 60) & 1884 (c. 3) (now repealed).

Solicitor.]—*See* SOLICITORS.

Part III.—Classes of Agents.

101. General agent—Special agent.]—There is a wide distinction between general & particular agents. If a person be appointed general agent, as in the case of a factor for a merchant residing abroad, the principal is bound by his acts. But an agent, constituted so for a particular purpose & under a limited & circumscribed power, cannot bind the principal by any act in which he exceeds his authority, for that would be to say that one man can bind another against his consent (BULLER, J.).—FENN *v.* HARRISON, No. 351, *post*.

For full anns., *see* S. C. No. 351, *post*.

102. —— ——.]—Where a man appoints a general agent, he is bound by all his acts; but it is otherwise where he appoints an agent for a particular purpose only, the principal in that case being only bound to the extent of authority given.—EAST INDIA CO. *v.* HENSLEY (1794), 1 Esp. 111.

103. —— ——.]—Where a purchase is made by an agent, he is not a special agent if he has any discretion to exceed the sum ordered to be given by his principal; if he has such discretion, the principal is bound by his contracts, though they exceed the sum which he is ordered by his principal to give.—HICKS *v.* HANKIN (1802), 4 Esp. 114.

104. —— ——.]—SMITH *v.* M'GUIRE, No. 396, *post*.

For full anns., *see* S. C. No. 396, *post*.

105. —— ——.]—A general agent employed for a principal to carry on his business has a general authority to bind his principal in transactions arising out of the business, although as between the

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PART II. SECT. 2, SUB-SECT. 4.

z. *Commercial traveller.*] — A commercial traveller who, without a licence, offered goods for sale in Saskatoon on behalf of a merchant in Toronto, was convicted under City Bye-law 1025, which required that a licence should be taken out by a commercial traveller offering or selling goods on behalf of a merchant selling direct to the consumer. City Act, 1915, s. 204 (62), only gave power for a bye-law to license commercial travellers selling on behalf of principals "not having his principal place of business in the city":—*Held:* as the bye-law did not contain these words of limitation, it was *ultra vires*, being broader than authorised by stat., & the conviction was quashed.—R. *v.* PIERCE (1917), 1 W. W. R. 1312; 27 Can. Cr. Ca. 442.—**CAN.**

PART III.

101 i. *General agent—Special agent.*]—No multiplication of acts as special agent can convert a special into a general agent so as to bind a principal for an act which he has not authorised.—BARRETT *v.* IRVINE, [1907] 2 I. R. 462, 474.—**IR.**

101 ii. —— ——.]—Deft. obtained a loan on mtge. from C. through a solr., who guaranteed deft. from loss, in case the principal was called for within five years. The solr. stated in evidence that he was not the agent of the mtgee. to invest his money, & that in remitting the interest he deducted nothing for commission. But deft. swore that when he applied to the solr. the latter told him he had £200 to lend, that he had advertised it, & that it was the mtgee.'s money:—*Held:* assuming the solr. to be the agent of the mtgee., as he was not a general agent, but a particular agent, deft. could not assume that he had been authorised to do an illegal act.—AIMON *v.* FOOT, R. E. D. 1.—**CAN.**

101 iii. —— ——.]—WILLETT *v.* ROSE (1915), 31 W. L. R. 528; 32 W. L. R. 948; 9 W. W. R. 634; 25 D. L. R. 258; 8 Sask. L. R. 421.—**CAN.**

101 iv. —— *Distinguished from universal agent.*]—A general agent has not ordinarily powers co-extensive with those possessed by a universal agent.—DOORGA CHURN *v.* KOONIBEHAREE PANDEY (1868), 3 Agra, 23.—**IND.**

principal & agent there was no such authority, or even an order not to do the particular act done. A special agent, employed for a principal to carry out a particular transaction, not arising out of the principal's business, cannot bind his principal, in the absence of express authority, unless he is held out by the principal as having authority to do the particular act.—BRADY *v.* TODD (TOD) (1861), 9 C. B. N. S. 592 ; 30 L. J. C. P. 223 ; 4 L. T. 212 ; 25 J. P. 598 ; 7 Jur. N. S. 827 ; 9 W. R. 483 ; 142 E. R. 233.

Annotations :—**Apld.** Udell *v.* Atherton (1861), 7 H. & N. 172. **Consd.** Howard *v.* Sheward (1866), L. R. 2 C. P. 148. **Distd.** Brooks *v.* Hassall (1883), 49 L. T. 569. **Consd.** Baldry *v.* Bates (1885), 52 L. T. 620. **Refd.** Weir *v.* Barnett & Bell (1878), 38 L. T. 929, C. A. ; Payne *v.* Leconfield (1882), 51 L. J. Q. B. 642 ; Armstrong *v.* Jackson, [1917] 2 K. B. 822. **Mentd.** Miller *v.* Lawton (1864), 15 C. B. N. S. 834.

Mercantile agent.]—*See* Nos. 106-114, *post.*

106. Factor.]—A factor is a person to whom goods are consigned for sale by a merchant residing abroad, or at a distance from the place of sale, & he usually sells in his own name without disclosing that of his principal ; the latter, with full knowledge of these circumstances, trusts him with the actual possession of the goods, & gives him authority to sell in his own name (ABBOTT, C.J.).—BARING *v.* CORRIE, No. 821, *post.*

For full anns., *see* S. C. No. 821, *post.*

107. ——.]—Where an agent has been entrusted with possession of goods consigned for the purpose of sale, he is not less a factor because, as between him & his principal, he is under restriction as to the price at which the goods are to be sold, or is bound to sell in the principal's name.—STEVENS *v.* BILLER (1883), 25 Ch. D. 31 ; 53 L. J. Ch. 249 ; 50 L. T. 36 ; 32 W. R. 419, C. A.

108. Broker.]—A broker is to be considered as an agent of the seller or the buyer, or of both, bound honestly to exercise his skill & fairly to communicate his opinion on the subject of the purchase to those who, for that purpose, have confidently employed him (LORD ELDON, C.).—*Re* MOLINE, *Ex p.* DYSTER (1816), 1 Mer. 155 ; 2 Rose, 349 ; 35 E. R. 632.

Annotations :—**Refd.** Green *v.* Weaver (1827), 1 Sim. 404. **Mentd.** Robinson *v.* Kitchin (1856), 2 Jur. N. S. 294 ; Cope *v.* Rowlands (1836), 2 Gale, 231 ; *Re* Pemberton, *Ex p.* Huth (1840), Mont. & Ch. 667 ; Bank of Bengal *v.* Macleod (1849), 5 Moo. Ind. App. 1 ; *Re* Curry, *Ex p.* Lever (1850), 15 L. T. O. S. 476 ; Armstrong *v.* Jackson, [1917] 2 K. B. 822.

109. ——.]—A broker is a person concerned in exchange or in buying & selling goods or securities. A person engaged in procuring freights or passengers for ships, & in conducting their transfer on commission, though called a shipbroker in ordinary language, is not a broker within 6 Anne, c. 16.—GIBBONS *v.* RULE (1827), 4 Bing. 301 ; 12 Moore, C. P. 539 ; 5 L. J. O. S. C. P. 176 ; 130 E. R. 783.

Annotation :—**Refd.** Smith *v.* Lindo (1858), 4 C. B. N. S. 395.

110. ——.]—HUNTER *v.* WYKES, No. 100, *ante.*

111. ——.]—A broker makes a contract between two persons & binds them together by or on such bargain. The employment of a broker relates to goods & money & not to personal contracts for work & labour. A person who hires or procures for another, persons to be employed by him in surveying a line of ry. is not a broker within the above Act.—MILFORD *v.* HUGHES (1846), 16 M. & W. 174 ; 16 L. J. Ex. 40 ; 8 L. T. O. S. 194 ; 10 Jur. 990 ; 10 J. P. Jo. 788.

Annotation :—**Refd.** Pidgeon *v.* Burslem (1849), 3 Exch. 465.

112. ——.]—A dealer in London in shares in a public co. (whether British or foreign) is a "broker" within the above Act, & incapable of suing for commission, unless duly licensed.

Where an unlicensed person had assumed to act as broker in the purchase of such shares :—*Held :* he might recover from his principal the price which pursuant to a usage of the share market he had been obliged to pay ; the above Act not making the contract void, but merely preventing the unlicensed broker from recovering any remuneration for his services in making it.—SMITH *v.* LINDO (1858), 5 C. B. N. S. 587 ; 27 L. J. C. P. 335 ; *sub nom.* LINDO *v.* SMITH, 32 L. T. O. S. 62 ; 4 Jur. N. S. 974 ; 6 W. R. 748, Ex. Ch.

Annotation :—**Folld.** Scott *v.* Jackson (1865), 19 C. B. N. S. 134.

113. —— **Distinguished from auctioneer.**]—*Semble :* the selling of goods by auction within the city of London by an auctioneer, who has paid the duty of 20*s.* for a licence required by 17 Geo. 3, c. 50, but who has not been admitted as a broker by the Ct. of Mayor & Aldermen, does not make him liable to the penalty of 6 Anne, c. 16, for acting as a broker without being so admitted.—WILKES *v.* ELLIS (1795), 2 Hy. Bl. 555 ; 126 E. R. 699.

See, now, LONDON BROKERS RELIEF ACTS, 1870 (c. 60) & 1884 (c. 3).

114. —— **Distinguished from factor.**]—The character of a broker is materially different from that of a factor. He is not trusted with the possession of goods, & ought not to sell them in his own name.—BARING *v.* CORRIE, No. 821, *post.*

For full anns., *see* S. C. No. 821, *post.*

115. —— ——.]—STEVENS *v.* BILLER, No. 107, *ante.*

116. Bill broker.]—A bill broker is not a person known to the law with certain prescribed duties, but his employment is one which depends entirely upon the course of dealing. His duties may vary in different parts of the country ; their extent is a question of fact to be determined by the usage & course of dealing in the particular place —FOSTER *v.* PEARSON, STEPHENS *v.* FOSTER, No 558, *post.*

For full anns., *see* S. C. No. 558, *post.*

117. ——.]—A bill broker is a person holding himself out as desirous of receiving bills for discount, making a profit by rediscounting them, charging as much as possible & giving as little as he can to those who discount for him (WILDE, C.J.).—COLUMBINE *v.* PENNEL (1850), cited 2 Bankr. & Ins. R. 146.

Annotations :—**Apprvd.** *Re* Lane (1855), 2 Bankr. & Ins. R. 146.

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106 i. *Factor.*]—A person acting as agent in Montreal for a book-house in Paris, & taking subscriptions & rendering accounts in name of such house, is not a factor so as to sue in his own name.—DOUTRE & DANSEREAU (1879), 3 L. N. 22, Q. B.—**CAN.**

106 ii. —— *Distinguished from other agents.*]—The distinction between a factor & a confidential clerk or other agent is that the factor has certain duties imposed on him & is subject to certain legal liabilities from which a confidential clerk is exempt.—EVANS *v.* BULLEY (ASSIGNEE OF CONGDON) (1823), 1 Nfld. L. R. 330.—**NFLD.**

114 i. *Broker — Distinguished from factor.*]—Possession or control of the goods of the principal by the factor distinguishes him from a broker, & he is personally liable when contracting for a foreign principal, while the broker incurs no personal liability if he do not exceed his instructions.—CRANE *v.* NOLAN, (1875) 19 L. C. J. 309, Q. B. 1875.—**CAN.**

114 ii. —— *Distinguished from agent for sale.*]—Where a broker signed & sent to a party a bought note : "We have this day bought by your order & for your account from our principals . . . 250 bales of jute . . . (name) brokers," & a corresponding sold note was signed & sent by the broker to another party, the names of the principals being disclosed to each other at a subsequent date :—*Held :* the broker was merely an intermediary & not an agent for sale, & was not liable under Contract Act (IX. of 1872), s. 230 (2), the contract (if any) between the broker & the buyer being a contract of employment, the employment being to negotiate, & not to sell, on behalf of another. *Southwell v. Bowditch* (1876), 1 C. P. D. 374, folld.—PATIRAM BANERJEE *v.* KANKINARRAH CO., LTD. (1915), 1. L. R. 42 Calc. 1050.—**IND.**

118. Ship broker.]—A ship broker, whose ordinary business is to negotiate contracts for the hire & freighting of ships, to receive the money on such contracts, & to pay it over to the owners deducting a commission, is subject to the bkpcy. law as a broker within 6 Geo. 4, c. 16, s. 2.—POTT *v.* TURNER (1830), 6 Bing. 702; L. & Welsb. 293; 4 Moo. & P. 551; 8 L. J. O. S. C. P. 282; 130 E. R. 1451.

119. Scrivener.]—COLUMBINE *v.* PENNEL, No. 117, *ante*.

For full anns., *see* S. C. No. 117, *ante*.

120. Del credere agent.]—A commission *del credere* is an absolute engagement to the principal from the broker, & makes him liable in the first instance.—GROVE *v.* DUBOIS (1786), 1 Term Rep. 112; 99 E. R. 1002.

Annotations:—**Folld.** Dize *v.* Dickason (1786), 1 Term Rep. 285. **Distd.** Parker *v.* Smith (1812), 16 East, 382; Cumming *v.* Forester (1813), 1 M. & S. 494. **Folld.** Koster *v.* Eason (1813), 2 M. & S. 112. **N.F.** Morris *v.* Cleasby (1813), 4 M. & S. 566. **Folld.** Baker *v.* Langham (1816), 2 Marsh. 215. **Consd.** Hornby *v.* Lacy (1817), 6 M. & S. 166. **Distd.** Peele *v.* Northcote (1817), 1 Moore, C. P. 178. **N.F.** Gabriel *v.* Churchill & Sim, [1914] 1 K. B. 449. **Refd.** Houghton *v.* Matthews (1803), 3 Bos. & P. 485; Mavor *v* Simeon (1810), 3 Taunt. 497; Minett *v.* Forrester (1811), 4 Taunt. 541; Brisbane *v.* Dacres (1813), 5 Taunt. 143; Gall *v.* Comber (1817), 7 Taunt. 558; Beckwith *v.* Bullen & Hancock (1858), 27 L. J. Q. B. 162.

121. ——.]—The only effect of a *del credere* commission is to make the factor responsible for the value of the goods to his principal (ALVANLEY, C.J.).—HOUGHTON *v.* MATTHEWS (1803), 3 Bos. & P. 485; 127 E R. 263.

Annotations:—**Refd.** Morris *v.* Cleasby (1813), 1 M. & S. 576; Hudson *v.* Granger (1821), 5 B. & Ald. 27. **Mentd.** Bramwell *v.* Spiller (1870), 21 L. T. 672.

122. ——.]—A commission *del credere* is the price given by the principal to the factor for a guarantee; it pre-supposes a guarantee. The obligation of the factor arises on the guarantee. The guarantor is to answer for the solvency of the vendee, & to pay the money, if vendee does not; on the failure of vendee he is to stand in his place & make his default good (LORD ELLENBOROUGH, C.J.).—MORRIS *v.* CLEASBY (1816), 4 M. & S. 566; 105 E. R. 943.

Annotations:—**Expld.** Campbell *v.* Hassel (1816), 1 Stark. 233. **Consd.** Hornby *v.* Lacy (1817), 6 M. & S. 166; Wolff *v.* Koppel (1843), 22 L. J. Ex. 103 n.; Gabriel *v.* Churchill & Sim, [1914] 1 K. B. 449. **Refd.** Fleet *v.* Murton (1871), 41 L. J. Q. B. 49. **Mentd.** Magor *v.* Wilks (1827), 5 L. J. O. S. K. B. 308.

123. ——.]—A commission *del credere* imports that if the vendee does not pay, the vendor will: it is a guarantee from vendor to the principal against any mischief to arise from vendee's insolvency. The commission is in the nature of a private agreement between factor & principal & cannot vary the rights subsisting between vendor & vendee.—HORNBY *v.* LACY (1817), 6 M. & S. 166; 105 E. R. 1205.

Annotations:—**Folld.** Bramwell *v.* Spiller (1870), 21 L. T. 672; Gabriel *v.* Churchill & Sim, [1914] 1 K. B. 449. **Refd.** Wolff *v.* Koppel (1843), 5 Hill. N. Y. 458, cited 22 L. J. Ex. 103 n.

124. ——.]—The vendor of goods through the medium of a broker who has a commission *del credere* cannot recover the price from the broker in a declaration upon an *indebitatus assumpsit* for goods by pltf. to deft. delivered to be sold, & sold by him.—GALL *v.* COMBER (1817), 7 Taunt. 558; 1 Moore, C. P. 279; 129 E. R. 222.

125. ——.]—PEELE *v.* NORTHCOTE (1817), 7 Taunt. 478; 1 Moore, C. P. 178; 129 E. R. 192.

126. —— **Distinguished from other agents.**]—A *del credere* agent, like any other agent, is to sell according to the instructions of his principal, & to make such contracts as he is authorised to make for him; & he is distinguished from other agents simply in this, that he guarantees that those persons to whom he sells shall perform the contracts which he makes with them. If he sells at the price at which he is authorised to sell, & upon the credit which he is authorised to give, & the customer pays him according to his contract, he is bound like any other agent, as soon as he receives his money, to hand it over to his principal (MELLISH, L.J.).—*Re* NEVILL, *Ex p.* WHITE, No. 2, *ante*.

Annotations:—**Expld.** Gabriel *v.* Churchill & Sim, [1914] 1 K. B. 449. **Refd.** *Re* Watson, *Ex p.* Atkin, [1904] 2 K. B. 753, C. A.

For full anns., *see* S. C. No. 2, *ante*.

127. ——.]—The obligation of a *del credere* agent on a sale of goods to an undisclosed buyer does not extend to make him the person with whom the seller is entitled, if he wishes, to litigate any disputes that arise out of the contract & ascertain what is due upon it. It does not extend further than that, where there is an ascertained amount or certain sums due as a debt from the buyer to the seller, & the buyer fails to pay that amount either through insolvency or something that makes it as impossible to recover as in the case of insolvency, the broker has to answer for that default by reason of his having received a *del credere* commission.—GABRIEL (THOMAS) & SONS *v.* CHURCHILL & SIM, [1914] 3 K. B. 1272; 84 L. J. K. B. 233; 111 L. T. 933; 30 T. L. R. 658; 58 Sol. Jo. 740; 19 Com. Cas. 411, C. A.

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120 i. *Del credere agent—Facts from which implied.*]—GLASS *v.* JOSEPH (1847), 3 Rev. de Leg. 22, Q. B.—**CAN.**

120 ii. —— ——.]—In an action for a balance of account between principal & agent where the agent set up the insolvency of those to whom he had sold the goods of his principal:—*Held:* the rate of commission charged by him & paid by the principal at different times could be taken as proof of a *del credere* commission, & his plea of the insolvency of some of his customers must be dismissed.—RENKIN *v.* FOLEY (1861), 6 L. C. J. 156.—**CAN.**

a. *Landing agent at Penang.*] — "Landing agents" at the port of Penang are intermediaries owing duty to both parties—agents of the shipowners as long as the contract of affreightment remains unexhausted, agents for the consignees as soon as the bill of lading is produced with delivery order indorsed.—CHARTERED BANK OF INDIA, AUSTRALIA & CHINA *v.* BRITISH INDIA STEAM NAVIGATION CO., LTD. (1909), 13 C. W. N. 733.—**IND.**

b. *Prize agent.*]—Prize agents made a distribution, & retained a sum representing the share of the captain's clerk. As an authority for the retention, they produced an attachment over property in their hands of the captain's clerk, who was an absent & absconding debtor:—*Held:* prize agents' position did not satisfy requirements of the Proclamation as to the distribution of prize produce or the law of the Province as to attachments, & they could not hold money against petitioner, who was entitled to receive the unclaimed shares.—THE BERMUDA (1811), Stewart, 231.—**CAN.**

Part IV.—Formation and Evidence of the Contract of Agency.

SECT. 1.—APPOINTMENT BY DEED.

SUB-SECT. 1.—WHEN DEED NECESSARY.

128. Agent to execute deed—Presumption.]—An authority to execute a deed must be by deed; if one partner acknowledge he gave another partner authority to execute a deed for him, the presumption is it was a legal authority, which must be under seal & produced. An acknowledgment is not sufficient.—STEIGLITZ *v.* EGGINTON (1815), Holt, N. P. 141.

Annotations:—**Folld.** *Re* Milsted, *Ex p.* Jorey (1868), 18 L. T. 156. **Refd.** *Re* Burnsel & Wootton, *Ex p.* Burnsel & Wootton (1867), 16 L. T. 538.

129. —— ——.]—An authority to an agent to execute an indenture under seal must also be under seal.—BERKELEY *v.* HARDY (1826), 5 B. & C. 355; 8 Dow. & Ry. K. B. 102; 4 L. J. O. S. K. B. 184; 108 E. R. 132.

Annotations:—**Folld.** *Re* Milsted, *Ex p.* Jorey (1868), 18 L. T. 156. **Mentd.** Hall *v.* Bainbridge (1840), 1 Scott, N. R. 151; Hunter *v.* Parker (1840), 7 M. & W. 322; Cooch *v.* Goodman (1842), 2 Q. B. 580; *Re* Smith & Laxton, *Ex p.* Cockburn (1863), 3 New Rep. 227; Chesterfield & Midland Silkstone Colliery Co. *v.* Hawkins (1865) 3 H. & C. 677; Forster *v.* Elvet Colliery Co., [1908] 1 K. B. 629, C. A.

130. —— ——.]—A power of attorney to execute a deed must be under seal as well as the deed itself.

A deed signed in her husband's name by a *feme covert* without the authority of her husband, who is therein named a trustee, is not a sufficient execution by the husband under the second condition of Bkpcy. Act, 1861 (c. 134), s. 192. Nor is the execution of a deed by the wife, upon the authority of a letter from her husband, sufficient.—*Re* MILSTED (MILSTEAD), *Ex p.* JOREY (1868), 18 L. T. 156; 16 W. R. 582.

131. Award requiring deed to be executed—Demand by agent that deed be executed.]—A person was directed by an award to sign a release to the opposite party. The solr. for the opposite party tendered a release to him; he refused to sign it. The ct. would not grant an attachment for a contempt, because the solr. had not a power of attorney to do that specific act.—HUMPHRIES' CASE (1824), 2 L. J. O. S. K. B. 78.

132. —— ——.]—Where an arbitrator directed by his award that pltf. should execute deeds of assignment, mtge. & release, & a demand of execution was made by the agent of deft.'s attorney:—*Held:* it was not necessary that the agent should be authorised by a power of attorney.—TEBBUTT *v.* AMBLER (1843), 12 L. J. Q. B. 220; 7 Jur. 304.

133. Memorandum of association — Signed by agent—Under verbal authority.]—C. verbally authorised O. to sign on his behalf the memorandum of assocn. of a co. O. accordingly signed the name of C. to the memorandum without his own name appearing. The co. being in course of winding-up, C. was put on the list, & applied to have his name removed, on the ground that he had never signed the memorandum nor agreed to take shares:—*Held:* (1) there being nothing in Cos. Act, 1862 (c. 89), to show that Parliament intended anything special as to mode of signature of the memorandum, the ordinary rule that signature by an agent was sufficient applied; (2) although by s. 11 of the Act a subscriber was bound in the same way as if he had signed & sealed the memorandum, still the memorandum was not a deed, & it was not necessary that authority to sign it should be given by deed; (3) though it was irregular for O. to sign C.'s name without denoting it was signed by O. as his attorney, the signature was not on that ground invalid; (4) C. was not entitled to have his name removed from the list.—*Re* WHITLEY PARTNERS, LTD. (1886), 32 Ch. D. 337; 55 L. J. Ch. 540; 54 L. T. 912; 34 W. R. 505; 2 T. L. R. 541, C. A.

Annotations:—**Apld.** Jackson *v.* Napper, *Re* Schmidt's Trade Mk. (1886), 35 Ch. D. 162; Dennison *v.* Jeffs, [1896] 1 Ch. 611. **Refd.** Bevan *v.* Webb, [1901] 2 Ch. 59, C. A.

Necessity for deed in case of—Corporation.]—*See* CORPORATIONS.

—— **Company.**]—*See* COMPANIES.

SUB-SECT. 2.—EVIDENCE OF DEED.

134. Deed executed in principal's presence.]—If A. executes a deed for himself & his partner by the authority of his partner & in his presence, it is a good execution, though the deed was only sealed once, & although A.'s authority was not conferred by deed.—BALL *v.* DUNSTERVILLE (1791), 4 Term Rep. 313; 100 E. R. 1038.

Annotations:—**Apprvd.** Burn *v.* Burn (1797), 3 Ves. 573. **Distd.** Cooch *v.* Goodman (1842), 2 Q. B. 580.

135. Evidence of execution.]—An indenture having been prepared for binding a boy apprentice, the apprentice & his father, being unable to write, desired a third party to write their names opposite two of the seals, & he did so. The indenture was not read to them. The apprentice immediately afterwards took the indenture to the master & left it with him, & afterwards stated that when he did so he considered himself bound, & he went into service under the indenture:—*Held:* the indenture was sufficiently executed & delivered.—R. *v.* LONGNOR (INHABITANTS) (1833), 4 B. & Ad. 647;

PART IV. SECT. 1, SUB-SECT. 1.

128 i. *Agent to execute deed—Renewal of lease.*]—An agent of a trustee, residing in Newfoundland, for an estate in Newfoundland, undertook to renew leases which had expired. For so doing he had no authority except instructions contained in letters from his principal, not under seal, though in other respects the homologation was complete. To the leases so granted he had attached seals. The law of Newfoundland did not require any such formality to render valid a lease. The trustee sold the property & ignored the tenants holding under the new leases, as if no leases had been granted, upon the ground that an authority to an agent to execute a document under seal must be given under seal:—*Held:* where a seal is not necessary to a lease, as in Newfoundland, the principal will be bound if the agent execute it.—CONFERENCE METHODIST CHURCH *v.* GOODALL (1888), 7 Nfld. L. R. 367.—**NFLD.**

c. Agent to serve notice to quit.]—An agent under a power of attorney which gave no authority to determine tenancies signed a notice to quit without describing himself as agent. There was evidence of parol authority to serve the notice:—*Held:* notice valid.—SLIGO *v.* DAVITT (1840), 3 I. L. R. 146 (Q. B.); 1 Leg. Rep. 38, Q. B.; *sub nom.* SLIGO (LORD) *v.* DURETTS.—**IR.**

d. ——.]—An authority to determine tenancies need not be in writing, but it may be given by parole & read, although the agent have a power of attorney for other purposes.—WARDESFORD *v.* WALSHE (1851), 18 L. T. O. S. 45.—**IR.**

e. ——.]—In ejectment a notice to quit served by a general agent of pltf. is sufficient, although the agent has not been appointed by power of attorney.—TEMPLEMORE *v.* ADAMS (1861), 6 Ir. Jur. N. S. 132 (E.).—**IR.**

f. Land agent — Newfoundland.] — An authority by parol to an agent to let or dispose of property is as effectual in Newfoundland as the most formal deed.—WADDEN *v.* WADDEN (1893) 7 Nfld. L. R. 795.—**NFLD.**

Sect. 1.—*Appointment by deed: Sub-sects.* 2 & 3. *Sect.* 2; *Sub-sect.* 1.]

1 Nev. & M. K. B. 576; 1 Nev. & M. M. C. 128; 2 L. J. M. C. 62; 110 E. R. 599.

Annotation:—**Refd.** Tupper *v.* Foulkes (1861), 9 C. B. N. S. 797.

136. Deed executed for principal's benefit—Estoppel.]—G. having through physical infirmity become incapable of managing his affairs, intrusted his father, H., to undertake sole direction of them in his stead, & H. exercised the office of agent for many years. P., a debtor of G., having become embarrassed, H. was sent for by the creditors' attorney to execute a deed of assignment of P.'s estate for the benefit of his creditors; he did so, & entered the amount of the debt in a schedule annexed to the deed. G. having died, & a dispute arising as to his claim, H. filed his bill to establish his claim as a creditor upon P.'s estate:—*Held:* (1) the effect of H.'s having executed the deed was to prevent him, as his son's agent, from taking any proceedings against P. so that the estate of P. would obtain a benefit through such execution; (2) the way in which the parties had dealt with the deed was a beneficial thing for the son, & would enable the ct. also to deal with it for the benefit of the son; (3) the execution of the deed by H. was valid in the circumstances, although he might not have been appointed an agent by deed.—GOODALL *v.* MAXWELL (1845), 6 L. T. O. S. 166.

137. Proof of authority—Conduct of principal—Recognition of agency—Non-production of power.]—In an action on a policy of insurance subscribed by deft.'s agent under a power of attorney, it is sufficient proof of the agency that deft. is in the habit of paying losses so subscribed by the agent in his name, without producing the power of attorney.—HAUGHTON *v.* EWBANK (1814), 4 Camp. 88.

138. Subsequent acknowledgment—Inference of re-delivery.]—Where a deed of gift executed by an attorney under a power which does not authorise the execution of such a deed is afterwards shown to the grantor & acknowledged & treated as a valid deed, & the grantor acts as if the property comprised therein had duly passed to the grantee, the ct. may infer that there has been a re-delivery as at the date of the acknowledgment, & the grantor is bound thereby, & it is not necessary to show that at the date of acknowledgment the grantor knew he was not already bound.—*Re* SEYMOUR, FIELDING *v.* SEYMOUR. [1913] 1 Ch. 475; 82 L. J. Ch. 233; 108 L. T. 392; 57 Sol. Jo. 321, C. A.

139. Property in & production of deed.]—A power of attorney is the property of the person to whom it is given; where in an action on a lease executed under a power of attorney the party executing was not duly served with a *subpœna duces tecum* to produce the power:—*Held:* secondary evidence of its contents was not receivable.—HIBBERD *v.* KNIGHT (1848), 2 Exch. 11; 3 New Pract. Cas. 75; 17 L. J. Ex. 119; 10 L. T. O. S. 395; 12 Jur. 162; 154 E. R. 384, Ex. Ch.

SUB-SECT. 3.—OTHER POINTS.

140. Deed not essential to validity of transaction—Principal bound.]—Where a married woman contracts, by deed, without any power of attorney from her husband, for the hire of a servant, pltf. may consider the deed as void, & declare on the simple contract against the husband; & in such case the deed is evidence of the contract. If another person joins in such deed, it does not take away the remedy against the husband to sue him *in assumpsit*.—WHITE *v.* CUYLER (1795), 6 Term Rep. 176; 1 Esp. 200; 101 E. R. 497.

Annotations:—**Consd.** Clifford *v.* Burton (1823), 8 Moore, C. P. 16; Weston *v.* Foster (1836), 3 Scott, 164; Hunter *v.* Parker (1840), 7 M. & W. 322. **Refd.** Fishmongers' Co. *v.* Robertson (1843), 5 Man. & G. 131. **Mentd.** Hogan *v.* Hand (1861), 14 Moo. P. C. C. 310.

141. —— Transfer of ship.]—A ship, having been sold by auction, was transferred by an instrument executed by the auctioneer under seal, though not acting under any power of attorney:—*Held:* as no transfer under seal was required by Act of Parliament it operated as a written transfer by the principal.—HUNTER *v.* PARKER, No. 1045, *post*.

Annotation:—**Refd.** Naylor *v.* Mortimore (1864), 13 W. R. 47.

For full anns., *see* S. C. No. 1045, *post*.

142. —— Sale of chattel—Principal not liable on covenants.]—If an agent, acting under a parol authority to sell a chattel, sells it under a contract purporting to be executed by himself as owner of the chattel, & made in fact under seal, though not required by law to be so made in order that it may be binding, such contract under seal is binding on the principal as a contract of sale, & passes the property in the chattel to the vendee, but the deed & the covenants thereof are the deed & covenants of the agent & not of the principal.—LOW *v.* MCGILL, No. 212, *post*.

143. Lease by mortgagee—"As agent" of mortgagor—Mortgagee not in possession.]—R., a legal mtgee., who collected rents as agent for the mtgors., but did not assume the position of mtgee. in possession, was a party to a tenancy agreement under seal, which was expressed to be made between R. "as agent, hereinafter called the landlord," & S., the tenant. Mtgors. were not parties to the agreement, & had not given power to R. under seal:—*Held:* (1) the agreement operated to effect a legal demise of the premises; (2) a purchaser from mtgors. was entitled to enforce as against the tenant the covenants contained in the agreement.—CHAPMAN *v.* SMITH, [1907] 2 Ch. 97; 76 L. J. Ch. 394; 96 L. T. 662; 51 Sol. Jo. 428.

SECT. 2.—APPOINTMENT OTHERWISE THAN BY DEED.

SUB-SECT. 1.—NECESSITY FOR WRITTEN APPOINTMENT.

144. General rule—Not necessary.]—Where one person signs on behalf of another, authority for his

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PART IV. SECT. 1, SUB-SECT. 2.

137 i. *Proof of authority—Conduct of principal—Recognition of agency—Non-production of power.*]—A bond was executed by D. for V. as his attorney. D. on examination by pltf. as to his authority said he had a power of attorney (not produced) from V. & had acted for him in relation to the matter in respect of which the bond was given for several months:—*Held:* D. was authorised to execute the bond.—BALFOUR *v.* DRUMMOND (1890), 9 C. L. T. Dec. N. 201.—**CAN.**

137 ii. —— *Conduct of third party—Recognition of agency—Non-production of power.*]—An agent having appeared as pltf. in an action for the balance of a bill of exchange, deft. called for a power of attorney. Deft. had from time to time paid pltf., who received the money under written instructions received some time back from the principal:—*Held:* deft. had by his conduct admitted the agent's authority.—SEWELL & CO. *v.* NOWLIN (1844), Bluett, 284—**I. of M.**

137 iii. —— *Ancient deed.*]—Production of a deed thirty years old, purporting to be executed under a power of attorney, does not prove the power. Where the only proof of authority was the production of a copy of an unsealed power of attorney received by pltf.'s attorney from the son of the person appointed by it, since dead:—*Held:* clearly insufficient.—JONES *v.* MCMULLEN (1866), 25 U. C. R. 542.—**CAN.**

PART IV. SECT. 2, SUB-SECT. 1.

144 i. *General rule—Not necessary.*]—An agent acting for B. signed an agreement for the purchase of an hotel. The agreement was one which did not require to be under seal:—*Held:* in such case the appointment of the agent did not require to be under seal, or, in fact, in writing, & B. could be sued under the agreement made by the

so doing need not be in writing unless the instrument is one within Stat. Frauds.—COOKE *v.* JACKSON (1850), 15 L. T. O. S. 523.

145. —— Del credere agent.]—An agreement by a factor to sell upon a *del credere* commission need not be in writing, not being a promise to answer for the debt, default, or miscarriage of another person within Stat. Frauds, s. 4.—COUTURIER *v.* HASTIE (1852), 8 Exch. 40 ; 22 L. J. Ex. 97 ; 155 E. R. 1250 ; *revsd.* on another point (1856), 5 H. L. Cas. 673, H. L.

Annotations :—**Distd.** Wickham *v.* Wickham (1855), 2 K. & J. 478. **Apld.** Reader *v.* Kingham (1862), 32 L. J. C. P. 108 ; **Distd.** Mallett *v.* Bateman (1864), 16 C. B. N. S. 530. **Apld.** Sutton *v.* Grey, [1894] 1 Q. B. 285, C. A. **Distd.** Harburg India Rubber Comb Co. *v.* Martin, [1902] 1 K. B. 778, C. A. ; Davys *v.* Buswell, [1913] 2 K. B. 47, C. A. **Consd.** Gabriel *v.* Churchill & Sim, [1914] 1 K. B. 449. **Refd.** Risbourg *v.* Bruckner (1858), 30 L. T. O. S. 258 ; Ralli *v.* Universal Marine Insce. (1862), 4 De G. F. & J. 1 ; Fleet *v.* Murton (1871), L. R. 7 Q. B. 126 ; Mountstephen *v.* Lakeman (1871), 25 L. T. 755, Ex. **Mentd.** Hall *v.* Conder (1857), 2 C. B. N. S. 22 ; Pritchard *v.* Merchant's & Tradesman's Mutual Life Assce. Soc. (1858), 3 C. B. N. S. 622 ; The John Bellamy (1870), L. R. 3 A. & E. 129 ; Mollett *v.* Robinson (1872), L. R. 7 C. P. 84 ; Joliffe *v.* Baker (1883), 11 Q. B. D. 255 ; Griffith *v.* Brymer (1903), 19 T. L. R. 434.

146. —— ——.]—*Semble :* a contract for a *del credere* agency is not a promise to answer for the debt, default or miscarriage of another within Stat. Frauds, s. 4.—WICKHAM *v.* WICKHAM (1855), 2 K. & J. 478 ; 69 E. R. 870.

Annotations :—**Refd.** Sutton *v.* Grey (1893), 69 L. T. 354 ; Harburg India Rubber Comb Co. *v.* Martin, [1902] 1 K. B. 778, C. A. **Mentd.** *Re* Deane & Youle, *Ex p.* Goldsmid (1856), 25 L. J. Bcy. 26.

147. —— Stockbroker—Half commission.]—By a verbal agreement with deft., pltfs., a firm of stockbrokers, undertook to transact ordinary business, & be answerable upon the Stock Exchange for customers whom deft. should introduce, upon terms that deft. should receive half the commission earned upon, & be liable to pltfs. for half the losses arising from, such transactions. Owing to the default of a customer a loss was incurred by pltfs., half of which they sought to recover under the above agreement :—*Held :* (1) the promise to be answerable for the losses was the ulterior consequence only of the above agreement, the main object of which was to regulate the terms of deft.'s employment in respect of transactions in which he was interested ; (2) upon the principle applicable in the case of a *del credere* agency, the contract was one of indemnity, not a promise to guarantee the debt of another person ; (3) Stat. Frauds, s. 4, did not apply ; (4) the agreement was valid.—SUTTON & Co. *v.* GREY, [1894] 1 Q. B. 285 ; 63 L. J. Q. B. 633 ; 69 L. T. 673 ; 42 W. R. 195 ; 10 T. L. R. 96 ; 38 Sol. Jo. 77 ; 9 R. 106, C. A.

Annotations :—**Distd.** Harburg India Rubber Comb Co. *v.* Martin, [1902] 1 K. B. 778, C. A. ; Davys *v.* Buswell, [1913] 2 K. B. 47, C. A. **Refd.** Guild *v.* Conrad, [1894] 2 Q. B. 885, C. A.

148. —— Contract for lease.]—A bill for specific performance of a contract for a 21 years' lease alleged to be entered into by deft. P., as agent for pltf., with the other deft. S., stated that P. had informed pltf. that S. had written him a letter constituting the contract, & further stated that P. had entered into " the said " contract as agent for & on behalf of pltf. On demurrer :—*Held :* (1) the bill contained a sufficient averment of a contract in writing to satisfy Stat. Frauds ; (2) it was not necessary that the agency of P. should be constituted by writing.—HEARD *v.* PILLEY (1869), 4 Ch. App. 548 ; 38 L. J. Ch. 718 ; 21 L. T. 68 ; 33 J. P. 628 ; 17 W. R. 750, C. A.

Annotations :—**Consd.** James *v.* Smith, [1891] 1 Ch. 384. **Refd.** Cave *v.* Mackenzie (1877), 46 L. J. Ch. 564. **Mentd.** Chattock *v.* Muller (1878), 8 Ch. D. 177 ; Rochefoucauld *v.* Boustead, [1897] 1 Ch. 196, C. A.

149. —— Purchase of land.]—Authority to an agent to buy land is good without writing, though the contract itself must be in writing by Stat. Frauds.—WALLER *v.* HENDON & COX (1723), 2 Eq. Cas. Abr. 50 ; 22 E. R. 44.

150. —— ——.]—A contract for the purchase of land made by an agent will be enforced although the agent be appointed merely by parol.—HEARD *v.* PILLEY, No. 148, *ante*.

Annotations :—**Consd.** Cave *v.* Mackenzie (1877), 46 L. J. Ch. 564 ; James *v.* Smith, [1891] 1 Ch. 384.
For full anns., *see* S. C. No. 148, *ante*.

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agent.—NATIONAL TRUST Co., LTD. *v.* NADON (1915), 30 W. L. R. 588 ; 7 W. W. R. 1067.—**CAN.**

148 i. —— *Contract for lease.*]—An agent's authority to contract for a lease of lands need not be in writing. *Semble :* a written proposal for a lease made to an agent, who has not power to enter into a contract for such a lease, may be acknowledged by parol by the principal, so as to bind him.—CALLAGHAN *v.* PEPPER, 2 I. Ed. R. 399 (E. E.).—**IR.**

148 ii. —— ——.]—Defts.' agent was authorised, though not in writing, to advertise a house & farm for letting, & laid a proposal offering £2 per acre for such term as should be agreed on before defts., who authorised its acceptance if the agent was satisfied with security for rent. A draft lease was prepared for thirty-one years from defts. to pltf., & the agent wrote on it names of proposed sureties, & pltf. at an auction purchased some furniture for the house & a large amount of manure. In a suit for specific performance :—*Held :* the agent having full authority, & the agreement between agent & pltf. being preliminary to a formal lease, the former need not be authorised in writing to conclude it, & specific performance granted.—M'CAUSLAND *v.* MURPHY (1881), 9 L. R. Ir. 9.—**IR.**

148 iii. —— ——.]—Defts. who were incorporated under Charitable Associations Act, R. S. M., 1902, c. 18, passed a resolution in favour of opening club rooms, & the house committee, which was vested with full power to rent or lease suitable club rooms, agreed to lease certain premises from pltf. An offer in writing to take the premises for two years on certain terms therein stated was made to pltf.'s agent, & this offer was signed " Loyal Order of Moose, *per* W. G. G." G., who held the office of Vice-Dictator, had assisted the house committee considerably & a vote of thanks had been passed to him for his untiring efforts on behalf of the house committee. The offer was accepted :—*Held :* defts., acting by resolution, delegated their powers with respect to renting club rooms, & the house committee had practically delegated their powers to G., & clothed him with authority to make the offer to pltf.—PULFORD *v.* LOYAL ORDER OF MOOSE (1913), 25 W. L. R. 868.—**CAN.**

149 i. —— *Purchase of land.*]—In an action against defts. to compel a conveyance to pltf. it was proved that they had purchased certain land as agents for pltf., who had entered into possession, made improvements, & paid interest on the purchase-money, on faith of the arrangement with defts. :—*Held :*—pltf. could prove the agency & the purchase by parol evidence notwithstanding Stat. Frauds, & was entitled to a conveyance. *James* v. *Smith*, [1891] 1 Ch. 384 ; *Re Marlborough* (*Duke*), *Davis* v. *Whitehead*, [1894] 2 Ch. 133 ; *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196, C. A. ; *Bartlett* v. *Pickers-gill* (1760), 4 East, 577 n., cited.—LUNDY *v.* GARDNER (1903), 2 Ont. W. R. 1104.—**CAN.**

149 ii. —— —— *By sub-agent.*]—An agent to purchase land employed a sub-agent, who bought in his own name. In an action by the principal against the sub-agent :—*Held :* the agreement to act as sub-agent did not require to be in writing, because the cause of action was not upon the agreement as creating a trust in land, but upon a constructive trust not created or intended by the parties ; the cause of action arose *ex delicto* & not *ex contractu*, & Stat. Frauds had no application. *Bartlett* v. *Pickersgill* (1760), 4 East, 577 n., distd.—PORTER *v.* TE KORAMO, 4 J. R. N. S. S. C. I.—**N.Z.**

g. *Land agent.*] — Land Agents Act, 1912, s. 13, does not require that all the terms of the agreement between an agent & a principal should be in writing. It is not necessary that the writing should contain anything beyond the actual appointment of the agent & a description of the property authorised to be sold.—THORNES *v.* EYRE (1915), 34 N. Z. 651.—**N.Z.**

h. —— *Parol evidence inadmissible.*]—LANGLOIS *v.* BERTHIAUME (1913), 9 L. R. N. S. 367.—**CAN.**

i. *Subscription for shares.*]—The authority to take shares should be in writing ; but, *semble :* a parol authority will be binding.

Deft. had taken shares in a road co. On the secretary soliciting a further subscription, deft. told him he would take another £100, & the secretary afterwards, in deft.'s absence, put down his name for these shares :—*Held :* not sufficient to charge deft.—INGERSOLL & THAMESFORD GRAVEL ROAD Co. *v.* MCCARTHY (1859), 16 U. C. R. 162.—**CAN.**

Sect. 2—Appointment otherwise than by deed: Subsects. 1 & 2.]

151. —— ——.]—A contract for the purchase of land made by an agent in his own name vests the equitable title in the principal & may be established by him against the agent & persons claiming under him, although the agent be appointed merely by parol.—CAVE *v.* MACKENZIE (1877), 46 L. J. Ch. 564; 37 L. T. 218.

Annotations:—**Refd.** James *v.* Smith, [1891] 1 Ch. 384. **Mentd.** Chattock *v.* Muller (1878), 8 Ch. D. 177.

152 —— ——.]—An agent to purchase lands may be appointed by parol.—JAMES *v.* SMITH, [1891] 1 Ch. 384; 63 L. T. 524; 39 W. R. 396; *affd.* on another point, 65 L. T. 544, C. A.

Annotation:—**Refd.** Rochefoucauld *v.* Boustead, [1897] 1 Ch. 196, C. A.

153. —— ——.]—A memorandum of the purchase of leasehold houses, written at the time when and the place where the transaction took place, & at the purchaser's dictation, by a relative of the vendor, who was present when the transaction was entered into, is a sufficient memorandum or note of the agreement in writing signed by the party to be charged therewith or some other person thereunto by him lawfully authorised, to satisfy s. 4 of Stat. Frauds.—BROOKS *v.* BILLINGHAM (1912), 56 Sol. Jo. 503.

154. —— **Sale of goods.**]—The authority of an agent to sign a contract for the sale of goods within Stat. Frauds, s. 17, need not be in writing.—GRAHAM *v.* MUSSON, No. 168, *post.*

Annotations:—**Refd.** Graham *v.* Fretwell (1841), 3 Man. & G. 368; Mews *v.* Carr (1856), 1 H. & N. 484; Durrell *v.* Evans (1862), 1 H. & C. 174, Ex. Ch.; Williams *v.* Byrnes (1863), 1 Moo. P. C. C. N. S. 154; Vanderbergh *v.* Spooner (1866), 14 L. T. 701.

155. Memorandum of deposit—Equitable mortgage.]—Certain bankers petitioned for the sale of an equitable mtge. The memorandum of deposit of title deeds was not written or signed by bkpt., but was drawn out by a clerk of the bankers, when he left the deeds at the bank. It was submitted on behalf of petitioners that the clerk might be considered bkpt.'s agent *pro hac vice:*—*Held:* the memorandum of deposit being entirely in the handwriting of the clerk of the depository, it was not sufficient to take the case out of the general rule, which requires a memorandum to accompany a deposit of deeds by way of equitable mtge.—*Re* KINGSFORD, *Ex p.* EMMERTON (1834), 3 Deac. & Ch. 654, C. of R.

SUB-SECT. 2.—AUTHORITY OF AGENT TO SIGN MEMORANDUM UNDER THE STATUTE OF FRAUDS.

156. Agent—Special authority unnecessary.]—A letter written by an agent within scope of his authority, which refers to & recognises an unsigned document as containing the terms of a contract made by his principal, is a sufficient memorandum of the contract within Stat. Frauds, s. 4. It is not necessary, in order to satisfy the stat., that the principal should have authorised the agent to sign the letter as a record of the contract.—GRIFFITHS (JOHN) CYCLE CORPN., LTD. *v.* HUMBER & CO., LTD., [1899] 2 Q. B. 414; 68 L. J. Q. B. 959; 81 L. T. 310, C. A.; *revsd.* on another point, 85 L. T. 141, H. L.

Annotation:—**Distd.** Daniels *v.* Trefusis (1913), 109 L. T. 922.

157. —— ——.]—Stat. Frauds may be satisfied as completely by a note or memorandum signed by an agent, of the terms contained in a verbal contract, as by a note or memorandum signed by the principal himself, provided the agent had authority to sign the particular note or memorandum; & the fact that the agent was not authorised or did not intend to bind his principal by a contract is immaterial.—DANIELS *v.* TREFUSIS, [1914] 1 Ch. 788; 83 L. J. Ch. 579; 109 L. T. 922; 58 Sol. Jo. 271.

Auctioneer.]—*See* AUCTION & AUCTIONEERS.

Auctioneer's clerk.]—*See* AUCTION & AUCTIONEERS.

158. Broker—Authority as such while acting for both buyer & seller.]—A broker employed to sell goods for any person, who agrees for the sale of them, & gives to the purchaser & to his employer a sale note, is to be considered as agent for both parties, & such note is a sufficient note in writing within Stat. Frauds.—RUCKER *v.* CAMMEYER (1794), 1 Esp. 105.

Annotation:—**Folld.** Sievewright *v.* Archibald (1851), 17 Q. B. 103.

159. —— ——.]—Pltf. at the request of deft. sold to H. a certain quantity of brown malt. The contract was actually made by T., employed by pltf., and was in these terms: "Sold H. 320 quarters of [pltf.'s] malt at 74 shillings. (Signed) T." It was objected that T. was agent for pltf. only, and that, as he only had signed the sale note, Stat. Frauds was not satisfied:—*Held:* it was sufficient, as T. was the agent of both parties in making the contract.—HICKS *v.* HANKIN (1802), 4 Esp. 114.

160. —— ——.]—When a person is told by two parties that he is to be the broker to make a contract between them for the sale of goods, & he, in consequence, reduces it into writing, & sends a sale note of the items to each party, this is a valid contract within Stat. Frauds.—CHAPMAN *v.* PARTRIDGE (1805), 5 Esp. 256.

161. —— ——.]—A broker is agent of both buyer & seller to sign a memorandum of the contract.—HINDE *v.* WHITEHOUSE & GALAN (1806), 7 East, 558; 3 Smith, K. B. 528; 103 E. R. 216.

Annotations:—**Refd.** Emmerson *v.* Heelis (1809), 2 Taunt. 38; Rossiter *v.* Miller (1878), 39 L. T. 173, H. L. **Mentd.** Dickenson *v.* Lilwal (1815), 1 Stark. 128; Kenworthy *v.* Schofield (1824), 2 B. & C. 945; Carruthers *v.* Payne (1828), 5 Bing. 270; Alexander *v.* Gardner (1835), 1 Bing. N. C. 671; Spartali *v.* Benecke (1850), 10 C. B. 212; North Staffordshire Ry. *v.* Peek (1860), E. B. & E. 986; Turley *v.* Bates (1863), 2 H. & C. 200; Sweeting *v.* Turner (1871), L. R. 7 Q. B. 310; Peirce *v.* Corf (1874), L. R. 9 Q. B. 210; Oliver *v.* Hunting (1890), 44 Ch. D. 205.

162. —— ——.]—Where a broker is authorised by one man to sell goods, & to buy such goods for another, an entry in his books of a sale of these goods from the one to the other, signed by him, is

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PART IV. SECT. 2, SUB-SECT. 2.

158 i. *Broker—Authority as such while acting for both buyer & seller.*]—Where a broker really is employed by both parties & becomes the agent of both, he may bind them both, but unless he be in that position his signature will only bind the party by whom he is employed.

A., deft.'s agent, offered flour for sale, & pltfs. authorised brokers to buy a portion of it. A. & the brokers negotiated a bargain, the former acting for deft. & the latter for pltfs. The brokers signed a contract note for both parties:—*Held:* (1) there was no evidence that deft. had made the brokers his agents to sign the contract note; (2) there was not a note or memorandum sufficient to satisfy Stat. Frauds. *Bird* v. *Boulter* (1833), 4 B. & Ad. 443; *Hinde* v. *Whitehouse* (1806), 7 East, 558; *Emerson* v. *Heelis* (1809), 2 Taunt. 38; *Williams* v. *Millington* (1788), 1 Hy. Bl. 81; *Henderson* v. *Barnewall* (1827), 1 Younge & Jervis. 395; *Rucker* v. *Cammeyer* (1794), 1 Esp. 105; *Goom* v. *Aflalo* (1826), 6 B. & C. 117; *Hawes* v. *Forster* (1834) 1 Mood. & R. 368; *Chapman* v. *Partridge* (1805), 5 Esp. 256; *Grant* v. *Fletcher* (1826), 5 B. & C. 436; *Thornton* v. *Kempin* (1844), 5 Taunt. 786; *Soames* v. *Spencer* (1822), 1 Dow. & Ry. K. B. 32; *Gale* v. *Wells* (1824), 1 C. & P. 388; *Hicks* v. *Hankin* (1802), 4 Esp. 114; *Graham* v. *Musson* (1839), 5 Bing. N. C. 603; *Thornton* v. *Meux* (1827), 1 Mont. & M. 43, cited.—SYME *v.* HEWARD (1856), 1 L. C. Jurist, 19.—**CAN.**

a binding contract between the parties.—HEYMAN *v.* NEALE (1809), 2 Camp. 337.

Annotations:—**Distd.** Henderson *v.* Barnewall (1827), 1 Y. & J. 387. **Refd.** Sievewright *v.* Archibald (1851), 17 Q. B. 103; Thornton *v.* Charles (1842), 9 M. & W. 802.

163. —— ——.]—In an action for not accepting goods bought through a broker, the sold note, bearing the signature of the broker, who acted for both buyer & seller, is a note or memorandum in writing of the bargain signed by a lawfully authorised agent of buyer to satisfy Stat. Frauds, s. 17.—PARTON *v.* CROFTS (1864), 16 C. B. N. S. 11; 3 New Rep. 513; 33 L. J. C. P. 189; 10 L. T. 34; 12 W. R. 553; 143 E. R. 1027.

164. —— ——.]—A broker acting for pltf. made a contract for the sale of goods to deft., sending a note to each party, but signing only that which was sent to the seller; he, however, entered the contract in his book, in which he signed both bought & sold notes. Deft. kept the note sent to him without objection until called upon to accept the goods, when he repudiated the contract, assigning for reason that the note sent to him was not signed:—*Held:* (1) the conduct of deft. amounted to an admission that the broker had authority to make the contract for him; (2) his signature to the sold note bound deft.; (3) the signed entry in the broker's book was a sufficient memorandum of the bargain to satisfy Stat. Frauds.—THOMPSON *v.* GARDINER (1876), 1 C. P. D. 777.

See, further, SALE OF GOODS.

165. Estate agent — Authority to sell.]—An authority given to an estate agent to sell property *primâ facie* implies an authority to effect a sale binding in law, & includes an authority to execute an agreement on behalf of the principal where the law requires a contract in writing.—ROSENBAUM *v.* BELSON, [1900] 2 Ch. 267; 69 L. J. Ch. 569; 82 L. T. 658; 48 W. R. 522; 44 Sol. Jo. 485.

166. Factor—Authority as such while acting for both buyer & seller.]—Deft., having negotiated with pltf., a hop-grower, for the purchase, by sample, of some hops, went with him to his factor, when deft. agreed to buy the hops, & in the presence of both parties the factor wrote out bought & sold notes, the former of which contained the name of deft., & was delivered by the factor to him. The date of the notes was altered by the factor at the request of deft., in order to give him further time for payment. The hops were afterwards weighed in the presence of pltf. & deft., when a dispute arose as to their weight & condition, & deft. refused to accept them:—*Held:* (1) there was evidence for the jury that the factor was agent of both parties for the purpose of drawing a record of the contract binding on them.—DURRELL *v.* EVANS (1862), 1 H. & C. 174; 31 L. J. Ex. 337; 7 L. T. 97; 9 Jur. N. S. 104; 10 W. R. 665; 158 E. R. 848, Ex. Ch.

Annotation:—**Distd.** Murphy *v.* Boese (1875), L. R. 10 Exch. 126. **Mentd.** Simmonds *v.* Humble (1862), 13 C. B. N. S. 258.

Other contracting party.]—*See* Nos. 92-95, 98, *ante.*

167. Shopman—Purchaser asking for invoice.]—A person buying in a shop goods above the value of £10 does not make the shopman his agent to sign a memorandum of the contract by asking for an invoice, or by directing some alteration in the invoice when made, where the invoice is merely the account of the seller & is not intended as a record of the contract (WILDE, B.).—DARRELL (DURRELL), *v.* EVANS (1861), 6 H. & N. 660; 30 L. J. Ex. 254; 158 E. R. 272; *revsd.* on another point (1862), 1 H. & C. 174, Ex. Ch.

For full anns., *see* S. C. No. 166, *ante.*

Solicitor.]—*See* SOLICITORS.

168. Traveller—Instructed by buyer to make & sign entry in latter's book.]—A contract for the sale of goods was, in the presence & at the desire of the buyer, written & signed by the seller's traveller in a book belonging to the former, as follows: "Of N. & Co., 30 mats of Maurit., à 71s. cash, two months. J. D." :—*Held:* not a sufficient note or memorandum of the bargain to satisfy Stat. Frauds, s. 17, J. D. not appearing to be authorised to sign it as agent for the buyer.—GRAHAM *v.* MUSSON (MOSSON) (1839), 5 Bing. N. C. 603; 7 Scott, 769; 8 L. J. C. P. 324; 3 Jur. 483; 132 E. R. 1232.

Annotations:—**Distd.** Durrell *v.* Evans (1862), 1 H. & C. 174, C. A. **Refd.** Graham *v.* Fretwell (1841), 3 Man. & G. 368; Mews *v.* Carr (1856), 1 H. & N. 484; Williams *v.* Byrnes (1863), 1 Moo. P. C. C. N. S. 154; Vanderbergh *v.* Spooner (1866), 14 L. T. 701.

169. —— **Instructed to sign entry made by buyer in latter's book.**]—J. D., pltfs.' traveller, sold defts. sugar on account of pltfs. At the time of the sale, one of defts. wrote the following entry in their book, which J. D., on being requested, then signed, viz.: "Of N. & Co., 150 mats Ma. sugar, à 71-6, as sample, *per sea*, F.'s wharf. First & second ship. Signed, J. D." J. D. had, upon many previous occasions, sold sugars for pltfs. to defts. on credit, upon which occasions similar sale notes had been signed by him, & these contracts defts. had always performed:—*Held:* the above entry was not a sufficient memorandum in writing within Stat. Frauds, s. 17, to bind defts., J. D. not being their agent for that purpose.—GRAHAM *v.* FRETWELL (1841), 3 Man. & G. 368; 4 Scott, N. R. 25; 11 L. J. C. P. 41; 133 E. R. 1186.

Annotation:—**Refd.** Durrell *v.* Evans (1860), 9 Jur. N. S. 104, Ex. Ch.

170. —— **Authority as such.**]—Pltf.'s traveller, on taking an order for goods from deft., wrote out, in the ordinary course of his business, in his own order book, & in deft.'s presence, a memorandum in

165 i. *Estate agent—Authority to sell.*]—An agent to contract for the sale of lands under Stat. Frauds, s. 2, need not be authorised in writing. *Secus* of an agent to create or pass an estate.—CLINAN *v.* COOKE (1802), 1 Sch. & L. 22, 27. 31.—**IR.**

165 ii. —— ——.]—The owner of land gave parol authority to an agent to sell, & the agent accordingly entered into a parol contract for sale, & communicated the fact & the particulars of the contract to his principal by letter:—*Held:* sufficient to satisfy the stat.—MCMILLAN *v.* BENTLEY (1869), 16 Gr. 387.—**CAN.**

165 iii. —— ——.]—To admit the proposition that an agent could sell the property of another & prove by parol testimony, in an action for commission, a verbal mandate authorising such sale, would destroy the safeguards of the proprietor. The retaining of services to sell & the giving of a mandate to sell are without distinction, & neither can be proved by parol testimony.—DUDEMAINE *v.* PELLETIER (1914), 47 Que. S. C. 154.—**CAN.**

165 iv. —— —— *Or to purchase.*]—A., acting as agent for B., but without written authority, bought certain lands. In an action against B. for balance of purchase-money:—*Held:* an agent might be authorised by parol to treat for, or buy, or sell an estate, although the contract must be in writing. *Coles* v. *Trecothick* (1804), 9 Ves. 234; 32 E. R. 592, & *Schneider* v. *Norris* (1814), 2 M. & S. 286, follds.—MCILVRIDE *v.* MILLS (1905), 16 Man. L. R. 276; 1 W. L. R. 229.—**CAN.**

168 i. *Traveller—Instructed by buyer to make & sign entry in latter's book.*]—Pltf.'s travelling salesman took an order from deft. at her place of business, & the order was reduced to writing by a salesman, but not signed by deft. Deft. refused to accept delivery of the goods, contending that the order was countermanded before their arrival & that in any case there was no contract within Stat. Frauds:—*Held:* a traveller or salesman of a wholesale dealer is presumably not authorised by the persons who buy from him to sign a contract for them as purchasers, & this presumption is not rebutted by the memorandum of the order being made up in the purchaser's presence in duplicate, one copy being given to the buyer & the other copy being sent to the wholesale house. The entry of the name of the buyer made by the salesman is not evidence *per se* of his agency to sign. *Murphy* v. *Boese* (1875), L. R. 10 Ex. 126, follds.; *Elliot* v. *Dean* (1884), 1 Cab. & El. 283; *Wilkinson* v. *Evans* (1866), L. R. 1 C. P. 407, distd.—IMPERIAL CAP CO. *v.* COHEN (1906), 11 O. L. R. 382.—**CAN.**

Sect. 2.—Appointment otherwise than by deed: Sub-sect. 2. Sect. 3: Sub-sects. 1 & 2.]

duplicate of the order, writing therein the name of deft. as purchaser, & handing one of such duplicate memoranda to deft., who kept it:—*Held:* (1) the traveller, in what he did, was acting in the ordinary course of his business on behalf of pltf. alone; (2) there was no evidence that he signed, or had any authority to sign, the memorandum as agent of deft. within Stat. Frauds, s. 17.—MURPHY *v.* BOESE (1875), L. R. 10 Exch. 126; 44 L. J. Ex. 40; 32 L. T. 122; 23 W. R. 474.

SECT. 3.—EVIDENCE OF AGENCY.

SUB-SECT. 1.—IN GENERAL.

171. Burden of proof.]—The burden of proof is on the person dealing with anyone as an agent through whom he seeks to charge another as principal. He must show that the agency existed & that the agent had the authority which he assumed to exercise, or otherwise that the principal is estopped from disputing it.—POLE *v.* LEASK, No. 1, *ante*.

172. ——.]—Pltf. instructed deft., a broker, to purchase certain goods for him. Deft., professing to have bought the goods as broker, delivered a bought note to pltf., "Bought by order & for account of" pltf. "from principal, 102 barrels of raisins, etc." Pltf. paid to deft. the purchase-money, & received from him a delivery warrant for the goods; but, upon pltf.'s presenting it to the wharfingers holding the goods, they refused to deliver them, on the ground that the warrant was fictitious. In an action for money had & received to recover back the money so paid:—*Held:* (1) the burden of proving the broker was the real principal lay on pltf.; (2) pltf. might deliver interrogatories to deft. under C. L. P. Act, 1854 (c. 125), s. 51, requiring him to answer whether he acted in the transaction as principal or agent, &, if as agent, to name his principal.—THÖL *v.* LEASK (1855), 10 Exch. 704; 24 L. J. Ex. 142; 24 L. T. O. S. 262; 1 Jur. N. S. 117; 3 C. L. R. 317.

Annotation:—Refd. Jones *v.* Platt (1861), 30 L. J. Ex. 365.

173. ——.]—Where, in an action to recover money alleged to have been received by deft. as the result of bets on commission, deft. pleads that he acted as a principal & not as an agent, the burden of proof that deft. acted as an agent lies on pltf.—POTTER *v.* CODRINGTON (1892), 9 T. L. R. 54.

174. *S. P* PRITCHARD *v.* DOUGHTON, LOVYCK & Co. (1900), 16 T. L. R. 377, C. A.

175. ——.]—Pltf. sued deft. upon a Lloyd's fire policy effected through an agent. Deft. relied upon a misstatement in the policy, which was due to a mistake of the agent. The question being whether the agent acted on behalf of pltf. or deft.:—*Held:* (1) the burden of proving the agent acted on behalf of deft. lay on pltf.; (2) pltf. not having discharged the burden of proof, was not entitled to succeed.—BANCROFT *v.* HEATH (1901), 17 T. L. R. 425; 6 Com. Cas. 137, C. A.

176. Necessity for proof.]—A statement of grounds of appeal was signed by W. R., T. G., & for W. H., W. P. H., "churchwardens & overseers" of parish A., which formed part of a union:—*Held:* such signature was insufficient, it not appearing that W. H. had given W. P. H. authority to sign for him.—R. *v.* SURREY JJ., ALLHALLOWS *v.* WIMBLEDON (1844), 5 Q. B. 506; 1 Dav. & Mer. 106; 1 New Sess. Cas. 124; 13 L. J. M. C. 86; 3. L. T. O. S. 53; 8 J. P. 440; 1 Jur. 379; 114 E. R. 1340.

For full anns., *see* POOR LAW.

PART IV. SECT. 3, SUB-SECT. 1.

171 i. *Burden of proof.*]—In a suit against a principal for acts of an agent, the *onus* lies on pltf. to prove that the alleged agent was the duly accredited agent of deft. in reference to the subject of the claim.—HATHE RAM *v.* GOBIND RAM (1868), 3 Agra, 131.—**IND.**

171 ii ——.]—The *onus* of proving an agency lies strictly on the party seeking to enforce a contract made with the alleged agent. Where pltf. seeks to enforce a contract on the ground that it was made with a person whom deft. held out to the world as his agent by permitting him to deal in a certain way, pltf. must prove he was aware of & contracted on the strength of that course of dealing from which he seeks to show an implied agency.—ROBINSON *v.* TYSON (1888), 9 N. S. W. 297.—**AUS.**

171 iii. ——.]—The burden of proof is on the person dealing with anyone as an agent, through whom it is sought to charge another as principal, & it must be shown the agency did exist & that the agent had the authority he assumed to exercise.—MCCORMACK *v.* GALLAGHER (1917), 44 N. B. R. 630; 36 D. L. R. 711.—**CAN.**

176 i. *Necessity for proof.*]—Where the action is against the agent of pltf. in the suit, it is not sufficient to produce an affidavit purporting to be made by him; it must be proved to have been made by him, & that he was pltf.'s agent. — MCLARREN *v.* BLACKLOCK (1857), 14 U. C. R. 24.—**CAN.**

176 ii. ——.]—To sustain an action against a principal for damages occasioned in performance of a contract, it must be shown that the contractor is the authorised agent of the party sought to be charged, or at all events that he subsequently ratified or adopted the work as his own. — CARROLL *v.* PLYMPTON CORPN. (1860), 9 C. P. 345. —**CAN.**

176 iii. ——.]—In ejectment for non-payment of rent, founded on an agreement entered into by an agent "to let the premises for 150 years, at £150 rent, three leases to be made in equal proportion":—*Held:* an authority in the agent, at the time of signing the agreement, need not be proved.—STEWART *v.* SISSON (1832), Hayes, 512.—**IR.**

176 iv. —— *Agent under power of attorney.*]—In an action in a magistrate's ct. by an interned alien enemy, deft. applied for absolution on the ground that the general power of attorney under which pltf.'s bookkeeper instituted the action, was not produced in ct. The magistrate refused the application on the ground that general powers of attorney were not registered in magistrates' cts., the presumption being that an agent is duly authorised & the *onus* being on the other side to raise the question of authorisation. On appeal:—*Held:* in view of Rules of Ct. 8 & 413, the magistrate's reasons were not good; a magistrate should have some *primâ facie* evidence of authority; & the practice of the Supreme Ct. requiring the production of a power should, in the absence of other established usage, be followed in magistrates' cts.—LABUSCHAGNE *v.* MAARBURGER, S. A. L. R. (1915), C. P. D. 163.—**AUS.**

l. *Whether agency exists—Question for jury.*]—The question of agency is a question of fact for the jury, there being some evidence to go to them, of which the judge must decide.—DE BLAQUIERE *v.* BECKER (1859), 8 C. P. 167.—**CAN.**

m. —— *Inference of agency.*]—Whether authority has been conferred on an agent is a question of fact, which may be proved by showing that it was expressly given; or the acts of recognition by the principal may be such that the authority may be inferred.—SAYWARD *v.* DUNSMUIR & HARRISON, 11 B. C. R. 375.—**CAN.**

n. —— —— *Agent of foreign company.*]—In order to prove that a person, acting as agent of a foreign insurance co. by issuing policies in its name & receiving premiums, is the co.'s accredited agent, it is not necessary to show his appointment under the corporate seal where such person has acted as agent on various occasions & paid losses in the name of the co.—ROBERTSON *v.* PROVINCIAL MUTUAL & GENERAL INSURANCE CO. (1854), 3 All. 379.—**CAN.**

o. —— —— *Agent to sell land.*]—Mere statement of a price which an owner of land is willing to take & reference to a commission does not vest a real estate agent with a general monopoly of sale. A servitude of that kind needs a specific written contract, or, at least, an equivalent admission of its existence on the part of the owner.—MAINWARING *v.* CRANE (1902), 22 Que. R. C. S. 67.—**CAN.**

p. —— —— ——.]—In an action for specific performance of an alleged contract for sale of land, the evidence showed that deft. A. K. had no authority to make a contract on behalf of deft. S. K., & that S. K. had not ratified the act; further, that A. K. had no authority to sell the land:—*Held:* where an agent not expressly authorised sells real estate, his authority to exercise such power is not readily inferred from the act of selling.—WILLIAMS *v.* KLINGEL (1913), 23 W. L. R. 67; 9 D. L. R. 871.—**CAN.**

177. Parol evidence.]—Where an agent contracts, it may be proved by parol evidence who is his principal.—MORRIS *v.* WILSON (1859), 33 L. T. O. S. 56; 5 Jur. N. S. 168.

Annotations:—**Distd.** Pattle *v.* Anstruther (1893), 69 L. T. 175, C. A. **Followed.** Filby *v.* Hounsell, [1896] 2 Ch. 737. **Refd.** Stanley *v.* Dowdeswell (1874), L. R. 10 C. P. 102; Commins *v.* Scott (1875), L. R. 20 Eq. 11; Wylson *v.* Dunn (1887), 34 Ch. D. 569; Lovesy *v.* Palmer, [1916] 2 Ch. 233.

178. Incomplete agreement—Offer of agency not accepted—Underwriting.]—A contract made by an agent under a written & signed offer of agency, purporting to have been duly & effectually accepted by the agent, will not, if such acceptance has not in fact been communicated to the principal, be binding upon the principal by estoppel.

A. signed an underwriting letter to the secretary of the promoters of a co. whereby for a commission he undertook on or before a certain day to subscribe or find subscribers for 10,000 shares in the co., or "such less number as may be accepted by you," & it was agreed that in the event of his failing to comply with the terms thereof the secretary as his agent might apply on his behalf for the shares guaranteed by him. The secretary signed this letter, purporting to accept the offer therein contained to the extent of 10,000 shares, & applied for shares in A.'s name, which were allotted to him, but no notice of the acceptance was communicated to A. until after the allotment:—*Held:* the letter was an offer requiring acceptance by the secretary & communication of such acceptance to A. in order to bind A.—*Re* CONSORT DEEP LEVEL GOLD MINES, LTD., *Ex p.* STARK, [1897] 1 Ch. 575; 66 L. J. Ch. 297; 76 L. T. 300; 45 W. R. 420; 13 T. L. R. 265, C. A.

Annotation:—**Followed.** *Re* Gutta Percha Corpn. (1899), 15 T. L. R. 183.

See, further, COMPANIES.

179. Acting on contract.]—A contract establishing between contracting parties the relation of principal & agent is made absolute in law by the agent acting under it.—ROBERTS *v.* OGILBY (1821), 9 Price, 269; 147 E. R. 89.

Annotations:—**Distd.** Hardman *v.* Willcock (1832), 9 Bing. 382 n. **Consd.** Stuart *v.* Welch (1839), 4 My. & Cr. 305.

180. Contract made on Sunday.] — Defts., through the medium of a broker, contracted for the purchase of goods belonging to pltf. The whole terms of the contract were at defts.' request arranged on a Sunday, & on same day entered in the broker's contract-book with the exception of the name of the seller, which was added next day, & the sold note delivered to defts.:—*Held:* (1) the entire contract being, as far as it affected defts., completed on Sunday, was void by Sunday Observance Act, 1677 (c. 7); (2) the conduct of defts. made no difference.—SMITH *v.* SPARROW (1827), 4 Bing. 84; 12 Moore, C. P. 266; 5 L. J. O. S. C. P. 80.

Annotation:—**Refd.** Beaumont *v.* Brengeri (1847), 5 C. B. 301.

181. Place where constituted.]—An order to make certain bets having been transmitted by postal telegraph from pltf. without the city of London to deft. within it, he telegraphed from the City that the order had been obeyed:—*Held:* the contract of agency was made in the City, & an action for breach of such contract was within the jurisdiction of the Lord Mayor's Ct.—COWAN *v.* O'CONNOR (1888), 20 Q. B. D. 640; 57 L. J. Q. B. 401; 58 L. T. 857; 36 W. R. 895.

SUB-SECT. 2.—PARTICULAR FACTS.

182. Admissions.]—Deft. & others hired a job carriage & four post-horses, with two postillions,

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177 i. *Parol evidence.*]—*Semble:* the fact of agency may be proved by parol though the appointment was in writing.—WILSON *v.* STREET (1855), 3 All. 251.—**CAN.**

177 ii. ——.]—Deft. undertook to sign a contract as pltf.'s agent:—*Held:* he could not claim the benefit of the contract without committing a fraud, & evidence of the agency could be received although not manifested in writing. *Cave* v. *Mackenzie* (1877), 46 L. J. Ch. 564; *Bartlett* v. *Pickersgill* (1760), 4 East, 577 n.; *Heard* v. *Pilley* (1869), 4 Ch. App. 548, cited.—KITCHEN *v.* DOLAN (1885), 9 O. R. 432.—**CAN.**

177 iii. ——.]—In an action by pltfs. on certain promissory notes, alleged to represent the balance of purchase-money for agricultural machines, parol evidence was given by C. to prove that he was pltfs.' agent & had done certain acts on their behalf. During the giving of the parol evidence, it was revealed that C.'s appointment was in writing:—*Held:* there was good ground for striking out so much of C.'s evidence as was given before the fact was revealed that his authority was in writing, & for objecting to so much as was given after that fact got out, but as no application was made to strike out the one, and no objection raised as to the reception of the other, the testimony was entitled to consideration, & it could not be treated as of no value.—HARRIS *v.* DUSTIN (1892), 1 Terr. L. R. 404.—**CAN.**

177 iv. ——.]—Deft. employed pltf. to sell his property, but no written mandate was given, & pltf. put up his sale board on the property. Another agent who had already been appointed for the same object was showing the property to a customer who saw pltf.'s sale board. The customer, not having heard from the agent for a few days, called upon pltf., who introduced him to the owner:—*Held:* pltf. entitled to give verbal testimony to prove the existence of the oral mandate, as deft. had stated in his depositions that he would divide the commission between his two agents, & had allowed pltf. to fix up his sale board, & had handed the keys to the customer when introduced by pltf.—SCHLEIFER *v.* KAUFMAN (1914), 45 Que. S. C. 356.—**CAN.**

q. *Facts excluding agency — Payment under compulsion.*]—In 1891 a two-inch water service pipe was supplied by deft. to pltf.'s brewery. In 1895 pltf. conveyed the property to a co., of which O. was manager, & some time afterwards deft., as a means of enforcing payment of a claim against pltf. in respect of the pipe, turned off the water. O., to prevent serious loss to the co., paid the amount in dispute, & afterwards obtained it from pltf., who in turn sought to recover it from deft. as paid on his account:—*Held:* the fact that the payment made by the co. was made under compulsion excluded the idea that the co. was acting in the matter as agent of pltf.—LINDBERG *v.* HALIFAX (CITY) (1898), 31 N. S. R. 154.—**CAN.**

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r. *Access to post office box by party sharing office.*]—When W., a student at law, was in the habit of receiving, whilst a student in the office of deft., letters for deft. from the post office, his agency after he is admitted an attorney is not necessarily continued, although he occupies by permission of deft. a portion of his office, & has access to deft.'s post office box whenever he wishes, it being no longer his duty to bring to deft. his letters, & W. never having had any authority to open deft.'s letters, & never having opened them to deft.'s knowledge, & deft. cannot be made liable for money received by W. on collection of a note, there being no evidence of a retainer by deft.—EASTERN TOWNSHIPS BANK *v.* HANINGTON (1879), 18 N. B. R. 631.—**CAN.**

s. *Acknowledgment of receipt of purchase price by nominee of vendor.*]—A. & B. negotiated for the sale of A.'s property to B., but differed as to price. A. wrote to C. agreeing to take a certain sum subject to his approval, & B. lodged this sum with C., who made a memorandum of the receipt of it:—*Held:* C. was the agent of A. so as to bind him.—FIELD *v.* BOLAND (1837), 1 Dru. & W. 37.—**IR.**

182 i. *Admissions.*]—P. represented himself to be agent of deft. co., employing sub-agents, effecting policies, & paying losses in their name, & it was stated by one of the professed sub-agents of the co. that P. was agent. This was not contradicted by P., whose evidence was read at the trial, & who admitted that he had acted as agent of the co., & had sent the preliminary proofs in the case to the co.:—*Held:* sufficient proof of agency.—PEPPIT *v.* NORTH BRITISH & MERCANTILE INSURANCE CO. (1879), 1 R. & G. 219.—**CAN.**

182 ii. ——.]—Pltf. booked cattle over defts.' line by a man whom he sent to defts.' office. The man signed the contract note "on owner's behalf." In the freight note which was referred to in the contract note, pltf. was stated to be the owner. In an action for

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to go to Epsom races. On the road the drivers, in "cutting in" to the line formed for the purpose of passing through a toll-gate, overturned a gig in which pltf. was seated, & severely injured him. After the accident deft., who was on the driving box, offered money to the injured party, & gave his card; & upon the owner of the gig afterwards calling upon him, deft. observed that "cutting in" was all fair upon such occasions, & he "intended, if the gig had gone quietly out, to have pulled up to let it in again":—*Held:* (1) the jury was warranted in inferring that the postillions had acted as they did with the sanction of deft.; (2) he was liable in trespass.—M'LAUGHLIN *v.* PRYOR (1842), 4 Scott, N. R. 655; 4 Man. & G. 48; 11 L. J. C. P. 169; 6 Jur. 372; 134 E. R. 21.

Annotations:—**Distd.** Gordon *v.* Rolt (1849), 4 Exch. 365. **Apprvd.** Pidgeon *v.* Legge (1857), 21 J. P. 743; **Distd.** Holmes *v.* Mather (1875), L. R. 10 Exch. 261. **Refd.** Burgess *v.* Gray (1845), 1 C. B. 578.

183. ——.]—Where deft., on being served with notice of replevin, uses such expressions as "I know nothing about it; I left it all to my brother," or says only "Very well," this is evidence of authority given by deft. to distrain.—BOTTELEY *v.* ROGERS (1847), 8 L. T. O. S. 559.

184. —— **Reference to wife.**]—On a plea that the action did not accrue within six years pltf. proved an application to deft. for interest, when deft. said that his wife would have called to make a payment on account of it, but she had been prevented; the wife called shortly after & made a small payment without saying anything:—*Held:* the admission of deft. was receivable in evidence, & was sufficient to go to the jury, & to warrant them in finding that the payment by the wife was by deft.'s authority.—WATERS *v.* TOMPKINS (1835), 2 Cr. M. & R. 723; 1 Gale, 333; Tyr. & Gr. 137; 5 L. J. Ex. 61; 150 E. R. 306.

Annotations:—**Refd.** Bayley *v.* Ashton (1840), 12 Ad. & El. 493; Maghee *v.* O'Neil (1841), 7 M. & W. 531; Edan *v.* Dudfield (1841), 1 Q. B. 302; Eastwood *v.* Saville (1842), 9 M. & W. 615; Baildon *v.* Walton (1847), 1 Exch. 617; Nash *v.* Hodgson (1854), Kay, 650; Bevan *v.* Gething (1842), 3 Q. B. 740; Bodger *v.* Arch (1854), 10 Exch. 333; Turney *v.* Dodwell (1854), 18 Jur. 187; Goodwin *v.* Pacton & Page (1879), 41 L. T. 91.

185. —— ——.]—Deft. being pressed to pay a debt, promised pltf. he would either call again the following day or send some one to arrange terms of a security to be given by him. He did not call on the following day, but his wife called & admitted the amount of the debt claimed:—*Held:* this admission was binding on deft., there being sufficient *primâ facie* evidence of the wife's agency.—BARKER *v.* VAUGHAN (1839), 9 L. J. Ex. 4; 4 Jur. 222.

186. Adoption of statements in advertisement—Sale of business.]—TAYLOR *v.* GREEN (1837), 8 C. & P. 316.

187. Approval of draft contract—Subsequent withdrawal.]—R., after some negotiations, contracted with the assignees of Messrs. E. for purchase of certain claims of bkpts. against the estate of B. He represented that he acted on behalf of himself & M., who was clearly cognisant of the negotiations & contract. Several documents passed between the parties, & finally a draft of a deed was prepared, which recited that the contract was a joint purchase by R. & M. This was submitted to M., who approved of it; & at that time he was willing to adopt the contract, but subsequently, upon an alteration of circumstances, M. objected to the contract, & refused to join in the purchase:—*Held:* (1) there was no evidence that M. had entered into any agreement, or that R. acted as his agent; (2) the recital of an agreement in a document intended to be executed would not bind a party who had done nothing to recognise it, though at one time it was apparent that he was willing to execute it.—FOLIGNO *v.* MARTIN (1852), 22 L. J. Ch. 502.

188. Assignment for benefit of creditors—Debtor carrying on business under control of trustees—Not agent of trustees.]—P. executed a deed of inspectorship under Bkpcy. Act, 1861 (c. 134), by which he assigned all his property, but not his business, to trustees, upon trust for the benefit of his creditors. The deed contained a covenant by P. to carry on his business to the best of his ability under the inspection & control of the trustees, to whom he was to pay all moneys received by him, & a provision that the trustees should be liable as against each other for his own defaults only, & an express declaration that the deed was intended to operate as a deed of inspectorship & composition under the Act. The trustees derived no benefit under the deed other than that which they shared in common with the other creditors. After the deed was registered, pltfs. supplied goods upon written orders expressed to be "for P." to the place where he had carried on his business previous to the execution of the deed, & where the business was still being carried on under his management. The trustees regularly supplied him with money for current expenses weekly in advance, & they had no personal knowledge of orders given to pltfs., who, on the other hand, were not shown to have had any knowledge of the deed:—*Held:* (1) the real intention of the parties as appearing by the deed was that P. should carry on the business as his own, subject to the inspection & control of the trustees; (2) the relation of principal & agent did not exist between them & him; (3) they were not liable to pltfs. for the price of the goods supplied on his orders.—EASTERBROOK *v.* BARKER (1870), L. R. 6 C. P. 1; 40 L. J. C. P. 17; 23 L. T. 535; 19 W. R. 208.

Annotation:—**Distd.** Nicholls *v.* Knapman (1909), 101 L. T. 746.

189. Cab proprietor & driver.]—By arrangement between deft., registered proprietor, & the licensed driver of a hackney cab, plying for hire under London Hackney Carriage Act, 1831 (c. 22), & London Hackney Carriage Act, 1843 (c. 86), the driver paid 14*s.* 6*d.* each morning for the uncontrolled use of the cab & two horses during the day, & fares earned each day belonged to the driver. The horses were fed at the expense of deft., & his

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breach of contract safely to carry, pltf. admitted that he was not the owner of the cattle at the time of the injury, but had purchased them for C.:—*Held:* pltf. could not recover; the cattle belonged not to him, but to C.—MURPHY *v.* MIDLAND GREAT WESTERN OF IRELAND RY. CO., K. B., [1903] 2 I. R. 5; 37 I. L. T. 23.—**IR.**

188 i. *Assignment for benefit of creditors—Debtor carrying on business.*]—A trader transferred his stock to a creditor until the latter should be paid, & the former continued business in his own name, & bought goods in his own name for the purposes of the business:—*Held:* in so doing he acted as agent of the transferee, who was liable in an action for the price of the goods.—VÉZINA & COTÉ (1876), 3 Q. L. R. 32.—**CAN.**

188 ii. —— *Trustees carrying on business—Not agents of creditors.*]—Trustees under a deed of assignment to creditors, with power to carry on the business for a fixed time, carried it on after the time on their own credit & incurred large losses:—*Held:* the trustees were not, in the circumstances, agents of the creditors.—CHINIC *v.* GARNEAU (1884), 7 L. N. 210, Q. B.—**CAN.**

t. Assumption of agency.]—The mere fact of a chief of an Indian tribe assuming to act as a duly authorised agent in the name & on behalf of the tribe shows no power in him so to act; & a lessee under a lease signed by him as agent has no estate which, on his being subsequently attainted of high treason, could be forfeited to the Crown, & vested in comrs. of forfeited estates, under 59 Geo. 3, c. 12.—DOE d. SHELDON *v.* RAMSAY (1853), 9 U. C. R. 105.—**CAN.**

name appeared upon a plate on the cab, as required by s. 20 of the former Act:—*Held:* (1) in the circumstances, & looking to the provisions of the above Act, the driver was to be considered as deft.'s agent with authority to enter into contracts for the employment of the cab; (2) deft. was liable for a loss occasioned by the breach of a contract by the driver safely & securely to carry.—POWLES *v.* HIDER (1856), 6 E. & B. 207; 25 L. J. Q. B. 331; 27 L. T. O. S. 77; 2 Jur. N. S. 472; 4 W. R. 492; 119 E. R. 841.

Annotations:—**Consd.** Fowler *v.* Lock 1872), L. R. 7 C. P. 272. **Folld.** Venables *v.* Smith (1877), 2 Q. B. D. 279. **Consd.** King *v.* Spurr (1881), 8 Q. B. D. 104. **Apprvd.** King *v.* London Improved Cab Co. (1889), 23 Q. B. D. 281, C. A. **Consd.** Keen *v.* Henry, [1894] 1 Q. B. 292, C. A. **Folld.** Gates *v.* Bill, [1902] 2 K. B. 38, C. A. **Refd.** Steel *v.* Lester & Lilee (1877), 3 C. P. D. 121; Doggett *v.* Waterloo Taxicab Co. (1910), 79 L. J. K. B. 1085, C. A.; Smith *v.* General Motor Cab Co. (1911), 105 L. T. 113, H. L.

See, further, CARRIERS; MASTER & SERVANT; STREET & AERIAL TRAFFIC.

190. Commission payable.]—Pltfs. employed defts. to buy goods. By the terms of their employment defts. were to charge no commission, but the contract provided for "1 per cent. per month *pro & contra* on the accounts current." In an action for an account, defts. claimed to be principals & to be dealing as sellers with pltfs.:—*Held:* (1) defts. were agents, seeing that legal commission was not a mode of payment adopted between seller & buyer, & that the facts & correspondence pointed to evidence of the relation of principal & agent; (2) defts. must account to pltfs.—HYMAN *v.* HELM (1883), 24 Ch. D. 531; 49 L. T. 376; 32 W. R. 258, C. A.

Annotations:—**Consd. & Distd.** Mutrie *v.* Binney (1887), 35 Ch. D. 614, C. A. **Consd.** Vardopulo *v.* Vardopulo (1909), 25 T. L. R. 518, C. A.; Guaranty Trust Co. of New York *v.* Hannay (1915), 84 L. J. K. B. 1465, C. A. **Refd.** Logan *v.* Bank of Scotland, [1906] 1 K. B. 141, C. A.; *Re* Connolly, Wood *v.* Connolly, [1911] 1 Ch. 731, C. A.

191. Commission paid by deduction.]—The agent of the assured does not become agent of the underwriters merely because no commission is paid to him directly by the assured. Commission is, in the ordinary course of business, deducted by him from the premium before it is forwarded to the underwriters (MATHEW, J.).—BANCROFT *v.* HEATH, No. 175, *ante*.

See, further, INSURANCE.

Conduct—Recognition—Previous dealings.]—*See* Part V., Sect. 5, *post*.

192. Copyright—Song—Music hall proprietor—No supervision or control.]—Deft, proprietor of a music hall, engaged a singer, who on numerous occasions sang a song of the copyright of which pltf. was the assignee. Deft. at the trial denied he had directed the song to be sung; he was in the hall when it was being sung, but had never heard the whole of it. The jury found a verdict for pltf. & awarded a penalty of £2 for each occasion on which the song was sung. Upon motion for a new trial:—*Held:* (1) inasmuch as the singer was hired by deft. to sing what songs he liked & no supervision or control was exercised as to copyright, there was evidence of agency & authority to sing the song complained of; (2) there was no ground for disturbing the verdict.—MONAGHAN *v.* TAYLOR (1886), 2 T. L. R. 685.

Annotation:—**Refd.** Kelly's Directories *v.* Gavin & Lloyd's (1901), 84 L. T. 581.

Estoppel.]—*See* Part V., Sect. 5, *post*.

193. Financial position—Of principal—To disprove agency.]—In an action for goods sold & delivered upon the credit of deft., a question as to the amount of deft.'s income cannot be put, if evidence be tendered with a view to show the improbability of authority having been given to purchase the goods.

Where an action was brought against a widow for dresses ordered & worn by her daughter, who was about to be married:—*Held:* evidence of the amount of deft.'s income was admissible, as tending to show the dresses were not supplied upon her credit, but upon the credit of her daughter's future husband.—ROWE *v.* POLKINGHORNE (1844), 1 Car. & Kir. 618.

194. —— Of agent—To prove agency.]—Evidence that the persons alleged to be deft.'s agents had been previously made bkpts. is admissible in an action for goods supplied, to show the agents were in such circumstances that they were not likely to get credit for themselves.—SMETHURST *v.* TAYLOR, No. 574, *post*.

For full anns., *see* S. C. No. 574, *post*.

Holding out person as agent.]—*See* Part V., Sect. 5, *post*.

195. House agent—Instructions to write letter of inquiry.]—E., agent of pltf., was applied to by deft. respecting pltf.'s house. Deft. offered to take it if certain repairs were done. E. said he would write a letter to pltf. about it. Deft. said, "Do so":—*Held:* this did not make E. deft.'s agent so as to render the letter evidence against deft. under Stat. Frauds.—CLARKE *v.* FULLER (1864), 16 C. B. N. S. 24; 3 New Rep. 513; 9 L. T. 831; 12 W. R. 671; 143 E. R. 1032.

196. Insurance proposal—Filled up by agent of insurers—On behalf of proposer.]—An agent of an insurance co. who is allowed by a proposer to invent the answers to questions which form the basis of the contract between the proposer & the co., & to send them in as the answers of the proposer, is for that purpose agent of the proposer, & not of the insurance co.; in such circumstances the insurance co. is not liable upon a claim under a policy by the proposer, even though he did not instruct or authorise its agent to make any false answer & did not know the agent had answered

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190 i. *Commission payable.*]—A contract by which the owners of a chattel charge a person to sell it, with stipulation that this person shall have, for his remuneration, the surplus of the sale price above the fixed sum, constitutes a paid agency & not a partnership.—STAFFORD *v.* SMITH (1896), 10 S. 470.—**CAN.**

u. *Company prospectus naming person as agent.*]—A limited co. published a statement which notified that six hundred & ten £1 shares were available to subscribers & also stated that the U. Corpn., Ltd., were agents of the co. S. applied to the agents for three hundred shares, paid the purchase price, & obtained a receipt from the agents for the amount on a printed form supplied by the co. The co. went into voluntary liquidation before any shares had been delivered to S. On an application by S. under Cos. Act (No. 25 of 1892), s. 193, to have a compulsory liquidation, the co. set up that S. was not a creditor, inasmuch as the agents had no authority to sell shares:—*Held:* S. must be regarded as a creditor, & it was to his interest that a compulsory liquidation should take place.—SMITH *v.* F.'s BIOSCOPES & FILMS, LTD., S. A. L. R. (1917), Cape Prov. Div. 35.—**S. AF.**

v. *Insurance policy—Issue of—Receipt of premiums.*]—A policy of marine insurance was signed by R. as the co.'s agent; he issued & countersigned it as agent, received the premium, & acted throughout as such agent, & was so recognised by the president of the co.:—*Held:* this was sufficient *primâ facie* evidence that R. was agent of the co.—PROVIDENCE WASHINGTON INSURANCE CO. *v.* CHAPMAN (1883), 23 N. B. 105.—**CAN.**

196 i. *Insurance proposal—Filled up by clerk of insurers—As agent of proposer.*]—A proposal for a policy of insurance was signed in blank by a son of the insured, certain written particulars as to the buildings being subsequently filled in by a clerk of the insurance co., but neither the insured nor his son was aware until after the building was destroyed by fire of the way in which the proposal had been filled up. The policy contained a condition avoiding the policy for material misdescription of any of the property insured, etc. It was not shown that the clerk who filled up the proposal was the agent of the co. for the purpose of negotiating the insur-

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any question falsely.—BIGGAR *v.* ROCK LIFE ASSURANCE CO., [1902] 1 K. B. 516; 71 L. J. K. B. 79; 85 L. T. 636; 18 T. L. R. 119; 46 Sol. Jo. 105.

Annotations:—**Consd.** Tofts *v.* Pearl Life Assce. (1913), 110 L. T. 190, D. C. **Distd.** Golding *v.* Royal London Auxiliary Insce. (1914), 30 T. L. R. 350. **Refd.** Connors *v.* London & Provincial Assce. (1913), 6 B. W. C. C. 146.

See, further, INSURANCE.

197. Letters—From principal to agent—Admissibility to prove relation.]—Where pltf., through his agent, contracted with K. for the sale of goods, & the question was, whether they were sold on the credit of K. or of deft., whose agent K. was for the purchase of such goods:—*Held:* a letter of instructions from pltf. to his agent on the subject of the sale, not communicated to K. or to defts., was not admissible in evidence for pltf.—SMETHURST *v.* TAYLOR, No. 574, *post.*

For full anns., *see* S. C. No. 574, *post.*

198. —— —— ——.]—To prove authority of defts. to act for a person for a particular purpose, at a particular time, they offered in evidence a letter proved to be in the handwriting of that person undated, unaddressed, & with no evidence of when it was sent or received. On a motion for a new trial, upon the ground of misreception of evidence, a rule to show cause was granted.—PRITCHARD *v.* MULLINGS (1850), 15 L. T. O. S. 89.

199. —— —— —— **Letters from agent to principal.**]—Pltf. advanced money to A. & received in exchange deft.'s blank acceptance filled up by A. as drawer. In an action by pltf. against deft. for money lent:—*Held:* (1) letters from deft. to A., shown to pltf. before he advanced the money, were admissible in evidence on behalf of pltf. to prove A. was deft.'s agent; (2) letters from A. to deft. were admissible in evidence on behalf of deft. to disprove the alleged agency.—KING *v.* FORBES (VISCOUNTESS) (1862), 3 F. & F. 41.

200. —— **From agent to third party — Admissibility against principal—To prove continuance of agency.**]—If the attorney of a creditor writes to A. asking payment of a debt due from B., & A. answers the letter & pays £200 of the debt, & afterwards the attorney again writes to A. asking payment of the residue of the debt, & A. sends a letter promising payment, this last letter is evidence in an action against B.

"It is clearly shown that A. was B.'s agent at one time, & there is evidence to go to the jury that he continued so" (LORD TENTERDEN, C.J.).—ROBERTS *v.* GRESLEY (LADY) (1828), 3 C. & P. 380.

Annotation:—**Consd.** Wagstaffe *v.* Wilson (1832), 4 B. & Ad. 339.

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ance, or that he was aware of the actual construction of the building; nor was it shown that he was authorised by the co. to find out how the proposal ought to be filled up, or to fill it up:—*Held:* the clerk was acting as the agent of the insured, &, as there was a material misdescription in the proposal, the policy was rendered void.—*Re* SAMSON & ATLAS INSURANCE CO., LTD. (1909) 28 N. Z. L. R. 1035.—**N.Z.**

w. *Knowledge of vendor that middleman was reselling to third party.*] —Pltf. co. was engaged in getting gravel out of the river at Edmonton. D., a director of the co., communicated to G. that pltf. co. wanted to purchase an apparatus with an orange peel bucket. G. in conversations with D., & also with the co.'s manager, so spoke as to lead those persons to suppose that he was either a member of or agent for deft. co., G. saying: "We have the machinery you want which we can sell to you." An agreement for sale was in fact entered into between G. & pltf. co., but the machinery delivered was incomplete & useless to pltf. co. In an action for breach of contract defts. pleaded that their contract for sale was not with pltf. co., but with G., who agreed to resell to pltf. co. at a higher price:—*Held:* defts. had notice of all the terms of the agreement made between G. & pltf. co., & of the fact that G. was professing to act on their behalf & if they proposed to take the position that he had no right so to act they were, in the circumstances, bound instantly to notify pltf. co. to that effect, & not having done so became bound by the contract he had made; defts. were therefore liable to pltfs. in damages for breach of contract.—EDMONTON STEAM SHOVELLERS, LTD. *v.* JOHN GUNN & SONS (1913), 26 W. L. R. 234.—**CAN.**

197 i. *Letters—From principal to agent.*] —The consideration for the allotment to B. of certain fully paid up shares purported to be the assignment by L. to the co. of "sole agency" of N. & Co. for Australia, alleged to have been then held by L. The existence of the agency depended on two letters, one from N. & Co. to L. as follows: "We are prepared to enter into a joint account connection in Australia with you on following terms: you to sell cargoes, the prices & terms to be mutually arranged between us; any profit & loss to be divided equally between us; we will engage the services of C. to examine all cargoes shipped, & his charge at the rate of 5 per cent. per twenty-four feet will go to the debit of the joint account," & the other from L. to N. & Co., accepting the offer contained in their letter:—*Held:* (1) these letters did not constitute an agency, but a partnership; (2) even if there was an agency capable of being assigned, the contract did not sufficiently disclose the nature of the agency & did not comply sufficiently with Cos. Act, 1879 (No. 19), s. 57. *Re Kharaskoma Co.*, [1897] 2 Ch. 451, apld.—*Re* LINGHAM TIMBER CO., LTD. (1900), 21 N. S. W. Eq. 52.—**AUS.**

197 ii. —— ——.]—Deft. gave M. & W. a letter which contained an offer to them at a price per acre of his estate, & agreed that the offer should remain open for six months so as to enable them to form an assocn. under Land Settlement Finance Act, 1909. M. & W. paid £1 as consideration to keep the offer open & obtained a receipt. The negotiations for forming a co. fell through, & just before the expiration of the six months M. & W. accepted deft.'s offer by telegram & confirmed the telegram by letter:—*Held:* deft.'s letter constituted M. & W. agents of deft. & was not an offer to sell at a price per acre.—PIDGEON *v.* NARBEY (1911), 31 N. Z. L. R. 385, C. A.—**N.Z.**

197 iii. —— —— *From agent to principal.*]—In an action by an agent for commission on an exchange of properties, pltf. alleged that deft. in writing appointed pltf. agent to sell or exchange certain properties of deft. The correspondence between the parties upon which pltf. relied for proof of his authority began with an inquiry by pltf., a licensed land agent, for particulars of the property, accompanied by an intimation that pltf. had clients who were inquiring for a similar property, supplied the particulars required & stated his willingness to sell or exchange, but there was nothing in the correspondence on either side to intimate that if a sale resulted, pltf. would be entitled to a commission:—*Held:* in the absence of such intimation the correspondence did not prove pltf.'s appointment in writing as deft.'s agent, nor did it prove that in fact the relationship of principal & agent existed between them.—CHENNELLS *v.* SPURRELL (1917) N. Z. L. R. 258.—**N. Z.**

197 iv. —— —— ——.]—Resps., who had had previous dealings with applt., a brewer, wrote to him: "The writer is under the impression that he heard somewhere that you were inclined to sell your business. If such is the case we should be glad to hear from you stating what amount you require," etc. Applt. replied: "I want £2,500 net for the business. If I can't get that I don't sell. The only reason for selling is, I am getting old. Any further particulars you can have by applying." Resps. brought the brewery under the notice of S., who subsequently purchased directly from applt. for £2,500:—*Held:* (1) the letters did not establish a contract between applt. & resps. that applt. would employ resps. as his agents to introduce a purchaser.—DOLPHIN *v.* HARRISON, SAN MIGUEL PROPRIETARY, LTD. (1911), 13 C. L. R. 271. —**AUS.**

197 v. —— *From principal to third party.*]—In an action for not accepting goods alleged to have been purchased by P. as deft.'s agent:—*Held:* there was evidence that P. had a general authority to act for deft., deft. having spoken of P. in a letter as "our Mr. P."; there was also evidence of his purchasing for deft. on other occasions.—MURPHY *v.* THOMPSON (1877), 28 C. P. 233.—**CAN.**

200 i. —— *From agent to third party.*] —B.'s agent, under the orders of B., wrote a letter to S. headed: "Written by B. to S." The concluding portion was written by B. himself:—*Held:* sufficient evidence that the heading of the letter was written by an agent duly authorised.—MATHURA DAS *v.* BABU LAL (1878), I. L. R. 13 All. 68.—**IND.**

200 ii. —— ——.]—In an action in their own names by vendors, trustees, for specific performance by defts. of an agreement to purchase lands, on rescission of the contract, it appeared the negotiations were carried on between the vendors & B. by a written correspondence, B.'s letters containing the terms of sale accepted by defts. These letters were written on letter forms headed "C. P. Ry. Co., Land Dept.," & under B.'s signature was the word "Comr." Defts. pleaded Stat. Frauds, & that evidence that pltfs. were undisclosed principals of B. was not admissible:—*Held:* the form of

201. —— —— —— To prove agency in matters to which they relate.]—In debt against an exor. for a legacy, which, it was alleged, he was, by agreement with the legatee, to retain & to pay interest upon, deft. pleaded Stat. Limitations. It was proposed to take the case out of Stat. Limitations by putting in letters written by deft.'s son, who assisted him in his trade, & received for him money due to him in the way of his business as a shoe manufacturer:—*Held:* though this would be good evidence to show that the son was his father's agent in matters relating to the father's trade, it was not such evidence of agency as would render the letters of the son admissible in evidence in this case, as it was not evidence to show that the son was authorised to make admissions as to a legacy or exorship. accounts. To show agency as to accounts, evidence must be given of some authority pointing to such accounts.—WHITEHOUSE *v.* ABBERLEY (1845), 1 Car. & Kir. 642.

202. —— —— Admissibility for principal—To disprove agency.]—KING *v.* FORBES, No. 199, *ante*.

203. Negligent driving—Defendant present & permitting.]—WHEATLEY *v.* PATRICK (1837), 2 M. & W. 650; Murp. & H. 183; 6 L. J. Ex. 193; 150 E. R. 917.

Annotation:—**Refd.** Samson *v.* Aitchison, [1912] A. C. 844, P. C.

204. Other party — Servant of — Employed by request.]—In an action against a carrier it appeared the agent of pltf. went to the carrier's booking-office, & desired that a man should be sent to the agent's house to fetch a package, & one of the carrier's men fetched the package from the agent's house, & brought it to the booking-office:—*Held:* a delivery by pltf. to the carrier, as for this purpose the carrier's man was to be considered pltf.'s servant.—BOYS *v.* PINK (1838), 8 C. & P. 361.

Agent of one party acting as agent of other party.]—*See* pp. 284, 285, *ante*.

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the writing did not import that B. was contracting as agent for the C. P. Ry. Co.—SMITH *v.* MITCHELL (1894), 3 B. C. R. 450.—**CAN.**

x. *Management of property — Son & father.*]—A father owned, but his son managed, a shop, & the son paid a bill, his father saying: "You have taken money out of the till & robbed me, & you may pay the bill." In an action by the son against his father for money paid to his use:—*Held:* there was no agency, & claim dismissed.—DIXON *v.* DIXON (1867), 1 I. L. T. 229.—**IR.**

y. —— *Agent of co-tenant mortgagor paying share of profits to mortgagee.*]—Several co-tenants employed an agent to manage an oil property. One co-tenant mtged. his share to deft. The agent paid the mtgee. the mtgor.'s share of profits & sued the mtgee. for indemnity for expense incurred in sinking wells:—*Held:* the receipt of the mtgor.'s share of profits from the agent of the co-tenants did not make the agent agent for the mtgee.—HOPE *v.* FERRIS (1880) 30 C. P. 520.—**CAN.**

z. —— *Wife & husband.*]—A man allowed his wife to have control over certain property & to mtge. it:—*Held:* she acted as his agent, & he was bound by her act.—MOORADEE BEBEE *v.* SYEFOOLLAH (1864), W. R. 318.—**IND.**

a. —— ——.]—Where a wife took an active part in her husband's business & had the custody of his money, sums paid to her were treated as paid to the husband.—ROBINSON *v.* COYNE (1868), 14 Gr. 561.—**CAN.**

b. *S. P.* ANDERSON *v.* BELL (1881), 15 I. L. T. Jo. 18.—**IR.**

c. *S. P.* REAL & HAYES *v.* RYAN (1893), 27 I. L. T. Jo. 522.—**IR.**

d. *Mining company — Diggers working on property of.*]—By written contract B. Mission Society conceded on certain conditions to M. Co. the exclusive right of searching for & mining diamonds on their property. On the invitation of the co. many diggers settled on the property & took out claims, for which they paid the co. 5*s.* per month each for the right to search for diamonds on their claims. The diggers were not registered claimholders & could not themselves legally sell, but brought all diamonds found by them to the offices of the co. which sold the diamonds & paid the diggers a percentage of the proceeds:—*Held:* the co. worked the estate by means of the diggers as its agents or servants & was responsible for the acts of such agents in the course of their employment, such as the felling of trees.—PINEL D. M. Co. *v.* BERLIN MISSION SOCIETY (1909) 10 High Court (Griqualand West), 210; 3 Buchanan's Appeal Court Reports (Cape), 391; 19 Cape Times Reports, 301.—**S. AF.**

204 i. *Other party—Seller as agent for purchaser.*]—Deft. bought a pig from pltf. & sent it in charge of pltf. to the ry. station for delivery. When the pig arrived at the ry. station it was rejected by deft.'s servant, on the ground that its leg was broken:—*Held:* deft. made pltf. his special agent at his own risk, & if deft. insisted on the pig being delivered safe & sound at the ry. station, it ought to appear on face of the purchase note.—CONNOR *v.* SLATTERY (1896), 30 I. L. T. Jo. 150.—**IR.**

204 ii. —— *Servant of—Employed as agent.*]—Deft. signed a written indent, authorising pltf. to procure theatre chairs, telling pltf.'s manager that he trusted to him to get the best chairs & he wished him personally to approve of them. Deft. refused delivery or to pay the price:—*Held:* deft. by the verbal agreement constituted pltf.'s manager his agent to select the chairs, & if they were substantially of the description he ordered under the indent, he was liable.—WANT *v.* BENNETT (1879), 2 N. S. W. S. C. R. N. S. 186.—**AUS.**

204 iii. —— ——.]—A hotel-keeper gave instructions in writing to a firm to sublet his hotel & sell the stock-in-trade. The instructions, though addressed to the firm, were handed to a clerk of the firm, who managed the hotel booking branch of the firm's business to the knowledge of the hotel-keeper. In pursuance of the instructions, the clerk offered the premises to pltf., who paid a deposit of £25. The clerk gave a receipt for this £25, signed in the name of the firm. In an action for specific performance:—*Held:* deft. had agreed that the clerk should be his agent to sign the receipt.—KEILEY *v.* KAVANAGH (1898), 17 N. Z. L. R. 449.—**N.Z.**

e. *Payment of interest.*]—The agent of a mtgee. paid over a series of years from his own funds the interest, mtgee. giving receipts therefor which stated the interest had been received from the trustee of debtor & that all concerned were thereby discharged. These receipts remained in the custody of mtgee.'s agent. In a subsequent ranking & sale of the lands, a disposition & assignation was granted by mtgee. in favour of his agent, to enable him to obtain the interest advanced by him:—*Held:* (1) the terms of the receipts did not prevent the agent from taking full benefit of the disposition & assignation, the receipts never having been delivered to debtor; (2) there was no evidence that mtgee.'s agent had ever acted as agent for the mtgor.—NORTHERN REVERSION CO. *v.* MALCOLM & DICKSON & STEWART (1848), 21 J. 67.—**SCOT.**

f. *Payment of money to third party to pay off mortgage & perfect title.*]—Where the amount of a loan is paid to a third party to pay off hypotheca & perfect the title, the presumption is that such third party was acting as agent for the lender.—KNOX *v.* BOIVIN, 4 S. 311.—**CAN.**

g. *Payment by under-tenant to head landlord.*]—Payment by an under-tenant, C., to the head landlord, A., with the assent of B., the intermediate landlord, of the head rent does not *per se* make C. such an agent of B. as to induce the ct. to decree a reversionary lease of the premises, obtained by C. from A., a trust for B.—MAUNSELL *v.* O'BRIEN (1835), 1 Jones, 176 (E. E.).—**IR.**

h. *Place of payment of note.*]—A promissory note was, in the body of the document, made payable at the office of S., a broker & financial agent. On the holder presenting the note at S.'s office, S., on behalf of the maker, asked for a fortnight's grace, which was granted. Within the fortnight the maker paid the amount to S., who absconded without paying the payee:—*Held:* the fact that the note was payable at S.'s office did not constitute S. the holder's agent to receive payment, & the maker was liable to the holder, notwithstanding the payment to S.—HEYDENRYCH *v.* JEFFREY (1905), 2 Buch. A. C. 162; 14 C. T. R. 691.—**S. AF.**

k. *Preparation of assignment.*]—A tenant died, having appointed A., B., & C. exors. A. alone proved the will, & assigned to X. A cause petition sought to make the assets of testator liable for the rent. A. resided abroad; B., his father, a solr., resided within the jurisdiction of the ct. W., another son of B., also a solr., lived in the same house with him, & prepared the assignment. Agency was denied both by B. & W., the latter saying that in preparing the assignment he acted only for X.:—*Held:* the circumstances implied agency to A. in B. & W.; & service of notice of the cause petition on B. & W. was good service on A.—WESTBY *v.* FORD (1854), 6 Ir. Jur. 165 (R.).—**IR.**

l. *Relationship — Holder of promissory note living in father's house.*]—Defts. gave a promissory note, which was indorsed in blank by the payee; after it was due it was in the hands of J., who demanded payment of defts., but refused to produce it, & a few days afterwards told defts.' agent, who offered to pay the note, that they should not have it, & he would give them a hunt for it. Defts. afterwards tendered the amount of the note, when J. said he had sold it, but refused to tell who the holder was, saying defts. might seek it. On the following day the suit

Sect. 3.—*Evidence of agency: Sub-sect.* 2. *Sects.* 4 *to* 7.]

205. Post-master—Request to receive by post.]—Prisoner obtained money by false pretences; it was forwarded by post as requested by him:—*Held:* he constituted the post-master, where the letter was posted, his agent for receipt of the money, & was properly indicted in the county in which such post-office was situated.—R. *v.* JONES (1850), T. & M. 270; 3 Car. & Kir. 346; 4 New Sess. Cas. 353; 4 New Mag. Cas. 92; 19 L. J. M. C. 162; 14 J. P. 322; 14 Jur. 533; 1 Den. 551; 4 Cox, C. C. 198, C. C. R.

Annotations:—**Folld.** R. *v.* Cryer (1857), Dears. & B. 324, C. C. R.; R. *v.* Stoddart (1909), 2 Cr. App. Rep. 217. **Refd.** R. *v.* Cooper (1875), 1 Q. B. D. 19.

See, further, CONTRACT.

Previous dealings.]—*See* Part V., Sect. 5, *post.*

206. Railway company—Directors & solicitors.]—In order to prove that land was sold by a ry. co., it is not sufficient to prove by an auctioneer that he received directions for the sale from one of the directors, & that he received the conditions of sale from the solr. of the co., by whom he had been employed in former sales for the co., & who attended the sale. Some evidence ought to be given to show that the director or the solr. was authorised by the co. to offer the particular land for sale.—MOODY *v.* L. B. & S. C. RY. CO., No. 805, *post.*

Ratification.]—*See* Part VII., *post.*

207. Reference for information—Inquirer referred to third party — Third party constituted agent.]—If a party, on being applied to on a particular subject, writes in answer, mentioning another party & saying on one occasion, "He is in possession of my sentiments," & on another, "I have written to him, & I refer you to him thereon," such letters are sufficient to constitute the party referred to agent in the business; & what he said at a meeting on the subject may be given in evidence against the principal. — HOOD *v.* REEVE (1828), 3 C. & P. 532.

208. Reference for instructions.]—Deft., in London, purchased of pltf., at D., a quantity of Polish wheat, upon terms of paying for one third immediately, & for the remainder by bills at 3 months, "on handing the shipping documents." Deft. afterwards sold to L. & Co. one half of that wheat, & informed pltf. of the sale, & of the co.'s desire to have the wheat sent by a particular ship, adding, "You will please to follow instructions of those gentlemen as respects shipment." The wheat was shipped & the bills of lading delivered to L. & Co., who gave their acceptance for the price; but, the co. failing shortly afterwards, the bill was dishonoured:—*Held:* (1) deft. had made L. & Co. his agents in respect to the shipment of the wheat; (2) the delivery of the bills of lading to them was "handing the shipping documents" according to the contract.—BAUM *v.* RICKETTS (1849), 13 L. T. O. S. 425.

209 Reference for advice.]—Where, when a writ was delivered to a sheriff, he was told A. could give him advice & information as to the best mode of effecting a caption:—*Held:* A. was not thereby constituted an agent of pltf.—WILLIAMS *v.* GRIFFITHS (1849), 13 J. P. 397.

210. Referees for assured on insurance contract.]—Where, on a proposal for an insurance upon the life of another, the insurers were referred for information to the life proposed to be insured, to his usual medical attendant & to a friend:—*Held:* the life insured, the medical referee, & the private referee were not agents of the assured so as to make their fraud or concealment the fraud or concealment of the assured, in absence of a condition to that effect.—WHEELTON *v.* HARDISTY (1857), 8 E. & B. 232; 26 L. J. Q. B. 265; 29 L. T. O. S. 385; 3 Jur. N. S. 1169; 5 W. R. 784; 120 E. R. 86; *revsd.* on another point, 8 E. & B. 285, Ex. Ch.

Annotations:—**Distd.** Macdonald *v.* Law Union Insce. (1874), L. R. 9 Q. B. 328. **Refd.** Joel *v.* Law Union & Crown Insce., [1908] 2 K. B. 863, C. A. **Mentd.** Liverpool Borough Bank *v.* Eccles (1859), 4 H. & N. 139; Behn *v.* Burners (1863), 3 B. & S. 751, Ex. Ch.; Ryder *v.* Wombwell (1868), L. R. 4 Exch. 32; Blackman *v.* L. B. & S. C. Ry. Co. (1869), 17 W. R. 769; Hall *v.* Jupe (1880), 49 L. J. Q. B. 721.

See, further, INSURANCE.

211. Representations by alleged agent.]—In an action for the price of goods sold, the fact that the person who took the order from deft. called himself a "commission agent" & exhibited pltf.'s prospectus, there being no evidence that pltf. sent an invoice to deft., or that deft. sent any order to pltf., will not be any evidence of a liability to pltf. If the person who took the order agreed he would allow deft. a certain discount off the prices specified, this will tend to show the contract was with him as principal.—BURTON *v.* FURNISS (1858), 27 L. J. Ex. 139.

212. Standing by—Bill of sale.]—A., living in the same house with B., was the owner of certain goods therein, which A., for a fraudulent purpose, permitted B. to raise & receive money upon by way of a bill of sale in his own name to C., who believed the goods to be goods of B.; they being afterwards seized upon a *fi. fa.* against A.:—*Held:* the sale of the goods to C. was valid, B. being in effect agent of A. in the transaction.—LOW *v.* MCGILL (1864), 4 New Rep. 145; 10 L. T. 495; 12 W. R. 826.

213. —— Sale of goods.]—Where A., a married man, sells, with her concurrence, goods belonging

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was commenced, & defts. immediately afterwards paid into the justice's hands the amount of the note & costs. Pltf. was J.'s son, living in the house with him, & there was no proof of any actual transfer of the note by J.:—*Held:* it might be inferred that pltf. was only the agent of J., & that the jury were justified in finding a verdict for defts. — JORDAN *v.* COATES, 2 All. 107. — **CAN.**

211 i. *Representations by alleged agent.*]—Where a party negotiating between two persons, the one desiring to sell, the other to buy, certain land, gave the former to understand that he was acting in her interest:—*Held:* there might be agency & its duties & liabilities without express words of appointment or acceptance.—WRIGHT *v.* RANKIN (1871), 18 Gr. 625.—**CAN.**

211 ii. ——.]—Financial brokers who invest money for a client are his agents in the transaction, if they profess to be acting for him, & in his interest, though their remuneration may come from the other side.—LOWENBURG *v.* WOLLEY, 25 S. C. R. 51.—**CAN.**

211 iii. ——.]—The holder of a policy of insurance issued by R., as the agent of a foreign co., went to what purported to be the head office of the co. in Philadelphia, to inquire about payment for a loss under the policy, & conversed with H., who was represented to him as the president of the co., & who produced a paper which he said was a copy of the policy, & spoke about the loss & payment of it by R., the co.'s agent:—*Held:* H.'s declaration was evidence of the agency of R.—CHAPMAN *v.* DELAWARE MUTUAL INSURANCE CO. (1883) 23 N. B. R. 121.—**CAN.**

n. *Reputation — Collection of money on one occasion.*]—In an action for demurrage, the shipping bill of certain staves, forming the contract on which pltf. relied, was signed "A., agent"; & the only evidence to prove his agency was that of a witness who swore that A. had been the generally reputed agent of deft. in the stave business at the port of shipment for several years, & once collected money from the witness for deft., but neither this nor any other act of agency was shown to have come to deft.'s knowledge:—*Held:* evidence not sufficient to go to the jury, & pltf. was properly nonsuited.—MYLES *v.* THOMPSON (1863) 23 U. C. R. 553.—**CAN.**

o. *Request from vendee to vendor to take back goods & sell on his behalf.*]—Upon a conditional sale of chattels, the property was not to pass to the vendee until payment. Default having been made, the vendor under the terms of the contract resumed possession & sold the goods:—*Held:* a request from the vendee "to take the engine back & sell same & apply the proceeds, less the expenses, towards paying my indebtedness to you," did not constitute the vendor the agent of the vendee to re-sell the goods, which were never the property of the vendee.—ABELL *v.* CAMPBELL, 21 C. L. T. 303.—**CAN.**

213 i. *Standing by—Sale of goods.*]—Pltf. shipped grain from P., consigned

to B., a woman whom he has bigamously married, B. cannot afterwards, on discovering that her marriage was void, dispute the sale, as against a *bonâ fide* purchaser, inasmuch as she had constituted A. her agent to sell.—WALLER *v.* DRAKEFORD, No. 843, *post.*

For full anns., *see* S. C. No. 843, *post.*

214. Surrender of lease—Key delivered up by tenant's wife—Accepted by one of lessors.]—A. & B. demised a house by a lease in writing to C., at a rent payable quarterly. The key was delivered to C.'s wife. C. entered into possession, but before the first quarter's rent became due, there having been some dispute as to arrears of rent & taxes, C.'s wife delivered the key back to A., who accepted it. B., after signing the lease, had never interfered:—*Held:* (1) the delivering back of the key by the tenant, *animo sursum reddendi*, & acceptance by the landlords, amounted to a surrender of the term by act & operation of law, within Stat. Frauds; (2) the jury was, upon the facts, warranted in finding that C.'s wife acted as his agent in surrendering the term, & A. acted as agent for B. in accepting such surrender; (3) B. was bound by such surrender & acceptance. —DODD *v.* ACKLOM (1843), 6 Man. & G. 672; 7 Scott, N. R. 415; 2 L. T. O. S. 121; 134 E. R. 1063.

Annotations:—**Distd.** Cannan *v.* Hartley (1850), 9 C. B. 634. **Refd.** Morrison *v.* Chadwick (1849), 18 L. J. C. P. 189; Kelly *v.* Webster (1852), 2 C. B. 283; Furnivall *v.* Grove (1860), 8 C. B. N. S. 496; R. *v.* Tyrone JJ. (1860), 2 L. T. 639; Phene *v.* Popplewell (1862), 12 C. B. N. S. 334.

215. Words of courtesy.]—A husband delivered his wife's compliments in a letter to an agent:—*Held:* no proof of her joining in giving authority to the agent.—DANIEL *v.* ADAMS, No. 812, *post.*

SECT. 4.—AGENCY OF NECESSITY.

See HUSBAND & WIFE: SHIPPING & NAVIGATION.

SECT. 5.—AGENCY BY ESTOPPEL.

See Part V., Sect. 5, *post.*

SECT. 6.—CO-PRINCIPALS AND CO-AGENTS.

See Part VIII., Sect. 4, *post.*

SECT. 7.—STAMP DUTIES.

See, generally, REVENUE.

(NOTE.—*In considering the cases under this subtitle regard must be had to the date when the case was decided & to the effect of Stamp Acts passed since that date.*)

216. Authority to act—Under bill of sale.]—*Semble:* a mere authority to "act" under a particular bill of sale does not require to be stamped as a letter or power of attorney.—BAKER *v.* DALE (1858), 1 F. & F. 271.

217. Authority to pay calls.]—Notice being given to pltf. of a call on certain mining shares which he had transferred to deft., his attorney wrote to deft.'s attorney to inquire whether deft. was desirous of avoiding a forfeiture of the shares by authorising pltf. to pay the amount of the call. Deft.'s attorney wrote in reply authorising pltf. to pay the call:—*Held:* these letters were not a contract, nor evidence of a contract, & did not require a stamp.—PARKER *v.* DUBOIS (1836), 1 M. & W. 30; 1 Gale, 366; Tyr. & Gr. 243; 5 L. J. Ex. 90.

218. Authority to sell goods.]—A. having goods at the wharf of B., which C. had conveyed there by ship, gave B. a paper, authorising him to sell the goods, & out of the proceeds to pay C. the balance due to him for freight, mentioning the sum; B. sold the goods, & received the proceeds. In common *assumpsit* by C. against B. for the sum mentioned in the paper:—*Held:* the paper neither required a stamp, nor ought to have been declared upon specially.—HUMPHREYS *v.* BRIANT (1829), 4 C. & P. 157.

219. Authority to sign deed.]—A letter authorising A. to sign a deed in B.'s name does not require a stamp as a power of attorney.—COLLINS *v.* BRADLEY (1847), 8 L. T. O. S. 415.

220. Authority to survey & negotiate mortgage on commission.]—In order to prove retainer of pltf. by deft. as a surveyor & agent to procure a mtge., pltf. put in a letter from deft., wherein, after authorising pltf. to survey & value his estates, deft. added, "& upon such survey & valuation, I authorise & request you to obtain for me £5,000 by way of mtge., & in consideration thereof I agree to pay you 1 per cent., &c." :—*Held:* this instrument was properly stamped as an agreement & was not a letter of attorney.—TURNER *v.* JUDD (1848), 11 L. T. O. S. 536; 12 J. P. 555.

221. Authority to take possession.]—A written authority to an agent to take possession of premises & property on behalf of his principal is not a letter of attorney requiring a stamp.—VANSITTART *v.* JAMES (1858), 1 F. & F. 156.

222. Broker's note sent to principal.]—A note in these words, "Bought for Mr. T. fifty Continental Gas shares, at £2 premium (£8 already paid) £500; commission £6 5*s.* :—£506 5*s.*," sent by a broker to his principal, is not a contract nor evidence of a contract; but it is admissible to show a representation made by the broker to the principal without any stamp. Brokers' notes are not contracts nor evidence of contracts; they may be evidence that the broker has performed the transaction mentioned in the note, but nothing more.—TOMKINS *v.* SAVORY (1829), 9 B. & C. 704; 4 Man. & Ry. K. B. 538; 7 L. J. O. S. K. B. 334; 109 E. R. 262.

See, now, Finance (1909—10) Act, 1910 (c. 8), s. 77.

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to his agent at O., the consignee to hold it subject to defts.' order. The local agent of defts. at P. concurred therein, but no bill of lading was indorsed to defts., nor other transfer of title made. The consignee obtained advances at O. on the grain, & it was sold to repay them: —*Held:* defts. were not liable to pltf. for such sale, for there was no evidence to show the consignee was their agent, & they had acquired no control over the goods.—WILSON *v.* BANK OF MONTREAL (1870), 20 C. P. 411.—**CAN.**

p. *Supervision of debtor's affairs.*]—Three banks, creditors of B. Bros., agreed together to make further advances to them, declaring it a matter of common cause. One of them advanced funds to renew a draft part of the indebtedness, & not making sure that the funds were so employed, incurred a loss for which the other two were not liable:—*Held:* the stipulation in the agreement that K., to whom the funds for renewal were handed, should supervise the affairs of B. Bros. during the period covered by the agreement did not constitute him the agent of the banks.—UNION BANK & QUEBEC BANK (1887), 14 Q. L. R. 69.—**CAN.**

PART IV. SECT. 7.

q. *Authority to buy stock—Broker.*]—Where a person directs by letter a broker to buy stock in a co., the letter is a mandate & not an agreement requiring the stamp applicable to agreements.—BROWN *v.* MICHIE (1849), 11 D. 1131.—**SCOT.**

Sect. 7.—Stamp duties. Part V. Sects. 1 & 2: *Sub-sect.* 1.]

223. Common-keeper—Appointment of deputy.] Two persons who had been appointed common-keepers in the manor of W. appointed E. their deputy, by the following writing, signed by them: —"We, the undersigned, having been appointed common-keepers for the parish of P., hereby nominate & appoint you our deputy for the lower common, & authorise you to act for us in that behalf in all things pertaining to the rights & privileges of the lord & tenants of the manor, with the same powers & in the same manner as it would be our duty to act." It went on to state what were the rights of common, & in what manner the duties of common-keeper should be exercised:—*Held:* this document did not require to be stamped as being a "grant, or appointment of or to an office or employment," within Stamp Act, 1815 (c. 184), Sched. 1, Part 1.—ROBERTS *v.* ELLIOTT (1843), 11 M. & W. 527; 1 L. T. O. S. 147; 152 E. R. 914.

224. Parol contract on terms in printed document—No stamp required.]—Pltf., having signified by a printed prospectus the terms on which he is ready to engage to perform particular services, may in an action against one who has employed him to render those services under a parol agreement read the printed prospectus to show what the terms were, although it is not stamped.—EDGAR *v.* BLICK (1816), 1 Stark. 464.

Annotations:—**Distd.** Bowen *v.* Fox (1828), 2 Man. & Ry. K. B. 167. **Refd.** Clay *v.* Crofts (1851), 17 L. T. O. S. 231; Carlill *v.* Carbolic Smoke Ball Co., [1892] 2 Q. B. 484.

225. Power of attorney—Co-principals—Common purpose but not entirely common interest.]—A deed, in which several persons combine to effect a common purpose, requires only a single stamp. A power of attorney, whereby the several members of a mutual insurance club authorise the subscription of policies in their respective names, requires only one stamp; there being a community of purpose though (from each insurer being excluded from the policy upon his own ship) not an entire community of interest.—ALLEN *v.* MORRISON (1828), 8 B. & C. 565; 3 Man. & Ry. K. B. 70; 108 E. R. 1152.

226. —— Written authority to indorse specific bills—Immaterial additions.]—A written authority in the following terms: "I authorise you to indorse my name to three several bills of exchange now in your possession," describing them:—*Held:* a letter or power of attorney, requiring a 30*s.* stamp under Stamp Act, 1815 (c. 184), Sched. 1, Part 1, although it went on to say, "& which indorsement I undertake shall be binding upon me; & I undertake to pay you the amount of the several bills as they respectively become due, should they not be duly honoured when mature." — WALKER *v.* REMMETT (1846), 2 C. B. 850; 1 New Pract. Cas. 426; 15 L. J. C. P. 174; 7 L. T. O. S. 86; 10 Jur. 380; 135 E. R. 1178.

227. —— To execute composition deed.]—On a plea of a composition deed under Bkpcy. Act, 1861 (c. 134), s. 192, it appearing the deed had been executed by an agent under a power of attorney:—*Held:* under s. 197 of the Act, incorporating the Act of 1849 (c. 134), s. 138, the power did not require a stamp.—TAYLOR *v.* CLARK (1866), 4 F. & F. 1032.

228. —— To receive costs in bankruptcy.]—A power of attorney to receive costs in bkpcy. need not be stamped.—*Re* ELGIE (1839), 8 L. J. Bcy. 52.

229. —— Proxy under local Act—Effect of directions to vote in a particular way.]—An Act of Parliament for embanking & draining lands in a county provided "that the proprietors of certain lands & grounds" should appoint comrs. for that purpose; & it also enacted "that it should be lawful for the known agent, for the time being, of each & every proprietor entitled to vote in the election of any original or special comr., or for any other person authorised & empowered by any note in writing, signed by such proprietor, to act in the nomination & appointment of such comr., as fully & effectually as if such proprietor, on whose behalf he should act, was present at any meeting to be held for that purpose." In pursuance of this provision the following authority in writing was given: "We, the undersigned, being the major part of the trustees of the shares of the estate of M., deceased, lying & being, etc., do, by this note or writing, under our hands, & in pursuance of the Act in this behalf made & provided, authorise & empower B., O., & T., all of, etc., & any one of them, to act for us in the nomination & appointment of a special comr. for the township of E. & S., at a meeting appointed to be held, on etc., at etc., for the purpose of appointing a special comr. for the said township." Signed by the several parties:—*Held:* under Stamp Act, 1815 (c. 184), Sched. 1, Part 1, tit. Letter or Power of Attorney, & Procuration, this authority required a stamp. *Qu.:* whether directions to vote in a particular way, if contained in the authority, would exempt it from a stamp.—R. *v.* KELK (1840), 12 Ad. & El. 559; 4 Per. & Dav. 185; 9 L. J. Q. B. 362; 113 E. R. 924.

Annotations:—**Distd.** Roberts *v.* Elliott (1843), 11 M. & W. 527. **Folld.** Walker *v.* Remmett (1846), 2 C. B. 850.

230. —— ——.]—By Hull Dock Act, 1844 (c. ciii.), it was enacted that it should be lawful for pltfs. to depute & appoint any one of the elder brethren by writing, under their common seal, to represent the guild or brotherhood at all meetings of the dock co., & to vote at such meetings as proxy of the guild, etc. By Stamp Act, 1844 (c. 21), which received the Royal assent two months prior to the other, it was enacted, "that any letter, power of attorney, or other instrument, made for nominating a proxy, & chargeable with duty under this Act, shall authorise such proxy to vote upon any matter, at one meeting of the proprietors or shareholders of or in any co. or society, the time of holding whereof shall be specified in such instrument or any adjournment of such meeting; & no such letter, power of attorney, or other instrument shall be further or otherwise available, anything in such instrument, or in any Acts of Parliament, to the contrary notwithstanding":—*Held:* (1) the above sect. referred only to those letters or powers of attorney which were proxies whereon the duty of 2*s.* 6*d.* was granted by that Act, *i.e.*, which were proxies to vote at one particular meeting only of a joint-stock co., or any adjournment thereof, & did not refer to more general powers of attorney, which would still be subject to a stamp of 30*s.* under Stamp Act, 1815 (c. 184); (2) an instrument under

225 i. *Power of attorney—To receive rents & serve notices to quit.*]—A power of attorney to receive rents, serve notices to quit, etc., must bear a £5 10*s.* stamp; the stamp required on a power of attorney to receive rents merely will not be sufficient.—BOOTH *v.* M'GOWAN (1841), 1 Leg. Rep. 270 (E.); Long. & T. 273; 4 I. L. R. 188 (E.).—**IR.**

225 ii. —— *To operate in India—Conflict of laws.*]—Cts. in India need not consider whether a power of attorney issued in England, but intended to operate in British India, complies with the stamp laws in England. It is sufficient if it is stamped according to the stamp laws of British India. *Bristow* v. *Sequeville* (1850), 5 Exch. 275; *James* v. *Catherwood* (1823), 3 Dow. & Ry. K. B. 190; *Clegg* v. *Levy* (1812), 3 Camp. 166, cited. — *In the Goods of* MCADAM (1895), I. L. R. 23 Calc. 187.—**IND.**

225 iii. —— *To receive mortgage money.*]—Deceased gave his daughter a general power of attorney to receive money due to him on mtge. & to lend the money again to same mtgor. in her own name:—*Held:* there was no gift to the daughter by any document, & no stamp duty was payable as on a deed of gift.—STAMPS MINISTER *v.* TOWNEND (1909), 101 L. T. 354, P. C.—**AUS.**

seal of pltfs., following the terms of the Dock Act, empowering C. to represent pltfs. at all meetings of the dock co., & to vote for them as proxy at all such meetings, was in the nature of a general power of attorney, & was a valid instrument, notwithstanding the Act of 1844, & entitled the nominee of pltfs. to vote at all meetings of the dock co.—TRINITY HOUSE OF HUIL *v.* BEADLE (1849), 13 Q. B. 175; 18 L. J. Q. B. 78; 13 Jur. 557; 116 E. R. 1230.

Part V.—Authority of the Agent.

SECT. 1.—IN GENERAL.

How the authority of the agent may be derived, *see* Part IV.

The extent of the agent's authority, *see* Sects. 2 & 3, *post.*

SECT. 2.—CONSTRUCTION OF AUTHORITY.

SUB-SECT. 1.—POWERS OF ATTORNEY.

231. Construed strictly—Necessary powers to be implied.]—A power of attorney must be pursued strictly, but so as to include the necessary means of executing it with effect. An express power includes all powers, though not expressed, necessary to be used in order to accomplish the object of the principal power (EYRE, C.J.).—HOWARD *v.* BAILLIE, No. 264, *post.*

Annotation:—*Re* Disputed Adjudication (1859), 33 L. T. O. S. 348.
For full anns., *see* S. C. No. 264, *post.*

232. ——.]—Powers of attorney are to be construed strictly; & in all cases are to be examined carefully in order to see whether the act done by the attorney is fairly within scope of the authority given by the principal.—ATTWOOD *v.* MUNNINGS, No. 265, *post.*

Annotations:—**Apld.** Withington *v.* Herring (1829), 5 Bing. 443; Lewis *v.* Ramsdale (1886), 55 L. T. 179; Bryant, Powis & Bryant *v.* La Banque du Peuple, Bryant, Powis & Bryant *v.* Quebec Bank, [1893] A. C. 170, P. C.; Jacobs *v.* Morris, [1901] 1 Ch. 261. **Refd.** Danby *v.* Coutts (1885), 29 Ch. D. 500.
For full anns., *see* S. C. No. 265, *post.*

233. Limited to individual donee—Dealings by firm not covered.]—C. & Co. consisted of C. & E. A power of attorney to C. alone will not authorise business transacted under such power by C. & Co.—THE JONGE PIETER (1801), 4 Ch. Rob. 79.

For full anns., *see* PRIZE LAW & JURISDICTION.

234 —— **No authority to co-partner.**]—From a general power of attorney granted to one of two partners the other can derive no authority.—EDMISTON *v.* WRIGHT (1807), 1 Camp. 88, N. P.

235. —— **But may be to two persons in the alternative.**]—A power of attorney to A. or B. to make livery is not void for uncertainty.—LEEDES & CROMPTON'S CASE (1587), Godb. 93; 78 E. R. 57.

For full anns., *see* LANDLORD & TENANT.

236. Limited to occasion for which power given.]—At first choice of assignees a great number of powers of attorney from creditors to vote in the choice, for which there was a strong contest, had been presented & acted upon. The assignees chosen were removed by the comr., & a second choice was about to take place, at which it was attempted to use those powers again by the attorneys named in them; & they claimed to vote under the powers at such second choice:—*Held* (1) they were not entitled so to do; (2) the powers extended only to one occasion; (3) having been once acted on, they were spent, & not available for any subsequent service.—*Re* WILLIAMS & SONS (1854), 23 L. T. O. S. 11.

237. ——.]—A proxy is a delegation of authority for a particular purpose then in contemplation of the person giving it.

Proxies were given in Nov. & Dec., 1886, by the governors of an infirmary for a contemplated election between A. & B. for the post of surgeon. The particular election did not take place, owing to the retirement of B.:—*Held:* the proxies so given were properly rejected at a subsequent election in April, 1887, between A. & C.—HOWARD *v.* HILL (1888), 59 L. T. 818; 37 W. R. 219.

—— **Proxies.**]—*See, generally,* BANKRUPTCY & INSOLVENCY; COMPANIES.

238. Limited by capacity in which principal acted when granting power.]—Several members of a mutual insurance assocn., on entering the assocn. executed a power of attorney to the secretary, authorising him to sign & underwrite for them policies of insurance not exceeding a certain sum in any one risk; to demand, sue for, & recover such sums as might be due to them; & also to pay such expenses for losses as might become due from them, & generally to do all such things as might be necessary for the purposes of the assocn., the members respectively agreeing to confirm same, & covenanting with the secretary to accept, & when due, to pay, all such drafts or bills as might be ordered by the committee of the assocn., in pursuance of the rules thereof, & also to pay to the secretary or the committee all the expenses & contributions to which they might become liable. On the co. being wound up, several members paid what was due from them to the secretary, but, the secretary becoming bkpt., the moneys so paid never reached the persons to whom they were due:—*Held:* (1) the power of attorney was not a power of attorney of the paying members in that character, but of the receiving members; (2) on payment to the secretary by a contributing member of the sum due from him, his liability entirely ceased.—ANDREWS & ALEXANDER'S CASE, CHATT'S CASE, COOK'S CASE, CREW'S CASE (1869), L. R. 8 Eq. 176; 20 L. T. 943; 17 W. R. 784.

Annotations:—**Consd.** *Re* Arthur Average Assocn. (1876), 3 Ch. D. 522. **Mentd.** *Re* Arthur Average Assocn. for British, Foreign & Colonial Ships, *Ex p.* Hargrove (1875), 10 Ch. App. 545, n.; *Re* Haycock's Policy (1876), 1 Ch. D. 611; *Re* Queen Average Assocn., *Ex p.* Lynes (1878), 26 W. R. 432.

239. Construction—For court, not for jury.]—BERWICK *v.* HORSFALL, No. 298, *post.*

PART V. SECT. 2, SUB-SECT. 1.

231 i. *Construed strictly.*]—A power of attorney must be construed strictly.—MALUKCHAND BIR GYANMAL *v.* SHAN MOGHAN VARDRAJ (1890), I. L. R. 14 Bom. 590.—**IND.**

238 i. *Limited by capacity in which principal acted when granting power.*]—J. died intestate seised of lands. W., his eldest son & heir, took out letters of administration, & appointed H. his attorney under a power "to sign & execute all deeds which W. as heir & administrator may be called upon to execute, etc.":—*Held:* the power authorised H. to bind W. by the execution of such deeds only as W. in his capacity of administrator & heir might be called upon to execute.—*Re* BAXTER (No. 2) (1863), 1 Q. S. C. R. 99.—**AUS.**

a. *Effectual from date of signature—Not date of receipt by attorney.*]—*Re* JOHNSTON *v.* WELLINGTON, MAYOR, ETC. (1901), 19 L. R. 733.—**N.Z.**

Sect. 2.—Construction of authority: Sub-sect. 1.]

240. —— May be construed with other documents.]—D. gave G. a power of attorney authorising him to buy, sell, charge & transfer in any form whatsoever any estate, stocks, or funds "following his letters of instructions & private advices which, if necessary, shall be considered part of these presents." D. wrote to G. with respect to the investment of certain money when received & G. pledged the property before the letter was received. The question being whether general words authorised the attorney to bind the principal by what he did although the act was done before further instructions arrived:—*Held:* the power authorised the execution of the mtge., although as between D. & G. the mtge. was unauthorised.—DAVY *v.* WALLER (1899) 81 L. T. 107.

241. —— ——.]—PERRY *v.* HOLL, No. 279, *post.*

For full anns., *see* S. C. No. 279, *post.*

242. —— ——.]—WITHINGTON *v.* HERRING, No. 277, *post.*

For full anns., *see* S. C. No. 277, *post.*

243. Effect of usage.]—TONKIN *v.* FULLER, No. 293, *post.*

244. ——.]—HOGG *v.* SNAITH, No. 267, *post.*

For full anns., *see* S. C. No. 267, *post.*

245. Can only be construed as power & not as deed of appointment.]—By a marriage settlement, moneys in the funds, lent on mtge. & other property, were assigned to trustees upon trust to pay & transfer same unto such persons, for such estates or interests, either absolutely or conditionally, & in such parts, shares & proportions, manner & form, & under & subject to such powers, provisoes, etc., either for the benefit of the issue of the intended marriage, or of any other persons whomsoever, as the wife notwithstanding her coverture, at any time or times, & from time to time during the joint lives of herself & her husband, should, by & with the consent & approbation of her husband, testified in writing under his hand & seal, or as the wife alone, after the decease of the husband, in case she should survive him, should by any deed or writing, to be sealed & delivered by her in the presence of & attested by two or more witnesses, direct or appoint; & in default of such direction or appointment, & in the meantime & until such direction or appointment should be made & executed, & subject thereto, & as to so much of the trust moneys, etc., whereof no such direction or appointment should be made, upon trust to receive the annual proceeds due, & to grow due for, or in respect of, same, & pay same to such persons as the wife, during her life, notwithstanding her coverture, & whether sole or covert, should from time to time, by any writing or writings under her hand, direct or appoint to receive same, & in default of such direction or appointment into the proper hands of the wife for her separate use. The moneys in the funds were transferred to the husband by virtue of powers of attorney, under the hand & seal of the wife, with the consent of the husband under his hand & seal, & attested by two witnesses, & the mtge. money was received & a receipt given by husband & wife, & the premises reconveyed, & the receip & reconveyance also so attested:—*Held:* (1) the powers of attorney were not directions, but were merely authorities to the bankers by the wife to assign the stock to her husband, & only enabled the bankers, to do for her what she might have done for herself, without their intervention; (2) as the directions must follow on the authorities before the authorities could be acted on, it still remained to make the appointment after the execution of the powers of attorney; (3) the transfer made subsequently to such execution, being unaccompanied by any of the formalities required by the settlement, could not have the effect of converting instruments of substitution into instruments of alienation & could not operate as executions of the power of appointment.—HUGHES *v.* WELLS (1852), 9 Hare, 749; 20 L. T. O. S. 136; 16 Jur. 927; 68 E. R. 717.

Annotations:—**Dbtd.** Vaughan *v.* Vanderstegen (1854), 2 Eq. Rep. 1229; Johnson *v.* Gallagher (1861), 3 De G. F. & J. 494. **Consd.** Shattock *v.* Shattock (1866), 14 L. T. 452; London Chartered Bank of Australia *v.* Lempriere (1873), L. R. 4 P. C. 572, P. C.; *Re* Harvey's Estate, Godfrey *v.* Harben (1879), 13 Ch. D. 216. **Dbtd.** *Re* Armstrong, *Ex p.* Gilchrist (1886), 17 Q. B. D. 521, C. A. **Refd.** Campbell *v.* Ingilby (1857), 29 L. T. O. S. 287, C. A.; *Re* Whitaker, Ainley *v.* Ainley (1897), 41 Sol. Jo. 209.

246. Conflict of laws—Foreign power of attorney—Power to be used in England—Construed by English laws.]—Where a power of attorney is executed in a foreign country in the language of that country, the intention of the writer is to be ascertained by evidence of competent translators & experts, including, if necessary, lawyers of the country, as to the meaning of the language used; & if, according to such evidence, the intention appears to be that the authority shall be acted upon in other countries, the extent of the authority in any country in which the authority is acted upon must be determined by the law of that country.

Pltf., who carried on business in Brazil, executed there a power of attorney giving a London stockbroker power to buy & sell shares for him. The document was drawn up in the Portuguese language

240 i. *Construction—May be construed with other documents.*]—A. executed a power of attorney authorising the agent to sell or mtge. land. In the course of correspondence A. expressed a willingness to accept £1,000 for it. The agent sold for £628:—*Held:* the sale was made at a price not warranted by the agent's authority & must be set aside.—KERR *v.* LEFFERTY (1859), 7 Gr. 412.—**CAN.**

240 ii. —— —— *Surrounding circumstances to be considered.*]—A contract made with a person purporting to contract as attorney was made subsequent to the execution of, but was not within the powers conferred by, a power of attorney. Evidence of a prior collateral parol authority was rejected:—*Held:* (1) where a preliminary contract is followed by execution of a formal instrument, & it is not clear on the construction of the latter document that it is to be regarded as the final & sole agreement between the parties, the ct. must take into consideration the preliminary contract & all surrounding circumstances in order to determine whether the latter instrument was intended to supersede the prior contract or cover part of the ground only; (2) the evidence was wrongly rejected. *Dicta* in *Lindley* v. *Lacey*, 17 C. B. N. S. 578, 586; *Palmer* v. *Johnson*, 13 Q. B. D. 351, 357; *Gillespie Bros. & Co.* v. *Cheney, Eggar & Co.*, [1896] 2 Q. B. 59, 62, cited.—TICEHURST *v.* MOORE (1907), 7 S. R. (N. S. W.) 202.—**AUS.**

240 iii. —— *May be construed with verbal instructions.*]—A covenant for payment by the mtgor. of a mtge. to deft., assigned by deft. to pltf., had been executed by C., as attorney for deft., during his absence from the country, under a power which authorised him only to collect debts & to execute all such deeds & perform all such acts as might be considered necessary & proper concerning the business of deft.; but it was proved that deft., before leaving, agreed to give this covenant, & told the attorney of it, in consequence of which the latter executed the deed, & received the money:—*Held:* in the circumstances the authority was sufficient, & deft. could not refuse to be bound by the covenant.—DARLING *v.* MCLEAN (1861), 20 U. C. R. 372.—**CAN.**

240 iv. —— *May be construed along with other evidence.*]—A married woman employed her husband, J. B., to carry on a business which she had purchased from his assignee in bkpcy., & by a power of attorney she authorised him to manage it under the name of B. & Co. & to make promissory notes in & about her said business. The husband gave to one of his own creditors who was pressing for payment notes signed *per pro* B. & Co., J. B. In an action on the notes against the wife she denied that J. B. had any authority to give the notes, & he would not swear that he did not tell her that he had given them. The wife, on the advice of her counsel, refused to answer questions as to the business:—*Held:* affirming the judgment of the county ct., there was evidence on which a jury could reasonably find that the husband had authority to sign the notes.—COOPER *v.* BLACKLOCK (1880), 5 A. R. 535.—**CAN.**

& made in compliance with the forms of Brazilian law. The broker having sold certain shares of pltf. in deft. co., an action was brought by pltf. for rectification of the register of shareholders, on the ground that the power of attorney did not authorise the sale. On an issue to determine whether the power of attorney was to be construed according to Brazilian or English law:—*Held:* as the power of attorney was used & put in force in England, its construction was governed by English law.—CHATENAY *v.* BRAZILIAN SUBMARINE TELEGRAPH CO., [1891] 1 Q. B. 79; 60 L. J. Q. B. 295; 63 L. T. 739; *sub nom. Re* BRAZILIAN SUBMARINE TELEGRAPH CO., LTD., 7 T. L. R. 1, C. A.

Annotations:—**Refd.** Wehner *v.* Dene Steam Shipping Co. (1905), 10 Com. Cas. 139. **Mentd.** Western Counties Ry. Co. *v.* Anderson (1892), 8 T. L. R. 595, C. A.

247. General powers—Limited by recital.]—A power of attorney contained a recital that the donor was about to return to Australia, & was "desirous of appointing an attorney or attorneys to act for him during his absence from England." The operative part of the deed, which gave the attorney large powers of mtging. the donor's property, contained no mention of the duration of those powers:—*Held:* (1) the operative part of the deed was controlled by the recital; (2) charges effected by the attorney upon the property of donor while he was in England were invalid as against him.—DANBY *v.* COUTTS & CO. (1885), 29 Ch. D. 500; 54 L. J. Ch. 577; 52 L. T. 401; 33 W. R. 559; 1 T. L. R. 313.

Annotation:—**Refd.** Hawksley *v.* Outram, [1892] 3 Ch. 359, C. A.

248. —— Rule of ejusdem generis.]—General words must be construed with reference to the antecedent matter which states the purpose for which the letter of attorney was given. Perhaps they would be sufficient to confer all powers not specifically enumerated but necessary to carry the principal purpose of the letter of attorney into effect.—ESDAILE *v.* LA NAUZE, No. 269, *post.*

Annotation:—**Refd.** Munroe *v.* Bordier (1849), 8 C. B. 862.

249. —— ——.]—A power of attorney followed by general words is not to be extended beyond what is necessary for doing the particular act for which the power is given.—PERRY *v.* HOLL, No. 279, *post.*

Annotation:—**Apld.** Lewis *v.* Ramsdale (1886), 55 L. T. 129. For full anns., *see* S. C. No. 279, *post.*

250. —— ——.]—The special terms of the first part of a power prevent the general words from having an unrestricted effect. The meaning of the general words is cut down by the context in accordance with the ordinary rule of *ejusdem generis* (BLACKBURN, J.).—HARPER *v.* GODSELL (1870), L. R. 5 Q. B. 422; 39 L. J. Q. B. 185; 18 W. R. 954.

Annotations:—**Distd.** Hawksley *v.* Outram, [1892] 3 Ch. 359 C. A. **Apld.** Jacobs *v.* Morris, [1901] 1 Ch. 261.

251. —— ——.]—General words in a power of attorney do not confer general powers on the attorney; they only enlarge his special powers, & they must only be used where needed to extend his special powers.—LEWIS *v.* RAMSDALE, No. 289, *post.*

252. Incidental powers implied — Accounts — Power to dispense with.]—A power of attorney authorised C. to settle any accounts in which pltf.

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248 i. *General powers—Rule of ejusdem generis.*]—H. was authorised by power of attorney from W., the administrator of J., "to take into possession all chattels belonging to" an intestate "& recover & receive all moneys due" to him:—*Held:* the power was confined to matters connected with the collection & management of the estate, & it was doubtful whether, on the application of the rule *noscitur a sociis*, H. could bring ejectment in W.'s name.—*Re* BAXTER (No. 2) (1863), 1 Q. S. C. R. 99. —**AUS.**

248 ii. —— ——.]—The authority conferred by general words in a power of attorney is restricted to what is necessary for the proper execution of the special powers contained therein, & general words are construed as enlarging the special powers where necessary, & only where necessary, for the accomplishment of the purposes for which the authority is given.—*Re* HOAREY (1906), V. L. R. 437.—**AUS.**

248 iii. —— ——.]—A general power of attorney is nothing more than a bundle or collection of special powers enumerated in one instrument. Yet, if there are any general words which appear to govern the whole instrument, the ct. must so far regard the power as a whole, unless there is something to show that one or more clauses should be read apart from the rest.

A general power of attorney by which the principal gives the agent power "for me & in my name, & for my account & benefit . . ." to indorse negotiable securities in satisfaction or on account of any debt or claim due, receivable, or payable to or by the principal does not empower the agent to indorse in the principal's name promissory notes made by himself in favour of a third party for a consideration in which the principal has had no share or benefit. Such power is governed & limited throughout by the words "for my account & benefit."—GROBBELAAR *v.* COCKCROFT (1906), E. D. C. 109.—**S.AF.**

248 iv. —— ——.]—D., being about to leave the country, executed a general power of attorney authorising G. to buy for him, & in his name, & to his use, "any freehold lands, or any ships, vessels, or steamboats, or any shares therein, as the said G. may think expedient, & for my benefit." During D.'s absence G. purchased a leasehold property known as the "N. Saloon," together with the furniture, provisions, & business therein, for the payment of which he gave his own notes, indorsed by him in D.'s name, under a clause in the power of attorney authorising him to make & indorse notes, etc., in the course of business, alleging that he had made the purchase for the joint benefit of himself, his principal, & a third person, who also indorsed these promissory notes:—*Held:* this was an unauthorised purchase. — DICK *v.* GORDON (1858), 6 Gr. 394.—**CAN.**

248 v. —— ——.]—Where a power of attorney authorises an agent to do a particular act & this is followed by general words, those general words are not to be extended beyond what is necessary for doing the particular act.—HAZEN *v.* PORTLAND TOWN (1885), 24 N. B. R. 332.—**CAN.**

248 vi. —— ——.]—In construing a power of attorney, the special purpose for which the power is given is first to be regarded, & the most general words following the declaration of that special purpose will be construed to be merely all such powers as are needed for its effectuation. The owner of a ship by power of attorney constituted the master his agent, & authorised him to raise or borrow upon the ship's papers such sums of money as he should deem necessary for the repair of the ship, "& to act in the premises as fully & effectually to all intents & purposes as I might or could do if personally present." In a suit for the amount of a mtge.-bond upon the ship executed by the master:—*Held:* the master had no authority to sell or mtge. the ship.—JUDAH *v.* ADDI RAJA QUEEN BIBI (1864) 2 Mad. 177.—**IND.**

248 vii. —— ——.]—A clause of a sublease contained an irrevocable appointment by the lessee of the lessors as the lessee's attorneys. The authority was in three branches. The first gave the attorneys power to give all notices & to execute all writings necessary in the application for renewal of a licence; the second was a general power "to do, execute, & perform all such further acts, deeds, matters & things as may be necessary or expedient to be done, executed, or performed to enable the lessor to obtain a renewal of any licence," etc.; the third was an authority to the lessors "to do, execute, & perform all acts, deeds, & things necessary to comply with the requirements of any Licensing Committee," etc. The clause concluded with a covenant by the lessee to pay upon demand to the lessors "all moneys expended by the lessors for any such purpose during the continuance of the term," etc. The Licensing Committee required certain repairs as a condition to the renewal of the licence:—*Held:* (1) the second & third branches of the authority conferred by the clause were not restricted to the particular matters referred to in the first branch; (2) the attorneys were authorised to effect repairs & to recover the price thereof from the lessee.—MESSITER *v.* WOLLERMAN & FREEMAND (1907), 27 N. Z. L. R. 589.—**N.Z.**

248 viii. —— —— *General words preceding specific powers.*]—A power of attorney was given by deft. to her husband on a form supplied by a bank; it contained power & authority to do for deft., & in her name, five separate & distinct classes of business, & proceeded, "& further, to manage & transact all manner of business whatsoever with the branch of the Bank of British North America in Winnipeg, their manager or other officer duly authorised." The note sued on was signed by deft.'s husband under this power:—*Held:* the clause in the power, "for me & in my name to make, draw, accept, transfer & endorse in favour of all parties whomsoever, all promissory notes, bills of exchange," etc., conferred a general power that was not limited or restricted by the subsequent clauses that referred specially to the bank.—VELIE *v.* RUTHERFORD 8 M. R. 168.—**CAN.**

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was interested & to compound or compromise any claim or demand which he might have:—*Held:* this gave C. no right while acting under this power to dispense with the production of an account, especially where the transactions were long & complicated.—JENKINS *v.* GOULD (1827), 3 Russ. 385; 38 E. R. 620.

Annotation:—Apprvd. Jenkins *v.* Hughes (1860), 3 L. T. 106, H. L.

253. —— Administration suit—Power to institute.]—Where a married woman, entitled to the income of property held on trust for her separate use, with a restraint on anticipation, joined with her husband in a power of attorney to receive & sue for any moneys due to them or either of them:—*Held:* the power did not entitle the attorney to institute an administration suit in the name of the wife by himself as next friend.—KENRICK *v.* WOOD, No. 284, *post.*

For full anns., *see* S. C. No. 284, *post.*

254. —— Administration grant—Power to take.]—An exor., absent from the country & expected to be absent for two years, had before his departure executed a power of attorney, in general terms, enabling the persons named in it to act for him about all his concerns or business of every kind whatsoever as fully & effectually as he himself could do, & also to appear for him in any ct. of justice in any action or proceeding to which he might be a party:—*Held:* the power was sufficiently wide to justify the ct. in making a grant with the will annexed to the parties named in it for the use & benefit of the exor.—*In the Goods of* BARKER, [1891] P. 251; 60 L. J. P. 87; 39 W. R. 560.

255. —— Arbitration—Power to submit to.]—In 1797 A. & B. assigned to pltf. all debts due to them & gave him a power of attorney to receive & compound for the same:—*Held:* (1) pltf. under the above power was entitled to refer to arbn. the matters in difference subsisting between his principals & defts.; (2) the ct. would not presume the matters in difference submitted to arbn. arose subsequent to the assignment & power of attorney, but such matters might be pleaded by way of defence to an action on the award.—BANFILL *v.* LEIGH (1800), 8 Term Rep. 571; 101 E. R. 1552.

For full anns., *see* ARBITRATION.

256. —— —— ——.]—A partner gave his son a power of attorney "to act on his behalf in dissolving the partnership, with authority to appoint any other person he might see fit":—*Held:* this gave the son power to submit the accounts to arbn.—HENLEY *v.* SOPER (1828), 8 B. & C. 16; Dan. & Ll. 38; 2 Man. & Ry. K. B. 153; 6 L. J. O. S. K. B. 210; 108 E. R. 949.

For full anns., *see* CONFLICT OF LAWS.

257. —— —— ——.]—W. & M., who had contracted to cover wires with gutta percha for R., who supplied the wires, afterwards assigned their business to C. & gave him a power of attorney authorising him in their names to bring any action or suit or other proceedings to enforce any existing contracts, & otherwise to deal in respect thereof as he might think proper. C. himself, after the assignment, covered wires with gutta percha for R. Afterwards C. brought two actions for debt against R., one in his own name, the other in the name of W. & M. to recover the balance due for covering the wires. Deft. pleaded in each action the general issue, payment & set-off. Issue was not joined in the second action. On the trial of the first action, an order of reference by consent of C. & R. was made in the cause *C.* v. *R.* & professed to refer "this cause, & all matters in difference in this cause, & in the cause of *W. & M.* v. *R.*, & all matters in difference between the parties, & all matters in difference in the cause of *W. & M.* v. *R.* between those parties." After the reference, a rule for a discontinuance having been obtained in the action of *W. & M.* v. *R.*, the order of reference was amended by consent, & it was ordered "that the rule for a discontinuance should be suspended, & left to the decision of the arbitrator." R., before the arbitrator, made a claim for damages in respect of some wires spoilt by W. & M. in covering them. The award, among other things, decided the claim was not valid, & awarded a discontinuance in the action of *W. & M.* v. *R.* M. was called by R. as a witness before the arbn.:—*Held:* (1) the order of reference was good although it did not appear on the face of the document that W. & M. consented to the reference & although W. & M. did not, in fact, consent to it, as the power of attorney from W. & M. gave C. power to refer all matters arising out of the contract, & the order of reference referred nothing in the names of W. & M. except the matters in the action *W. & M.* v. *R.*; (2) there was no excess of jurisdiction in awarding on the claim by R. against W. & M. for spoilt wires, as it was a cross-claim under the contract, & consequently one which C. had authority to settle by virtue of the power of attorney.—*Re* HANCOCK & REID, (1851), 2 L. M. & P. 584; *sub nom.* HANCOCK *v.* REID, 21 L. J. Q. B. 78.

258. —— Bankruptcy proceedings—Power to sign petition.]—A power "to commence & carry on, or to defend, at law or in equity, all actions,

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254 i. *Incidental powers implied—Administration grant—Power to take.*]—An exor., who expected to be absent from the Colony for a long time, executed a power of attorney enabling the persons named in it, to "prosecute all proceedings whatsoever as party moving" & "to appear for me & my person to represent before all cts. as occasion may require & my attorneys think fit."—*Held:* the power justified the ct. in making a grant of administration with the will annexed to the parties named on behalf of the exor.—*In the Estate of* JONES (1900), 21 N. S. W. B. 35.—**AUS.**

254 ii. —— —— *Power to support application for.*]—A power of attorney authorised A. to apply for & obtain letters of administration, to take steps to compel a proper administration, etc., & generally to act as attorney in Australia in relation to the premises, & to do all acts & things as effectually as the grantor could himself do:—*Held:* the attorney had no power to support the application of another person for letters of administration *de bonis non* to the intestate's estate.—*Re* HOAREY (1906), V. L. R. 437.—**AUS.**

255 i. —— *Arbitration—Power to submit to.*]—A contract was entered into between a ry. co. & certain contractors by which the contractors were to complete a railroad & pay any claim which might be made against the co., including the purchase of lands required. The contractors, who resided in England, by power of attorney deputed R. as their agent with full power on their behalf to construct the railroad & to enter into contracts for the purchase of land, etc. A bond of arbn. was entered into by R. & Q., whose land was required, to refer the matter to arbitrators, "*aimables compositeurs,*" to ascertain the amount the co. should pay to Q. for the land:—*Held:* (1) the contractors were agents of the co. with authority to exercise the powers vested in the co. by the Act of incorporation; (2) R. was authorised to enter into the arbn. bond.—QUEBEC & RICHMOND RY. CO. *v.* QUINN (1856), 6 L. C. R. 129; *affd.* 12 Moo. P. C. C. 232.—**CAN.**

255 ii. —— —— ——.]—T., who prosecuted & defended suits in various cts., authorised S. by power of attorney to watch cases, to appoint a pleader, to receive money from the cts., to act on his behalf in cases of dakhil-kharij, & to get back deeds & decrees & give receipts & acquittances:—*Held:* S. not thereby authorised to refer questions to arbn.—THAKOOR PERSHAD *v.* KALKA PERSHAD, 6 N. W. 210.—**IND.**

d. —— *Arrest jurisdictionis fundandæ causâ—Power to.*]—An Englishman holding a power of attorney from a foreigner, authorising him to prosecute certain claims against the master of a vessel, is entitled to arrest the vessel *jurisdictionis fundandæ causâ*, & to raise action in Scotland, & for these purposes to appoint a mandatory in Scotland.—KNIGHT *v.* FREETO (1803) 36 Sc. Jur. 183.—**SCOT.**

258 i. —— *Bankruptcy proceedings—Power to present petition.*]—A power of

suits, or other proceedings in which I or my property may be in anywise concerned" :—*Held:* to confer authority to sign a bkpcy. petition.—*Re* WALLACE, *Ex p.* WALLACE (1884), 14 Q. B. D. 22; 54 L. J. Q. B. 293; 51 L. T. 551; 1 MORR. 246; *sub nom. Re* WALLACE, *Ex p.* RICHARDS, 33 W. R. 66; 1 T. L. R. 17, C. A.

Annotation:—**Consd.** *Re* A Debtor (No. 28 of 1917), *Ex p.* Petitioning Creditors *v.* The Debtor, [1917] 2 K. B. 808.

259. —— —— **Power to prove debt & vote.**]—A person authorised by the Bank of England by a general power of attorney may prove a debt due to them under a commission of bkpcy.; & a person authorised by them by a special power of attorney for that purpose may vote for them in the choice of assignees.—*Re* STEPHENS, *Ex p.* BANK OF ENGLAND (1818), 1 Wils. Ch. 296; 1 Swan. 10; 37 E. R. 129.

260. —— —— —— **Though power not under seal.**]—A power of attorney not under seal, but which the party giving it had signed, & then, placing his finger upon his signature, had said, "I seal & deliver this as my act & deed":—*Held:* sufficient to enable his attorney, to whom the power was given, to prove in respect of the debt of his principal, & vote in the choice of assignees.—*Re* KNIGHT, *Ex p.* WELCH (1857), 28 L. T. O. S. 223.

261. —— —— —— **Further effect of.**]—A power contained in a letter of attorney to vote in the choice of assignees implies in itself an acceptance of the office of assignee by the principal executing the power in the event of the choice of the creditors falling upon him.—*Re* JEWRY & JEWRY (1862), 6 L. T. 340.

262. —— —— **Power to grant release.**]—A general authority from one of several assignees of a bkpt.'s estate to the others to act for him, & use his name, is not sufficient to enable the others to execute a release by deed; there must be a special authority for that purpose.—WILLIAMS *v.* WALSBY (1802), 4 Esp. 220.

263. —— **Bills of exchange—Power to accept.**]—A power of attorney given by an extrix. to act for her as extrix. does not authorise the accepting of bills of exchange to charge her in her own right, though for debts due from her testator.—GARDNER *v.* BAILLIE (1795), 6 Term Rep. 591; 101 E. R. 720.

Annotations:—**Consd.** *Re* Disputed Adjudication (1859), 33 L. T. O. S. 348. **Refd.** Howard *v.* Baillie (1796), 2 Hy. Bl. 618; Ward *v.* Shew (1833), 9 Bing. 608.

264. —— —— ——.]—*Semble:* a letter of attorney given by an exor. to A., enabling him to transact the affairs of testator in the name of the exor. & to pay, discharge & satisfy all debts due from testator, conveys sufficient authority to A. to accept a bill of exchange in the name of the exor. drawn by a creditor for the amount of a debt due from testator so as to make the exor. personally liable. But if the exor. admits that such a bill so accepted by A. with the knowledge of the exor. is for a just debt & ought to be paid, it affords sufficient evidence of an authority given by him to A. to accept that particular bill without resorting to the letter of attorney.—HOWARD *v.* BAILLIE (1796), 2 Hy. Bl. 618; 126 E. R. 737.

Annotations:—**Dbtd.** *Re* Disputed Adjudication (1859), 33 L. T. O. S. 348. **Refd.** Ward *v.* Shew (1833), 9 Bing. 608; *Re* Acraman, *Ex p.* Bushell (1844), 3 Mont. D. & De G. 615.

265. —— —— ——.]—A power of attorney "for me, & on my behalf, to pay & accept such bills of exchange as shall be drawn or charged on me, by my agents or correspondents, as occasion shall require," authorises the attorney to accept such bills only as are drawn upon the principal, by his agents or correspondents, in that character, & in respect of private transactions, & on the individual account of the principal. A power of attorney to pay & receive money, buy & sell lands, bring & defend actions, give & take releases, indorse & negotiate bills of exchange payable to the principal, & generally to perform all other affairs & concerns of the principal, does not authorise the attorney to accept bills drawn on the principal.

Deft., a merchant engaged in extensive mercantile business, & also in joint speculations to a considerable amount with A., B. & C., gave two powers of attorney, one to his wife & A. to pay & receive money, buy & sell lands, bring & defend actions, give & take releases, indorse & negotiate bills of exchange payable, & generally perform all other affairs & concerns, & one to his wife "for me, & on my behalf, to pay & accept such bills of exchange as shall be drawn or charged on me, by my agents or correspondents, as occasion shall require, & generally to do, negotiate, & transact my affairs & business during my absence, as fully & effectually as if I were present & acting therein." During the absence of deft., A., for the purpose of raising money to pay to creditors of the joint concern, drew four bills of exchange upon deft. They were accepted by deft. by procuration of his wife:—*Held:* his wife had no authority to accept the bills.—ATTWOOD *v.* MUNNINGS (1827), 7 B. & C. 278; 1 Man. & Ry. K. B. 66; 6 L. J. O. S. K. B. 9; 108 E. R. 727.

Annotations:—**Apld.** Alexander *v.* Mackenzie (1848), 6 C. B. 766; Morison *v.* London & County & Westminster Bank (1913), 108 L. T. 379. **Refd.** Danby *v.* Coutts (1885), 29 Ch. D. 501. **Mentd.** Withington *v.* Herring (1829), 5 Bing. 443; *Re* Acraman, *Ex p.* Bushell (1844), 3 Mont. D. & De G. 615; Charrington *v.* Johnson (1845), 4 L. T. O. S. 398; Bank of Bengal *v.* Macleod (1849), 5 Moo. Ind. App. 1; Smith *v.* M'Guire (1858), 3 H. & N. 554; *Re* Disputed Adjudication (1859), 33 L. T. O. S. 348; Stagg *v.* Elliott (1862), 12 C. B. N. S. 373; *Re* Land Credit Co. of Ireland, *Ex p.* Overend Gurney (1869), 4 Ch. App. 460; Lewis *v.* Ramsdale (1886), 55 L. T. 179; Bryant, Powis & Bryant *v.* Banque du Peuple, [1893] A. C. 170 P. C.; Jacobs *v.* Morris & Morris, [1901] 1 Ch. 261.

266. —— —— **Power to Indorse.**]—Where one gives a power of attorney to another, to demand & receive all moneys due to him, on any account whatsoever, & to appoint attorneys for the purpose of bringing actions, & to revoke the same, "& to do all other business," the latter words must be under-

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attorney authorised the bringing of "any action, suit, or other proceeding for recovering or compelling payment" of any sum of money due to the donor:—*Held:* the attorney was authorised to present a petition for the sequestration of the estate of a debtor of his principal.—*Re* ANDERSON (1909), V. L. R. 465.—**AUS.**

258 ii. —— —— *Power to postpone realisation of property.*]—A mtgee. authorised his agent by a power of attorney to appear at meetings of creditors of his mtgor., etc., & to represent him in all matters relating to the insolvent estate:—*Held:* the general words in the power must be restricted to matters *ejusdem generis* & did not authorise the agent to vote for a resolution indefinitely postponing realisation of the mtged. property to the prejudice of his principal.—MARSHALL BROTHERS' TRUSTEE *v.* TRANSVAALSCHE BANK (1907), T. S. 1060.—**S. AF.**

263 i. —— *Bills of exchange, etc.—Power to accept.*]—Where by a document indorsed "procuration générale et spéciale" a wife being sole owner constituted her husband "son procureur général et spécial" to administer her affairs, specifying such acts as drawing bills of exchange & making promissory notes:—*Held:* the wife's liability extended to all promissory notes granted by the husband, & was not limited by art. 181 of the Civil Code to such notes as were required for purposes of the administration. — LA BANQUE D'HOCHELAGA *v.* JODOIN, [1895] A. C. 612, P. C.—**CAN.**

266 i. —— —— *Power to indorse.*]—A general power to an agent to sign bills, notes, etc., & to superintend, manage, & direct all the affairs of the principal, gives him a power to indorse notes.—AULDJO *v.* MCDOUGALL (1850), 3 O. S. 199.—**CAN.**

266 ii. —— —— ——.]—Exors. authorised B. by power of attorney to make & indorse all such notes as might be requisite in the management of the estate. Certain notes were received by B. for debts due to the estate, & indorsed to M., one of the exors., who

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stood, with reference to the former, as meaning all business appertaining thereto, & although the attorney may receive moneys due, in *autre droit*, to the principal, yet he cannot indorse a bill for him, which comes to his hands under the power.—HAY *v.* GOLDSMID (1804), 2 Smith, K. B. 79; cited 1 Taunt. 349; 127 E. R. 868.

Annotations:—**Follod.** Hogg *v.* Snaith (1808), 1 Taunt. 347. **Apld.** Ward *v.* Shew (1833), 9 Bing. 608. **Reid.** *Re* Disputed Adjudication (1859), 33 L. T. O. S. 348.

was largely indebted to the estate, & was in difficulties. They were discounted by pltfs., to whom M. owed a large sum:—*Held:* the indorsements not being for the purposes of the estate, were not within the authority given to B.—GORE BANK *v.* CROOKS (1868), 26 U. C. R. 251.—**CAN.**

266 iii. —— —— ——.]—Deft. executed a power of attorney giving A. a general authority to manage her personal affairs:—*Held:* a promissory note indorsed by A. to pltf. for a purpose not necessary for the administration of deft.'s affairs was outside the power conferred on A., & was not binding on deft.—POIRIER *v.* JOBIN (1881), 12 R. L. 64, S. C.—**CAN.**

266 iv. —— —— *Power to indorse accommodation note.*]—A power of attorney given by one person to another authorising the latter to attend to the affairs of the former, does not empower the attorney to indorse a promissory note for the accommodation of the maker thereof, although such note may be a renewal of an accommodation note indorsed by his principal.—MOLSON'S BANK *v.* COOKE (1905) Q. R. 27 S. C. 130.—**CAN.**

266 v. —— —— ——.]—Deft., who was illiterate, gave her husband a power of attorney for her & in her name to draw, accept, sign or satisfy bills of exchange & promissory notes. One of her sons applied to pltf. to obtain extension of time for the payment of a note given with the security of an indorser, & pltf. wrote to deft. asking her whether she would indorse the note. In reply he received a letter that the arrangement was satisfactory & the note would be indorsed by deft. The letter was written without deft.'s knowledge. The note was indorsed by the husband as attorney for deft., but he knew nothing about the circumstances or the correspondence:—*Held:* deft. by allowing her letter to be opened & answered by others had conduced to the acceptance by the indorsement of her attorney & that she was liable on the bill.—ROBINSON *v.* GREEN (1917) 15 N. S. R. 204; 36 D. L. R. 631.—**CAN.**

266 vi. —— —— *Power to indorse cheque.*]—The active partner in a partnership for dealing in land authorised to borrow money on mtge. was paid by cheque to the order of all the partners by name. He was authorised by power of attorney to sign his partners' names to all deeds requisite to carry on the business, but had no express authority to indorse cheques:—*Held:* having authority to effect the loan & receive the amount in cash, he could indorse his partners' names on the cheque.—MANITOBA MTGE. CO. *v.* BANK OF MONTREAL (1890), 17 S. C. R. 692.—**CAN.**

e. —— —— *Power to make promissory note.*]—Where a power of attorney authorised agreements with creditors of the principal upon such terms as the attorney should think proper touching payment or satisfaction of their demands, & for purposes incidental thereto signing, sealing, & delivering such agreements, etc., & instruments as he should think fit:—*Held:* the attorney could make & give promissory notes in the name of the principal.—ASHBURY *v.* ELLIS (1892), 10 L. R. 450, N.Z.—**N.Z.**

f. —— *Credit—Power to pledge.*]—Deft. gave to H. a power of attorney to carry on a general trading business, for cash only, or barter, or exchange of goods, with moneys supplied by deft., but giving H. no right to negotiate any promissory note for deft., or to pledge his credit. Subsequently deft. instructed H. that he was not to purchase any goods from pltf. H. purchased goods from pltf. & gave a note for the amount. In an action by pltf. seeking to recover from deft. the amount claimed for the goods sold, evidence was given by H. to the effect that deft. must have found out that he was dealing with pltf. There was also some evidence of deft. from which it might be inferred that H. could purchase goods on credit provided deft. knew of it. On the question of deft.'s liability:—*Held:* (1) the trial judge was justified in coming to the conclusion that the purchase of goods on credit was within apparent scope of the powers of H. (GRAHAM, E.J., & HENRY, J.); (2) the evidence of H. that deft. must have known of his dealings with pltf., being mere matter of opinion, greater effect must be given to the positive evidence of deft. that he had no such knowledge, there being nothing to show that the testimony of deft. was discredited by the trial judge, & the evidence showed that the credit was given to H., & not to deft. (MEAGHER & RITCHIE, JJ.).—KENNY *v.* HARRINGTON (1899) 31 N. S. R. 290.—**CAN.**

g. —— *Executor—Power to acknowledge statute-barred debts.*]—An exor. executed a power of attorney to deft. to do all that was legally requisite & necessary for proving & carrying out the will of A. Pltf., believing that deft. was A.'s exor., wrote to him regarding a promissory note, the amount of which he claimed against A.'s estate. The note was stat.-barred at the date of A.'s death:—*Held:* the discretionary function of the exor. was not transferred to the attorney so as to authorise him to acknowledge the claim. *Midgley* v. *Midgley*, [1893] 3 Ch. 282; *Smith* v. *Thorne* (1852), 18 Q. B. 134; *Re Hindmarsh* (1860), 1 Drew. & Sm. at p. 133; *Holland* v. *Clark* (1841), 1 Y. & C. Ch. Cas. 151; *Green* v. *Humphreys* (1884), 26 Ch. D. at p. 480; *Poynder* v. *Bluck* (1837), 5 Dowl. 570; *Rackham* v. *Marriott* (1857), 2 H. & N. 196; *Jupp* v. *Powell* (1884), Cab. & El. 349; *Stamford, etc., Banking Co.* v. *Smith*, [1892] 1 Q. B. 765; *Fisk* v. *Mitchell* (1871), 24 L. T. 272, cited.—KING *v.* ROGERS (1900), 21 C. L. T. 106; 1 O. L. R. 69; 20 C. L. T. 209; 31 O. R. 573; *affd.* 10 L. R. 69.—**CAN.**

h. —— *Guarantee—Power to grant.*]—A chetty gave his agent a wide & general power of attorney to carry on his money-lending business, & to transact all affairs in which he might in any wise be concerned, & for that purpose to sign his name to any document, & to borrow money from any bank or person with or without pledge of securities for money advanced to various persons, & to make, indorse, etc. all negotiable securities to which his signature might be required or which the attorney in his discretion might think fit to make. The agent pledged the credit of deft.'s firm by giving a letter of guarantee on behalf of his principal to a bank to secure advances made by the latter to a client of the firm, & also indorsed to the bank a promissory note made by the client in deft.'s favour. In an action by the bank, the client having become insolvent:—*Held:* the authority to enter into this transaction was implied from the nature of the business with which the agent was intrusted. *Bryant, Powis & Bryant* v. *Banque du Peuple*, [1893] A. C. 170, cited.—BANK OF BENGAL *v.* RAMANATHAN CHETTY (1916) I. L. R. 43 Cal. 527.—**IND.**

k. —— *Leases—Power to covenant.*]—A lease by an attorney under power with covenants in excess of the power is void altogether, not merely as respects the excess.—BLAKE *v.* LANE (1876), 2 V. L. R. L. 54.—**AUS.**

l. —— —— ——.]—A power "to make & execute any note, bond or bonds, or other instruments, or contract, & to make, execute, & acknowledge all contracts, orders, deeds, writings, assurances, & instruments which may be requisite or proper to effectuate all or any of the premises," will not *primâ facie* authorise the attorney to accept & execute leases of real estate containing burdensome covenants on the part of the lessees.—ST. JOHN CORPN. *v.* LOCKWOOD, 2 Kerr, 443.—**CAN.**

m. —— —— *Power to distrain.*]—A landlord, after leasing certain premises, by deed "assigned, transferred, & set over" to M. two instalments of the rent reserved, & appointed him his attorney to sue for, collect, or levy by landlord's warrant, if necessary, in his (landlord's) name:—*Held:* M. could distrain for the rent in his own name.—HOPE *v.* WHITE (1890), 19 C. P. 479.—**CAN.**

n. —— —— *Power to let for lives renewable for ever.*]—A power of attorney given by the owner in fee to make leases "for such terms of lives or years as should be agreed on":—*Held* to warrant the making of a lease for lives renewable for ever.—BOYLAND *v.* WARNER (1832), Hayes & Jo. 79.—**IR.**

o. —— —— *Power to serve notice to quit.*]—A power of attorney to manage estates &, *inter alia*, to cause such notices to be given as may be necessary authorises the agent, signing in his own name for the principal, to serve a notice to quit.—ERNE (EARL) *v.* ARMSTRONG (1872), 20 W. R. 370.—**IR.**

p. —— —— ——.]—A. P. & M. P., husband & wife, taking by entireties, executed a power of attorney authorising their agent to collect & receive rents, & to distrain or bring actions for same, & also authorising him to take proceedings for the enforcing covenants in leases, & for that purpose to sign & serve notices to quit:—*Held:* the power of attorney did not give the agent a general authority to serve notices to quit.—POLLOK *v.* KELLY (1856), 6 I. C. L. R. Rep. 367 (C. P.); S. C. 1 Ir. Jur. N. S. 360 (C. P.).—**IR.**

q. —— *Legal proceedings—Power to accept service.*]—A person appointed by power of attorney on behalf of a foreign corpn. to defend actions brought against the corpn. in Victoria has by implication authority to accept service of a writ on behalf of such corpn.—RUDD *v.* JOHN GRIFFITHS CYCLE CO., LTD. (1897), 23 V. L. R. 350.—**AUS.**

r. —— —— *Power to arrest.*]—A power of attorney to collect money authorises the agent to issue an attachment & arrest & imprison the debtor.—WILSON *v.* BRECKER (1886), 11 C. P. 268.—**CAN.**

s. —— —— *Power to take against debtor.*]—A power of attorney by which a party is authorised "to administer my properties . . . to sell them for such price & on such conditions that he may think fit, & generally do all I could do myself if personally

267. ——— ——— ———.]—A power of attorney to receive all salary & money, with all the principal's authority to recover, compound, & discharge, & to give releases, & appoint substitutes, does not authorise the attorney to negotiate bills received in payment or to indorse them in his own name. Nor does a power to transact all business. Evidence of usage at the navy office to pay bills indorsed by the attorney in his own name, & negotiated by him, under such a power, cannot be received to enlarge the operation of the power.—HOGG *v.* SNAITH (1808), 1 Taunt. 347; 127 E. R. 867.

Annotations:—**Distd.** Russell *v.* Dunskey (1821), 6 Moore, C. P. 233. **Reid.** Ward *v.* Shew (1833), 9 Bing. 608; *Re* Disputed Adjudication (1859), 33 L. T. O. S. 348.

268. ——— ——— ———.]—A power of attorney authorising an agent to demand, sue for, recover, & receive by all lawful ways & means whatsoever, all moneys, debts dues whatsoever, & to give sufficient discharge, does not authorise the agent to indorse bills for his principal.—MURRAY *v.* EAST INDIA CO. (1821), 5 B. & Ald. 204; 106 E. R. 1167.

Annotations:—**Apld.** Ward *v.* Shew (1833), 9 Bing. 608; Davidson *v.* Stanley (1841), 2 Man. & G. 721. **Distd.** Bateman *v.* Mid Wales Ry. Co. (1866), Har. & Ruth. 505. **Refd.** Esdaile *v.* La Nauze (1835), 1 Y. & C. Ex. 394; Goldstone *v.* Tovey (1839), 6 Bing. N. C. 98. **Mentd.** Tolson *v.* Kaye (1822), 3 Brod. & Bing. 217; Blades *v.* Free (1829), 7 L. J. O. S. K. B. 210; R. *v.* Okeford Fitzpayne (1830), 9 L. J. O. S. M. C. 12; Cowper *v.* Godmond (1833), 9 Bing. 748; Perry *v.* Jenkins (1836), 1 My. & Cr. 118; Rhodes *v.* Smethurst (1840), 6 M. & W. 351; Webster *v.* Kirk (1852), 17 Q. B. 944; Fuller *v.* Mackay (1853), 2 E. & B. 573; Thomson *v.* Harding (1853), 2 E. & B. 630; Curlewis *v.* Mornington (1858), 27 L. J. Q. B. 439, Ex. Ch.; Sturgis *v.* Darell (1859), 4 H. & N. 622; Crouch *v.* Credit Foncier of England (1873), L. R. 8 Q. B. 374; Musurus Bey *v.* Gadban, [1894] 2 Q. B. 352, C. A.; Smith *v.* Islington Grdns. (1902), 66 J. P. 664; Meyappa Chetty *v.* Supramanian Chetty, [1916] 1 A. C. 603, P. C.

269. ——— ——— ———.]—A power of attorney giving the agent full powers as to the management of certain specified real property, with general words extending those powers to all the property of the principal of every description &, in conclusion, authorising the agent to do all lawful acts concerning all the principal's business & affairs of what nature or kind soever, does not authorise the agent to indorse bills of exchange in the name of his principal.—ESDAILE *v.* LA NAUZE (LANOGE) (1835), 1 Y. & C. Ex. 394; 4 L. J. Ex. Eq. 46; 160 E. R. 160.

Annotation:—**Mentd.** Munroe *v.* Bordier (1849), 8 C. B. 862.

270. ——— ——— ———.] — A person appointed under a power of attorney to draw, accept & indorse bills in the course of business, & to settle & arrange accounts cannot indorse a bill as for his principal to a creditor of his own, since the indorsement is not in the course of business & is without consideration. *Qu.:* whether he can indorse the bill to himself in payment of a debt due to himself from his principal, & then indorse to his own creditor.—BINGLEY *v.* YOUNG (1845), 6 L. T. O. S. 216.

271. ——— ——— ———.]—The payee of promissory notes of the East India Co., by a power of attorney, authorised his agents at Calcutta to "sell, indorse, & assign" the notes. These notes were transferable by indorsement, payable to bearer. The agents, in their character of private bankers, borrowed money of the Bank of Bengal, offering as security these promissory notes. The bank made the advance, & the agents indorsed the notes, such indorsement purporting to be as attorney for their principal, & deposited them with the bank, by way of collateral security for their personal liability, at the same time authorising the Bank in default of payment to sell the notes in reimbursement of the advances. The agents afterwards became insolvent, & default having been made in payment, the bank sold the notes, & realised the amount of their loan:—*Held:* (1) the indorsement of the notes by the agents of the payee to the bank was within scope of the authority given to them by the power of attorney; (2) the payee could not recover in detinue against the bank.—BANK OF BENGAL *v.* MACLEOD (1849), 7 Moo. P. C. C. 35; 5 Moo. Ind. App. 1; 14 L. T. O. S. 285; 13 Jur. 945; 18 E. R. 795, P. C.

Annotations:—**Distd.** Jonmenjoy Coondoo *v.* Watson (1884), 9 App. Cas. 561, P. C.; Lewis *v.* Ramsdale (1886), 35 W. R. 8.

272. *S. P.* BANK OF BENGAL *v.* FAGAN (1849), 7 Moo. P. C. C. 61; 5 Moo. Ind. App. 27; 18 E. R. 804.

Annotations:—**Distd.** Jonmenjoy Coondoo *v.* Watson (1884), 9 App. Cas. 561, P. C. **Apprvd.** Hambro *v.* Burnand, [1904] 2 K. B. 10, C. A.: "There is a very remarkable

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present," includes not only the power to collect the rental due, but also the taking of such proceedings as may be necessary to force the debtor to pay same.—FUROIS *v.* LABADIE, 11 Que. P. R. 233.—**CAN.**

t. ——— ——— *Power to enter into special agreement with vakil.*]—Deft., on behalf of her minor son, gave to M. a power of attorney by which she authorised M., "for her & on her behalf, to appear in . . . any appeal, etc., . . . & to act in all such proceedings in any way in which she might, if present, be permitted to act":—*Held:* M. not authorised to enter into a special agreement with a vakil under which the vakil (in an appeal which he was employed to conduct for deft. on behalf of her minor son) was to receive a minimum reward, &, in case of success, a reward proportional to the amount awarded by the appellate ct.—RAO SAHEB V. N. MANDLIK *v.* KAMALJABAI SAHAB NIMBALKAR (1886), 10 Bom. 26. —**IND.**

u. ——— ——— *Power to enter appearance.*]—An exor., who had intromissions in Jamaica, obtained after the estate was thrown into the Ct. of Ch. in Jamaica a power of attorney from a residuary legatee. In a process of accounting in that ct. as to his intromissions he caused appearance to be made for the residuary legatee:—*Held:* the exor. was not entitled to use his power of attorney to the effect of making the legatee a party to the proceedings (seeing their interests were directly opposed), & the legatee was not barred by the decree from calling him to account.—ANDERSON *v.* SHAND (1833), 11 S. 688.—**SCOT.**

v. ——— ——— *Power to claim compensation under Public Works Act.*]—Owners of land authorised their attorney to manage the property, etc., & to commence & oppose, etc., all legal proceedings touching the property, & generally to act in relation to the premises as fully as the owners could if present:—*Semble:* the power of attorney gave the agent sufficient authority to sign & lodge a claim for compensation where the property had been taken under Public Works Act.

By a later power of attorney reciting land was to be taken under Public Works Act, the attorney was authorised to convey the property & receive the price & generally to do all things necessary for the matters aforesaid. This power arrived in the colony after the claim for compensation was signed & lodged by the attorney, but was executed & posted before signature & lodging:—*Held:* the attorney was authorised to sign & lodge the claim.—*Re* JOHNSTON *v.* WELLINGTON, MAYOR, ETC. (1901), 19 L. R. 733, C. A.—**N.Z.**

w. ——— *Liabilities—Power to incur.*]—A power of attorney to spend money in carrying on an enterprise (*e.g.*, mining operations) does not import authority to incur liabilities. Such authority must be distinctly shown by those who seek to make the principal liable.—JOHNS *v.* CUMMING (1909), 11 W. A. R. 14.—**AUS.**

x. ——— ——— ———.]—H., by power of attorney, authorised A. to collect all moneys due to his estate, etc., & to carry on the business if expedient. A. purchased goods from F., to whom on some occasions he gave notes signed "J. A. & Sons, H. trustee, per A.":—*Held:* A. was not authorised to sign H.'s name to notes, as he did or as an undisclosed principal.—HECHLER *v.* FORSYTH (1894), 22 S. C. R. 489.—**CAN.**

y. ——— ——— ——— *Opening bank account.*]—An insurance co. gave a power of attorney to its agent authorising him to act as such & receive & for that purpose to effect insurances on its behalf & to do other acts necessary to the ordinary working of such co. The agent as such opened an account with a banking house in the name of the co.:—*Held:* not within the authority, the transactions being outside the co.'s ordinary business.—MCDONALD *v.* ROYAL INSURANCE CO., 3 R. & G. 428.—**CAN.**

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passage in the judgment delivered by Lord Brougham in *Bank of Bengal* v. *Fagan*. He said: 'But it is said that the power was given to do the acts in question on the donor's behalf. That is really only saying that, what the agent is to do, he is to do as representing the principal, as doing it on behalf of, or in the place & in the right of, the principal. But it is further said that, even if the expression be read as only amounting to this, the indorsement is to be only made for the benefit of the principal, & not for the purposes of the agent. We do not see how this very materially affects the case, for it only refers to the use to be made of the funds obtained from the indorsement, not to the power; it relates to the purpose of the execution, not to the limits of the power itself; &, though the indorsee's title must depend upon the authority of the indorser, it cannot be made to depend upon the purposes for which the indorser performs his act under the power.' That passage seems to deal with the very point in this case" (COLLINS, M.R.). **Consd.** Ruben *v.* Great Fingall Consolidated (1904), 73 L. J. K. B. 872, C. A. **Mentd.** Raphael *v.* Bank of England (1855), 7 C. B. 161; London Joint Stock Bank *v.* Simmons, [1892] A. C. 201.

273. —— Divorce—Power to institute proceedings.]—In a suit by S., resident in India, against his wife, resident in England, for a separation by reason of her adultery, the question of sufficiency of authority from the husband arose, upon the ct.'s inquiry, previous to signing the sentence. There was a power of attorney authorising certain persons to commence proceedings on the part of the husband, ratifying & confirming what the attorneys had done, & agreeing to ratify & confirm what they should do:—*Held:* a sufficient authority.—SEWELL *v.* SEWELL (1840), 1 Notes of Cases, 33.

274. —— Election—Power to vote at.]—At a meeting of owners pursuant to Inclosure Act, 1848 (c. 99), s. 6, to elect a rating officer, A. attended as agent of a college, having a power of attorney dated in 1848, but before the passing of that Act, & expressly authorising A. to attend all meetings under Inclosure Act, 1845 (c. 118). B., another agent, had a power of attorney, authorising him to act for another college under certain specified Acts, & to attend any vestry or meeting under any Act of Parliament relating to the lands:—*Held:* under these authorities A. & B. were sufficiently authorised in that behalf to attend & vote for the owners respectively.—R. *v.* TARRANT (1880), 44 J. P. 425.

275. —— Equitable charge—Power to give.]—A merchant, being abroad, empowered certain persons in England to receive moneys, adjust claims, & do other acts. Money being wanted by his firm in England, of which he was a partner, his attorneys deposited certain deeds with the H. Co. to secure £12,000, & covenanted that he should execute the mtge.:—*Held:* the power of attorney was not sufficient authority.—MUNNINGS *v.* BURY, No. 1052, *post*.

276. —— —— ——.]—D., being given up to the authorities of a foreign country under an extradition treaty to be tried on a charge of murder, assigned all his property to P., & executed a general power of attorney in favour of P. & T. The object of these instruments was to enable money to be raised for his defence. T. was co-trustee with pltf. of a marriage settlement, & proposed to him that Consols belonging to the trust should be sold out, & the proceeds advanced on security of a charge on D.'s property. Pltf. assented, & the Consols were sold & proceeds paid to T., who produced to pltf. a document purporting to be a memorandum of deposit of the assignment & power of attorney & an equitable charge to secure the advance. The ct. held on the evidence that P. knew of the charge, & either actually authorised it, or left T. to do as he liked:—*Held:* (1) the money had been advanced upon faith of an agreement to charge the property of D.; (2) such an agreement was within the powers of P. & T.; (3) if the agreement had not been fully carried out, pltf. was entitled to have the charge carried into effect.—PARISH *v.* POOLE (1884), 53 L. T. 35.

277. —— Money—Power to borrow.]—Defts. having entered into an agreement with C. to carry on for them certain mining speculations in America, furnished him with instructions—a letter authorising him to draw on them for £10,000—& a power of attorney of the most extensive description, "to take & work mines, to purchase tools & materials, & erect necessary buildings, to execute any deeds or instruments he might deem necessary for the purpose." C., after he had raised £10,000 under the letter of authority, obtained of pltf. in America £1,500, which he applied to defts.' use, & for the amount drew bills on defts., which he indorsed to pltf. He did not show the letter of authority to pltf.; there were no indorsements on it of sums previously raised, & it did not appear that pltf. knew any money had been raised before by C. On defts. refusing to accept the bills:—*Held:* pltf. entitled to recover £1,500 from defts., as money had & received to his use.—WITHINGTON *v.* HERRING (1829), 5 Bing. 442; 3 Moo. & P. 30; 7 L. T. O. S. C. P. 172; 130 E. R. 1132.

Annotations:—**Refd.** Britten *v.* Hughes (1829), 3 Moo. & P. 77; *Re* Acraman, *Exp.* Bushell (1844), 3 Mont. D. & De G. 615; Alexander *v.* Mackenzie (1848), 6 C. B. 766. **Mentd.** Katsch *v.* Schenck (1849), 13 Jur. 668.

278. —— —— ——.]—An authority to borrow money on mtge., though deficient in the formalities necessary for creating a valid mtge. on land, may be effectual as a mandate to borrow & to bind the giver of the authority as to the money advanced.—DENYSSEN *v.* BOTHA (1860) 13 Moo. P. C. C. 352; 2 L. T. 126; 8 W. R. 710; 15 E. R. 132, P. C.

279. —— —— ——.]—A., upon going abroad in 1841, gave to B. in England a power of attorney empowering B. to act in & conduct & manage all his affairs in the United Kingdom during his absence, & to receive & recover debts, to settle accounts, to recover money due on security, to compound debts, to enter & repair his messuages & hereditaments, to receive his rents, & to sell & exchange his real estate, "& for all or any of the purposes aforesaid, generally to do all & every or any other acts, deeds, matters or things whatsoever in or about the estates, property & affairs of him, the said A., as amply & effectually as A. could do or have done," A. thereby ratifying & confirming & agreeing to ratify & confirm whatsoever B. should do or cause to be done. In 1848 B. wrote to A., who was in want of money, suggesting he should raise money upon a policy belonging to A.

277 i. —— *Money—Power to borrow.*]—A power of attorney to "draw, accept, make, sign, indorse, negotiate, pledge, retire, pay or satisfy any bills of exchange, promissory notes, cheques, drafts, orders for payments on delivery of money, securities, goods, warehouse receipts," etc., confers no general power to borrow money. *Jacobs* v. *Morris*, [1902] 1 Ch. 816, folld.—TAI SINGH CO. *v.* CHIM CAM (1917), 23 B. C. R. 8.—**CAN.**

277 ii. —— —— —— *By executing bond.*]—Under a power of attorney empowering A. to sell or mtge. donor's property for payment of his debts, A. executed a simple money bond to one of the creditors for payment of the sum due & interest:—*Held:* the act was *ultra vires*.—POORNA CHUNDER SEN *v.* PROSUNNO COOMAR DASS (1881), I. L. R. 7 Calc. 253; 8 C. L. R. 433.—**IND.**

277 iii. —— —— —— ——.]—Under a power of attorney executed by twenty proprietors of a joint estate, empowering their general manager to raise loans for the purposes of the estate upon bonds, & to sign their names or his name on their behalf, & to pledge the whole or any part of the estate by such bonds, the attorney executed a bond on behalf of three of the proprietors:—*Held:* the attorney not authorised to execute a bond on behalf of any one or more of the proprietors making him or them responsible for the whole money borrowed to the exclusion of the rest, & the manager's authority must be considered as strictly confined to the terms of the power of attorney.—BUDH SINGH DUDHURIA *v.* DENENDRA NATH SANCUL (1885), 11 C. L. R. 323.—**IND.**

in his (B.'s) possession, instead of selling it. In 1849, B., in the name of A., but unknown to him, borrowed a sum of money of C. upon security of the above policy, which was at the same time deposited with C. In 1850 A. wrote to B. directing money to be raised upon the same policy. Other letters were written by A. to B., urging B. to borrow money upon security of the policy. B. misappropriated the money received by him from C. in 1849. Upon a bill by A., alleging that he did not authorise the loan by C., & that he had not received any portion of the money thereby raised, & praying for a declaration that he was not liable for its repayment:—*Held:* (1) although upon the construction of the power of attorney *per se* B. might not have been authorised to borrow money on A.'s behalf, yet, upon the construction of the power, coupled with the correspondence, B. was authorised so to do; (2) the advance by C. to B. was a sufficient payment to A.—PERRY *v.* HOLL (1860), 2 De G. F. & J. 38; 29 L. J. Ch. 677; 2 L. T. 585; 6 Jur. N. S. 661; 8 W.R. 570; 45 E. R. 536, L. C.

Annotations:—**Apld.** Parish *v.* Poole (1884), 53 L. T. 35. **Distd.** Lewis *v.* Ramsdale (1886), 55 L. T. 179. **Refd.** Dixon *v.* Winch (1900), 69 L. J. Ch. 465, C. A. **Mentd.** Wall *v.* Cockerell (1860), 3 De G. F. & J. 737.

280. —— —— ——.]—An agent under his power of attorney possessed implied authority to raise money by loan for the purpose of carrying on the business affairs entrusted to him. In the absence of the means of raising the money required by the sale of bills or by obtaining accommodation from some other merchant with whom the house had transactions:—*Held:* the agent was entitled under the mandate conferred by his power of attorney, provided the occasion was a proper one to have recourse to native financiers or moneylenders upon exceptional terms & rates of interest. —MONTAIGNAC *v.* SHITTA (1890), 15 App. Cas. 357.

Annotations:—**Distd.** Jacob's *v.* Morris, [1902] 1 Ch. 261; Hambro *v.* Burnand, [1903] 2 K. B. 399.

281. —— —— ——.]—An agent authorised by his power to make contracts of sale & purchase, charter vessels, & employ servants, & as incidental thereto to do specified acts, including indorsement of bills & other acts for the purposes therein aforesaid, but not including the borrowing of money, cannot borrow on behalf of his principal nor bind him by contract of loan, such acts not being necessary for the declared purposes of the power.—BRYANT, POWIS & BRYANT *v.* LA BANQUE DU PEUPLE, SAME *v.* QUEBEC BANK, [1893] A. C. 170; 62 L. J. P. C. 68; 68 L. T. 546; 41 W. R. 600; 9 T. L. R. 322; 1 R. 336, P. C.

Annotations:—**Consd.** Jacobs *v.* Morris, [1901] 1 Ch. 261. **Apld.** Hambro *v.* Burnand, [1904] 2 K. B. 10, C. A. **Mentd.** Gompertz *v.* Cook (1903), 20 T. L. R. 106.

282. —— —— ——.]—Pltf. was sole partner in an Australian firm. Defts. had dealt with his firm since 1889. In Jan., 1899, pltf. gave to his agent in England a power of attorney to purchase goods in connection with pltf.'s business, & either for cash or on credit, "& for me & on my behalf, & where necessary in connection with any purchases made on my behalf as aforesaid or in connection with my business," to make, draw, sign, accept, or indorse any bills of exchange or promissory notes which should be requisite or proper, & to sign pltf.'s name, or his trading name, to any cheques on his banking account in London. The attorney, purporting to act under the power, obtained from defts. a loan of £4,000, & accepted bills of exchange for that amount in the name of the firm *per pro.* himself. He represented to defts. that he had full power to borrow, & produced the power, but they accepted his word, & did not read the power. The £4,000 was paid by two cheques of defts. in favour of pltf.'s firm. The attorney indorsed these cheques, & paid them into the London banking account of pltf.'s firm. He afterwards drew out the whole sum, & applied it to his own purposes. Pltf. brought this action to restrain negotiation of the bills. Defts. counterclaimed for payment of the money due on the bills, or, in the alternative, for the £4,000 as money had & received by pltf. to their use. The judge found that pltf. had no knowledge of the borrowing by the attorney, & got no benefit from it:—*Held:* (1) the power of attorney conferred no general power to borrow, & the claim for the money due on the bills of exchange failed; (2) defts. must be taken to have had notice of the terms of the power & that the attorney had no general power to borrow; (3) they could not recover the £4,000 as money had & received by pltf. to their use.—JACOBS *v.* MORRIS, [1902] 1 Ch. 816; 71 L. J. Ch. 363; 86 L. T. 275; 50 W. R. 371; 18 T. L. R. 384; 46 Sol. Jo. 315, C. A.

283. —— —— **Power to receive.**]—A power of attorney to receive & give receipts for all dividends due or to become due upon stock standing in the name of pltf. in the books of the Bank of England does not authorise the attorney to receive payment otherwise than in money or in some usual manner. Where the attorney received in payment of dividends due a dividend warrant, & it did not appear that payment by dividend warrant was a usual manner of payment:—*Held:* the payment was not a good payment.—PARTRIDGE *v.* BANK OF ENGLAND, No. 782, *post.*

Annotations:—**Expld.** Graves *v.* Legg (1857), 5 W. R. 597, Ex. Ch. **Consd. & Expld.** Crouch *v.* Credit Foncier of England (1873), L. R. 8 Q. B. 374; Goodwin *v.* Robarts, (1875), L. R. 10 Exch. 337.

284. —— —— —— **Married woman's separate income.**]—Where a married woman, entitled to the income of property held on trust for her separate use, with a restraint on anticipation, joined with her husband in a power of attorney to receive & sue for any moneys due to them or either of them:—*Held:* the trustee was not justified in paying the attorney the wife's separate income.—KENRICK *v.* WOOD (1869), L. R. 9 Eq. 333; 39 L. J. Ch. 92; 19 W. R. 57.

Annotations:—**Apld.** Stanley *v.* Stanley (1878), 47 L. J. Ch. 256.

285. —— —— ——.]—The production by the vendor's solr. of a conveyance executed by the attorney of a trustee, acting under a general power, & not specially empowered to receive the money, is not a sufficient authority to the purchaser, under Conveyancing Act, 1881 (c. 41), s. 56 (1), & Trustee Act, 1888 (c. 59), s. 2 (1), to pay to the solr. the portion of his purchase-money payable to the trustee in question. The solr. for that purpose must be authorised by the trustee himself to produce the deed.

A contract for sale provided for payment of interest by the purchaser if from any cause whatever other than the wilful default of vendors the purchase should not be completed by a day named. One of the necessary parties to the conveyance was a trustee-mtgee. who was abroad, & was difficult to communicate with. Vendors were aware of that, but relied upon a general power of

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283 i. —— —— *Power to receive.*]—Deft., an old woman, granted a power of attorney in wide terms to M. in which he contracted with pltf. to sell to him a farm belonging to deft. Deft. executed a conveyance & gave it to M., who was authorised to receive the purchase-money. Pltf., in accordance with the contract, paid off certain charges & made a cash payment to M. & a mtge. to him for the balance. Deft. refused to give possession, although M. was willing & ready to make over the purchase-money & mtge. to her:—*Held:* deft. was bound by the contract & by the money & mtge. received by her agent duly authorised.—MCCLELLAN *v.* MCLAUGHAN (1892), 23 O. R. 679.—**CAN.**

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attorney given by him. Their solr. produced to purchaser the conveyance executed by the attorney of the trustee. Purchaser declined to pay the purchase-money to the solr. without the execution of the deed by the trustee. His execution was obtained, but, owing to this objection, the purchase was not completed until after the day fixed:—*Held:* vendors had been guilty of wilful default such as to disentitle them to interest.—*Re* HETLING & MERTON'S CONTRACT, [1893] 3 Ch. 269; 62 L. J. Ch. 783; 69 L. T. 266; 42 W. R. 19; 9 T. L. R. 553; 37 Sol. Jo. 617; 2 R. 543, C. A.

Annotations: **Distd.** *Re* London Corpn. & Tubb's Contract, [1894] 2 Ch. 524, C. A. **Consd.** *Re* Wilsons & Stevens' Contract, [1894] 3 Ch. 546. **Folld.** *Re* Strafford & Maples, [1896] 1 Ch. 235, C. A.; **Distd.** *Re* Woods & Lewis' Contract, [1898] 1 Ch. 433. **Apld.** *Re* Pelly & Jacob's Contract (1899), 80 L. T. 45; **Consd.** Bennett *v.* Stone, [1903] 1 Ch. 509, C. A.; *Re* Bayley-Worthington & Cohen's Contract, [1909] 1 Ch. 648.

286. —— —— —— **Not an act of forfeiture under will.**]—S. was entitled for life to the income bequeathed by a will which provided that if he should commit or suffer any act, default, or process whatsoever which, but for that proviso, would have the effect of vesting the right to receive the interest in any other person whomsoever, the life interest of S. should cease & be void & the income be paid as on his death. S., being about to go abroad, executed a general power of attorney to his solr., W., a trustee of testator's will, & on W.'s going abroad & retiring from the trusteeship in 1906 executed a power of attorney appointing his then solr., K., in his name & behalf to recover & receive all sums of money in respect of the interest under the will:—*Held:* (1) the power of attorney was a mere authority to receive the income of S.'s interest under the will & apply it for his benefit, & not a colourable transaction giving his creditors an equitable charge; (2) it did not constitute a forfeiture within the meaning of the will.—*Re* SWANNELL, MORICE *v.* SWANNELL (1909), 101 L. T. 76.

287. —— **Mortgage — Passage money.**]—The owners of a ship gave a power of attorney authorising their agent (*inter alia*) "to sign any bottomry bond or instrument of hypothecation on the vessel or her cargo, & sell & dispose of, either absolutely or by way of mtge. or otherwise as he should think proper, the vessel or any share thereof, & execute all instruments, & do all acts which would be requisite & necessary for completing such sales, transfers, mtges. or any of them, & generally do all acts about the business & affairs aforesaid which the owners, if present, could have done." Under this power, the agent, by deed—reciting a mtge. of the ship, & the necessity for a further advance to enable the ship to set sail, & the advance of £4,000 for that purpose by pltfs.—assigned all the freight, hire, & passage-money, & earnings of the ship in her intended voyage from Port Jackson to Liverpool, with a proviso for redemption if within 10 days after arrival the £4,000 should be repaid. The ship sailed, & arrived at Liverpool; but the £4,000 was not paid. After the ship had sailed, the agent of the owners received the passage-money of certain passengers by bills on England, payable at sight, which were remitted to the owners in England, & the amounts received by them before arrival of the ship:—*Held:* (1) the power of attorney authorised the assignment of the passage-money, & gave the mtgees. an immediate right to it before they took possession of the ship; (2) they were entitled to recover back the amount so received.—WILLIS *v.* PALMER (1859), 7 C. B. N. S. 340; 29 L. J. C. P. 194; 2 L. T. 626; 6 Jur. N. S. 732; 8 W. R. 295; 141 E. R. 847.

Annotation:—**Reld.** Essarts *v.* Whinney (1903), 88 L. T. 191, C. A.

288. —— —— **For past debt.**]—The chairman of a co. borrowed of the co. a sum of money in Jan., 1872. Soon afterwards he gave the secretary of the co. a general power of attorney to execute for him all deeds that might be necessary, & in Aug. left the country & never returned. On Nov. 1, 1872, the secretary, purporting to act under the power, executed a mtge. to the co. to secure the sum borrowed by the chairman. In the following month the chairman was adjudicated bkpt.:—*Held:* (1) the mtge. was invalid as not being authorised by the power of attorney; (2) it was not necessary to decide whether it was so as a fraudulent preference.—*Re* BOWLES' MORTGAGE TRUST (1874), 31 L. T. 365, C. A.

289. —— —— **Personal property.**]—Deft., going abroad, gave L. a power of attorney, authorising him to manage his landed estate, to sell his real & personal property, to commence & carry on or defend actions, etc., to enter into agreements for effectuating aforesaid purposes, "& generally to do, execute, & perform any other act, deed, matter, or thing whatsoever which ought to be done, executed or performed, or which, in the opinion of my attorney, ought to be done, executed, or performed in or about my concerns, engagements, & business of every nature & kind whatsoever, as fully & effectually to all intent & purpose as I myself could do if I were present & did the same in my proper person":—*Held:* L. was not authorised, either under the power of attorney or under Factors Acts, to mtge. personal estate belonging to deft.—LEWIS *v.* RAMSDALE (1886), 55 L. T. 179; 35 W. R. 8; 2 T. L. R. 691.

290. —— **Partnership—Power to dissolve.**]—A., partner in the firm of B. & Co., gave C. a power of attorney "for the purposes of exercising, for me all or any of the powers & privileges conferred by an indenture of partnership constituting the firm of B. & Co."; & the power went on, "& generally to do, execute & perform any other act, deed, matter, or thing whatsoever . . . in or about my concerns, engagements & business of every nature & kind whatsoever":—*Held:* (1) the former words restrained the generality of the latter words; (2) C. could not, under this power, execute a deed in A.'s name dissolving the partnership of B. & Co. & assigning over A.'s share of the partnership property for the benefit of creditors.—HARPER *v.* GODSELL, No. 250, *ante*.

Annotations:—**Reld.** Hawksley *v.* Outram, [1892] 3 Ch. 359, C. A.
For full anns., *see* S. C. No. 250, *ante*.

291. —— **Pledge—Navy bill.**]—M., owner of a ship, let it to the Comrs. of the Navy, & appointed

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287 i. —— *Mortgage—Power to make.*]—A power of attorney authorised the holder "to dispose" of certain property in any way he thought fit:—*Held:* that conferred no authority to mtge. the property.—MALUKCHAND BIN GYANMAL *v.* SHAN MOGHAN VARDRAJ (1890), I. L. R. 14 Bom. 590.—**IND.**

287 ii. —— —— *Power to transfer.*]—A power of attorney conferred, *inter alia*, the power to sell & convert into money "the goods, effects, & things belonging to" the principal:—*Held:* (1) the word "things" included mtges., there being nothing in the deed which suggested that things were to be limited to *choses in possession* & not to *choses in action*; (2) the mtges. were capable of being transferred by the attorney. *Re Dawson & Jenkin's Contract*, [1904] 2 Ch. 219, cited.—JOGENDRA CHUNDER DUTT *v.* APURNA DASSI (1908), 13 C. W. N. 1191.—**IND.**

287 iii. —— —— *Power to execute.*]—A power of attorney authorising money to be raised by mtge. of specified land includes power to execute the mtge. & convey the legal estate.—BALLANTYNE *v.* COLEMAN (1891), 9 L. R. 131.—**N.Z.**

291 i. —— *Pledge—Shares.*]—A principal having executed a deed empowering his factor to sell shares & to do "all acts & deeds, thing & things whatsoever needful & requisite with regard

T. his factor & attorney, with power to receive the freight & profits, & to compare & transact with the comrs. T. settled the account, & took a navy-bill for the money to M. He then sold it, and indorsed it as attorney for M. The question being whether M. was bound:—*Held:* in the Ct. of K. B. T. had not sufficient authority to sell & dispose of the navy-bill; but, a bill having been brought for relief against the verdict & judgment, relief was decreed "in all the circumstances" against the verdict obtained at law by M.—EKINS *v.* MACKLISH (1753), Amb. 184; 27 E. R. 125.

292. ——— ———.]—DE BOUCHOUT *v.* GOLDSMID, No. 526, *post*.

For full anns., *see* S. C. No. 526, *post*.

293. ——— ——— **Victualling bill.**] — Victualling bills are not assignable; but by usage, a power of attorney, to the attorney, his substitutes & assigns, to receive the money, authorises the attorney to assign. Such power is called a general power, in contra-distinction to a special power, which authorises the attorney only to receive. Where an attorney, acting under the latter power, deposited certain victualling bills with deft., as a security for money borrowed from him, in an action of trover by the payee of the bills:—*Held:* pltf. entitled to recover.—TONKIN *v.* FULLER (1783), 3 Doug. K. B. 300; 99 E. R. 664.

294. ——— ——— **Promissory note.**]—A power of attorney gave to the holders authority "for the purposes aforesaid to sign, for me & in my name, & on my behalf any & every contract or agreement, acceptance, or other documents," the purposes aforesaid being "from time to time to negotiate, make sale, dispose of, assign, & transfer" Govt. promissory notes, & "to contract for, purchase & accept, the transfer" of same:—*Held:* upon the true construction of this power the holders were authorised to sell or purchase such notes but not to pledge them.—JONMENJOY COONDOO *v.* WATSON (1884), 9 App. Cas. 561; 50 L. T. 411, P. C.

Annotation:—**Refd.** Lewis *v.* Ramsdale (1886), 55 L. T. 179.

295. ——— **Sale—Land comprised in voluntary settlement.**]—B. executed a voluntary settlement of land in favour of his wife & children, which contained a power of sale. B., being about to leave England, executed a power of attorney to E. authorising him to sell all or any of his lands, but in general terms. E. as B.'s attorney agreed to sell a portion of the land comprised in the settlement to deft.; & deft. contracted to sell same to pltfs. The title was objected to by pltfs. on the ground that the power of attorney did not authorise the sale to deft.:—*Held:* (1) the power of attorney did not authorise E. to sell to deft. any portion of the land comprised in the settlement; (2) such sale

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to the shares as fully & effectually to all intents as he might or could do if personally present," the factor assigned the shares as security for money which he borrowed for the purpose of paying arrears of calls in order to save the shares from forfeiture:—*Held:* such assignation within the factor's powers.—THOMSON *v.* GLASGOW, PAISLEY & GREENOCK RY. CO., FULLARTON (1842) 15 Sc. Jur. 173.—**SCOT.**

a. ——— *Real property — Power to create easement.*]—A power of attorney authorised the conduct of any contract, compromise, etc., or arrangement in relation to the affairs of the principal & for all or any of such purposes to execute, etc., conveyances, etc., memorials for registration, & other deeds, etc., whether made under or having reference to "Transfer of Land Stat." of Victoria or Real Property Act of New South Wales, or other stat. in the said colonies or not:—*Held:* not authority to execute a creation of easement under that Act over land of which the principal was the registered proprietor.—MAGOR *v.* DONALD (1887), 13 V. L. R. 255.—**AUS.**

b. ——— *Release — Power to execute.*]—Pltfs. by a power of attorney authorised H. to take such proceedings as he should think proper to secure, or for the recovery of, a judgment against defts., & to accept any security for the whole or any part of same, & upon such terms as should seem meet, & to give time for payment, & to execute & do all agreements, deeds, matters, & things that might be expedient or necessary in the premises. Under this power H. executed a release from all creditors who should execute same:—*Held:* by the power no authority was given to compromise or accept a part in satisfaction of the whole, the general words therein applying only to what immediately preceded them, *i.e.*, the accepting of security, & the giving of time; & defts. were not released.—HAMILTON *v.* HOLCOMB (1863), 13 C. P. 9.—**CAN.**

295 i. ——— *Sale—Indefinite language of power.*]—J. died intestate seised of lands, leaving W., his eldest son & heir-at-law, to whom letters of administration were granted. W. appointed H. his attorney under a power of attorney which authorised H. "to sign & execute all deeds which J. as heir & administrator may be called upon to execute," etc. H. applied to bring certain lands under Real Property Act, requesting that certificate of title might be issued to an intending purchaser:—*Held:* as owner of the lands W. had the option to sell or keep them, but the language of the power was not sufficiently precise to enable H. to exercise the option.—*Re* BAXTER (No. 2) (1863), 1 Q. S. C. R. 99.—**AUS.**

295 ii. ——— ——— *Power verbally to rescind contract.*]—An attorney under power with authority to sell land & "rescind any contract for sale" can make a verbal rescission of the contract.—BARTLETT *v.* LOONEY (1876-7), 3 V. L. R. 14.—**AUS.**

295 iii. ——— ——— *Power to convey as grantor.*]—A. received from B. a power of attorney to sell lands. Under the power A. delivered to C. a deed, throughout which A., the party of the first part, was made the grantor:—*Held:* B.'s interest did not pass by the deed.—DACKSTEDER *v.* BAIRD (1849), 5 U. C. R. 591.—**CAN.**

295 iv. ——— ——— *Power to sell on credit.*]—A power of attorney authorised the agent to enter & take possession of lands & sell same for the best price that could be got:—*Held:* the power of attorney did not authorise a sale upon credit.—RODBURN *v.* SWINNEY (1889), 16 S. C. R. 297.—**CAN.**

295 v. ——— ——— *Power to sell otherwise than for cash.*]—N. & Co. had a power of attorney from pltf., authorising them "to purchase, sell, endorse, & transfer for pltf., & in pltf.'s name & on his behalf," all shares standing in his name in the books of any public co.:—*Held:* the power to sell was only a power to sell in the ordinary course of business, *i.e.*, for a money price.—JUMNA DOSS *v.* ECKFORD (1882), I. L. R. 9 Calc. 1.—**IND.**

295 vi. ——— ——— *Power to accept land in lieu of cash.*]—Deft. gave her husband a power of attorney to sell her lands in such manner & at such prices as he should think fit. The husband completed a bargain, & deft. personally executed the deeds, which were in the ordinary form as for cash sales. The husband accepted mtged. lands instead of cash, unknown to deft.:—*Held:* the power did not authorise the husband to take property in exchange, or in part payment, for deft.'s lands subject to a mtge. which fixed on her a liability to indemnify the mtgor. against such incumbrances. *Palliser v. Gurney* (1887), 19 Q. B. D. 519; *Stogdon v. Lee*, [1891] 1 Q. B. 661; *Re Shakespear, Deakin v. Lakin* (1885), 30 Ch. D. 169; *Leak v. Driffield* (1889), 24 Q. B. D. 98; *Braunstein v. Lewis* (1891), 7 T. L. R. 566; *Scott v. Morley* (1887), 20 Q. B. D. at p. 126; *Waring v. Ward* (1802), 7 Ves. at p. 337; *Kinnaird v. Trollope* (1888), 39 Ch. D. 636; *Horwell v. London General Omnibus Co.* (1877), 2 Ex. D. 365; *Wright v. Chard* (1859), 4 Drew. 673; *Chamley v. Dunsany* (*Lord*) (1807), 2 Sch. & Lef. 690, at p. 718; *Pike v. Fitzgibbon* (1881), 17 Ch. D. 454; *Wainford v. Heyl* (1875), L. R. 20 Eq. 321, cited. — M'MICHAEL *v.* WILKIE (1891), 18 Ont. App. 464.—**CAN.**

c. ——— *Salvage money — Power to receive & distribute.*]—The master & crew of the *I.* executed a power of attorney to P. "for as & in our name as crew of the *I.* to bring suit or otherwise settle & adjust any salvage claim for services to the *Q.*, hereby granting unto our attorney full power & authority concerning the premises as fully & effectually as we might do if personally present." The owners of the *Q.* paid P. $1,300 in full, & obtained his release & receipt:—*Held:* P. had no authority to receive or distribute the salvage money or release the lien on the *Q. Yates v. Freckleton*, 2 Doug. 623, apld.; *Berwick v. Horsfall*, 4 C. B. N. S. 460; *Neilson v. Harford*, 8 M. & W. 806; *Attwood v. Munnings*, 7 B. & C. 283, consd.—CHURCHILL & SONS *v.* MCKAY, *Re* THE SHIP QUEBEC (1892) 20 S. C. R. 472.—**CAN.**

d. ——— *Securities — Power to redeem.*]—A co., incorporated by Act of Assembly, authorised its agent by power of attorney "to manufacture logs into lumber at the mills, & transport them to market, & sell & dispose thereof" for the co.'s benefit:—*Held:* the agent had no authority to deliver over lumber at the mills in payment of securities given by him on behalf of the co. for debts contracted in the course of his agency; & such delivery vested no property in the creditor.—LOMBARD *v.* WINSLOW, 1 Kerr. 327.—**CAN.**

Sect. 2.—*Construction of authority: Sub-sects.* 1, 2 & 3. *Sect.* 3: *Sub-sect.* 1.]

was not sufficient to call into operation 27 Eliz. c. 4.—GENERAL MEAT SUPPLY ASSOCN., LTD. *v.* BOUFFLER (1879), 40 L. T. 126; *affd.* on another point, 41 L. T. 719, C. A.

296. —— —— Land held by principal as mortgagee.]—A power of attorney authorised the agent to sell any real or personal property then or thereafter belonging to the principal, & also to receive & give a discharge for any moneys then or thereafter owing to the principal by virtue of any security:—*Held:* it did not authorise the agent to sell property held by the principal as mtgee. under mtgee.'s statutory power of sale.—*Re* DOWSON & JENKIN'S CONTRACT, [1904] 2 Ch. 219; 43 L. J. Ch. 684; 91 L. T. 121, C. A.

297. —— —— Business on terms.]—By a power of attorney, A., one of four partners in a firm of dyers carrying on business at B. under the style of A. & Co., appointed his brother C. his attorney to sell or concur in selling any of his real, leasehold, or personal property to any person or persons, "upon such terms, subject to such special or other conditions, & in such manner" as the attorney should approve, & also to sign any deeds that ought to be executed "& generally to do, negotiate, transact, & perfect all & any other act, deed, matter, or thing whatsoever . . . for the transacting, settling, & adjusting all other my estate, affairs, tradings, & concerns whatsoever;" & with full power & authority to act as fully & effectually as if he were personally present & did the same himself. C., acting for himself as a partner, & also under his power of attorney on behalf of A., joined with the other partners of the firm in executing a contract for sale of the business to D. Amongst other things it was agreed that D. should pay the debts of the business, which were estimated at £15,000; if they did not exceed that amount the vendors were to be entitled to a share of profits calculated on £5,000 "deferred capital"; if the debts exceeded £15,000, £5 for every £2 of the excess was to be deducted from the £5,000 deferred capital; vendors might require D. to take over their deferred capital, paying in cash two-fifths of its nominal amount; if the concern was converted into a limited co. vendors were to receive shares for their deferred capital, & if the debts were less than £15,000, D. was to pay the difference in cash at the end of two years. It was agreed that D. might carry on the business under the style of A. & Co., & that vendors should not carry on any like business within 50 miles of B. D. brought an action for specific performance:—*Held:* (1) the agreement was not void against A. on the ground that the power of attorney did not authorise an agreement for a partnership; (2) if the power of attorney did not authorise C. to give the purchaser power to trade under the name of A. & Co., or to agree not to trade within 50 miles of B., they were stipulations for the benefit of D., which he could waive. *Semble:* C. was authorised by the power of attorney to enter into the agreement not to carry on business of a similar character within 50 miles of B., as a going concern could not be sold advantageously without such a provision. *Qu.:* whether he was authorised by the power to give authority to D. to trade in the name of A. & Co.—HAWKSLEY *v.* OUTRAM, [1892] 3 Ch. 359; 62 L. J. Ch. 215; 67 L. T. 804; 2 R. 60, C. A.

Annotations:—**Distd.** Lloyd *v.* Nowell, [1895] 2 Ch. 744. **Apld.** Morrell *v.* Studd & Millington, [1913] 2 Ch. 648. **Refd.** *Re* Johnston Foreign Patents Co., *Re* Johnston Die Press Co., *Re* Johnstonia Engraving Co., J. P. Trust *v.* The Above Cos., [1904] 2 Ch. 234, C. A.

298. —— Servant — Power to dismiss.]—A., agent abroad for owners of a vessel under a written power of attorney from them, which gave him general authority to take care of their interest & act as their representative, dismissed there the master of such vessel for alleged misconduct, & the latter ceased afterwards to act as master. In an action by the master against the owners for wages, secondary evidence was given of the contents of such power of attorney, in absence of the document, which was lost, & the judge ruled that it gave A. power to dismiss the master:—*Held:* (1) the construction of the contents of such document was properly with the judge, & not the jury; (2) his decision on such construction was right; (3) the dismissal being with the authority of the owners, the master could not claim wages subsequently thereto.—BERWICK *v.* HORSFALL (1858), 4 C. B. N. S. 450; 27 L. J. C. P. 193; 31 L. T. O. S. 117; 22 J. P. 659; 4 Jur. N. S. 615; 6 W. R. 471; 140 E. R. 1160.

299. —— Ship — Power to warrant.]—The owners of a vessel, which had once been classed A.1. at Lloyd's, authorised their agent, by power of attorney, to charter the vessel or employ her as a general ship on any voyage, on such terms & in such manner & in all respects as he should think proper, & generally represent the owners in relation thereto & in relation to her management or sale as fully as if the owners were personally present, & do all things necessary for that purpose though not specially mentioned:—*Held:* the agent had authority to enter into a charterparty with a warranty that the ship was at the time of the charterparty A.1. at Lloyd's, though she was not so described in the power of attorney, & though she had ceased to be so classed when the power was given.—ROUTH *v.* MACMILLAN (1863), 2 H. & C. 750; 3 New Rep. 391; 33 L. J. Ex. 38; 9 L. T. 541; 10 Jur. N. S. 158; 12 W. R. 381; 1 Mar. L. C. 402.

300. Power executed abroad—Proof that principal alive.]—A contract was entered into with the agent of a vendor resident in Van Diemen's Land for purchase of copyhold hereditaments, but purchaser refused to accept a surrender of the copyholds from the agent of vendor until it had been first shown that vendor was alive at the date of the admission of the agent, & also to pay the purchase-money to the agent. Upon these questions being submitted for the opinion of the ct. upon a special case:—*Held:* as the power would be revoked by the death of vendor, the ct. could only answer the questions in favour of purchaser.—BAILEY *v.* COLLETT (1854), 18 Beav. 179; 23 L. J. Ch. 230; 22 L. T. O. S. 313; 2 W. R. 216; 52 E. R. 71.

299 i. —— *Ship—Power to charter.*]—A power of attorney given to an agent in the Maldive Islands to do all things that the principal could do in gathering, collecting, & exporting guano does not authorise the agent to charter a ship to Melbourne merely to bear thither "samples of guano & dispatches," samples not being commonly sold as merchandise & the dispatches not being averred to have borne upon the "collecting & exporting of guano."—HORT *v.* NICHOLSON (1865), 2 W. W. & a'B. L. 183.—**AUS.**

e. —— *Winding up proceedings — Power to present petition.*]—The London Chartered Bank of Australia having branch offices in the colonies, appointed by power of attorney an agent to represent the bank in any colony, & to take the management of & superintend, direct, & control the same, & gave him the fullest powers over its officers. It also authorised him "in the name & on behalf of the bank to commence, institute, prosecute, & carry on one or more action or actions, suit or suits, at law or in equity, or other proper proceedings as the said attorney for the time being, acting in the execution of this power as aforesaid, shall deem requisite & necessary to compel the payment of any money due to the bank":—*Held:* the agent was authorised to petition the ct. for the winding-up, under Co. Stat., 1854 (No. 190), of a co. which was unable to pay its debts.—*Re* FEDERAL LAND CO., LTD. (1889), 15 V. L. R. 135.—**AUS.**

SUB-SECT. 2.—WRITTEN AUTHORITY.

Where agent has a discretion, *see* Part VIII., Sect. 2, Sub-sect. 1, C., *post.*

Where agent's authority is ambiguous, *see* Part VIII., Sect. 2, Sub-sect. 1, D., *post.*

SUB-SECT. 3.—AUTHORITY IN GENERAL TERMS.

Authority of agent to do particular acts under an authority in general terms, *see* Sect. 3, *infra.*

SECT. 3.—IMPLIED AUTHORITY.

SUB-SECT. 1.—TO DO NECESSARY AND INCIDENTAL ACTS.

301. General rule.]—Where general authority is given to an agent, this implies a right to do all subordinate acts incident to, & necessary for, execution of that authority, & if notice is not given that the authority is specially limited, the principal is bound.—COLLEN *v.* GARDNER, No. 428, *post.*

302. Agent inserting principals' name in registries as mortgagees—Authority to see that security effectual.]—A. & Co. being indebted to B. & Co., it was agreed that as security for the debt B. & Co. should be interested in a moiety of certain ships owned by A. & Co. The names of the partners in B. & Co. were inserted in the respective registries with those of A. & Co. by an agent employed by B. & Co. to see that their security was effectual, but (as they alleged) without their personal knowledge or direction. Petitioner afterwards supplied the ships with articles for their use on orders from A. & Co., & without knowing B. & Co. were interested. The ships were sold & the proceeds divided before bkpcy. There were no joint effects of A. & Co. & B. & Co.:—*Held:* (1) in inserting the names of the mtgees. their agent performed a necessary duty; (2) he must be taken to have inserted their names with their knowledge & by their direction; (3) *primâ facie* the individuals whose names appeared on the registries were liable.—*Re* DAWES & Co., *Re* WILLIAMS, WILSON & Co., *Ex p.* MACHEL (1813), 1 Rose, 447.

303. Agent employing another to take stock—Authority to manage business.]—A person employed to manage a business is an agent to bind his principal in everything that concerns the business, but not to employ a person to take stock.—LAWRENCE *v.* THATCHER (1834), 6 C. & P. 669.

304. Agent undertaking to pay charges—Authority to obtain possession of goods.]—KINGSTON *v.* WENDT, No. 869, *post.*

Architect employing surveyor.]—*See* BUILDING CONTRACTS, ENGINEERS & ARCHITECTS.

305. Beerhouse manager ordering stock—Authority to manage beerhouse.]—A., a brewer & owner of a beerhouse, put in B. as manager & servant, & paid him weekly wages, supplying B. with beer & cigars to sell in the house for the benefit of A. & forbidding him to buy them elsewhere. While B. was manager he ordered cigars from C., who supplied them to B., & C. credited B. alone; but afterwards discovering that B. was only a servant of A., sued A. for the price:—*Held:* as the cigars were such as a manager of such business would have power to order as incident to the management, A. was liable for the price.—WATTEAU *v.* FENWICK, [1893] 1 Q. B. 346; 67 L. T. 831; 56 J. P. 839; 41 W. R. 222; 9 T. L. R. 133; 37 Sol. Jo. 117; 5 R. 143.

Annotations:—**Distd.** Johnston *v.* Reading (1893), 9 T. L. R. 200. **Apld.** Kinahan *v.* Parry, [1910] 2 K. B. 389. **Dbtd. & Distd.** Lloyd's Bank *v.* Swiss Bankverein, Union of London & Smith's Bank *v.* Swiss Bankverein (1912), 17 Com. Cas. 280.

306. Broker paying call—Authority to buy shares.]—One who employs a broker to buy ry. shares for him impliedly authorises him to do all that is needful to complete the bargain.

A. employed B., a Stock Exchange broker, to buy shares for him. At the time of the purchase, a call had been made, but was not then payable. The seller having paid the call, in order to enable him to make a transfer of the shares, B., who, by the rules of the Stock Exchange, was personally responsible for it, paid the money:—*Held:* B. entitled to recover from A. the sum so paid, as money paid to his use.—BAYLEY *v.* WILKINS (1849), 7 C. B. 886; 18 L. J. C. P. 273; 13 L. T. O. S. 234; 13 Jur. 883; 137 E. R. 351.

Annotation:—**Refd.** Sweeting *v.* Pearce (1861), 9 C. B. N. S. 534.

307. Authority to sell & receive price — Principal bound to deliver.]—If the owner of goods intrust another to sell them for him & to receive the price, he has bound himself to deliver the goods to purchaser; & that would hold equally if the goods had never been removed from his warehouse. The question of the right of the consignor to stop & retain the goods can never occur where the factor has acted strictly according to the orders of his principal & where he has bound him by his contract (LORD LOUGHBOROUGH).—MASON *v.* LICKBARROW (1790), 1 Hy. Bl. 357; 126 E. R. 209.

Annotations:—**Refd.** Christy *v.* Row (1808), 1 Taunt. 300; Bloxam *v.* Sanders (1825), 4 B. & C. 941.

308. Managers of ship ordering repairs—Authority as such.]—In an action for repairs to a ship ordered by managers, the owner is liable if he has in fact made the managers his agents, although he

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PART V. SECT. 3, SUB-SECT. 1.

z. *Agent accepting notice of renewal of charterparty—Special authority to make original charterparty.*]—A charterparty made between pltf. & deft. cos. provided that pltfs. should have the right of renewal, upon giving notice on or before a specified date. On the date specified pltfs. gave notice of renewal to M. K. & Co., who had acted as agents of defts. in connection with the negotiation of the charterparty, & the receipt & remittance of the hire of the vessel. Defts. refused to renew, on the ground that the notice required had not been given:—*Held:* the authority given by defts. to M. K. & Co. was a special authority, & the duty devolved upon pltfs. of showing that, by usage or otherwise, they had authority to receive notice in connection with the extension of the time, such notice not being incidental or necessary to their original authority.

The trial judge having refused to submit to the jury a question tendered on behalf of pltfs. as to the authority of M. K. & Co.:—*Held:* the judge was justified in deciding, as matter of law, that there was no proof of agency, & that there was, therefore, nothing that could properly be submitted to the jury.—DOMINION COAL CO. *v.* KINGSWELL S.S. Co. (1900), 33 N. S. R. 499.—**CAN.**

a. *Agent taking mortgage to himself—Authority to lend principal's money.*]—A person advancing money belonging to others, but for which he is responsible, may take a mtge. for it in his own name.—WHITE *v.* BROWN (1854), 12 U. C. R. 477.—**CAN.**

b. *Insurance agent—Authority to advertise.*]—A special power to publish advertisements is inherent in the office of an agent appointed to take risks & receive premiums; such authority is to be presumed.—COMMERCIAL UNION INSURANCE CO. *v.* FOOTE (1872), 3 R. C. 40.—**CAN.**

c. *Agent to secure contract — Acts done to induce same.*]—A person who employs an agent to secure a binding contract for him with a third party is not lightly to be relieved from the obligation of a promise, guarantee, or stipulation which his agent has made in order to induce that third party to enter into the contract with his principal, even though there was no specific authority for his act, & even though the inducing stipulation or guarantee was not inserted in the formal contract & was not directly brought to the notice of the principal.—MAGRATH *v.* COLLINS (1917) 3 W. W. R. 677.—**CAN.**

Sect. 3.—*Implied authority: Sub-sects.* 1, 2, 3 & 4, *A.*]

has never held them out as his agents.—TYNESIDE ENGINE WORKS CO. *v.* GOLDSMITH (1892), 8 T. L. R. 478.

309. Surveyor making claim for purchase-money —Authority to act in compulsory purchase.]—A ry. co. had given pltf. notice to treat for certain lands required for purposes of their undertaking & had served him with notice under Lands Clauses Consolidation Act, 1845 (c. 18), s. 85, of their intention to apply to the Board of Trade for the appointment of a surveyor to determine the value of pltf.'s interest in the lands in question. Negotiations took place between the surveyors employed by pltf. & by the ry. co. Pltf.'s surveyor suggested alterations by which it would become unnecessary to take all the lands in question, & he prepared draft proposals of agreement which involved *inter alia* the payment of £2,000 as purchase-money. The ry. co. paid £2,000 into ct., & executed a bond for £2,000 in the statutory form required by the above sect. In an action to restrain the ry. co. from *inter alia* entering & doing works on pltf.'s land:—*Held:* (1) pltf. had made no claim for purchase-money so as to enable the ry. co. to enter under the above sect. on payment of the amount claimed & delivery of a bond; (2) pltf.'s surveyor was not his agent to make the claim.—FORD *v.* PLYMOUTH, DEVONPORT & SOUTH WESTERN JUNCTION RY. CO., [1887] W. N. 201.

SUB-SECT. 2.—TO ACT ACCORDING TO CUSTOM OR ACCORDING TO ORDINARY COURSE OF BUSINESS.

310. General rule.]—An agent employed generally to do any act is authorised to do it only in the usual way of business.—WILTSHIRE *v.* SIMS, No. 817, *post.*

311. ——.]—A person who authorises another to contract for him authorises him to contract in the usual way.—BAYLIFFE (BAILIFF) *v.* BUTTERWORTH (1847), 1 Exch. 425; 5 Ry. & Can. Cas. 283; 17 L. J. Ex. 78; 10 L. T. O. S. 167; 11 Jur. 1019.

Annotations:—**Apld.** Pollock *v.* Stables (1848), 12 Q. B. 765. **Consd.** Sweeting *v.* Pearce (1859), 7 C. B. N. S. 449. **Apld.** Ireland *v.* Livingston (1866), L. R. 2 Q. B. 99. **Mentd.** Simpson *v.* Rand (1848), 17 L. J. Ex. 146.

312. ——.]—*Semble:* a party who employs a broker at a particular place to purchase shares is bound by a usage affecting the broker at that place.—POLLOCK *v.* STABLES (1848), 12 Q. B. 765; 5 Ry. & Can. Cas. 352; 17 L. J. Q. B. 352; 12 Jur. 1043; 116 E. R. 1057.

313. ——.]—A broker employed to deal in a particular market is authorised to deal according to the usage of the market (WILLIAMS, J.).—SWEETING *v.* PEARCE (1861), 9 C. B. N. S. 534; 30 L. J. C. P. 109; 5 L. T. 79; 7 Jur. N. S. 800; 9 W. R. 343; 1 Mar. L. C. 134; 142 E. R. 210, Ex. Ch.

Annotations:—**Distd.** Grissell *v.* Bristowe (1868), L. R. 3 C. P. 112. **Apld.** Gibson *v.* Hillstrom (1869), 21 L. T. 302; Pearson *v.* Scott (1878), 9 Ch. D. 198; Blackburn *v.* Mason (1893), 37 Sol. Jo. 283, C. A.; Matveieff *v.* Crosfield (1903), 51 W. R. 365. **Refd.** Emanuel *v.* Robarts (1868), 9 B. & S. 121; Bridges *v.* Garrett (1869), L. R. 4 C. P. 580; Pape *v.* Westacott, [1894] 1 Q. B. 272, C. A.; Legge *v.* Byas (1901), 18 T. L. R. 137. **Mentd.** Catterall *v.* Hindle (1867), L. R. 2 C. P. 368.

314. ——.]—The appointment of a general agent for the sale of goods implies an authority to sell according to the ordinary course of trade.

Where an agent sold timber of his principal at one of a number of sales, held at the same place & by the same person, on behalf of himself & other vendors, at which it was alleged to be the custom that purchasers should be liable for the purchase-money to the holder of the sale only, & not to the real vendor; & it was proved that the agent had himself sold goods on his own account in conformity with this alleged usage:—*Held:* the principal vendor was entitled to look for his purchase-money beyond the holder of the sales, to the real buyer of the timber.—*Re* WILLIAMS, *Ex p.* HOWELL, No. 808, *post.*

315. Apparent authority as real authority.]—Strangers can only look to the acts of the parties & to the external *indicia* of property & not to the private communications which may pass between a principal & his broker. So if a person authorise another to assume the apparent right of disposing of property in the ordinary course of trade it must be presumed that the apparent authority is the real authority.—PICKERING *v.* BUSK (1812), 15 East, 38; 104 E. R. 758.

Annotations:—**Consd.** Cole *v.* North Western Bank (1875), L. R. 10 C. P. 354. **Refd.** Guichard *v.* Morgan (1819), 4 Moore, C. P. 36; Coleman *v.* Riches (1855), 16 C. B. 104; Collen *v.* Gardner (1856), 21 Beav. 540; Brady *v.* Todd (1861), 9 C. B. N. S. 592; Johnson *v.* Credit Lyonnais Co. (1877), 3 C. P. D. 32, C. A. **Mentd.** Martini *v.* Coles (1813), 1 M. & S. 140; Shipley *v.* Kymer (1813), 1 M. & S. 484; *Re* Acraman, *Ex p.* Bushell (1844), 3 Mont. D. & De G. 615.

316. Incorporation of usage as explaining principal's intention.]—A contract departing in two particulars from the agent's authority, but expressing the true intentions of the principal by reason of customs annexed to the contract, is within scope of the agent's authority.—HEYWORTH *v.* KNIGHT, No. 585, *post.*

For full anns., *see* S. C. No. 585, *post.*

317. Intrinsic character of actual authority must not be changed.]—A person who employs a broker to transact business for him in a market with the usages of which the principal is unacquainted gives him authority to contract upon the footing of such usages, provided that they are only such as relate to the mode of performing the contract, & do not change its intrinsic character.—ROBINSON *v.* MOLLETT (1875), L. R. 7 H. L. 802; 44 L. J. C. P. 362; 33 L. T. 544, H. L.

Annotations:—**Expld.** *Re* Simpson, *Ex p.* Morgan (1876), 34 L. T. 329, C. A. **Expld. & Distd.** *Re* Rogers, *Ex p.* Rogers (1880), 15 Ch. D. 207, C. A. **Apld.** Perry *v.* Barnett (1885), 14 Q. B. D. 467. **Distd.** Sachs *v.* Spielmann (1889), 5 T. L. R. 487. **Consd. & Expld.** May & Hart *v.* Angell (1898), 14 T. L. R. 551, H. L.; Levitt *v.* Hamblet, [1901] 2 K. B. 53, C. A.; Scott & Horton *v.* Godfrey, [1901] 2 K. B. 726. **Consd.** Matveieff *v.* Crosfield (1903), 51 W. R. 365. **Refd.** Anderson *v.* Beard (1900), 5 Com. Cas. 261; Johnson *v.* Kearley, [1908] 2 K. B. 514, C. A.

318. Bill-broking usage.]—A bill-broker is not a person known to the law with certain prescribed duties, but his employment is one which depends entirely upon the course of dealing; his duties may vary in different parts of the country, & their extent is a question of fact to be determined by the usage & course of dealing in the particular

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PART V. SECT. 3, SUB-SECT. 2.

310 i. *General rule—Factors.*]—Factors can transact for their principals only according to the usage of trade.—BEAUDRY *v.* LAFLAMME (1861), 6 L. C. J. 134.—**CAN.**

d. *Bakery usage.*] — Where it was proved to be the custom of the bakery trade that employers should take over the small debts in their bread-servers' books on the latter leaving their employment:—*Held:* the employer could not go behind that custom, & could not make the bread-server liable for these debts as a *del credere* agent.—WILSON & STRAIN, LTD. *v.* PINKERTON (1897 31 I. L. T. 86.—**IR.**

e. *Commission agent's usage—Worsted spinner trade.*] — ANDERSON *v.* BUCK & HOLMES (1841), 16 Fac. 1021; 3 D. 975.—**SCOT.**

place.— FOSTER *v.* PEARSON, STEPHENS *v.* FOSTER, No. 558, *post.*

Annotations :—**Apld.** Muttyloll Seal *v.* Dent (1853), 5 Moo. Ind. App. 328 ; Sheffield *v.* London Joint Stock Bank (1888), 13 App. Cas. 333 ; London Joint Stock Bank *v.* Simmons, [1892] A. C. 201 ; Bentinck *v.* London Joint Stock Bank, [1893] 2 Ch. 120.

319. Cotton market usage.] — CATTERALL *v.* HINDLE, No. 774, *post.*

Insurance—Usage at Lloyd's in respect of payment of losses.]—*See* INSURANCE.

320. Stock Exchange usage.]—A broker, member of the Stock Exchange, has an implied authority to act according to its rules, whether his employer is cognisant of them or not.—SUTTON *v.* TATHAM (1839), 10 Ad. & El. 27 ; 2 Per. & Dav. 308 ; 8 L. J. Q. B. 210 ; 113 E. R. 11.

Annotations :—**Consd. & Expld.** *Re* Crosland (1846), 6 L. T. O. S. 378. **Consd.** Bayliffe *v.* Butterworth (1847), 1 Exch. 425, Ex. Ch. ; Dails *v.* Lloyd (1848), 12 Q. B. 531. **Consd. & Foll.** Pollock *v.* Stables (1848), 12 Q. B. 765. **Expld. & Distd.** Westropp *v.* Solomon (1849), 8 C. B. 345. **Consd.** Brown *v.* Byrne (1854), 2 C. L. R. 1599 ; Sweeting *v.* Pearce (1859), 7 C. B. N. S. 449. **Refd.** Lindo *v.* Smith (1858), 32 L. T. O. S. 62, Ex. Ch.

321. ——.]—No private instructions given to a broker can limit the general authority which, by employing him as his broker to sell on the Stock Exchange, the principal gives to the broker to sell according to the usage of the Stock Exchange (LORD CAIRNS, C.).—COLES *v.* BRISTOWE (1868), 4 Ch. App. 3 ; 38 L. J. Ch. 81 ; 19 L. T. 403 ; 17 W. R. 105, C. A.

Annotations :—**Apld.** *Re* Asiatic Banking Corpn., Royal Bank of India's Case (1869), 4 Ch. App. 252 ; Cruse *v.* Paine (1869), 4 Ch. App. 441 ; Davis *v.* Haycock (1869), L. R. 4 Exch. 373 ; Hawkins *v.* Maltby (1869), 4 Ch. App. 200 ; Maxted *v.* Paine (1869), L. R. 4 Exch. 81, 203 ; (1871), L. R. 6 Exch. 132, Ex. Ch. ; Bowring *v.* Shepherd (1871), L. R. 6 Q. B. 309, Ex. Ch. ; Merry *v.* Nickalls (1872), 7 Ch. App. 740 n. ; Maynard *v.* Eaton (1873), 9 Ch. App. 416 n. ; Neilson *v.* James (1882), 9 Q. B. D. 546, C. A. **Expld.** Loring *v.* Davis (1886), 32 Ch. D. 625. **Refd.** Sheppard *v.* Murphy (1868), 16 W. R. 948 ; Street *v.* Morgan (1869), 21 L. T. 432. **Mentd.** Allen *v.* Graves (1870), L. R. 5 Q. B. 478.

322. ——.]—A person employing a broker on the Stock Exchange must be taken to conform to the usages which have been established by members of the Stock Exchange as among themselves, for the better conducting of their business, & must be supposed to intend that his shares shall be sold subject to that condition.—NICKALLS *v.* MERRY (1875), L. R. 7 H. L. 530 ; 45 L. J. Ch. 575 ; 32 L. T. 623 ; 23 W. R. 633, H. L.

Annotations :—**Apld.** Heritage *v.* Paine (1876), 2 Ch. D. 594 ; Speight *v.* Gaunt (1883), 9 App. Cas. 1, H. L. **Consd.** Ellis *v.* Pond & Bloomsbury Syndicate, [1898] 1 Q. B. 426, C. A. **Apld.** Levitt *v.* Hamblet, [1901] 2 K. B. 53, C. A. **Mentd.** Robinson *v.* Mollett (1875), L. R. 7 H. L. 802 ; Sheffield Corpn. *v.* Barclay, [1903] 2 K. B. 580, C. A.

323. ——.]—A person employing a broker on the London Stock Exchange agrees with the broker that the dealings between them are to be carried on under the rules of the Stock Exchange so far as they are applicable to outsiders, & not under the rules applicable only to the domestic powers of the Stock Exchange (A. L. SMITH, M.R.).—LEVITT *v.* HAMBLET, [1901] 2 K. B. 53 ; 70 L. J. K. B. 520 ; 84 L. T. 638 ; 17 T. L. R. 307 ; 6 Com. Cas. 79, C. A.

Annotations :—**Distd.** Lomas *v.* Graves, [1904] 2 K. B. 557, C. A. **Refd.** Scott *v.* Godfrey, [1901] 2 K. B. 726 ; Ponsolle *v.* Webber (1907), 98 L. T. 375.

See, further, STOCK EXCHANGE.

324. Sugar market usage.]—IRELAND *v.* LIVINGSTONE (1872), L. R. 5 H. L. 395 ; 41 L. J. Q. B. 201 ; 27 L. T. 79 ; 1 Asp. M. L. C. 389, H. L.

325. Tallow market usage.]—ROBINSON *v.* MOLLETT, No. 317, *ante.*

For full anns., *see* S. C. No. 317, *ante.*

326. Wool market usage.]—GRAVES (GREAVES *v.* LEGG (1857), 2 H. & N. 210 ; 26 L. J. Ex. 316 ; 29 L. T. O. S. 145 ; 3 Jur. N. S. 519 ; 5 W. W. 597 ; 157 E. R. 88, Ex. Ch.

Annotations :—**Refd.** Kidston *v.* Monceau Ironworks Co. (1902), 86 L. T. 556 ; Sweeting *v.* Pearce (1859), 7 C. B. N. S. 449. **Mentd.** Metropolitan Water Board *v.* Dick, Kerr, [1917] 2 K. B. 1, C. A.

327. ——.]—CROPPER *v.* COOK, No. 587, *post.*

For full anns., *see* S. C. No. 587, *post.*

SUB-SECT. 3.—AUTHORITY IN REGARD TO ARBITRATION.

328. Agent referring dispute—Power to underwrite & settle losses.]—An agent who underwrites & settles losses for another has implied authority from him to refer a dispute about a loss to arbn.—GOODSON *v.* BROOKE (1815), 4 Camp. 163.

Annotations :—**Refd.** Xenos *v.* Wickham (1863), 14 C. B. N. S. 435.

329. Master of ship referring claim for salvage—Authority as such.]—*Qu.* : whether the master of a ship has authority to bind the owners to submit a claim for salvage to arbn.—THE CITY OF CALCUTTA (1898), 79 L. T. 517 ; 15 T. L. R. 108 ; 8 Asp. M. L. C. 442, C. A.

330. Agent waiving objection—Authority to represent principal.]—An agent appointed to represent a party on a reference to arbn., & to conduct the reference on his behalf, though not an attorney, has authority to bind his principal by waiving an objection to an improper appointment of an umpire by lot.—BACKHOUSE *v.* TAYLOR (1851), 2 L. M. & P. 70 ; 20 L. J. Q. B. 233 ; 16 L. T. O. S. 130, 373.

SUB-SECT. 4.—AUTHORITY IN REGARD TO BILLS OF EXCHANGE, PROMISSORY NOTES, CHEQUES AND OTHER NEGOTIABLE INSTRUMENTS.

A. Authority to draw.

331. Agent—Express authority.]—If I authorise a person to draw a bill in my name I am liable on

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PART V. SECT. 3, SUB-SECT. 3.

328 i. *Agent referring dispute—Authority to settle dispute.*]—Authority to settle a matter in dispute between his principal & a third party does not authorise the agent to refer it to arbn. ; an award made under such reference is not binding on the principal.—O'REGAN *v.* QUEBEC & GULF PORTS S.S. Co. (1880), 19 N. B. R. 528. —**CAN.**

i. *Agent appointing arbitrator — Authority to refer disputes.*]—An agent having authority to refer disputes to arbn. has not necessarily power to appoint an arbitrator.—NEW PINNACLE GROUP S.M. CO. *v.* LUHRIG COAL & ORE DRESSING APPLIANCES CO. (1900), 21 N. S. W. 297.—**AUS.**

PART V. SECT. 3, SUB-SECT. 4.—A.

g. *Acceptor of bill—Express authority to redraw—Sight draft.*]—Deft. being apprehensive that A. might not be able to meet an acceptance at maturity, requested him by telegram to "draw on us for draft due to-day if you cannot pay it." A. showed the telegram to pltfs., who discounted a sight draft which A. drew on deft. :—*Held* : (1) A. was authorised to draw at sight by the telegram, & such authority implied a promise to accept & pay the draft ; (2) the telegram was intended to be shown to pltfs. to induce them to discount the draft. *Bank of Ireland* v. *Archer* (1843), 11 M. & W. 383 ; *Johnston* v. *Collings* (1800), 1 East, 98 ; *Scott* v. *Pilkington* (1862), 2 B. & S. 11, 43 ; *Maddison* v. *Alderson* (1883), 8 App. Cas. 467 ; *Re Agra & Masterman's Bank* (1866), L. R. 2 Eq. 509 ; *Re Barned's Banking Co.* (1866), 14 L. T. 451 ; *Pillans* v. *Van Mierop* (1765), 3 Burr. 1663 ; *Pierson* v. *Dunlop* (1777), Cowp. 571 ; *Williams* v. *Carwardine* (1833), 4 B. & Ad. 621 ; *Denton* v. *G. N. Ry. Co.* (1856), 5 E. & B. 860 ; *Warlow* v. *Harrison* (1858), 1 E. & E. 295, cited.—BANK OF MONTREAL v. THOMAS (1888), 16 O. R. 503.—**CAN.**

331 i. *Agent — Express authority — Limited to part of price only.*]—A party residing abroad sent a vessel to Newfoundland & gave instructions to an agent resident in St. John's to procure a cargo of fish for her, directing him at same time to apply the balance then

Sect. 3.—Implied authority: Sub-sect. 4, A. & B.]

it (LORD LYNDHURST, C.B.).—DICKENSON *v.* TEAGUE (1834), 4 Tyr. 450.

332. —— —— Bills drawn in own name.]—An arrangement was made between defts., merchants in London, & V. & Co., merchants in Buenos Ayres, that V. & Co. should draw upon defts. & sell those drafts, & when opportunity offered, purchase others, to be remitted to pltfs. for the purpose of covering their acceptances. The profits on these transactions were expected to arise from difference in the rates of exchange, & it was agreed they, or the losses, if any, should be divided equally between the two firms. Bills were drawn by V. & Co. upon defts., & sold to pltfs., who were informed of the authority given by defts. to V. & Co. to draw the bills. These were signed by V. & Co., in their own names. In an action against defts., as drawers of the bills:—*Held:* (1) though there was a partnership between V. & Co. & defts., they were not liable, V. & Co. having no authority to bind them by their signature in their own names; (2) defts. were not liable for the amount of the bills in an action for money had & received as upon a failure of consideration; (3) defts. were not liable for not accepting the bills, as they had not, in the above circumstances, contracted to do so.—NICHOLSON *v.* RICKETTS (1860), 2 E. & E. 497; 29 L. J. Q. B. 55; 1 L. T. 544; 6 Jur. N. S. 423; 8 W. R. 211; 121 E. R. 187.

Annotations:—**Followed.** *Re* Adansonia Fibre Co., Miles' Claim (1874), 9 Ch. App. 635. **Consd.** Yorkshire Banking Co. *v.* Beatson (1880), 5 C. P. D. 109, C. A.

333. Broker—Holding out.]—TOWNSEND *v.* INGLIS, No. 764, *post.*

For full anns., *see* S. C. No. 764, *post.*

334. Clerk—Express authority from firm—Bill drawn to individual partner.]—Two of six partners, who had given a confidential clerk general authority in writing to sign bills & notes on behalf of the firm, directed the clerk to sign four promissory notes, in the name of the firm, payable respectively to one or the other of the two partners, who claimed to be creditors of the aggregate firm, in respect of an excess of capital advanced by them for the purposes of the partnership. The two partners afterwards indorsed the notes to a separate creditor for a private debt of one of the two:—*Held:* although, as between these two partners & the other members of the firm, the notes were unjustifiably created & possessed by the two, yet, in the absence of all fraud or connivance in the transaction by the party to whom the notes were indorsed, the aggregate firm were liable for the amount, & on the firm's bkpcy. the holder of the notes had a right to prove the amount of them against the joint estate.—*Re* ACRAMAN, *Ex p.* BUSHELL (1844), 3 Mont. D. & De G. 615; 3 L. T. O. S. 264; 8 Jur. 937.

335. Consignee—Express authority—Subject to conditions.]—Documents in the form of letters of credit were addressed by defts. to S. & Co., authorising them to draw bills on defts. against shipments. To the documents certain conditions were appended. S. & Co. drew bills upon defts. under the credit so opened without performing the conditions. Pltfs. having notice of the conditions & knowing that they were unfulfilled advanced money on the bills so drawn which defts. refused to accept. In an action for not accepting the bills:—*Held:* if the documents created a contract between pltfs. & defts., that contract was subject to such of the conditions as were not necessarily subsequent to the advance.—UNION BANK OF CANADA *v.* COLE (1877), 47 L. J. Q. B. 100.

Annotation:—**Applied.** Chartered Bank of India, Australia & China *v.* Macfayden (1895), 64 L. J. Q. B. 367.

336. Farm bailiff—Authority to make & receive payments.]—The bailiff of a large farming establishment, through whose hands all payments & receipts take place, has no implied authority to pledge the credit of his employer by drawing & indorsing bills of exchange in the name of the latter. Nor, in absence of all direct evidence of authority, does the nature of the employment of such a bailiff furnish any ground for inferring the existence of such an authority upon slight, or upon any other than distinct, evidence of assent or acquiescence. To fix the principal the evidence should distinctly show that he knew, or had the means of knowing, the acts done in his name.—DAVIDSON *v.* STANLEY (1841), 2 Man. & G. 721; 3 Scott, N. R. 49; 133 E. R. 936.

337. Manager—Entire charge of company's interests abroad.]—A co. which carried on business as importers of tinned ox-tongues & other provisions appointed H., one of the directors, manager of the co. to take entire charge of its interests in South America. H. sailed to South America, & there arranged with L. for the supply of meat to the co., but L. refused to sign the contract unless its performance was guaranteed. S. agreed to guarantee performance of the contract by placing a sum of money to the credit of L. in a bank upon being given a promise to pay signed by H. on behalf of the co. H. signed a promissory note on behalf of the co., & S. deposited the money. Default was made by the co. in carrying out the contract, & the sum deposited by S. became forfeited to L. The note given to S. was dishonoured, & he made a claim against the co. in its winding up in respect thereof:—*Held:* (1) as it was not shown that the giving of the promissory note was necessary for carrying on the business of the co. or was usual in

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due by him to his principal to the payment of the cargo of fish, so far as same would go, & to draw bills upon her for the balance. The agent drew for the whole sum:—*Held:* with respect to that part of the price of the fish which was to be paid in bills, there could be no doubt that the seller of the fish might successfully sue the foreign principal for it, & though with regard to the other part of the price the agent was guilty of a breach of his instructions, yet as the fish was shipped on board the vessel of the principal under the expectation that he was to pay for it & was actually there for his benefit he was liable to pay the seller for it, since he was clearly bound either to do so or to return the article.—BAINE, JOHNSTON & CO. *v.* COSNARD & JANVRIN (1849), 1 Nfld. L. R. 185.—**NFLD.**

331 li. —— *Authority as such—Secret limitations.*]—MESSIER *v.* DAVIGNON (1867), 3 L. C. L. J. 67.—**CAN.**

h. *Commission agent — Trade custom.*]—A commission agent in Scotland drew & indorsed a bill *per pro.* his employer, a worsted spinner in England. A banker, who discounted the bill, raised action for payment against the constituent, averring that it was the general practice of his trade for commission agents, without special mandate, to draw & indorse bills of the purchasers *per pro.* their principal, that the bill was so drawn & indorsed in the exercise of the usual powers, & its proceeds received by the principal, who was well aware not only of the general practice of the trade, but also that his agent exercised the usual powers of commission agent, without objection from him:—*Held:* these averments warranted an issue, whether the commission agent was authorised to draw & indorse the bill *per pro.* defender & whether he was resting owing to pursuer the sum in the bill, or any part thereof, with interest.—ANDERSON *v.* BUCK & HOLMES (1841), 16 Fac. 1024; 3 D. 975.—**SCOT.**

k. *Factor—General authority as such—Similar acts on previous occasions.*]—A factor under a general power of agency having in his own name drawn bills on a purchaser of goods from his principal, which purchaser accepted, & having discounted them with a banker, by indorsing them also in his individual name, & he & purchaser having become bkpt.:—*Held:* although the agent was in the practice of drawing & discounting bills, sometimes in his own name, & at others *per pro.* his principal, who settled with purchaser on the footing of his acceptance, yet, as the principal's name was not on the bills, he was not liable.—TELFORD *v.* JAMES, WOOD & JAMES (1824), 2 Shaw's App. 220.—**SCOT.**

its ordinary course of business, the general authority given to H. was not sufficient to enable him to bind the co. thereby; (2) S.'s claim must fail.—*Re* CUNNINGHAM & CO., LTD., SIMPSON'S CLAIM (1887), 36 Ch. D. 532; 57 L. J. Ch. 169; 58 L. T. 16.

338. —— Authority to sign per pro. for business purposes.]—A., manager in the service of pltfs., insurance brokers, had authority to sign cheques *per pro.* pltfs. for purposes of their business. A. gave deft. in payment of certain racing debts cheques signed by him *per pro.* pltfs.:—*Held:* (1) A. had only authority to draw cheques for purposes of pltfs.' business; (2) deft. must be taken to have had notice that the cheques were signed for purposes outside that business; (3) there was no evidence pltfs. had held out A. as having authority to sign the cheques in question; (4) pltfs. were entitled to recover the amount of the cheques from deft.—MORISON *v.* KEMP (1912), 29 T. L. R. 70.

Annotation:—**Consd.** Morison *v.* London County & Westminster Bank (1913), 108 L. T. 379.

339. —— General authority as such—Secret limitations.]—EDMUNDS *v.* BUSHELL & JONES, No. 349, *post.*

For full anns., *see* S. C. No. 349, *post.*

340. —— Authority as such—Postdated cheque.]—T., a partner in a firm of solrs., drew a cheque for £90 in the firm's name, dated July 20, & delivered it to pltf. on July 13, in exchange for £80, which pltf. paid him in good faith believing it to be for a client:—*Held:* T. had no implied authority to bind the firm, & the cheque must be regarded as equivalent to a seven days' bill.—FORSTER *v.* MACKRETH (1867), L. R. 2 Exch. 163; 36 L. J. Ex. 94; 16 L. T. 23; 15 W. R. 747.

Annotations:—**Refd.** Bull *v.* O'Sullivan (1871), L. R. 6 Q. B. 209; Hutley *v.* Peacock (1913), 30 T. L. R. 42.

341. Traveller—Holding out.]—Pltfs. supplied deft. with goods ordered through A., the traveller of pltfs., & deft. by way of payment accepted a bill drawn by A. upon them, & made payable to his own order. A. absconded having cashed the bill, & the value thereof did not reach pltfs., who sued deft. for the price of the goods. It was proved in support of the plea of payment that A. had on a prior occasion taken payment by a bill drawn in blank & accepted by deft., which pltfs. had afterwards filled up & cashed, & also that pltfs. had written a letter to A., which was shown to deft., in which they intimated a wish to draw upon him for an amount due:—*Held:* neither the previous dealing, nor pltfs.' letter to A., were evidence of an authority to A. to draw a bill in his own favour, & a rule to enter a verdict for deft. must be discharged.—HOGARTH *v.* WHERLEY (1875), L. R. 10 C. P. 630; 44 L. J. C. P. 330; 32 L. T. 800.

Annotations:—**Distd.** Charles *v.* Blackwell (1876), C. P. D. 548. **Refd.** *Re* Heath Parker & Brett (1898), 43 Sol. Jo. 98, C. A.

B. Authority to accept.

342. Agent—Authority to liquidate partnership business.]—Deft., a partner in a firm of A. Bros., agreed with her co-partners that the partnership should be dissolved, & the affairs of the firm liquidated by an agent, who should realise the assets & pay the creditors, & the business carried on by deft. Deft. & the agent opened a joint banking account, & requested the bank to honour drafts signed by either of them. Cheques were drawn on joint account signed by the agent in the names of deft. & himself, & bills were drawn on A. Bros., & accepted by the agent in the names of deft. & himself, & honoured. Deft. knew nothing of these cheques & bills. Pltf. sued as indorsee for value of a bill of exchange drawn on A. Bros., accepted by the agent in the names of himself & deft. & made payable at the bank where the joint account was opened:—*Held:* (1) the agent had no authority to accept the bill in deft.'s name so as to bind her; (2) not being a partner in the firm of A. Bros., he had no authority to accept bills drawn on the firm, & deft. was not liable.—ODELL *v.* CORMACK BROTHERS (1887), 19 Q. B. D. 223.

For full anns., *see* BILLS OF EXCHANGE, PROMISSORY NOTES & NEGOTIABLE INSTRUMENTS.

343. —— General authority to accept given on previous occasion.]—The holder of a bill purporting to be, but not in fact, accepted by the person to whom it is addressed, cannot recover against the apparent acceptor, by proving a fact subsequently discovered, that on a former occasion deft. had given a general authority to the person who accepted in his name to accept bills for him. To make such authority available for such purpose, he must show, either that the authority remained unrevoked at the time of the acceptance, or that he took the bill on the faith of such authority.—CASH *v.* TAYLOR (1830), L. & Welsb. 178; 8 L. J. O. S. K. B. 262.

Annotations:—**Distd.** Llewellyn *v.* Winckworth (1845), 13 M. & W. 598. **Consd.** Hollingham *v.* Head (1858), 4 C. B. N. S. 388. **Mentd.** Morris *v.* Bethell (1869), L. R. 4 C. P. 765.

344. —— Payment of similar acceptances on previous occasions.]—A. drew bills on his aunt B. & signed B.'s name thereto as acceptor: B. paid

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340 i. *Manager—Authority as such.*]—In an action by resps. as indorsers charging appts. as makers of the following note: "Sixty days after date we promise to pay," etc., signed "Manager, O. T. L. Co.":—*Held:* the words "we promise" were not appropriate to a promise by one man with the designation of "Manager, O. T. L. Co.," & the promise must be read according to what it was in fact intended to be, as the promise of the co., & appts. were liable on the note. *Lindus* v. *McIrose*, 2 H. & N. 293; *Alexander* v. *Sizer*, L. R. 4 Exch. 102; *Edmunds* v. *Bushell & Jones*, L. R. 1 Q. B. 97; *Penkivil* v. *Connell*, 5 Exch. 381; *Maclae* v. *Sutherland*, 3 E. & B. 1, reid. — FAIRCHILD & FERGUSON *v.* NOLAN (1892), 21 S. C. R. 484.—**CAN.**

340 ii. —— —— .]—A bill was drawn by the general manager of a friendly society in his individual name upon the secretary of the society individually, which the latter accepted as secretary. The transaction had not been authorised:—*Held:* the bill was not binding on the society.—BROWNING *v.* BRITISH AMERICAN FRIENDLY SOCIETY (1859), 3 L. C. J. 306.—**CAN.**

l. —— *Express authority as to cheques—Promissory note.*]—H. appointed P. manager of his business during his absence, with authority to draw & sign cheques on his current account, whether in credit or otherwise, to indorse cheques, drafts & bills, & to accept bills of exchange. P. drew promissory notes duly signed for moneys advanced by him to the business, & for salary due to him:—*Held:* P. had no authority express or implied to draw promissory notes & H. was not liable thereon.—HAINE *v.* PATTRICK, S. A. L. R. Trans. Prov. Div. & Witwatersrand Local Div. (1917), 110.—**S.AF.**

m. *Mercantile agent—Authority as such.*]—Special authority is required to empower a mercantile agent to draw or indorse bills & notes, but the authority may be implied from circumstances. —PESTONJEE NESSERWANJEE *v.* GOOL MAHOMED SAHIB (1874), 7 Mad. 369.—**IND.**

n. *Station overseer—Authority as such—Previous instances.*]—The situation of an overseer on a sheep station does not necessarily authorise drawing drafts for station purposes, but if on previous occasions drafts so drawn have been honoured the principal will be bound.—FLETCHER *v.* JOULL (1870), 1 V. R. L. 61.—**AUS.**

o. *Wife—Authority for purposes of husband's business.*]—A husband who authorises his wife to sign notes for the purposes of his business & during his absence will not be answerable for a note made to pay off indebtedness due by his son.—BRODEUR *v.* DUBOIS (1916), 51 Que. S. C. 14.—**CAN.**

PART V. SECT. 3, SUB-SECT. 4.—B.

p. *Agent — General authority to draw—Forgery.*]—An agent having a general authority to draw bills, forged an acceptance to a bill drawn within scope of his authority:—*Held:* the forgery was no defence for the principal.—D'ARCY *v.* JENNINGS, B. L. D. & O. 11.—**IR.**

q. *Secretary of friendly society — Authority as such.*]—BROWNING *v.* BRITISH AMERICAN FRIENDLY SOCIETY (1859), 3 L. C. J. 306.—**CAN.**

Sect. 3.—Implied authority: Sub-sect. 4, B. & C.]

some of these bills, in one case after the bill was protested; she had never given authority to A. to sign them for her, & there was evidence that she had expressly denied having done so. A creditor, who was the *bonâ fide* holder of a bill signed by A. for B., filed a claim for recovery of the amount due upon it, & insisted that he was entitled to recover, on the ground that A. had an implied authority from B., who had paid the former bills, in attaching her name to the bill in question:—*Held:* the creditor was not entitled to recovery, or even an inquiry as to whether he was a creditor on the estate.—LEONARD *v.* MATHEWS (1851), 18 L. T. O. S. 83.

345. —— ——.]—The fact that deft. admitted a former bill does not prove he authorised the drawer to accept bills in his name, unless the former bill was accepted by his hand. Even so, a single instance would be no evidence of a general authority.—PHILPOT *v.* STOCK (1860), 2 F. & F. 180.

346. —— —— Forgery.]—The acceptor of a bill set up the defence that the acceptance was a forgery by the drawer. It was proved that when the bill was presented for payment he had without looking at it promised to pay in a short time, & further that he had in fact on previous occasions paid similar bills by the drawer of this bill, to which (as it was supposed) the drawer had written deft.'s acceptance:—*Held:* a sufficient answer to the defence of forgery, for it showed that deft. had adopted the acceptance.—BARBER *v.* GINGELL (1799), 3 Esp. 60.

Annotations:—**Consd.** Jones *v.* Ryde (1814), 5 Taunt. 488. **Distd.** Morris *v.* Bethell (1869), L. R. 5 C. P. 47.

347. —— —— ——.]—The indorsee of a bill of exchange sued the person by whom it purported to be accepted, but such acceptance was forged. Deft. had not authorised or adopted the forged signature, nor had he led pltf. to believe he had adopted it; once before—viz., in the previous year—he had paid to pltf. a bill of the same drawer, which purported to be similarly accepted by him, the acceptance in that case also being forged, but such payment was not in the course of business:—*Held:* deft. not estopped from denying the acceptance to be his.—MORRIS *v.* BETHELL (1869), L. R. 5 C. P. 47; 21 L. T. 330; 18 W. R. 137.

348. —— General authority to accept—Admission as to previous transaction.]—Proof having been given of a general authority by deft. to another to accept bills in his name, an admission by deft. of his liability on another bill accepted in his name by the same party is admissible, not as evidence of a general authority, but as a confirmation of the general authority already proved.—LLEWELLYN (LEWELLYN) *v.* WINCKWORTH (1845), 13 M. & W. 598; 14 L. J. Ex. 329; 153 E. R. 250.

Annotations:—**Distd.** Hollingham *v.* Head (1858), 4 C. B. N. S. 388; Morris *v.* Bethell (1869), L. R. 4 C. P. 765.

349. Manager—General authority as such—Secret limitations.]—A. employed B. to manage his business, & to carry it on in the name of "B. & Co."; the drawing & accepting bills of exchange was incidental to the carrying on of such business, but it was stipulated between them that B. should not draw or accept bills. B. having accepted a bill in the name of "B. & Co.":—*Held:* A. was liable on the bill in the hands of an indorsee who took it without any knowledge of A. & B. or the business.—EDMUNDS (EDMONDS) *v.* BUSHELL & JONES (1865), L. R. 1 Q. B. 97; 4 F. & F. 1044; 35 L. J. Q. B. 20; 30 J. P. 694; 12 Jur. N. S. 332.

Annotations:—**Distd.** *Re* Adansonia Fibre Co., Miles' Claim (1874), 9 Ch. App. 635; Yorkshire Banking Co. *v.* Beatson, (1879) 4 C. P. D. 204; Daun *v.* Simmins (1879), 41 L. T. 783, C. A. **Apld.** Watteau *v.* Fenwick, [1893] 1 Q. B. 346; Nicholls *v.* Knapman (1909), 101 L. T. 746.

350. Trustee for temperance hall—Authority as such.]—In an action by an indorsee against A., B., & C. as acceptors of a bill of exchange, it appeared the bill was drawn on "M. & others, trustees of C. Temperance Hall, Liverpool," & accepted thus: "Accepted M." A., B., & C. with M. & another were the five trustees of a body of persons associated for the purpose of building the Temperance Hall. M. had authority from all the trustees to accept the bill on their behalf:—*Held:* defts. were bound by the acceptance, though it did not show on the face of it that M. intended to accept not individually, but for himself & four others.—JENKINS *v.* MORRIS (1847), 16 M. & W. 877; 9 L. J. O. S. 151; 153 E. R. 1447.

Annotation:—**Consd.** Jones *v.* Jackson (1870), 22 L. T. 828.

C. Authority to indorse.

351. Agent—Authority to discount bill—Secret limitations.]—The holder of a bill of exchange desired A. to get it discounted, but positively refused to indorse it. A. delivered it to B. for the same purpose, informing him to whom it belonged. B., finding he could not dispose of it without indorsing it, was prevailed upon so to do by A.'s telling him he would indemnify him; but the indorsee took it upon the credit of the names on the bill without knowledge of the real owner. The original holder afterwards promised to pay the bill:—*Held:* such promise could not support the action brought against him by the indorsee, it being *nudum pactum;* for as A. was a special agent under a limited authority, he could not bind his principal by any act beyond the scope of such limited authority.—FENN *v.* HARRISON (1790), 3 Term Rep. 757; 100 E. R. 842.

Annotations:—**Distd.** Lyon *v.* Mells (1804), 1 Smith, K. B. 478. **Apld.** Collen *v.* Gardner (1856), 21 Beav. 540. **Reid.** Whitehead *v.* Tuckett (1812), 15 East, 400; *Re* Acraman, *Ex p.* Bushell (1844), 3 Mont. D. & De G. 615; Coleman *v.* Riches (1855), 16 C. B. 104; Brady *v.* Todd (1861), 9 C. B. N. S. 592; Baines *v.* Ewing (1866), 4 H. & C. 511; Baldry *v.* Bates (1885), 52 L. T. 620; Royal Albert Hall Corpn. *v.* Winchilsea (1891), 7 T. L. R. 362, C. A.; Meyer *v.* Richards (1895), 163 U. S. Rep. 385. **Mentd.** Jones *v.* Ryde (1814), 5 Taunt. 488; Smith *v.* Mercer (1815), 6 Taunt. 76; *Re* Lawrance, Mortimore & Schroder (1861), 4 L. T. 184; Udell *v.* Atherton (1861), 7 H. & N. 172; Dumont *v.* Williamson (1867), 17 L. T. 71.

PART V. SECT. 3, SUB-SECT. 4.—C.

r. *Agent — Authority to sign mortgage —Paper "similarly indorsed."*]—By a mtge. reciting that H. B. & Co. were indebted to pltfs. for money lent to them on promissory notes made by B., indorsed by the co. & by deft., deft. covenanted with pltfs. that he or B. or the co. should pay the indebtedness represented by notes or by renewed or substituted notes. For several years B. had been presenting notes for discount purporting to be indorsed by deft. & had always written his name as indorser, as he alleged, with his assent, & gave evidence that on deft. objecting to signing the mtge., as pltfs. would notice the difference in signatures, he signed deft.'s name in his presence, & that deft. acknowledged the mtge. as his act & deed. In an action against deft. under the mtge. & on promissory notes made by B. indorsed by the co. & by deft. the judge told the jury they might infer from the evidence & deft.'s conduct that he consented to his name being used & that as the mtge. contemplated renewals of the notes & there was no evidence from which it might be considered the renewal notes were payment of the mtge., it was clear pltfs. were not paid, & the jury found for pltfs. as regards the mtge. & for deft. as regards the promissory notes. On appeal:—*Held:* (1) there was no ground for disturbing the verdict as regards the mtge.; (2) pltfs. ought to be allowed a new trial as regards the promissory notes, & a distinct direction should be given the jury that in the undoubted absence of any notice to pltfs. of the indorsements not being genuine, they were clearly warranted in accepting paper "similarly indorsed," & deft. should

352. —— Express authority — Accommodation bill.]—A letter written by A. & Co. inclosed a bill of exchange, accepted & specially indorsed to B. & Co., & stated, "We have drawn upon you for £300; against this we remit you inclosed for £300." B. & Co. had absconded when this letter arrived, but had left the following letter with C.: "In our absence we authorise you to open our letters, & for us & in our name to indorse any bills of exchange which may be remitted to us, & to deliver such bills to D. or to negotiate such bills, & deliver the proceeds to D., against any liability he may be under for our account." C. having indorsed the inclosed bill in the name of B. & Co., on the supposed authority contained in the second letter:—*Held:* (1) the second letter gave an authority to indorse those bills only of which B. & Co. were *bonâ fide* holders, & not a bill received upon the terms of the first letter; (2) a subsequent indorsee for value, without notice of the circumstances, could not recover against the acceptor of the bill.—FEARN *v.* FILICA (1844), 7 Man. & G. 513; 8 Scott, N. R. 241; 14 L. J. C. P. 15; 3 L. T. O. S. 180; 135 E. R. 206.

Annotation:—**Refd.** Bank of Bengal *v.* Macleod (1849), 5 Moo. Ind. App. 1.

353. —— Similar acts on previous occasions.]—The declaration in an action on a bill of exchange stated it to have been drawn by Hannah P., accepted by deft., & indorsed by H. P. to pltfs. The drawing & indorsement appeared to be in this form:—"*Per pro.* H. P., J. P." A clerk of pltfs. proved that the drawing & indorsement were in the handwriting of J. P., whom he understood to be the son of a Mrs. P., whom he had never seen, but with whose house the house of his employers had dealings, & that he had seen bills drawn & accepted in the same form as the bill in question, some of which bills had been paid:—*Held:* sufficient proof as against deft. of an authority to indorse.—JONES *v.* TURNOUR (1830), 4 C. & P. 204; L. & Welsb. 318; 8 L. J. O. S. K. B. 173.

354. Clerk—Similar acts on previous occasions.]—Defts.' confidential clerk had been accustomed to draw bills & cheques for them by procuration; & it was proved that, in one instance, he had authority to indorse, & that in two other instances defts. had received money obtained by his indorsing in their name:—*Held:* sufficient evidence to warrant a jury in finding that the clerk had a general authority to indorse.—PRESCOTT *v.* FLINN (1832), 9 Bing. 19; 2 Moo. & S. 18; 1 L. J. C. P. 145; 131 E. R. 521.

Annotation:—**Refd.** *Re* Acraman, *Ex p.* Bushell (1844), 3 Mont. D. & De G. 615.

355. Factor—Usual authority as such.]—Pltfs. through K., whose name appeared on the invoices as their agent, sold goods to defts. Defts. gave K. a cheque in payment payable to pltfs. or order. K., without express authority, indorsed the cheque in pltfs.' name, adding "per K., agent." The bankers paid, & K. failed to account to pltfs. Pltfs. sued defts. for the money & in trover for the cheque:—*Held:* there was evidence that K. had implied authority to indorse the cheque, or that pltfs. had held him out as their agent so as to justify payment on his indorsement.—CHARLES *v.* BLACKWELL (1877), 2 C. P. D. 151; 46 L. J. Q. B. 368; 36 L. T. 195; 25 W. R. 472, C. A.

Annotation:—**Consd.** Bissell *v.* Fox (1884), Cab. & El. 395.

356. Farm bailiff—Authority to make & receive payments.]—DAVIDSON *v.* STANLEY, No. 336, *ante*.

357. Manager—Express authority to indorse per pro. for particular purpose.]—A., manager of the firm of B. & Co., debt collectors, had authority *inter alia* to indorse bills & cheques sent in payment to B. & Co. "*per pro.* B. & Co., A.," for the purpose of paying them into B. & Co.'s banking account. A. took six bills to deft., some being indorsed "B. & Co.," & others "B. & Co. *per pro.*," & asked deft., who knew A. as B. & Co.'s manager, to obtain cash for them for the purpose of paying wages. Deft. obtained from his bank the full face value of the bills & handed it over to A., who misappropriated it. The jury having found A. had no authority to indorse otherwise than *per pro.*, that B. & Co. had not held out A. as having a general authority to indorse or to cash bills, that the bills indorsed *per pro.* were so indorsed for the purpose of defrauding B. & Co., & that deft. was a *bonâ fide* holder for value:—*Held:* (1) as to the bills not indorsed *per pro.*, B. & Co. were entitled to recover; (2) as to the bills indorsed *per pro.*, A. had no authority to negotiate them but only to pay them into B. & Co.'s bank, & B. & Co. were entitled to recover.—GOMPERTZ *v.* COOK (1903), 20 T. L. R. 106.

Annotation:—**Refd.** Morison *v.* London County & Westminster Bank, [1914] 3 K. B. 356, C. A.

358. —— General authority as such—Onus of proof.]—Defts. were trustees under a deed by the provisions of which they were to carry on a business in the name of S. M. They did so & employed S. M. to conduct the business. The indorsement of bills was necessary & incidental to the carrying on of such business. Bills indorsed "S. M." were discounted with persons who were in the habit of discounting for the former firm who assigned their effects to defts. as trustees:—*Held:* (1) the onus of

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not be permitted to object to the indorsements on the renewal notes.—MERCHANT'S BANK *v.* GEORGE BOSTWICK (1878), 28 C. P. 450; *affd.* 3 A. R. 24.—**CAN.**

352 i. —— *Express authority—Accommodation bill.*]—A promissory note made by C. payable to the order of B. & indorsed by B. was intrusted by him to C. for the purpose of being used by C. to retire another note which B. had indorsed for C.'s accommodation. While it was still in C.'s possession C. was pressed by pltf. for a debt due to him & handed him the note, which pltf. received on account of his debt, making no inquiry respecting C.'s title to the note or his authority so to deal with it. In an action on the note against B.:—*Held:* the note was none the less current because C. in fraud of the purpose for which it had been intrusted to him had used it for another purpose, & the wrongful diversion from the purpose for which it had been intrusted to C. could not destroy the apparent title of a *bonâ fide* holder for value, & pltf. was entitled to recover.—CROSS *v.* CURRIE (1880), 43 U. C. R. 599; 5 A. R. 31.—**CAN.**

s. *Commission agent—Trade custom.*]—ANDERSON *v.* BUCK & HOLMES. p. 310 h, *ante*.—**SCOT.**

358 i. *Manager—General authority as such.*]—An agency given in a general manner to manage & administer the personal effects of the principal does not authorise the agent to indorse notes so as to bind the principal for an object foreign to the administration of the effects.—JODOIN *v.* LANTHIER (1878), 31 L. C. J. 111, Q. B.—**CAN.**

358 ii. —— —— *Similar acts on previous occasions.*]—Trustees for creditors employed bkpt. as manager for a coal mine, which he had conveyed to them; he negotiated a bill which bore to be for value in coals of the colliery, but on which the trustees' names did not appear. Bkpt. had been in the practice of accepting, drawing & indorsing bills in his own individual name in relation to the colliery:—*Held:* the trustees were liable.—MURRAY & MACGREGOR *v.* CAMPBELL & CO. (1827), 6 S. 147; 3 Fac. 130.—**SCOT.**

t. *Mercantile agent — Authority as such.*]—PESTONJEE NESSERWANJEE *v.* GOOL MAHOMED SAHIB, p. 311 m, *ante*.—**IND.**

u. *Station-master — Authority to receive & transmit cheques.*]—Pltf. co. instructed one of its station-masters to receive cheques for freight, & forward same to a bank for collection. He indorsed cheques made payable to the co., received for freight, signing the co.'s name, per himself as agent, & received proceeds from deft.:—*Held:* deft. should have obtained an authority from pltf. co. before accepting the agent's indorsations & was liable for the amount of the cheques.—CANADIAN PACIFIC *v.* HOCHELAGA (1908), 5 E. L. R. 567.—**CAN.**

Sect. 3.—*Implied authority: Sub-sect.* 4, *C. D. & E.*]

showing that the indorsements were made on account of the separate business & not on that of the trustees which was the general & ostensible business lay on defts.; (2) in the circumstances defts. were bound by the indorsements.—FURZE *v.* SHARWOOD (1841), 2 Q. B. 388; 2 Gal. & Dav. 116; 11 L. J. Q. B. 119; 6 Jur. 554; 114 E. R. 154.

Annotations: **Distd.** East *v.* Smith (1847), 16 L. J. Q. B. 292; Yorkshire Banking Co. *v.* Beatson, Leeds & County Banking Co. *v.* Beatson (1879), 4 C. P. D. 204; Yorkshire Banking Co. *v.* Beatson (1880), 5 C. P. D. 109, C. A. **Refd.** Nicholls *v.* Knapman (1909), 101 L. T. 746. **Mentd.** Robson *v.* Curlewis (1842), 2 Q. B. 421; King *v.* Bickley (1842), 6 Jur. 582; Miers *v.* Brown (1843), 11 M. & W. 372; Caunt *v.* Thompson (1849), 7 C. B. 400; Paul *v.* Joel (1859), 5 Jur. N. S. 603, Ex. Ch.

359. Manager of bank—Express authority—Bill indorsed after bank stopped payment.]—M., manager of a joint-stock bank, having authority to indorse bills in course of business of the bank, but not otherwise, indorsed a bill of exchange four months after the bank had stopped, professedly "per procuration" for the bank, but without authority from the directors, whose business it was to wind up the affairs of the bank. In an action against the bank upon the bill:—*Held:* (1) an indorsement "per procuration" imported that the indorsement was not the act of the bank, but of a person professing to have special authority so to indorse; (2) it was the duty of a person taking the bill to satisfy himself that the indorser had the authority which he pretended to have; (3) pltf. was not entitled to recover.—ALEXANDER *v.* M'KENZIE (1848), 6 C. B. 766; 18 L. J. C. P. 94; 12 L. T. O. S. 175; 13 Jur. 346; 136 E. R. 1449.

Annotations:—**Expld.** *Re* Sea, Fire & Life Insce., *Ex p.* Greenwood (1854), 18 Jur. 387. **Distd.** Richards *v.* Ruegg (1856), 27 L. T. O. S. 184. **Consd.** Smith *v.* M'Guire (1858), 3 H. & N. 554. **Apld.** Stagg *v.* Elliott (1862), 12 C. B. N. S. 373. **Consd.** Charles *v.* Blackwell (1877), 2 C. P. D. 151, C. A. **Refd.** Grant *v.* Norway (1851), 20 L. J. C. P. 93.

D. Authority to discount.

360. Agent—Express instructions to discount—Secret limitations.]—FENN *v.* HARRISON, No. 351, *ante*.

For full anns., *see* S. C. No. 351, *ante*.

361. Agent to sell—Express authority to draw & transmit.]—Where an agent was authorised to draw bills upon sale of goods for pltfs. at so many months, which bills were to be transmitted to pltfs., & the agent drew bills at a larger credit than that for which he was authorised, &, instead of indorsing & transmitting them to pltfs., got them discounted by deft. & converted them to his own use:—*Held:* proof of these facts alone did not afford sufficient evidence of fraud connected with deft. to give pltfs. a *primâ facie* right to recover the amount of the bills from him as money had & received & make it incumbent on him to show he gave full value for the bills.—DAVIS *v.* WILLIS (1836), 1 Har. & W. 679; *sub nom.* DAVIES *v.* WILLATS, 5 L. J. K. B. 94.

362. Farm bailiff—Instructions to transmit.]—Where B. drew a cheque at his place of residence, a single house, four miles from L., on unstamped paper, dated at L. upon a banker there, & delivered it to his farming bailiff to give to C., in whose favour it was drawn, & the bailiff discounted it with A., a banker at C., 12 miles from L., & five days afterwards the drawee stopped payment, A. not having presented the cheque:—*Held:* the bailiff was not acting within scope of his authority in discounting the cheque, so as to bind his principal.—WATERS *v.* BROGDEN (1827), 1 Y. & J. 457; 148 E. R. 750.

363. Financial agent & secretary—Express authority to discount—Forged bills.]—A secretary & financial agent of a co., having authority to get bills discounted, forged bills & got them discounted. He paid the proceeds into a bank to the account of a firm to which he belonged, & in his character of a member of that firm drew cheques on the account in favour of the co., & it was alleged that, out of the amounts so drawn, he actually made payments for the benefit of the co. The bill-discounter had not negotiated the bills. In the winding-up of the co., the discounter asked for an inquiry what amount of proceeds of the bills had thus reached the co. & asking to claim for the amount when ascertained:—*Held:* (1) an inquiry must be directed what amount of the proceeds of the bills had been applied directly or indirectly for the benefit of the co.; (2) a claim for the amount when ascertained would be good.—*Re* JAPANESE CURTAINS & PATENT FABRIC CO., LTD., *Ex p.* SHOOLBRED (1880), 28 W. R. 339.

E. Authority to fill up and negotiate Blank Instruments.

See, further, BILLS OF EXCHANGE, PROMISSORY NOTES & NEGOTIABLE INSTRUMENTS; ESTOPPEL. For cases in reference to blank transfers, *see* STOCK EXCHANGE.

364. In general.]—*Qu.:* whether the cases as to the liability of a man who signs a blank bill or note or cheque are founded on the doctrine of estoppel, or on a rule of law merchant that an actual authority is thereby conferred on the person in whose hands the instrument is (WILLIAMS, J.).—*Ex p.* SWAN (1860), 30 L. J. C. P. 113.

For full anns., *see* COMPANIES.

365. Agent—Receipt of acceptance blank as to amount—Secret limitations.]—A party giving another his blank acceptance authorises him to fill it up with any sum covered by the stamp & negotiate it, & will be liable thereupon in the hands of a *bonâ fide* holder, notwithstanding any limitation of authority, in point of time or otherwise, as between himself & the party to whom he delivers it. In such case the lapse of time is only evidence of a limitation of authority as between the blank acceptor & the party to whom he delivers it, & does not disprove the authority to negotiate the bill after lapse of an unreasonable time, if, upon the face of the bill, no such lapse of time appears. On a plea of Stat. Limitations, lapse of time from the giving of the blank acceptance will be no evidence, for it will not appear when the bill is filled up, as the Act does not run until then.—MONTAGUE (MOUNTAGUE) *v.* PERKINS (1853), 22 L. J. C. P. 187; 21 L. T. O. S. 185; 17 Jur. 557; 1 W. R. 437; 1 C. L. R. 579.

Annotations:—**Distd.** Carter *v.* White (1882), 20 Ch. D. 225; **Refd.** Hatch *v.* Searles, Stanway's Case, Conway's Case (1854), 2 Sm. & G. 147; Harvey *v.* Cane (1876), 34 L. T. 64; London & South Western Bank *v.* Wentworth (1880), 5 Ex. D. 96.

366. —— ——.]—Giving a blank acceptance is only *primâ facie* evidence of an authority to the person to whom it is given to fill up the bill for the amount to which the stamp extends; & where the holder of a bill takes it with notice of a circumstance of suspicion, he can be in no better situation than

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PART V. SECT. 3, SUB-SECT. 4.—D.

v. *Manager — Express authority for business purposes.*]—N. & Co., managing agents of deft. co., had a general banking account with pltf., & N. & Co. had power to draw, accept, indorse, & negotiate on behalf of deft. co. all cheques, promissory notes, drafts, etc., necessary to enable them to carry on deft. co.'s business. Purporting to act under this power, N. & Co. drew a bill of exchange on deft. co., which was accepted by it, & indorsed by N. & Co. to pltf., who credited the amount to N. & Co.'s general account. N. & Co. personally drew out by cheque the amount without reference to deft. co., & the money was not applied in deft. co.'s business:—*Held:* deft. co. not liable on the bill.—ORIENTAL BANK CORPN. *v.* BAREE TEA CO. (1883), I. L. R. 9 Calc. 880; 13 C. L. R. 412.—**IND.**

the drawer or indorser, who had given no value for the bill.—HATCH *v.* SEARLES, STANWAY'S CASE, CONWAY'S CASE (1856), 2 Sm. & G. 147; 24 L. J. Ch. 22; 24 L. T. O. S. 122; 3 W. R. 49; 65 E. R. 342.

Annotations:—**Consd.** Carter *v.* White (1882), 20 Ch. D. 225. **Refd.** France *v.* Clark (1884), 26 Ch. D. 257, C. A.; Faulks *v.* Atkins (1893), 10 T. L. R. 178.

367. —— —— Notation in margin.]—Deft. signed an acceptance, the amount in the body of which was then left in blank, but in the margin of which were the figures £14 0*s.* 6*d.*, that being the sum for which deft. desired to accept. He then handed the acceptance to the drawer, who filled in the blank in the body of the bill for £164 0*s.* 6*d.*, & fraudulently altered the figures in the margin to that sum. The bill was then indorsed by drawer to pltfs., who took it *bonâ fide* for value for the larger amount:—*Held:* deft. was liable on the bill for such larger amount, on the grounds (1) the marginal figures were not an essential part of a bill of exchange; (2) one who gave an acceptance in blank held out the person he intrusted therewith as having authority to fill in the bill as he pleased within the limits of the stamp; (3) no alteration (even if fraudulent & unauthorised) of the marginal figures could vitiate the bill as a bill for the full amount inserted in the body when it reached the hands of a holder for value who was unaware that the marginal figures had been improperly altered.—GARRARD *v.* LEWIS (1882), 10 Q. B. D. 30; 47 L. T. 408; 31 W. R. 475.

Annotations:—**Apld.** Herdman *v.* Wheeler, [1902] 1 K. B. 361. **Consd.** Macmillan *v.* London Joint Stock Bank, [1917] 2 K. B. 439, C. A.

368. —— Receipt of accommodation bill blank as to drawer's name.]—In pursuance of an agreement made between pltfs. & A. for accommodation in relation to acceptances, pltfs. handed A. certain bills, which they had accepted, in which the dates & drawers' names were left blank, which under the agreement were to be provided by A. The bills were to be used by A. to recoup himself for advances to pltfs., & for the purpose of raising money for pltfs. A. used the bills for his own purposes, & having filled in the dates, handed them to deft., L., who, in good faith, inserted the drawers' names. In an action against L. for conversion:—*Held:* (1) although L. took the bills in good faith, he was liable, as he took bills with only an acceptor's name but no drawer's name, & so ran the risk that A. had no authority, or only a limited authority, to allow a drawer's name to be put in the instrument; (2) A. had no authority to insert a drawer's name in the circumstances, as the only authority he had to insert a name was that of a drawer who would take the bill for pltfs.' benefit; (3) insertion of the words in the agreement, "drawers to be provided by A.," did not extend the limited authority actually given.—WATKIN *v.* LAMB (1901), 85 L. T. 483; 17 T. L. R. 777.

369. —— Receipt of blank bill of exchange.] —The drawer of an unstamped bill of exchange drawn abroad, but filled up in England by his agent contrary to his intentions, is liable to an innocent holder for value.—BARKER *v.* STERNE (1854), 9 Exch. 684; 23 L. J. Ex. 201; 23 L. T. O. S. 95; 2 W. R. 418; 2 C. L. R. 1020.

370. —— Receipt of blank promissory note for delivery to particular parties—Secret limitations as to amount.]—Where deft. in an action brought by payees of a promissory note against him, as maker of the note, had signed his name on a blank stamped piece of paper, & intrusted the paper to A. with authority to fill it up as a promissory note for a certain sum payable to pltfs. & deliver it to pltfs. as security for an advance to be made by them, & A. had fraudulently filled the paper up as a promissory note for a larger amount & obtained by means of it an advance of that amount from pltfs., who had no notice of fraud:—*Held:* (1) deft. was estopped from denying validity of the note as between himself & pltfs.; (2) the action was maintainable against him for the full amount of the note.—LLOYDS BANK, LTD. *v.* COOKE, [1907] 1 K. B. 794; 76 L. J. K. B. 666; 96 L. T. 715; 23 T. L. R. 429, C. A.

Annotations:—**Distd.** Smith *v.* Prosser, [1907] 2 K. B. 735, C. A. **Consd.** Macmillan *v.* London Joint Stock Bank, [1917] 2 K. B. 439, C. A. **Mentd.** Talbot *v.* Von Boris, [1911] 1 K. B. 854, C. A.; Shaw *v.* Holland, [1913] 2 K. B. 15, C. A.

371. —— Receipt of blank promissory notes for custody—To be used only in accordance with subsequent instructions.]—P., in S. Africa, being about to leave for England, in anticipation of the possibility of funds being suddenly required during his absence, signed his name on two blank unstamped pieces of paper, which were lithographed forms of promissory notes, & handed them to T. with instructions that they should be retained in the custody of his attorneys until P. should, by telegram or letter from England, give instructions for their issue as promissory notes & as to the amounts for which they should be filled up. After P. had left S. Africa T., without waiting for instructions from P. (which were in fact never given) & in fraud of P., filled in the blanks in the documents so as to make them appear to be promissory notes for considerable sums & sold them to pltf., who took them honestly & in good faith, & without notice of fraud, & gave full value for them. For the purpose of suing in England, the notes were stamped as foreign bills:—*Held:* (1) as P. handed the notes to

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PART V. SECT. 3, SUB-SECT. 4.—E.

370 i. *Agent—Receipt of blank promissory note for delivery to particular parties—Secret limitations as to use.*]—Deft. wishing to purchase shares in a co. about to be formed, signed & handed over to C. a blank promissory note on the understanding that it would be filled in with the name of the co. as payee & used only in payment of the shares. The co. was never formed, & C. filled in his own name as payee & indorsed the note to pltf. for value:—*Held:* deft. not liable on the note. *Smith* v. *Prosser*, [1907] 2 K. B. 735, folld.; *Lloyd's Bank, Ltd.* v. *Cooke*, [1907] 1 K. B. 794, distd.—CAMPBELL *v.* BOURQUE (1914), 28 W. L. R. 148.—**CAN.**

371 i. —— *Receipt of blank promissory notes for custody—To be used only in accordance with subsequent instructions.*]—Resp. signed some blank forms of bills & sent them to his agent, T., at Port Arthur, where he owned house property. Resp.'s instructions were that in the event of money being required for repairs to the houses, T. was to notify him, & if resp. could not send T. the money, then the latter was to fill up & use the forms for the purpose of raising the necessary sum. T. filled up one of the notes, & issued it for his own private purposes. In an action by the holder of the note, the ct. found on the evidence that the circumstance on which alone T. was authorised to fill up the note never arose, that T.'s act was unauthorised & fraudulent as against resp. On appeal:—*Held:* (1) the judgment of the ct. affirming this finding was not so clearly wrong as to justify the Supreme Ct. in reversing it; (2) Bills of Exchange Act, R. S. O., 1906, c. 119, ss. 31, 32, did not protect holders in due course where the agent who issued the note was a mere custodian only; (3) T.'s act was not capable of ratification in so far as he was not acting for resp.'s benefit or on resp.'s behalf in fraudulently negotiating the instrument. *Smith* v. *Prosser*, [1907] 2 K. B. 735; *Johnston* v. *O'Neill*, [1911] A. C. 552; *Gray* v. *Turnbull* (1870), L. R. 2 H. L. Sc. & Div. 53; *The P. Calanet* v. *Glamorgan S.S. Co.*, [1893] A. C. 207; *Lloyd's Bank* v. *Cooke*, [1907] 1 K. B. 794; *Farquharson* v. *King*, [1902] A. C. 325, at 336; *Rimmer* v. *Webster*, [1902] 2 Ch. 163, at 169; *Scholfield* v. *Londesborough*, [1896] A. C. 514, at 521; *Colonial Bank of Australasia* v. *Marshall*, [1906] A. C. 559, at 565; *Imperial Bank of Canada* v. *Bank of Hamilton*, [1903] A. C. 49, at 54; *Cundy* v. *Lindsay*, 3 App. Cas. 459, at 463; *Keighly Maxsted* v. *Durant*, [1901] A. C. 240; *Nash* v. *De Freville*, [1900] 2 Q. B. 72; *London Joint Stock Bank* v. *Simmons*, [1892] A. C. 201; *Baxendale* v. *Bennett* (1878), 3 Q. B. D. 525; *Lloyd's* v. *Grace Smith*, [1911] 2 K. B. 489; *New South Wales Taxation Comrs.* v. *Palmer*, [1907] A. C. 179, cited.—RAY *v.* WILLSON (1911), 45 S. C. R. 401.—**CAN.**

Sect. 3.—Implied authority: Sub-sect. 4, E. F. G. & H.; sub-sect. 5.]

T. as custodian only, & not with the intention that they should be issued as negotiable instruments, he was not estopped from denying the validity of the notes as between himself & pltf.; (2) the action was not maintainable.—SMITH *v.* PROSSER, [1907] 2 K. B. 735; 77 L. J. K. B. 71; 97 L. T. 155; 23 T. L. R. 597; 51 Sol. Jo. 551, C. A.

Annotations:—**Consd.** Macmillan *v.* London Joint Stock Bank, [1917] 2 K. B. 439, C. A. **Refd.** Morison *v.* London County & Westminster Bank (1913), 108 L. T. 379.

372. Clerk—Receipt of cheques blank as to payee & amount.]—Pltf., a stockbroker, employed a confidential clerk. On settling days on the Stock Exchange it was pltf.'s practice to sign a number of blank cheques & to hand them over to the clerk, giving him authority to fill in the names of persons with whom pltf. did business & whose accounts he wished to settle, & the amount of the sums due to him. The authority of the clerk was absolutely limited to this. The clerk had entered into betting transactions with defts. & had incurred debts. To pay these debts he wrongfully filled in seven of the blank cheques with the name of defts., who took them in good faith, & certain sums which he owed them from time to time. Pltf. sued defts. for damages for conversion of the cheques & their proceeds:—*Held:* pltf. was entitled to recover.—PAINE *v.* BEVAN & BEVAN (1914), 110 L. T. 933; 30 T. L. R. 395, C. A.

373. Pledgor agent of pledgee—Receipt of delivery warrant blank as to quantity.]—A harbour board furnished owners of goods lying at their warehouses with delivery order forms, which were printed & had three columns, the first headed "Ship," the second "New numbers," & the third "Quantity in words at length." At the bottom of the sheet was a ruled line for signature. In Aug., 1898, N. presented a form to pltfs. for signature referring to one hogshead of tobacco out of 18 pledged by him with pltfs. In column 2 he placed the number 246, but the third was left blank for N. to fill up, as he told pltf.'s manager he did not know whether it was a tierce or hogshead. After the signature had been placed on the form he drew a line after the number 246 & wrote in the figures 263, & in the third column put the words "eighteen hogsheads." In an action against the harbour board for conversion of the 17 hogsheads:—*Held:* (1) pltfs. could not recover, as N. was their agent to complete the form; (2) they were responsible for his fraudulent act.—UNION CREDIT BANK, LTD., & DAVIES *v.* MERSEY DOCKS & HARBOUR BOARD, UNION CREDIT BANK, LTD., & DAVIES *v.* MERSEY DOCKS & HARBOUR BOARD & NORTH & SOUTH WALES BANK, LTD., [1899] 2 Q. B. 205; 68 L. J. Q. B. 842; 81 L. T. 44; 4 Com. Cas. 227.

F. Authority to give Notice of Dishonour.

374. Tradesman's foreman—Authority as such.]—Deft. drew a bill on A., who accepted it; deft. indorsed it to B., & B. to C. The bill falling due on a Sunday, C.'s son presented it on the Saturday to A., who refused to pay it. C.'s son went & told B. & his foreman; on the same day the foreman told deft. of the dishonour; on the Sunday B. also told him of it:—*Held:* there was no sufficient notice, there being no sufficient intimation from an authorised person that deft. would be looked to for payment. *Semble:* a tradesman's foreman is not to be presumed to have authority to give a notice of dishonour for his master.—EAST *v.* SMITH (1847), 4 Dowl. & L. 744; 16 L. J. Q. B. 292; 9 L. T. O. S. 130; 11 Jur. 412.

Annotation:—**Refd.** Caunt *v.* Thompson (1849), 7 C. B. 400.

G. Authority to receive Notice of Dishonour.

See BILLS OF EXCHANGE, PROMISSORY NOTES & NEGOTIABLE INSTRUMENTS.

H. Authority to waive Notice of Dishonour.

See cases, *infra.*

SUB-SECT. 5.—AUTHORITY TO BORROW.

375. Agent—Authority to collect rents & repair houses.]—Deft.'s agent, to whom the collection of rent & keeping of houses, among them pltf.'s house, in repair, was intrusted by deft., landlord thereof, had ordered sewerage work to be done, & had authorised pltf. to pay for beer for the workmen, promising that the amount so paid should be deducted out of the rent. No rent was due at the time of the authority thus given. Pltf. had paid for the beer. In an action for wrongful distress, on the ground that the promised allowance had not been made:—*Held:* (1) the agent had no authority to borrow money, or to get others to pay for beer; (2) it might have been different if there had been any rent due.—CROOKE *v.* WILSON, No. 610, *post.*

376. —— Authority to draw on banking account.]—An agent has no right, without authority of his principal, to overdraw a banking account. If it appears the agent has done so with his principal's knowledge the jury will be warranted in inferring from this that the agent had in fact requisite authority.—POTT *v.* BEVAN (1844), 1 Car. & Kir. 335.

PART V. SECT. 3, SUB-SECT. 4.—H.

w. *Agent — Authority to draw.*] — A special authority to draw a bill ceases on its acceptance; if the drawer is discharged by want of notice of dishonour, the agent cannot, without further express authority, revive the liability by waiving the legal discharge. —MCGHIE *v.* GILBERT (1848), 1 All. 235.—**CAN.**

PART V. SECT. 3, SUB-SECT. 5.

376 i. *Agent—Authority to open banking account.*]—A native lady, possessing an estate in a district in which she did not reside, opened an account with a banker, through her son, as agent, to provide for the punctual payment of Govt. revenue & to meet current expenses:—*Held:* such course of dealing did not of itself warrant the banker in advancing to the son, as accredited agent of his mother, large sums of money on bonds.—MISRAIN *v.* GOPAL LALL DOSS (1868), 10 W. R. 376.—**IND.**

376 ii. —— *Banking expressly as agent for unnamed principal.*]—An account kept in a bank in the name of C., as the agent expressly of S., was closed, & a new account opened in the name simply of "C. agent"; C. was in reality (although unknown to the bank) the agent not only of S., but of various other parties, all of whose funds were indiscriminately deposited & withdrawn in the name of "C. agent":—*Held:* S. liable for an overdrawn balance due by "C. agent," in the absence of any special evidence to establish indebtedness to the bank by S. personally.—THE METROPOLITAN BANK *v.* SYMES (1876), 21 L. C. J. 201.—**CAN.**

x. —— *Authority to manage estate.*]—M. as administrator was managing the real estates of S.; he was also one of the exors. & trustees of E. There was a sum due for taxes on some property of the S. estate, & M. paid same with money of the E. estate, directing the agent of that estate to charge the amount to the S. estate; M. did not enter the amount in his accounts with the S. estate as a loan, but on the contrary in the accounts which he rendered took credit for the amount as a payment by himself. M. had no authority to borrow money:—*Held:* the E. estate could not hold the S. estate liable for the sum & was not entitled to a lien therefor on the property in respect of which the taxes were payable.—EWART *v.* STEVEN (1871), 18 Gr. 35.—**CAN.**

y. —— *Holding out.*]—To prove a course of dealing which would estop a principal from denying an authority which, in fact, he never conferred on his agent & which could not legally be implied from the nature of the agency, it is not sufficient to show that pltf. may possibly have been misled, but pltf. must show that the course of dealing was of such nature that it could reasonably have been expected to mislead, & that it did in fact mislead him.

Deft. employed C. as his runner, &

377. —— Donee of voluntary bond.]—A person giving a voluntary bond to an agent that money may be raised upon it is bound by his agent's acts, although he may receive no part of the money raised; but an assignee of the bond can only hold it as security for the actual amount advanced by him upon it.—TOTTENHAM *v.* GREEN (1863), 1 New Rep. 466; 32 L. J. Ch. 201.

378. —— Instruction to raise money on collateral security.]—A., having understood from B., his solr., that C. was willing to lend money, by letter authorised B. to obtain a sum on the security of a mtge. & bond, & executed a bond & a transfer of the mtge., referred to in the bond, to C. to secure a less sum. B., having money of C.'s in his hands, gave C. the bond, & represented to him that he had passed the money to A. C. made no inquiry as to B.'s authority, & B. told A. that the loan was not to be obtained, & the bond was rescinded. B. absconded, & C., having recovered against A. at law, was compelled to refund in equity.

The bond expressly refers to another security which was intended to be the principal & the bond the collateral security. The authority to receive money on the bond was only a limited authority, & deft. was not justified in lending his money without being satisfied as to B.'s authority. But the case is stronger, for the money was not paid to B. at the time it was an existing debt of the latter to deft. Deft. clearly is not entitled to the benefit of the bond (LORD LANGDALE, M.R.).—YOUNG *v.* GUY (1844), 8 Beav. 147; 3 L. T. O. S. 260; 50 E. R. 58.

379. —— —— Limitation as to amount.]—Applt., mtgee. of land, having deposited title-deeds with a bank for an advance, & being desirous of obtaining a larger advance, gave, on two consecutive days, two written authorities to his son to receive the deeds on payment of the amount due to the bank. The first authority was in general terms, but in the second authority he specified the bank which had agreed to make the larger loan & directed payment to be made to that bank. The son, by means of the first authority, obtained possession of the deeds, & procured from a different bank than the one specified in the second authority a loan largely in excess of the amount authorised by his father, paid his father the additional amount he was instructed to raise, & kept the balance. As the bank pressed for payment, the son forged a transfer of mtge. from his father to himself, & having obtained an assignment of the equity of redemption, sold the land to resp. societies, who paid off the bank:—*Held:* applt. having intrusted his son with control of the deeds for the purpose of raising money, could only redeem the property upon payment of the whole amount advanced by resps. for paying off the bank.—BROCKLESBY *v.* TEMPERANCE BUILDING SOCIETY, [1895] A. C. 173; 64 L. J. Ch. 433; 72 L. T. 477; 59 J. P. 676; 43 W. R. 606; 11 T. L. R. 297; 11 R. 159, H. L.

Annotations:—**Distd.** Farquharson *v.* King, [1902] A. C. 325; Jared *v.* Walke (1902), 18 T. L. R. 569. **Expld.** Rimmer *v.* Webster, [1902] 2 Ch. 163. **Apld.** Lloyd's Bank *v.* Cooke, [1907] 1 K. B. 794; Fry *v.* Smellie, [1912] 3 K. B. 282, C. A. **Refd.** Lloyd's Bank *v.* Bullock, [1896] 2 Ch. 192; Herdman *v.* Wheeler, [1902] 1 K. B. 361; Thurstan *v.* Nottingham Permanent Bldg. Soc., [1902] 1 Ch. 1, C. A.; Lloyd *v.* Grace, Smith, [1911] 2 K. B. 489, C. A.

380. —— —— ——.]—If a co. intrusts its agent with a certificate of debenture stock issued by itself, it will be assumed in favour of a purchaser or mtgee., in whose name the certificate is made out & who has no notice to the contrary, that the agent had authority to deal with it to the full extent of its face value. A co., desirous of borrowing £3,000, requested its brokers to negotiate the loan. The brokers applied to G. to advance not £3,000 but £6,000, which he agreed to do upon having a debenture-stock certificate for £8,000 deposited at his bank by way of security. The certificate was made out in the name of G. and stated he was the registered holder of £8,000 debenture-stock in the co.; & G. advanced the £6,000 & paid same to the brokers, but only £3,000 of this sum was handed to the co.:—*Held:* (1) G. was not bound to inquire what were the relations between the brokers & the co., but had a right to assume the brokers had authority from the co. to deal with the certificate; (2) he was as regards the co., & other debenture-holders, in the position of a *bonâ fide* purchaser for value to the extent of his advance, & entitled in the liquidation of the co. to prove for the full amount of £8,000 until he obtained dividends not exceeding the amount due in respect of his loan of £6,000.—ROBINSON *v.* MONTGOMERYSHIRE BREWERY CO., LTD., [1896] 2 Ch. 841; 65 L. J. Ch. 915; 3 Mans. 279.

381. —— —— ——.]—Pltfs., registered holders of shares in a limited co., gave to an agent authority to obtain for them a loan of not less than £250 upon the shares, & handed to him the documents of title to the shares, including a blank transfer, signed by them. The agent handed the documents of title, including the blank transfer, to deft. as security for a loan of £100 from deft. to himself, deft. taking them in good faith & without express notice or knowledge of the limitation of the agent's authority. The agent not having repaid the sum borrowed by him, deft. caused the blank transfer to be filled up with his own name, & by means of that & the other documents of title obtained the certificates for the shares. Pltfs. brought an action against deft. for return of the shares:—*Held:* (1) the mere fact that the transfer was in blank & not filled up with the name of any transferee did not put deft., on taking it, upon his inquiry as to the extent of the agent's authority; (2) as pltfs. had intrusted the agent, with intention he should deal with them on their behalf, with documents which apparently represented the entire interest in the shares, they were estopped from setting up limitation of the agent's authority as against deft., who had no notice of the limitation.—FRY & MASON *v.* SMELLIE & TAYLOR, [1912] 3 K. B. 282; 81 L. J. K. B. 1003; 106 L. T. 404, C. A.

Annotation:—**Refd.** Fuller *v.* Glyn, Mills, Currie (1913), 83 L. J. K. B. 764.

382. —— Power of attorney.]—BRYANT, POWIS & BRYANT *v.* LA BANQUE DU PEUPLE, SAME *v.* QUEBEC BANK, No. 281, *ante*.

For full anns., *see* S. C. No. 281, *ante*.

383. —— ——.]—DAVY *v.* WALLER, No. 240, *ante*.

384. Donee of blank acceptance—Authority as such.]—A blank acceptance is not in itself evidence

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C. employed G. as his sub-agent, but neither C. nor G. had any authority to borrow money on behalf of deft. G. borrowed money in his own name from pltfs., who knew that G. was a sub-agent, but they debited C. with amounts borrowed. Deft. on two occasions paid to the credit of pltfs. sums thus borrowed:—*Held:* the fact of deft. having so paid such sums did not amount to such course of dealing as would estop him from denying that G. was authorised to borrow money in his name & on his behalf.—STRACHAN *v.* BLACKBEARD & SON (1910), A. D. 282.—S.AF.

379 i. ——*Instruction to raise money on collateral security—Limitation as to amount.*]—Pltf. authorised V. to procure for her a loan of $200 on certain property & for that purpose handed to him her certificate of title & a blank transfer. V. arranged a loan of $500 with deft. in fraud of pltf., to whom he did not hand any money at all:—*Held:* (1) V. had acted in excess of & not in absence of authority; (2) no fraud being alleged against deft., pltf. was not entitled to a declaration that deft. had no mtge. or lien on the lands, or to an order for delivery to her of the transfer & certificate of title.—MAHAN *v.* MANNESS (1917), 2 W. W. R. 629.—CAN.

Sect. 3.—*Implied authority: Sub-sects.* 5 & 6, *A.*]

of authority to the party to whom it is given to borrow the amount on the credit & behalf of the acceptor, even although it is admitted on the part of the acceptor that the money to be raised on the security of the bill was to be lent to the acceptor, & however the latter may be liable on the bill at the suit of an honest holder, the question on a claim for money lent by him to the acceptor will be, whether the money was received by any one as authorised agent of the acceptor in that behalf.—KING *v.* FORBES, No. 199, *ante*.

385. Donee of share certificate & blank transfer—Authority as such.]—W. & H. were co-adventurers in speculative transactions. W. signed a blank transfer of certain shares of his, & this, with the certificate of such shares, H. intrusted to pltf., who obtained a personal advance to himself as borrower of £700 for the use of H. from the M. Co. H. not repaying the loan, the co. inserted pltf.'s name in the blank transfer so as to yield it a transfer from W. to pltf. W. wrote to the co. to put a stop to their registering the transfer. Subsequently the shares fell very much in value & were ultimately transferred to pltf. In an action by pltf. against W.:—*Held:* whether or not W. authorised H. to raise the loan was immaterial, as he had handed him the documents for the purpose of raising a loan, & was estopped from denying the co.'s authority to deal with the blank transfer as they did, & was liable to pltf. in damages, the measure being the difference in value of the shares when pltf.'s name was inserted in the transfer & when pltf. ultimately acquired them.—HOOPER *v.* HERTS, [1906] 1 Ch. 549; 75 L. J. Ch. 253; 94 L. T. 324; 54 W. R. 350; 50 Sol. Jo. 271; 13 Mans. 85, C. A.

386. Manager of business—Authority to draw on banking account for business purposes—Principal benefited by loan.]—A., defts.' manager, had power to draw on defts.' account for purposes of the business, but not to overdraw or borrow money on defts.' account. He borrowed money from B., stating he wanted it to pay the wages of defts.' men, & gave B. a cheque signed by him by procuration for defts.; A. had overdrawn defts.' account & wanted the money to replace what he had abstracted. He paid B.'s money into defts.' account & used it to pay defts.' men:—*Held:* (1) as by Bills of Exchange Act, 1882 (c. 61), s. 25, B. had notice of A.'s limited authority & defts. could only be bound if A. acted within his authority, an action on the cheque must fail; (2) as the money had found its way into defts.' hands & had been used for defts.' benefit, it was money received for the use of defts.; (3) although defts. did not know A. had borrowed it, B. was entitled to recover.—REID *v.* RIGBY & Co., [1894] 2 Q. B. 40; 63 L. J. Q. B. 451; 10 T. L. R. 418; 10 R. 280.

Annotations:—**Consd.** Jacobs *v.* Morris, [1901] 1 Ch. 261; Reversion Fund & Insce. *v.* Maison Cosway, [1913] 1 K. B. 364, C. A. **Mentd.** Burdett *v.* Horne (1911), 27 T. L. R. 402.

387. —— —— ——.]—Defts., a country firm, opened a branch of their business in London, & appointed an agent to carry it on. Defts. had an account with a London bank in their name, upon which the agent was entitled to draw. The agent had no authority to borrow money, but, the banking account being low, he borrowed a sum of money of pltf., who was told that it was for the use of the firm & believed that the agent had authority to borrow. The money was paid into the bank, & part of it was used by the agent in the payment of obligations of defts. Subsequently defts. supplied further sums of money, which would have been sufficient to meet their obligations but for the agent's drawing on his own account sums to which he was not entitled. The agent meanwhile borrowed other sums of money of pltf., portions of which were alleged to have been used in discharging further obligations of defts. In an action to recover the amount so borrowed:—*Held:* to the extent to which the money borrowed should be found on inquiry to have been in fact applied in paying the legal debts of defts., pltf. was entitled in equity to stand in the same position as if that amount had been originally borrowed by them.—BANNATYNE *v.* MACIVER, [1906] 1 K. B. 103; 75 L. J. K. B. 120; 94 L. T. 150; 54 W. R. 293, C. A.

Annotation:—**Expld.** Reversion Fund & Insce. *v.* Maison Cosway, [1913] 1 K. B. 364, C. A.

388. —— **Expressly forbidden to borrow—Knowledge of lender—Principal benefited by loan.**]—M., manager of deft. co., was by the terms of his appointment prohibited from borrowing money on behalf of the co. Pltfs., on application of M., advanced to him a sum of money intending it as a loan to the co. When they advanced the money pltfs. knew M. had no authority to pledge the credit of the co. M. applied the money in paying existing legal debts of the co., which had no knowledge of the transaction & did not subsequently ratify it:—*Held:* pltfs. entitled to recover the money from the co. as money had & received by the

386 i. *Manager of business—Authority to draw on banking account for business purposes—Principal not benefited by loan.*]—The manager of a co. being instructed to effect sales, & to deposit proceeds in a bank, & to draw cheques against same for running expenses only, accepted a draft for a loan of money from which the co. derived no benefit:—*Held:* the manager not authorised to borrow & the co. not liable.—LA GRANDA HERMANOS Y CA. *v.* AMERICAN ELECTRICAL & NOVELTY MANUFACTURING CO. (1906), 29 Que. S. C. 444.—**CAN.**

386 ii. —— *Authority as such—Principal not benefited by loan.*]—Sub-agents accepted two bills drawn upon them by the manager of a business in anticipation of the freight of a steamer belonging to the principal; the bills were discounted by the manager & retired at maturity by the sub-agents. In an action by the sub-agents against the principal for the amount due to them in respect of the above transaction:—*Held:* defenders must be assoilzied in respect that pursuers had failed to prove (1) that the bills were granted by the manager under the terms of his appointment; (2) that the manager had, subsequent to the appointment, received authority to borrow money; & (3) that the proceeds of the discount of the bills had been applied for the behoof of the principal.—ROSS, SKOLFIELD & CO. *v.* STATE LINE S.S. Co. (1875), 13 Sc. L. R. 78; 3 R. (Ct. of Sess.) 134.—**SCOT.**

386 iii. —— —— *Principal benefited by loan.*]—An agent invested with all the general powers of agents managing a mercantile business, borrowed on the credit of his employers a sum of money for which he granted a bill of exchange blank in name of the drawer, accepted by him *per pro.* his employers, & antedated six months prior to date of loan; he used the money to reduce a deficit in his principals' bank account. In a suspension of a charge to pay same brought by the principals:—*Held:* in the absence of express powers to borrow, a general agent representing a firm had no implied powers of so extensive a character, & charge suspended.—SINCLAIR, MOORHEAD & CO. *v.* WALLACE & Co. (1880), 17 Sc. L. R. 604; 7 R. 874.—**SCOT.**

386 iv. —— —— *Holding out—Custom.*]—By an agreement between C. & T. & defts., P. & S., C. agreed to sell, & T., P., & S., to purchase, a half-share in the lands, plantation, & estate belonging to C. The agreement provided that C. was to conduct & manage all matters & affairs of the estates, but nothing was said as to its being done in his own name or in that of the partners of any firm. Money to carry on the business was provided by means of bills drawn by the local manager upon C. in same manner as if he (C.) had been the sole owner, defts. being fully aware of this & finding the funds. Pltfs. sued to recover a balance due in respect of moneys alleged to have been advanced on the tea to be manufactured on the security of tea invoices & bills of lading. The terms on which the required advances were to be made were arranged by an agreement between C. & pltfs., who were under the belief that C. was proprietor & not merely manager:—*Held:* the transaction would have been according to usage if C. had been the sole owner of the estate, & defts., by allowing him to manage ostensibly as sole owner, clothed him with every authority incidental to a sole owner in that business, & were liable.—SPINK *v.* MORAN (1873), 21 W. R. 161.—**IND.**

co. to pltfs.' use.—REVERSION FUND & INSURANCE CO. *v.* MAISON COSWAY, LTD., [1913] 1 K. B. 364; 82 L. J. K. B. 512; 108 L. T. 87; 57 Sol. Jo. 144; 20 Mans. 194, C. A.

389. Manager of mine—Authority as such.]—One of several co-adventurers in a mine has not, as such, any authority to pledge the credit of the general body for money borrowed for the purposes of the concern. And the fact of his having the general management of the mine makes no difference, in the absence of circumstances from which implied authority for that purpose can be inferred. —RICKETTS *v.* BENNETT & FIELD (1847), 4 C. B. 686; 17 L. J. C. P. 17; 9 L. T. O. S. 267; 11 Jur. 1062; 136 E. R. 678.

Annotations:—**Expld.** Yorkshire Ry. Wagon Co. *v.* Maclure (1881), 19 Ch. D. 478. **Refd.** *Re* German Mining Co. (1854), 2 Eq. Rep. 983.

390. —— Necessity.]—The resident manager appointed by the directors of a mining co. to manage the mine has not implied authority from the shareholders of the co. to borrow money on their credit, in order to pay the arrears of wages due to the labourers in the mine, who have obtained warrants of distress upon the materials belonging to the mine for the satisfaction of such arrears, or in any other case of necessity, however pressing There is no authority in our law for the proposition that every owner who appoints an agent for the management of his property must be taken to have given him authority to borrow money in cases of absolute necessity. The principle is confined to the cases of the master of a ship & of the acceptor of a bill of exchange for the honour of the drawer (PARKE, B.).—HAWTAYNE *v.* BOURNE (1841), 7 M. & W. 595; 10 L. J. Ex. 224; 5 Jur. 118; 151 E. R. 905.

Annotations:—**Consd.** Pott *v.* Bevan (1844), 1 Car. & Kir. 335; Pott *v.* Eyton (1846), 3 C. B. 32; Ricketts *v.* Bennett (1847), 4 C. B. 686; Cox *v.* Midland Counties Ry. Co. (1849), 3 Exch. 268; Brettel *v.* Williams, Aykroyd & Price (1849), 4 Exch. 623. **Consd. & Expld.** *Re* German Mining Co., *Ex p.* Chippendale (1854), 4 De G. M. & G. 19; Yorkshire Ry. Wagon Co. *v.* Maclure (1881), 19 Ch. D. 478. **Consd.** *Re* Cunningham, Simpson's Claim (1887), 36 Ch. D. 532; Gwilliam *v.* Twist, [1895] 2 Q. B. 84, C. A.; Jacobs *v.* Morris, [1902] 1 Ch. 816, C. A.

391. Master of ship—Authority as such.]—B., the master of a ship, being on a foreign station, was intrusted by A. with a sum of money to complete a purchase, which afterwards went off. B. expended part of the money in purchases of merchandise on behalf of the owners of the ship, & part in repairs. In order to reimburse A., B. drew a bill upon the owners for the amount deposited with him, & sent it to A., with a bill of lading, by way of collateral security. The bill of exchange, upon being presented for acceptance by A., was dishonoured & the bill of lading repudiated by the owners of the ship, it being alleged that B. had cash & merchandise enough on board to bring home the ship & a cargo without borrowing money:—*Held:* (1) defts., the owners, had had the benefit of pltf.'s money, though upon an unauthorised contract; (2) pltf. was entitled to recover.—ASHMALL *v.* WOOD (1858), 30 L. T. O. S. 20; 3 Jur. N. S. 232; 5 W. R. 397.

392. ——Necessity.]—HAWTAYNE *v.* BOURNE, No. 390, *ante*.

For full anns., *see* S. C. No. 390, *ante*.

SUB-SECT. 6.—AUTHORITY TO CONTRACT, VARY CONTRACTS, RECEIVE TENDER, ETC.

A. In General.

393. Agent contracting ostensibly as such—Before agency accepted by him.]—An ostensible agent who produces a written & signed offer of agency purporting to have been duly & effectually accepted by him, though such acceptance has not, in fact, been communicated to the principal, can contract within scope of the agency with third parties without notice so as to bind his ostensible principal.—*Re* CONSORT DEEP LEVEL GOLD MINES, LTD., *Ex p.* STARK, No. 178, *ante*.

For full anns., *see* S. C. No. 178, *ante*.

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391 i. *Master of ship—Authority as such.*]—A charterparty stipulated that a sum should be advanced for the ship's disbursements by the charterer's agents to account of freight, but the agents intimated to their principal that they would only make the advance on receiving a bond from the master, which condition was acceded to by the charterer:—*Held:* the agents were entitled, notwithstanding the stipulation of the charterparty, to recover from the owner an advance made by them for the ship upon the master's obligation to repay the amount.—BENN & Co. *v.* PORRET & SEALY (1868), 40 Sc. Jur. 278; 6 Macph. (Ct. of Sess.) 577.—**SCOT.**

a. *Partner — Authority to obtain an indorser.*]—One partner authorised the other to obtain an indorser to raise money:—*Held:* if express authority were required, this empowered the partner to mtge. all the stock-in-trade of the firm to secure such indorser.—PATERSON *v.* MAUGHAN (1876), 39 U. C. R. 371.—**CAN.**

b. *Treasurer of municipality—Authority as such.*]—S., treasurer of the county of M. & agent of the G. Bank, had his office for both purposes in the same building. The council had no account with the bank, & did not direct S. where to keep his funds as treasurer, & he had always received enough to meet all disbursements for the county. He did, however, open an account with the bank, & having misapplied the moneys of the council, overdrew that account, without the knowledge or authority of the bank, for the purpose of paying debts due by the county. S. having absconded, the bank sued the council for the amount thus overdrawn, as money paid to their use:—*Held:* no portion of it could be recovered.—GORE BANK *v.* COUNTY OF MIDDLESEX (1859), 16 U. C. R. 595.—**CAN.**

PART V. SECT. 3, SUB-SECT. 6.—A.

393 i. *Agent contracting ostensibly as such—Holding out.*]—Pltf. made a contract with F., as agent of deft., who knowingly permitted F. so to deal with the public as to lead pltf. to infer that F. had authority to make contracts binding on deft.:—*Held:* this was insufficient to constitute an estoppel.—GIBERSON *v.* TORONTO CONSTRUCTION Co. (1910), 40 N. B. R. 309; 9 E. L. R. 535.—**CAN.**

393 ii. —— —— .]—The right of a third party against the principal on the contract of his agent, though made in excess of the agent's actual authority, was nevertheless enforced where the evidence showed that the contracting party had been led into an honest belief in the existence of the authority to the extent apparent to him.—RAM PERTAB *v.* MARSHALL (1898), I. L. R. 26 Calc. 701; 3 C. W. N. 313.—**IND.**

c. *Agent contracting for building work—Holding out.*]—Prior to the date of a contract for the construction of stone foundations on four lots of land the principal entered into a building loan agreement in respect of each of the four lots. Each agreement provided, *inter alia*, that the principal would forthwith proceed to erect a frame building with stone foundation on the lot named. These agreements were signed by the principal personally. Subsequently four several applications for loans on the several lots were made. These applications were signed by the agent in the principal's name, & the principal acted upon them & recognised the loans made pursuant thereto. During the progress of work the principal came with the agent & saw the work proceeding, but made no objection to it, & they went frequently to the loan co.'s office together & gave directions as to the buildings:—*Held:* the agent's authority to enter into the contract on behalf of his principal was sufficiently established by the foregoing facts.—GILLIES *v.* GIBSON (1908), 17 M. R. 479.—**CAN.**

d. *Agent accepting goods as of specified quality — Authority to see barrels filled.*]—Defts. contracted to sell to pltfs. 6,000 gallons of rock oil. Pltfs. sent the barrels to defts., who sent their clerk to see them filled. The oil delivered was not "rock oil":—*Held:* pltfs. were not bound to accept the oil, as defts.' clerk was pltfs.' agent only to see the oil barrelled.—EDGAR *v.* CANADIAN OIL Co. (1864), 23 U. C. R. 333.—**CAN.**

e. —— *Authority to select.*]—Where deft. purchased from pltf. a quantity of futtocks to be of a certain size or sizes set forth in a written contract between them, & further agreed to send a man to superintend the

Sect. 3.—Implied authority: Sub-sect. 6, A.]

394. Agent making irrevocable offer—Express authority itself irrevocable.]—If an agent is authorised to make an irrevocable offer to a third party on behalf of his principal & the agent's authority is coupled with an interest so as to be irrevocable against him, the offer when made is irrevocable against the third party.—*Re* CONSORT DEEP LEVEL GOLD MINES, LTD., *Ex p.* STARK, No. 178, *ante.*

For full anns., *see* S. C. No. 178, *ante.*

395. Advertising agent contracting for magazine proprietors—Holding out.]—Pltf., an advertising agent, arranged with S., who conducted the advertising business of certain magazines belonging to defts., for insertion of a certain advertisement in defts.' magazine for 12 months. Subsequently defts. refused to insert the advertisement on the ground that they disapproved of it:—*Held:* (1) defts. were bound by the contract made by S., as he had been held out to the public as having a limited authority to treat for defts.; (2) the measure of damages was not the actual loss pltf. had sustained under his contract with the original advertiser, since S., though he knew of the contract, did not know of its terms, but a reasonable sum.—VICKERS *v.* CHURCH EXTENSION ASSOCN. (1888), 4 T. L. R. 674.

396. Agent chartering ship—Authority to manage business & make similar contracts subject usually to special instructions.]—Where a person permits another to act as his general agent, he is bound by a contract made by the agent, although the latter declares himself as acting "by procuration" & has received special instructions which he exceeds.

Deft., who formerly carried on the business of a corn merchant at Limerick, came to reside in London, & left his brother M. to conduct his business in Limerick. Deft.'s name remained over the door. For the space of 3 years M. purchased large quantities of oats, & chartered numerous ships on account of deft. On these occasions deft. usually sent him special instructions. In the year 1858, a ship in the port of Limerick being about to proceed to Q. for a cargo of timber, M. chartered her to carry on her return from Q. a cargo of oats to London. He signed the charterparty "*per procuration.*" In an action against deft. for not loading a cargo pursuant to the charterparty:—*Held:* (1) it was properly left to the jury to say whether deft. had allowed M. to act as his general agent; (2) if so, he was liable although M. might have exceeded his authority. — SMITH *v.* M'GUIRE (1858), 3 H. & N. 554; 1 F. & F. 199; 27 L. J. Ex. 465; 31 L. T. O. S. 248; 6 W. R. 726; 157 E. R. 589.

Annotations:—**Refd.** Cornish *v.* Abington (1859), 28 L. J. Ex. 262; Stagg *v.* Elliott (1862), 12 C. B. N. S. 373; The Fanny, The Mathilda (1883), 48 L. T. 771, C. A. **Mentd.** Aitken Lilburn *v.* Ernsthausen, [1894] 1 Q. B. 773, C. A.

397. Agent arranging terms—Authority to settle dispute—Secret limitations.]—A dispute having arisen between pltf. & defts. as to whether or not certain granite, which had been prepared by the former for a work which was in course of construction by the latter, was according to contract, getting out of the futtocks, agreeing to receive everything marked off for her by the man she would select, but, on pltf. tendering a quantity which were of inferior size & quality to those set out in the contract, she refused to accept, & pltf. brought an action:—*Held:* reversing the judgment of the ct. below, the man sent to mark off the futtocks had no power to bind deft. by marking off futtocks that were of an inferior size & quality to those stipulated in the contract.—VANFELSON *v.* MANN (1865), 16 L. C. R. 243.—**CAN.**

397 i. *Agent arranging terms—Authority to collect.*]—GUENOT *v.* GIRARDOT (1902), 1 O. W. R. 638.—**CAN.**

l. Agent contracting for towing—Authority to superintend towing of vessels.]—Steamships brought by deft. from Glasgow to run on the Upper Lakes having to be cut in two to be taken through the St. Lawrence Canals, an arrangement was made by B. (the person who was to manage the vessels) with D. S. & W. Co., that the co. should furnish tugs at specified rates per hour. The terms were contained in a letter which, after specifying the rates per hour for the tugs, & when the time was to begin, stated pltfs. should "furnish the main towing hawser free of charge & send D. to superintend the towing & transportation of the vessels, & to use his best endeavours successfully to complete same." D. arranged with the owners of the tugs at certain rates:—*Held:* D. had authority to make the contract with pltfs. & defts. having had the benefit of the work done, should pay therefor.—CANADIAN PACIFIC RY. CO. *v.* NEELON, CANADIAN PACIFIC RY. CO. *v.* HELLIWELL, THE ATHABASCA (1888), Cass. Dig. 2nd ed. 522.—**CAN.**

g. Agent contracting for future delivery of wheat—Authority to buy.]—Pltf. claimed that he agreed with deft. co.'s agent to sell it his wheat crop at 1 cent per bushel over market price. He delivered this wheat to its elevators a few days later:—*Held:* the agent had no authority to contract for future delivery, & pltf. had merely stored his wheat in deft. co.'s elevator.—SLY *v.* WESTERN CANADA FLOUR MILLS CO. (1908), 9 W. L. R. 581.—**CAN.**

h. Agent contracting to pay compensation for loss of easement—Authority to sell.]—In order to make a vendor liable upon an agreement to make compensation for the loss of a quasi-easement made by vendor's agent for sale with a purchaser, it must be shown that the vendor authorised the agent to make such agreement or held him out as having authority to make it.—HAYES *v.* GODDARD (1915), 31 W. L. R. 424.—**CAN.**

k. Agent contracting that third party should not bid—Authority to bid at auction.]—When a principal merely authorises an agent to bid at an auction, he is not liable for an agreement entered into by the agent with a third party pledging him to pay to such party a certain sum in consideration that he should abstain from bidding.—ESHAN CHUNDER SINGH *v.* SHAMA CHURN BHUTTO (1866), 2 Ind. Jur. N. S. 87; 6 W. R. P. C. 57; 11 Moo. I. A. 7.—**IND.**

l. Agent filling in blank guarantee bond otherwise than as authorised.]—A. received a blank sheet of paper with a sixpenny stamp upon it from his son with the request to sign across the stamp. He did so on the understanding that his son was to fill in simply a guarantee for £500. The son filled in the guarantee for £500 & added an obligation to pay certain premiums of insurance upon his life of which his father knew nothing:—*Held:* A. having given his son no authority to fill in this obligation, was not bound to pay the premiums.—WYLIE & LOCHHEAD, LTD. *v.* HORNSBY (1889), 26 Sc. L. R. 618.—**SCOT.**

m. Agent giving option to cancel order—Authority to obtain orders.]—Pltf. employed R. to obtain signed orders for goods on a printed form, which bore thereon the statement that "no conditions, representations, or promises" were authorised except such as were printed "hereon." Deft. signed an order, & simultaneously R. signed & handed deft. a document stating that deft. might cancel the order before a named date:—*Held:* deft. might cancel the order as arranged by R. although the order had been ratified by pltf.—HOUSE *v.* WHITELOCK (1911), 13 C. L. R. 334.—**AUS.**

n. Agent making unusual contract—Authority to manage business.]—An agent to manage & conduct a business generally cannot bind his principal by an unusual contract not strictly relating to the conduct of the business, unless he has express or implied authority therefor. The fact that a third party dealt in good faith with the agent is not sufficient to bind the principal.—MUDAREE LALL *v.* GILMORE (1868), 3 Agra, 196.—**IND.**

o. Agent making advertising contract—Authority to manage business.]—T., manager of deft.'s hotel at B., a summer resort, under agreement to pay 15 per cent. of the gross receipts to deft. & halve the profits, employed pltfs., an advertising co., to puff the hotel. The correspondence between T. & deft. showed that plenty of advertising was necessary & that the cost of it was an "outside expense" falling on the receipts from the business:—*Held:* T. had implied authority to pledge deft.'s credit for advertising. *Lane* v. *Jackson* (1855), 20 Beav. 535; *Meer Usd-Oollah* v. *Mussumat Beeby Imaman* (1836), 1 Moo. Ind. App. 19, 44; *Whitehead* v. *Tuckett* (1812), 15 East, 400, 409; *Watteau* v. *Fenwick*, [1893] 1 Q. B. 346; *Dann* v. *Simmons* (1879), 41 L. T. 783, cited.—KASTOR ADVERTISING CO. *v.* COLEMAN (1905), 11 O. L. R. 262; 6 O. W. R. 791.—**CAN.**

p. —— ——.]—Applt., a tailor, left B. to take care temporarily of his place of business & to attend to his customers. B., purporting to act on applt.'s behalf, entered into a contract with resps. for advertising applt.'s business for the period of one year:—*Held:* B. had no express authority to enter into a contract, as he was not held out as having such authority & was not applt.'s general agent.—RICHARDSON *v.* CENTRAL NEWS AGENCY, LTD. (1915), S. A. L. R.—**S.AF.**

pltf. wrote to defts., "I have seen E., & he has consented to see you on the subject of the granite, I have authorised him to do so, & if possible come to some amicable arrangement in the matter." E. having agreed with defts. they should have the granite for £50, the contract price being £121 16s. 11d. :—*Held:* it was not competent to pltf. afterwards to repudiate the act of E., on the ground that he had given him secret instructions not to settle for less than £100.—TRICKETT *v.* TOMLINSON (1863), 13 C. B. N. S. 663; 1 New Rep. 273; 7 L. T. 678; 143 E. R. 263.

398. Agent completing contract otherwise than as agreed on—Authority to take delivery & pay price on certain conditions.]—Pltf. & deft. having corresponded in writing for the sale by pltf. to deft. of a mare, but having reached no *consensus*, deft. sent his son to meet pltf. & fetch away & pay for the mare, on receipt of a warranty that she was quiet in harness, the limitation of authority being known to pltf. The son fetched her away without making payment or receiving the warranty, & rode her eighteen miles to deft.'s, where she arrived unsound in the legs & was kept two days before return:—*Held:* (1) the son had no authority to accept the mare without the warranty; (2) the deft. keeping her two days after her arrival in unsound condition was not an adoption of the son's act.—JORDAN *v.* NORTON (1838), 4 M. & W. 155; 1 Horn & H. 234; 7 L. J. Ex. 281; 150 E. R. 1382.

Architect authorising additions to or variations from plans.]—*See* BUILDING CONTRACTS, ENGINEERS & ARCHITECTS.

398 i. *Agent completing contract otherwise than as agreed upon—Authority to subscribe for shares.*]—T., on the understanding that a local board would be formed, of which he was to be a director, signed a power of attorney authorising the manager of an insurance co. to subscribe for shares for him. The manager caused an entry to be made in the co.'s books, debiting T. with the full value of the shares, but the local board was not formed:—*Held:* T. was not a shareholder, as the authority which he gave to the manager was to be acted upon only in a certain event which had not been fulfilled. *Morton's Case* (1873), L. R. 16 Eq. 104, cited.—*Re* STANDARD FIRE INSURANCE CO., TURNER'S CASE, 7 O. R. 448; *see also*, 12 A. R. 486; 12 S. C. R. 644.—**CAN.**

q. *Agent varying terms of contract—Authority to take contract to third party.*]—An agent who takes a contract written out by his principal to a third party & as a result of conversations alters a term in it, alleging authority so to do, does not thereby bind his principal if there was in fact no authority to vary the written contract, the agent in such case not having, like a broker, general power to enter into a contract.—HOLLAND CHINA TRADING CO. *v.* TONG TAI TINN (1907), 2 Hong Kong, 54.—**HONG KONG.**

r. *Agent varying date for delivery of goods—Authority to buy.*]—Pltf., a cattle owner, agreed in writing to sell O., deft.'s agent, cattle, delivery on or before a named date. Pltf. & O. agreed to vary the date for delivery, & a fresh date was indorsed on the original agreement. The cattle were not delivered until after the date so changed, & deft. refused acceptance. In an action to recover damages for refusal to take delivery:—*Held:* O. had no actual or apparent authority to vary the written contract by substituting a later date for delivery.—BACON *v.* BURCELL (1914), 19 C. L. R. 241.—**AUS.**

s. ——— *Authority for delivery on specified date.*]—A principal instructed his agent to enter into a contract for delivery of cotton at the end of Kartik, but the agent entered into a contract for delivery by the middle of that month:—*Held:* the agent exceeded his authority in such manner as to exempt the principal from liability.—ARLAPA NAYAK *v.* NARSI KESHAVJI & CO. (1871), 8 Bom. A. C. 19.—**IND.**

t. *Agent varying time for payment—Authority to collect.*]—Defts. purchased goods of pltfs., giving promissory notes for balance of the price. R., pltfs.' collection agent called on defts. in reference to one of the notes which was overdue, & agreed on pltfs.' behalf to "carry defts. along until the fall" in consideration of their agreeing to give mtges. on their land if they were unable to pay what was due at the fall. R. had authority to make arrangements & get security & upon receiving same to give extensions, & the account had been handed to him to get the money, or do the best he could:—*Held:* (1) R. was acting within his authority in extending the time; (2) the agreement to give a mtge. on the homestead before the application for patent was null & void under Dominion Lands Act, 1908, s. 31, & pltfs. were not bound by the extension.—SAWYER-MASSEY CO. *v.* DAGG (1911), 4 Sask. L. R. 228; 18 W. L. R. 612.—**CAN.**

u. *Agent varying bill of lading—Usual authority of carrier's agent.*]—Defts.' agent at W. received seed for carriage to Liverpool, & issued to pltf. two bills of lading. Pltf. then applied to defts.' agent at T. to have the destination changed to London, & he cancelled the bills of lading for Liverpool, issued fresh ones for London, & notified this to defts.' general agent at N.Y. Owing to a mistake on the part of defts., the consignment went to Liverpool:—*Held:* the agent at T. had authority to change the destination & grant the new bills of lading. *Ashley* v. *Harrison* (1793), 1 Esp. 48; *Gee* v. *L. & Y. Ry. Co.* (1860), 6 H. & N. 211; *Hales* v. *L. & N. W. Ry. Co.* (1863), 4 B. & S. 66; *Collard* v. *S. E. Ry. Co.* (1861), 7 H. & N. 79; *Borries* v. *Hutchinson* (1865), 18 C. B. N. S. 445; *Simmons* v. *S. E. Ry. Co.* (1861), 7 Jur. N. S. 849; *The Parana* (1877), 2 P. D. 118; *Simpson* v. *L. & N. W. Ry. Co.* (1876), 1 Q. B. D. 277; *Wilson* v. *L. & Y. Ry. Co.* (1861), 9 C. B. N. S. 641; *Horne* v. *Midland Ry. Co.* (1873), L. R. 8 C. P. 131; *Davis* v. *Garrett* (1830), 6 Bing. 716, cited.—MONTEITH *v.* MERCHANTS' DISPATCH & TRANSPORTATION CO. (1884), 9 A. R. 282; 1 O. R. 47.—**CAN.**

v. ——— *General authority of railway company's agent.*]—Resps. entered into a verbal agreement with appits. through their general agent for the carriage of oil from L. to H., the oil to be carried in covered cars with as quick despatch as possible. Afterwards, owing to a difference in the gauge on appits.' railway between L. & S., the agreement was varied, & it was agreed that the oil should be carried from L. to S. in open cars, taking same from L. in the evening so as not to expose the oil to the sun's heat, & that the oil should be transhipped into covered cars at S. The shipping notes & receipts said nothing about covered cars or the freight or mode of carriage, but on the backs of each of them was indorsed a condition that oil would in no circumstances be carried save "at owner's risk." The oil was delayed on the way & exposed to the sun, & in consequence resps. suffered great loss & sought to recover compensation:—*Held:* (1) the conditions indorsed on the shipping notes & receipts could only be applied to qualify the liability of appits. conditional upon their carrying the oil in accordance with the essential terms of the contract, upon the faith of which alone they were given the oil to carry; (2) oral evidence of the verbal agreement was admissible, such evidence not being in contradiction of anything in the shipping notes & receipts; (3) resps. could not be affected by any private instructions to the agent not to enter into the particular contract; (4) appits. were liable.—GRAND TRUNK RY. CO. & FITZGERALD (1881), 5 S. C. R. 204; 28 U. C. R. 587.—**CAN.**

w. *Agent waiving condition—General authority.*]—Subsequent waiver, by an authorised agent, may invalidate a previously written letter forbidding a tradesman to execute orders, except on express personal instructions.—NASH *v.* MUSKERRY (LORD) (1896), 30 I. L. T. Jo. 37.—**IR.**

x. ——— *Authority to estimate loss.*]—A policy of insurance against fire provided that pltf. should deliver within fifteen days after the fire an account of the loss, & that waiver of any condition of the policy was to be clearly expressed in writing signed by the co.'s manager. A fire having occurred, pltf. did not deliver an account of his loss, &, in support of his contention that the condition had been waived by the co., relied on the acts & statements of J., who had been sent by the co. to report, & who had induced pltf. to delay sending in the necessary proofs of loss:—*Held:* J. had no authority to extend the time limit, as he was merely appointed to make inquiries, investigate, & report to his employers what in his view was the loss sustained.—ATLAS ASSURANCE CO. & BROWNELL (1899), 29 S. C. R. 537.—**CAN.**

y. ——— ———.]—If a fire insurance adjuster has apparent authority to insist for the co. upon compliance with conditions, it is also within scope of that apparent authority to dispense with their performance.—MARGESON *v.* COMMERCIAL UNION ASSURANCE CO., LTD. (1899), 29 S. C. R. 601.—**CAN.**

z. *Agent appointed under statute.*]—The Govt. of Canada under 32 & 33 Vict. c. 7, s. 6, entered into a contract for binding. On the expiry of the contract a letter was written by the Queen's Printer by direction of the Secretary of State, stating that pending future arrangements all the binding, work of the Govt. would be given to W. Work was given to other binders, & W. claimed damages in respect thereof:—*Held:* the letter was not written on behalf of the Crown or of the Govt., & in so far as the Queen's Printer purported to enter into a contract he not only exceeded his authority, but violated the provisions of the above stat.—R. *v.* WOODBURN (1898), 29 S. C. R. 112.—**CAN.**

a. *Agent of Government.*]—Pltf. sued for specific performance of an agreement made between pltf. & C., a Govt. superintendent. The agreement failed to comply with a resolution

Sect. 3.—Implied authority: Sub-sect. 6, A.]

399. Broker omitting conditions of purchase from bought note—Authority to complete contract.]—A., having a quantity of wool to dispose of, placed a sample of it at his broker's for sale; B., having examined the sample at the broker's office, purchased from A., in the broker's presence, part of the wool at an agreed price, it being stipulated by B. that the wool was to be delivered in good dry condition. On the same day the broker sent to A. a sold note of the contract, which however omitted mention of the stipulation, & no note was sent to B.:—*Held:* the broker was not authorised to make the contract set forth in the sold note, omitting the condition.—PITTS *v.* BECKETT (1845), 13 M. & W. 743; 14 L. J. Ex. 358; 153 E. R. 312.

Annotation:—Reld. Sievewright *v.* Archibald 1851), 17 Q. B. 103.

400. Broker varying terms of payment—Authority to buy on advertised conditions.]—A., a merchant at Liverpool, circulated catalogues of certain goods to be sold by auction, subject to the following condition amongst others:—"Payment to be made on delivery of bills of parcels, by good bills on London to the satisfaction of the sellers, not exceeding 3 months' date, to be made equal to cash in 4 months." B., a broker at Liverpool, sent a catalogue to C., a merchant in London, who in return gave him directions to buy certain lots, which B. bought accordingly. Before the sale began the auctioneer stated that payment by known buyers was to be on the usual credit, 2 & 2 months. B., as a known buyer, received the goods without giving bills, forwarded them to C. in London, with an invoice, stating that payment was to be equal to cash at 4 months; & a few days afterwards B. drew on C. for the amount, at 4 months from the day of the sale, which bill C. accepted & paid at maturity. Within 2 months from the sale B. failed, never having given bills to A. for the price of the goods, & A. finding that C. was B.'s principal, sued him for the value:—*Held:* he could not recover, as C. would naturally be induced by A.'s catalogue to suppose that B. had given bills for the goods at the time of delivery, & accepted B.'s draft under a mistake occasioned by A.

The broker B. had not any authority from C. to make a contract for goods to be paid for at 2 & 2 months, & consequently C. was not bound by it (PARKE, J.).—HORSFALL *v.* FAUNTLEROY (1830), 10 B. & C. 755; L. & Welsb. 340; 5 Man. & Ry. K. B. 653; 8 L. J. O. S. K. B. 259; 109 E. R. 630.

401. Charterer's agent undertaking intermediate voyage—Authority to vary charter.]—Deft. chartered a vessel for a voyage from London to B., at which port she was addressed to A. & Co., deft.'s agents there; & by another charterparty of same date, it was agreed the ship should, after discharging her cargo at B., take in a homeward cargo, for which deft. agreed to pay freight, as to one half the cargo at £3 per ton, & as to the rest at the current rate of freight when the ship should be loading. In this latter charterparty, there was also a stipulation that the master of the vessel (a part owner) & A. & Co. were at liberty to make such alterations in the charterparty as they might mutually think proper, without prejudice to that agreement. Soon after arrival of the ship at B., the master & A. & Co. entered into a written agreement (which was indorsed on the second charterparty) that the ship might proceed to A. with Govt. coals & stores (her outward cargo) & return to B. with all possible despatch, without prejudice to the charterparty. She sailed to A. & there discharged her cargo, & returned to B. The owners received a large sum as freight for this voyage to A.:—*Held:* (1) deft. was bound by the alteration made in the charterparty as to land allotment. Deft. pleaded that C. had no authority to enter into the contract, & that he was an agent with a special limited authority, known to pltf.:—*Held:* pltf. could not succeed unless he showed the authority had been strictly complied with. An act of a Govt. officer does not bind the Govt. unless strictly in compliance with his authority.—RUNDLE *v.* SECRETARY OF STATE (1864), 2 Hyde, 25, 36.—**IND.**

b. *Broker's clerk signing bought & sold notes — Previous instances.*]—A broker who three times within three years delivers bought & sold notes to his client, signed by one of his employees for him, thereby gives reasonable cause for the belief that such employee is his agent for that purpose, & is liable upon an irregular & false bought & sold note signed in same manner.—BOLTON *v.* MACDOUGALL (1911), 20 Que. K. B. 544.—**CAN.**

c. *Debtor signing release on behalf of creditor—Authority by telegram.*]—To a claim on an account stated deft. pleaded release by deed. Deft. executed an assignment for the benefit of creditors, of whom pltf. was one. Deft. was authorised by telegram to sign the deed for him. With knowledge of the assignment pltf. continued to supply deft. with goods. Pltf. subsequently wrote expressing his confidence that deft. would protect him. The deed, which deft. relied on as a release, was dated Oct., 1881, & in 1885 deft. wrote expressing the hope to pay pltf. in full:—*Held:* the execution of the deed by deft. on pltf.'s behalf was without sufficient authority, & pltf. was not bound by the release therein, & never having ratified or adopted it, was not estopped from denying he had executed it. *Geere* v. *Mare* (1863), 2 H. & C. 339; *McKewan* v. *Sanderson* (1873), L. R. 15 Eq. 229, at p. 234, refd.—LAWRENCE *v.* ANDERSON (1890), 17 S. C. R. 349.—**CAN.**

d. *General freight agent contracting to increase employees' salaries—Authority as such.*]—The general freight agent of a Govt.-owned railway has no implied authority from his position as such to bind the Crown by a promise to give an increase of salary to an employee.—ROBINSON *v.* R. (1905), 25 C. L. T. 143; 9 Ex. C. R. 448.—**CAN.**

e. *Independent contractor contracting with workman—Holding out.*]—Pltf., a workman, was engaged by contractors for construction of a railway. The railway company acted as bankers for the contractors, & paid the wages of the workmen, cost of transport, etc.:—*Held:* the co. were the real principals, & they had given pltf. reasonable cause for believing that the contractors were their agents, & the co. were liable for a breach of the contract.—LAPOINTE *v.* CANADIAN PACIFIC RY. CO. (1883), 7 L. N. 29 C. C.—**CAN.**

f. *Logging superintendent contracting for indefinite time—Authority to contract for specified time.*]—The general manager of a lumber co. gave written instructions to a logging superintendent to make contracts for the season of 1912, but the superintendent contracted with pltf. for about three years. Pltf. worked under the contract for three & one-half months, when the co. discharged him. In an action for damages for being denied the right to complete his contract:—*Held:* the instructions received by the superintendent from the general manager did not authorise the contract made with pltf.—HEDICAN *v.* CROW'S NEST PASS LUMBER CO., LTD. (1913), 19 B. C. R. 416; 28 W. L. R. 37.—**CAN.**

g. *Manager promising commission on sale of land—Authority as such.*]—The general manager of a co. sold land of the co. through a broker to whom he promised a commission:—*Held:* the general manager had no authority to promise a commission. *Bolton Partners* v. *Lambert* (1889), 41 Ch. D. 295, C. A., distd.—MITCHELL *v.* ONEHUNGA SAWMILL CO., LTD. (1889), 8 L. R. 289.—**N.Z.**

h. *Manager of syndicate contracting not in open market.*]—A. was a member of a syndicate formed to buy & sell shares as a speculation. The syndicate bought & sold from & to other assocns., of which A. was not a member, but some of his associates were members:—*Held:* such dealings were not necessarily beyond the authority of the manager, which authority, in the circumstances, was not limited to operations in the open market.—LAUGHTON *v.* GRIFFIN, [1895] A. C. 104, P. C.

k. *Mine-owner's agent varying method of sampling—Authority to watch smelting.*]—At a smelter a mine-owner's representative to watch the weighing & sampling of ores, so that the mine-owner may be satisfied as to the correctness of the weight & sampling, has no authority to consent to a method of sampling not allowed by the smelting contract.—LE ROI CO., NO. 2, LTD. *v.* NORTHPORT SMELTING & REFINING CO., LTD., & LE ROI MINING CO., LTD. (1903), 2 M. M. C. 59; 10 B. C. R. 138.—**CAN.**

l. *Mortgagee's agent—Usual authority as such.*]—A power of sale having arisen under mtge., W., mtgee.'s agent, wrote to mtgor. threatening a sale, but at a meeting with mtgor. W. agreed to do nothing for one month:—*Held:* W., as general agent, could give time even after default by mtgor. *Albert* v. *Grosvenor Investment Co.* (1867), L. R. 3 Q. B. 123, folld.—MASONIC HALL CO., LTD. *v.* HARDWICK, DENN & HUDSON, 1 J. R. 93.—**N.Z.**

by A. & Co. permitting the voyage to A., which was within scope of the authority given to them by the stipulation above mentioned; (2) he was bound to pay the charter rate of £3 per ton for half the cargo, although that exceeded the current rate of freight at ti ne of loading, & although the alteration might be prejudicial to his interests.—WIGGINS *v.* JOHNSTON (1845), 14 M. & W. 609; 153 E. R. 619.

402. Charterer's agent substituting one voyage for another—Authority to see ship loaded.]—An agent at a foreign port to whom a ship is addressed for loading under a charterparty, has no implied authority to vary the contract by substituting another & a distant port of loading, or a different quality or description of cargo.—SICKENS *v.* IRVING (1859), 7 C. B. N. S. 165; 29 L. J. C. P. 25; 6 Jur. N. S. 200; 141 E. R. 778.

For full anns., *see* SHIPPING & NAVIGATION.

403. Consignee varying master of ship's instructions.]—Defts. chartered pltf.'s ship for the purpose of proceeding to L. & C. An order having been made forbidding vessels to go there, the consignee of the cargo directed the master to dispose of the cargo in a certain manner, whereby the ship was delayed for 75 days. On a claim for demurrage:—*Held:* the consignee had no authority from defts. to vary the contract.—STRINGER *v.* GIMMELL (1843), 1 L. T. O. S. 259.

404. Clerk binding principal to execute orders—Authority to obtain orders to be executed or not at option of principal.]—The fact of a principal's allowing an agent to obtain orders for him which he may or may not execute, as he thinks fit—this being well known to the person giving the orders—does not afford any evidence from which the inference of fact can reasonably be drawn that the principal holds out the agent either as having authority to bind him by contracts or as representing that he, the principal, will execute the orders brought to him by the agent.

Defts., a firm of stockbrokers, had in their employ a clerk, to whom they allowed commission upon orders introduced by him to them & accepted by them, but who was not authorised himself to accept orders on their behalf. On three occasions pltf. gave orders to the clerk for purchase of shares by defts. on pltf.'s behalf, which orders were transmitted by the clerk to defts., who executed them, & sent to pltf. bought notes in respect of shares so purchased. No intimation was given by defts. to pltf. that they accepted the orders prior to their execution by defts. In payment of the price of the first two lots of shares purchased pltf. drew a cheque payable to defts.' order which he gave to the clerk, who delivered it to defts. The third lot of shares was paid for by pltf. in a similar manner, with the exception that the cheque was drawn to the order of the clerk. Defts. received the cheques & credited pltf. with the amount of them. Orders for the purchase of other shares by defts. were subsequently given by pltf. to the clerk, who did not transmit them to defts., but made out & handed to pltf. bought notes purporting to show purchases of shares in pursuance of the orders & to be signed by defts., which were forgeries. Pltf. gave him cheques for the supposed prices of the shares, which he misapplied to his own use:—*Held:* (1) there was no evidence for a jury of a holding out by defts. to pltf. of the clerk as authorised to enter into contracts on their behalf; (2) defts. were not liable in respect of the orders subsequent to the first three.—SPOONER *v.* BROWNING, [1898] 1 Q. B. 528; 67 L. J. Q. B. 339; 78 L. T. 98; 46 W. R. 369; 14 T. L. R. 245, C. A.

405. Father binding child in marriage settlement—Natural relationship.]—A father living on affectionate terms with his daughter is her natural agent in matters relating to the preparation & provisions of her marriage settlement.—TUCKER *v.* BENNETT (1887), 38 Ch. D. 1; 57 L. J. Ch. 507; 58 L. T. 650, C. A.

Annotation:—**Refd.** Bonhote *v.* Henderson, [1895] 2 Ch. 202, C. A.

406. Insurance agent varying conditions of insurance—Usual authority as such.]—The agent of an insurance co. obtained from pltf. a proposal for insurance against accident. The proposal form stated that the proposed insurance was not to be binding on the co. until a policy should be issued in respect thereof. Pltf. paid the first year's premium to the agent & received a receipt upon which was printed "Held covered for 14 days from date hereof, subject to conditions of the policy, unless the proposal be previously declined." There was evidence that the agent told pltf. he would be insured right away, & if he did not hear within 14 days he might treat himself as insured. After expiration of 14 days pltf. was injured by an accident. The proposal was, in fact, declined by the co., but no notice of the refusal was sent to pltf.:—*Held:* (1) the agent had no authority to make the statements to pltf.; (2) pltf. was not insured at the time of the accident.—LEVY *v.* SCOTTISH EMPLOYERS' INSURANCE CO. (1901), 17 T. L. R. 229.

See, generally, INSURANCE.

407. Marine Board acting on behalf of Government—Contract signed by secretary.]—S., master of one of the East India Co.'s ships, was directed by the Govt. Board to place himself under orders of the Marine Board. The Marine Board entered into a treaty with him for the sale to him of a quantity of cotton, the property of the Govt. Board; he made a proposal to the Marine Board for the purchase of it, which proposal was communicated by the Marine Board, through its secretary, to the Govt. Board; the Govt. Board, by a letter of its secretary to the Marine Board, accepted the proposal with this additional term, that the cotton might occupy the tonnage of the ship, or such part of it as S. might please, "he holding himself subject to the payment of such freight as the Honourable Co. shall see fit to demand, for which he must be required to enter into a sufficient agreement." This was communicated to S. by the secretary of the Marine Board, when S. immediately objected to this latter term, & said he would not take the cotton if he was to pay any freight for it. Some days then elapsed, when a bond was presented to him for execution, binding him, amongst other things, to pay freight for the cotton according to the letter of the Govt. Board. He objected to sign this, although the secretary of the Marine Board told him the clause as to freight was inserted as a matter of form only, & it would not be enforced against him, stating also he should have an official letter to that effect. The Marine Board, by its secretary, wrote a letter, inclosing the bond for execution, & containing the following sentence: "You will be allowed the usual privilege tonnage, & no freight will be charged on the cotton purchased by you from the Govt., as it will be laden in a portion of the Honourable Co.'s three-fifths, nearly the whole of which is unoccupied." S. executed the bond:—*Held:* (1) S. was justified in presuming the Marine Board had the authority of the Govt. Board for writing that letter, & in considering himself safe from the legal effect of the bond: (2) the bond should be controlled by that letter.—SMITH *v.* EAST INDIA CO. (1848), 16 Sim. 76; 17 L. J. Ch. 178; 10 L. T. O. S. 411; 12 Jur. 367; 60 E. R. 801.

Master of ship.]—*See* SHIPPING & NAVIGATION.

408. Scrivener agreeing to composition—Authority to arrange loan & collect interest.]—A scrivener arranged a loan & took bonds in the name of his clients & afterwards collected the interest. The

Sect. 3.—*Implied authority: Sub-sect.* 6, *A. & B.; sub-sects.* 7 & 8, *A.*]

borrower failing, the scrivener arranged a composition at a rate higher than that paid to other creditors, & said that his clients would be governed by him. They refused to take the composition & sued on the bonds:—*Held:* the borrower was liable to the clients for the balance due on the bonds with a right of indemnity against the scrivener.—PARROT *v.* WELLS (1690), 2 Vern. 127; 23 E. R. 691.

409. Secretary of company imposing conditions as to application for shares—Authority to accept application.]—If a person to whom a proposal is made returns an answer by the hand of an agent, & the agent in that answer embodies, whether with or without authority, certain things accompanying the acceptance not warranted by the original proposal, that which the agent has done cannot be repudiated by the principal.

To an application for shares in a co. the secretary answered the shares had been allotted to the applicant, & he must sign the memorandum & articles of assocn., or else the shares & deposit would be forfeited. He did not comply with the condition, but was placed upon the register:—*Held:* (1) this was not a simple acceptance of the offer to take shares; (2) a bill by the co. to compel applicant to take the shares & pay the calls on them was demurrable.—ORIENTAL INLAND STEAM CO., LTD. *v.* BRIGGS (1861), 4 De G. F. & J. 191; 31 L. J. Ch. 241; 5 L. T. 477; 10 W. R. 125; 45 E. R. 1157.

Annotations: — **Distd.** *Re* General Provident Assce., Bridger's Case (1869), L. R. 9 Eq. 74; Imperial Land Co. of Marseilles, Harris' Case (1872), 7 Ch. App. 589 n.

410. Ship's agent making salvage agreement with master—Power to act only as agent for ship.]—A large s.s. belonging to defts., laden with sugar from J. to P. for orders, was coaled at C. by pltfs., who acted in the usual way as ship's agents. A few days afterwards the vessel grounded on G. Island in the Maldives & remained fast. Her master sent the chief officer back to C. with a letter to pltfs. acquainting them with the situation, telling them that he wanted a powerful tug, & that they were to draw on defts. for disbursements. He also suggested that a contract for a salvage boat "no cure, no pay," might be advisable. Pltfs., finding that the latter proposition was impracticable, engaged a Govt. tug at a rate working out at about £60 per day, &, making themselves personally liable for the payment of the hire, insured the tug for a limited period. The tug proceeded to the vessel with a representative of pltfs. on board. The master, doubting whether his vessel could be got off, declined to accept the services of the tug except on a "no cure, no pay" agreement, & after some discussion with pltfs.' representative as to terms, the master signed a letter agreeing on behalf of defts. to pay pltfs. £4,000 if the vessel was successfully floated. The tug then made fast, &, in the course of the next day's towage, the vessel came off. Pltfs. claimed £4,000:—*Held:* pltfs. could not be allowed to ratify the act of their representative, as, in the circumstances, the substituted agreement, insisted upon by the master & assented to by their representative, by which they were constituted salvors, was unreasonable, & pltfs. must be deemed, not only when engaging the tug, but throughout the operations, to have acted as agents of the ship. In that capacity they were only entitled to recover by personal action repayment of their disbursements, together with the usual agency charges.—THE CRUSADER, [1907] P. 196; 76 L. J. P. 102; 97 L. T. 20; 23 T. L. R. 382; 10 Asp. M. L. C. 442, C. A.

411. Steward making contract with tenants—Usual authority as such.]—A steward has a general authority to make contracts with the tenants, etc., but this will not bind the lord without his consent & approbation, or unless part of the bargain is actually executed.—ANON. (1717), 2 Eq. Cas. Abr. 55; 5 Vin. Abr. 522, pl. 35; 22 E. R. 48.

412. Surveyor accepting lowest tender—Authority to receive tenders.]—Defts. requested pltf. & other persons desirous of tendering for certain work to be done to their premises at A. to deliver their tenders at A. at a certain time on a certain day. Pltf. & others delivered their tenders at the time & place fixed to a surveyor whom they found there appointed to receive the tenders. The surveyor opened the tenders, said that pltf.'s was the lowest, & although it was higher than he had expected, the work was his. Thereupon pltf., as was usual for a person whose tender was accepted, paid for refreshment for the persons whose tenders had not been accepted. He proposed to perform his contract, but after part performance was not permitted to proceed. Pltf. sued defts. for the work done, & at the trial proved the facts already stated, & gave evidence that it was the practice of the trade to accept the lowest tender. On the other hand, it was shown that the surveyor had not had authority to accept the lowest tender, & evidence was offered that it was not the practice of the trade to accept the lowest tender. The cty. ct. judge held the case was not one in which a nonsuit ought to be directed, & finding that the evidence affirming the practice to accept the lowest tender preponderated over that in negation of such a practice, found a verdict for pltf. On appeal:—*Held:* (1) there was evidence to go to a jury; (2) the finding of the judge ought not to be disturbed.—PAULING *v.* PONTIFEX (1852), Saund. & M. 59; 20 L. T. O. S. 126; 16 J. P. 792; 1 W. R. 64.

B. Authority to receive Tender.

413. Agent—Authority to receive—Payment.]—A tender of money to an agent authorised to receive payment is a good tender to the creditor himself.—GOODLAND *v.* BLEWITH (1808), 1 Camp. 477.

414. —— —— Particular sum.]—A. & B., legal owners of a leasehold interest in a house, claimed £37 from deft. for use & occupation. They authorised him to pay this amount to C., owner of the reversion. C. called on deft., who expressed his willingness to pay the money, though he did not make any actual tender of it, but C. refused to receive it, & demanded more. In an action for use & occupation, claiming £238, deft. paid £37 into ct.:—*Held:* (1) as soon as deft. expressed to the agent his readiness to pay the £37 there was a concluded agreement between him & pltfs. for that amount, & pltfs. could not recover more; (2) the agent's refusal to receive the £37 was outside his authority, which was only an authority to receive payment of the £37.—GRETTON *v.* MEES (1878), 7 Ch. D. 839; 38 L. T. 506; 26 W. R. 607.

415. Clerk—Authority as such—Instructions not to receive tender.]—A tender to a managing clerk, before action brought for goods sold & delivered, is good, though the clerk should have received orders not to accept it.—MUFFATT (MOFFAT) *v.* PARSONS (1814), 1 Marsh. 55; 5 Taunt. 307; 128 E. R. 707.

Annotation:—**Expld.** Finch *v.* Boning (1879), 4 C. P. D. 143.

410 1. *Ship's agent hiring barge for salvage purposes—Holding out.*]—Deft. authorised R. to act as agent for a ship under the masters instructions. The ship being stranded R. applied for a Govt. barge, which was hired to assist in floating her, &, owing to the negligence of the captain, the barge was lost. Deft. knew of the application for the barge, but did not stop the negotiation:—*Held:* the agent had authority under the captain's instructions to hire the barge, & deft. was personally liable.—A.-G. *v.* CHARNOCK (1883), 17 S. A. R. 1. —AUS.

416. —— —— Disclaimer by clerk.]—A tender made to the managing clerk of pltf.'s attorney who at the time disclaims authority from his master to receive the debt, is insufficient.—BINGHAM *v.* ALLPORT (1833), 1 Nev. & M. 398; 2 L. J. Q. B. 86.

Annotation :—**Folld.** Finch *v.* Boning (1879), 4 C. P. D. 143.

417. —— —— ——.]—Money payable as a composition on a sum due to a solr. for costs was tendered to a clerk in his office, who, saying the solr. was out, & he, the clerk, had "no instructions," refused the money:—*Held:* (1) the clerk's statement did not amount to a disclaimer of his authority to receive the money—as he was apparently conducting his master's business in the office, such authority might be implied—& the tender was good (LORD COLERIDGE, C.J.); (2) the statement was in effect a disclaimer of authority, & the tender was bad (DENMAN, J.).—FINCH *v.* BONING (1879), 4 C. P. D. 143; 40 L. T. 484; 43 J. P. 527; 27 W. R. 872.

Annotation :—**Apld.** Graves *v.* Masters (1883), Cab. & El. 73.

418. —— Demand by principal for money to be paid.]—If an attorney send a letter to demand payment & the debtor make a tender to him, that is a good tender, unless the attorney disclaims his authority at the time; & if the attorney be absent he is bound by the acts of those whom he allows to represent him at his office. Therefore, after such a letter being sent, a tender to the clerk of the attorney at his office (the attorney being absent) is good.—WILMOT (WILMOTT) *v.* SMITH (1828), 3 C. & P. 453; Mood. & M. 238.

Annotation :—**Refd.** Pennell *v.* Stephens (1849), 7 C. B. 987.

419. —— Demand by principal for money to be paid at his office.]—Where a person demands payment of money at his office, such demand amounts to special authority for his clerk there to receive it; in his absence a tender to the clerk is a good tender, although he states he is not authorised to receive the money.

Pltf.'s attorney, before bringing the action, wrote to deft. that unless the debt, together with his (the attorney's) charge for that letter, were paid at his office on the Wednesday following, at 12 o'clock, proceedings would be commenced. On Wednesday, at 10 o'clock, an agent of deft. went to the attorney's office, & there saw a boy, to whom he tendered the amount of the debt only. The boy, after referring to the letter-book, refused to accept it, unless the charge for the letter were also paid. It appeared the writ was issued at 11 o'clock on that day:—*Held* (PARKE, B. *dubitante*): a good tender.—KIRTON (KINTON) *v.* BRAITHWAITE (1836), 1 M. & W. 310; 5 Dowl. 101; 2 Gale, 48; Tyr. & Gr. 945; 5 L. J. Ex. 165, Ex. Ch.

Annotations :—**Refd.** Boulton *v.* Reynolds (1859), 6 Jur. N. S. 46; Helman *v.* Stephens (1859), 6 Jur. N. S. 124; Finch *v.* Boning (1879), 4 C. P. D. 143.

420. —— Demand by principal for money to be paid to him.]—A., pltf.'s attorney, wrote to deft., stating that a debt due from deft. to pltf. "must be paid to me" on the next day. A tender was made on the next day to a writing clerk of A. in A.'s office, who said he could not take the money, as A. was out, & the person must wait till he came:—*Held:* not a good tender, as not being made to a person authorised to receive the money; but if A.'s letter had asked for payment "at my office," a tender to any person in the office carrying on business there would have been sufficient.—WATSON *v.* HETHERINGTON (1843), 1 Car. & Kir. 36.

Annotation :—**Refd.** Finch *v.* Boning (1879), 4 C. P. D. 143.

421. Servant—Ordinary duties of every-day life.] —Tender to a servant may be sufficient. In the common transactions of life, this kind of intercourse, by the intervention of servants, must be allowed, & if money was so brought to pltf.'s house & delivered to his servant, who retired, & appeared to go to the master, it was evidence to be left to the jury, from which they might infer a tender was made (LORD KENYON, C.J.).—ANON. (1795), 1 Esp. 349.

Annotation :—**Refd.** Finch *v.* Boning (1879), 4 C. P. D. 143.

422. Servant or workman—Authority as such.]—Tender of composition must be made to the creditor or to some one having authority to represent him. Tender to a mere workman or servant will not suffice.—HOADLEY *v.* JENKINS (1867), 16 L. T. 389.

SUB-SECT. 7.—AUTHORITY IN REGARD TO INSURANCE.

See INSURANCE.

SUB-SECT. 8.—AUTHORITY IN CONNECTION WITH THE LETTING OF LAND, RECEIVING, PAYING, AND DISTRAINING FOR RENT, GIVING NOTICE TO QUIT, ETC.

A. Authority to Let.

423. Agent—Authority to let for special purpose.]—On a bill for specific performance of an agreement by which A., as agent for B., contracted to let to C. a piece of ground for a term of years at a yearly rent, it appearing from the evidence that B. intended to let the ground for the building of houses of a particular class, & that if he had authorised A. to act as agent in the letting of the ground, which was disputed, he had told him the purposes for which it was to be let:—*Held:* (1) as the agreement did not contain any reference to building, nor any covenant to build, it was not in the circumstances such an agreement as ought to be performed; (2) decree for specific performance refused.—HELSHAM *v.* LANGLEY (1841), 1 Y. & C. Ch. Cas. 175; 11 L. J. Ch. 17; 62 E. R. 842.

PART V. SECT. 3, SUB-SECT. 8—A.

423 i. *Agent—Authority to let for special purpose.*]—Pltf. requested deft. to do certain representation work on his claims, promising to provide the necessary money in time. Deft., who had not received the money from pltf., & had no funds with which to obtain a renewal grant, approached co-defts. to take a lay on part of a claim & represent it, but they refused to take a lay to do representation work, & eventually an agreement was made to let to them a lay to work the claim, reserving 10 per cent. to pltf. From information received, pltf. thought that a lay to do representation work only had been let to co-defts.:—*Held:* deft.'s authority entitled him to let a lay to co-defts. to do representation work, but, the moment they continued working the claim after sufficient money had been raised to pay for such work & the renewal of claims, they were trespassers, & pltf. was entitled to the surplus. *Leeds (Duke)* v. *Amherst (Earl)* (1846), 41 E. R. 886; *De Bussche* v. *Alt* (1878), 8 Ch. D. 286, 314; *Jegon* v. *Vivian* (1871), 6 Ch. App. 742; *Trotter* v. *McLean* (1879), 13 Ch. D. 574, cited.—MILLS *v.* PORTER (1915), 32 W. L. R. 491; 24 D. L. R. 638.—**CAN.**

423 ii. —— *Express authority to let —Lease granted subject to condition.*]—The agent of a lessor granted a lease providing that the lessee should receive from the lessor the expenses of any litigation with third parties respecting the land leased. Litigation having ensued:—*Held:* (1) the agent acted in excess of his power in including the above proviso; (2) the lessee was entitled to costs of litigation for which he was liable from the agent, but not from the lessor.—KENNY *v.* MOOKTA SOONDEREE DABEE (1867), 7 W. R. 419. —**IND.**

423 iii. —— *Express authority to let subject to conditions—Lease granted on other terms—Mala fides.*]—S. & L. were authorised by pltfs. to let land to a tenant "who would be able to do it justice," such tenant not to have power to sublet. They obtained an offer

Sect. 3.—Implied authority: Sub-sect. 8, A. & B.]

424. —— Authority to let for best rent.]—An agent to let lands is bound to let them to the best advantage; but, upon the mere ground of undervalue, a *bonâ fide* letting, which would be binding on the principal himself, will be equally binding on him when he acts through an agent, if that agent has acted fairly & honestly. Authority to let lands may be inferred from the letters & acts of the party.—DYAS *v.* CRUISE (1845), 2 Jo. & Lat. 460.

Annotations:—**Refd.** Salamon *v.* Sopwith (1876), 35 L. T. 463; Gas Light & Coke Co. *v.* Towse (1887), 35 Ch. D. 519.

425. —— Power of attorney.]—An agreement for a lease made with an agent, who acts under a power of attorney, & a lease executed by such agent in pursuance of the agreement, effectually bind the principal.—HAMILTON *v.* CLANRICARDE (EARL) (1762), 1 Bro. Parl. Cas. 341; 1 E. R. 608.

Annotation:—**Apld.** Beaufort *v.* Neeld (1844-5), 12 Cl. & Fin. 248, H. L.

426. Estate & house agent—Authority as such.]—Estate agents as such have no general authority to enter into contracts for their employers. Their business is to find offers & submit them to their employers for acceptance. If any authority to enter into contracts is given in any case it must be proved, & cannot be inferred from the relations existing between the parties.

Deft. instructed G. & B., house agents, that he would be willing to let his flat for a term at £195 per annum. G. & B. wrote to pltf. purporting to confirm a conversation for a lease on the terms named & asking for references. References were not forthcoming, & deft. let the flat to another party:—*Held:* G. & B. had no authority to enter into a binding contract for a lease of the flat.—THUMAN *v.* BEST (1907), 97 L. T. 239.

427. Land agent & steward—Authority as such.]—The owner of an estate, in answer to an inquiry from an intending lessee, said, "A. B. manages all my affairs & you are to treat with him":—*Semble:* this did not imply that A. B. had authority to enter into a binding agreement for a lease.—RIDGWAY *v.* WHARTON (1857), 6 H. L. Cas. 238; 27 L. J. Ch. 46; 29 L. T. O. S. 390; 4 Jur. N. S. 173; 5 W. R. 804; 10 E. R. 1287, H. L.

For full anns., *see* LANDLORD & TENANT.

428. —— —— Special limitation.]—A steward has no general authority to enter into contracts for granting leases of farms for a term of years; & where a steward & land agent, whose powers were specially limited, had, in the name of the owner, entered into a written agreement with a farmer to grant him a lease for 12 years, but without communicating to him the fact that his power was specially limited:—*Held:* the agreement did not bind the owner.—COLLEN *v.* GARDNER (1856), 21 Beav. 540; 52 E. R. 968.

429. —— —— Agent agreeing to tenant changing mode of cultivation.]—*Re* PEARSON & I'ANSON, No. 881, *post.*

430. —— Authority to let on ordinary terms & receive rents—Agent letting on unusual terms.]—Where a farm bailiff or agent was used to let farms upon the ordinary terms, & received the rents, etc.:—*Held:* he had no authority in law to let upon unusual terms unknown to the owner.

A. entered into a farm in Sept., 1850, on an agreement with B. on the part of C., which was in writing, to the effect that at the end of the tenancy A. should be entitled to be paid a valuation for the tenant's property in the farm & premises in accordance with the terms of the valuation he should be subject to on entry. He paid the amount of the valuation to the outgoing tenant in the usual way. He had done repairs to the farm buildings & made substantial improvements in the way of constructing roads, erecting walls, roofing outhouses, etc., consulting B. as to all of them. In Dec., 1858, he received notice to quit. He saw B., who consented to enter into a second agreement embodying the first, & setting forth that B., acting as agent of C., did thereby agree with A. that he was to allow to A. a full & fair compensation for his repairs & improvements on the farm & premises during his tenancy, & also the amount of the valuation of the tenant's property, in accordance with the terms of the valuation which A. had paid on entering, the amount of such valuation to be settled by valuers to be chosen by each party respectively, & the amount to be paid to A. before he was required to give up possession; this agreement was drawn up & signed by B. on the part of deft. B. was a kind of farm bailiff, who allotted timber to tenants for repairs, sold the produce of the farm & let tenants in, on the ordinary terms of tenancies from year to year, & also received rents. Deft. had not appointed any valuer, nor had he been made aware of the agreement entered into by B.:—*Held:* it was a question of fact for the jury whether B. had express authority or had been held out by deft. as having authority to enter into such an agreement, or whether B. had only authority to let in tenants on the ordinary terms.—TURNER *v.* HUTCHINSON (1860), 2 F. & F. 185; (1861), 3 L. T. 815; 25 J. P. 149.

Annotation:—**Distd.** *Re* Pearson & I'Anson (1899), 81 L. T. 289.

431. —— Authority to manage & superintend estates.]—A power to a land agent to "manage & superintend estates" authorises him, on behalf of his principal, to enter into an agreement for the usual & customary leases, according to the nature & locality of the property.—PEERS *v.* SNEYD (1853), 17 Beav. 151; 51 E. R. 990.

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from C. which pltfs. accepted, but they concealed the fact that they held a bill of sale over C.'s effects, & this coming to the knowledge of pltfs., they repudiated the agreement. Nevertheless S. & L. affixed their signatures as agents for pltfs. to an agreement for a lease to C. which contained no stipulation that the tenant should not sublet, etc.:—*Held:* pltfs. were entitled to a decree directing S., L., & C. to deliver up the agreement to be cancelled, & to cause a release to be executed; & deft. C. was not entitled to specific performance.—CALCUTT *v.* CAMPBELL, Mac. 1020.—**N.Z.**

426 i. *Estate & house agent—Authority as such.*]—An owner of a building who refers an intending lessee to a person as his agent for leasing is bound by any representation made in connection with the leasing of the property.—TAYLOR *v.* REED (1878), 2 P. & B. 58.—**CAN.**

426 ii. —— *Authority to let for lives or years — Agent letting for indefinite period.*]—An agent authorised to make agreements for leases for lives or years, made an agreement in which the term of the proposed lease was not mentioned:—*Held:* not pursuant to his authority, & not binding on his principal.—CLINAN *v.* COOKE (1802), 1 Sch. & L. 32.—**IR.**

426 iii. —— *Authority to receive rents.*]—An agent to receive rents desired his principal to send him a power of attorney to let the estate. The principal did not object to the agent's letting, & stated that he would "send the power of attorney to follow this," as soon as he could get it:—*Held:* a sufficient authority to let the estate.—DYAS *v.* CRUISER (1845), 8 I. Ed. R. 408; 2 Jo. & Lat. 460 (C.).—**IR.**

427 i. *Land agent—Authority as such.*]—A land agent has not authority to enter into contracts for leases.

A tenant claimed specific performance of a contract for a lease made with a land agent, under which he entered into possession but did not claim performance for thirteen years: there was evidence of a contract for a tenancy from year to year:—*Held:* pltf. not entitled to specific performance.—MONTAL *v.* LYONS (1858), 8 I. Ch. R. 112 (R.).—**IR.**

B. Authority to give Notice to Quit.

432. Agent—Without authority.]—If a notice to quit be given by an agent without authority of the landlord the tenant is not bound by it.—BURON *v.* DENMAN (1848), 2 Exch. 167, at 188; 6 State Tr. N. S. 525, at p. 541; 154 E. R. 450, at 459.

Annotations:—**Mentd.** Houlden *v.* Smith (1850), 19 L. J. Q. B. 170; East India Co. *v.* Kamachee Boge Sahiba (1859), 7 W. R. 722, P. C.; Santos *v.* Illidge (1859), 28 L. J. C. P. 317; Secretary of State in Council of India *v.* Kamachee Boge Sahaba (1859), 7 Moo. Ind. App. 476; Scott *v.* Seymour (1862), 8 Jur. N. S. 568; Feather *v.* R. (1865), 6 B. & S. 257; London Corpn. *v.* Cox (1867), L. R. 2 H. L. 239; Phillips *v.* Eyre (1870), 10 B. & S. 1004, Ex. Ch.; Mill *v.* Hawker (1874), L. R. 9 Exch. 309; Doss *v.* Secretary of State for India in Council (1875), L. R. 19 Eq. 509; Rustomee *v.* R. (1876), 24 W. R. 428; Dixon *v.* Faner (1886), 17 Q. B. D. 658; Francis, Times *v.* Carr (1900), 82 L. T. 698, C. A.

433. —— —— Notice ratified.]—A notice to quit must be binding on both parties at the time when it is given. Subsequent ratification will not suffice.—RIGHT d. FISHER, NASH & HYRONS *v.* CUTHELL, No. 1079, *post.*

Annotations:—**Distd.** Goodtitle d. King *v.* Woodward (1820), 3 B. & Ald. 689; Doe d. Aslin *v.* Summersett (1830), 1 B. & Ad. 135; Charrington *v.* Johnson (1845), 4 L. T. O. S. 398. **Refd.** Doe d. Elliott *v.* Hulme (1828), 6 L. J. O. S. K. B. 345; Doe d. Mann *v.* Walters (1830), 10 B. & C. 626; Dodd *v.* Acklam (1843), 6 Man. & G. 672; *Re* Viola's Indenture of Lease, Humphrey *v.* Stenbury, [1909] 1 Ch. 244.

434. —— —— ——.]—A notice to quit given by an agent without authority is sufficient if subsequently ratified by his principal.—GOODTITLE d. KING *v.* WOODWARD, No. 1027, *post.*

Annotations:—**Dbtd. & Distd.** Doe d. Mann *v.* Walters (1830), 10 B. & C. 626. **Dbtd.** Doe d. Lyster *v.* Goldwin (1841), 1 Gal. & Dav. 463; Cope *v.* Mooney (1863), 10 L. T. 854.

435. —— —— ——.]—If a notice to a tenant to quit a farm is signed by a person who is not the landlord's usual agent or attorney, & his authority to sign it is recognised by the landlord bringing an action of ejectment, it is valid, especially if the tenant does any act in consequence of that notice. —GOODTITLE d. SAPIELHIA (PRINCE) *v.* JACKSON (1823), 2 L. J. O. S. K. B. 3.

436. —— —— ——.]—A notice to quit given by an agent without authority must be ratified before the day on which it begins to operate as a notice to quit. A ratification after the period named in the notice has begun to run is too late.—DOE d. MANN *v.* WALTERS (1830), 10 B. & C. 626; 5 Man. & Ry. K. B. 357; 8 L. J. O. S. K. B. 297; 109 E. R. 583.

Annotations:—**Apld.** Doe d. Lyster *v.* Goldwin (1841), 2 Q. B. 143; Doe d. Pulker *v.* Walker (1845), 14 L. J. Q. B. 181. **Expld.** Ancona *v.* Marks (1862), 7 H. & N. 686. **Refd.** Doe d. Richmond Corpn. *v.* Morphett (1845), 14 L. J. Q. B. 345. **Mentd.** Evans *v.* Mathias (1857), 3 Jur. N. S. 793.

437. —— —— ——.]—A notice to quit given by an agent of the landlord to receive rents is not sufficient, without a recognition by the landlord; the bringing of an action founded on the notice is not of itself a recognition.—DOE d. RHODES *v.* ROBINSON, No. 1078, *post.*

Annotation:—**Distd.** Doe d. Lyster *v.* Goldwin (1841), 1 Gal. & Dav. 463.

438. —— —— ——.]—A notice to quit must be such that the tenant can safely act on it at the time of receiving it; a notice by an unauthorised agent cannot be made good by the principal's ratification of it after the proper time for giving it.—DOE d. LYSTER *v.* GOLDWIN, No. 1030, *post.*

For full anns., *see* S. C. No. 1030, *post.*

439. Agent appointed by mortgagor & mortgagee of reversion—Express authority.]—A., being beneficially interested in the reversion, joined with B., the trustee, who was legally entitled, in mtging. it to pltf. A. by the mtge. deed, with the approbation of pltf., testified by pltf.'s executing the deed, appointed C. to be receiver, agent, & attorney of A. to demand & collect rents, adjust accounts, sue or distrain for rent, give notice to quit, & eject on refusal, & do all that A. could have done if the deed had not been made. A., B., & pltf. executed the deed. In an action for double value under Landlord & Tenant Act, 1730 (c. 28), s. 1:—*Held:* C. was an agent lawfully authorised to give the notice required by the Act.—POOLE *v.* WARREN (1838), 8 Ad. & El. 582; 3 Nev. & P. K. B. 693; Will. Woll. & H. 518; 3 Jur. 23; 112 E. R. 959.

For full anns., *see* LANDLORD & TENANT.

440. Agent of lessors & their successors in office.]—Where an agreement for a tenancy was made between A. as agent for & on behalf of the churchwardens of the parish of St. M. (not naming them) of the one part, & B. of the other part:—*Held:* the tenancy thereby created was properly put an end to by a notice to quit & deliver up possession, given by persons acting as agents for C. & D. who were churchwardens at the time the agreement was made & B. let into possession; notwithstanding the notice purported also to have been given on behalf of the churchwardens & overseers in office when the notice was served, & did not state to whom possession was to be delivered up.—DOE d. BAILEY *v.* FOSTER (1846), 3 C. B. 215; 15 L. J. C. P. 263; 7 L. T. O. S. 208; 136 E. R. 86.

441. Agent of one of several joint lessors.]—A notice to quit given by a person authorised by one of several lessors, joint-tenants, determines the tenancy as to all.—DOE d. KINDERSLEY *v.* HUGHES (1840), 7 M. & W. 139; H. & W. 147; 10 L. J. Ex. 185; 151 E.R. 711.

Annotation:—**Refd.** Belaney *v.* Kelly (1871), 24 L. T. 738.

442. General agent—Distinction between powers of general & special agent.]—Notice to quit may be given by an agent, & in the case of a general agent his agency need not appear on the face of the document, but in the case of a special agent it must. —JONES *v.* PHIPPS (1868), L. R. 3 Q. B. 567; 9 B.

PART V. SECT. 3, SUB-SECT. 8—B.

m. *Agent—Authority to serve written notice.*]—Authority to serve a written notice to quit is not sufficient to authorise the party to give a parol notice to quit.—WOOD *v.* AHEARNE (1843), 6 I. L. R. 95 (K.).—IR.

n. —— —— *Antecedent authority.*]—Antecedent authority is necessary to entitle an agent to serve a notice to quit; subsequent recognition is not sufficient; parol authority is sufficient.—CARNEY *v.* FOX (1842), I. C. R. 486.—IR.

o. —— *Authority to manage lands & serve necessary notices in owner's name.*]—An agent authorised in writing to manage lands in the name & on behalf of their owner, & also, in the owner's name, to sign, serve, & give notices, necessary to be served upon tenants for the purpose of carrying into effect such management, served a notice to quit signed by him in his own name, but purporting to be served by him as such agent, & on behalf of the landlord:—*Held:* sufficient notice to determine a yearly tenancy.—ERNE *v.* ARMSTRONG (1872), I. R. 6 C. L. 279.—IR.

p. *Club secretary—Authority as such.*]—R., as secretary of the Irish Rugby Football Union, employed W. as caretaker of premises vested in trustees for the union. R., as such secretary, subsequently dismissed W., & called upon him, under Landlord & Tenant (Ireland) Act, 1860 (c. 154), s. 86, to give up possession, which he refused to do:—*Held:* R. entitled to recover possession of the premises.—R. *v.* SWIFTE, [1912] 1 I. R. 113; 46 I. L. T. 176—IR.

442 i. *General agent—Given blank notices to quit.*]—A. & B. being in possession of the legal estate in certain lands as trustees, several notices to quit, signed by them in blank, & not containing either the tenants' names, the denominations of the lands, or any dates, were transmitted to W., who was the general agent over the estate; these notices were filled up in W.'s office, & sent out to be served, & one of them was served upon deft., who, it was proved, admitted the service, & did not object to its validity; an ejectment having been brought upon this notice:—*Held:* the above facts of themselves were evidence to go to the jury of the agent's authority to determine the tenancy by service of the notice to

Sect. 3.—*Implied authority: Sub-sect.* 8, *B. C. D. E. F. & G.; sub-sect.* 9.]

& S. 761; 37 L. J. Q. B. 198; 18 L. T. 813; 33 J. P. 229; 16 W. R. 1044.

Annotations:—**Distd.** Seaward *v.* Drew & Farmer (1898), 78 L. T. 19; Stait *v.* Fenner, [1912] 2 Ch. 504.

Receiver.]—*See* RECEIVERS.

443. Steward of corporation—No authority under seal.]—In an ejectment by a corpn. against a tenant from year to year, a notice to quit given by a person acting as steward of the corpn. is sufficient, without evidence that he had an authority under seal from the corpn. for this purpose.—ROE d. ROCHESTER (DEAN & CHAPTER) *v.* PIERCE (1809), 2 Camp. 96.

Annotations:—**Refd.** Smith *v.* Birmingham & Staffordshire Gas Light Co. (1834), 1 Ad. & El. 526; Arnold *v.* Poole Corpn. (1842), 12 L. J. C. P. 97.

444. —— —— —.]—On ejectment upon the demise of a corpn. it appeared, from deft.'s admissions, that he had taken the land by permission of H., a servant of the corpn., & that F., another servant of the corpn., had given him notice to deliver up possession. No lease, nor notice, nor appointment of F. or H. as agent under seal, was produced:—*Held:* the jury were rightly directed to find for pltf. if they thought H. & F. were authorised by the corpn. to act.—DOE d. BIRMINGHAM CANAL NAVIGATIONS *v.* BOLD (BOWL) (1847), 11 Q. B. 127; 10 L. T. O. S. 184; 12 Jur. 350; 116 E. R. 423.

Annotations:—**Refd.** Tupper *v.* Foulkes (1861), 9 C. B. N. S. 797. **Mentd.** Hogan *v.* Hand (1861), 14 Moo. P. C. C. 310, P. C.

C. Authority to receive Notice to Quit.

445. Rent collector — No special authority.] — Notice to quit given to a mere collector of rents:—*Held:* not good.—PEARSE *v.* BOULTER (1830), 2 . & F. 133.

See, further, LANDLORD & TENANT.

D. Authority to receive Rent.

446. Bailiff—Acting under distress warrant.]—A bailiff acting under a warrant of distress for arrears of rent has implied authority to receive the amount of the rent & costs, if tendered by the tenant.—HATCH *v.* HALE (1850), 15 Q. B. 10; 19 L. J. Q. B. 289; 15 L. T. O. S. 65; 14 Jur. 459; 117 E. R. 361.

447. —— —— Limitation.]—The implied authority of a bailiff acting under a warrant of distress to receive the amount of the rent & costs, if tendered by the tenant, cannot be limited by previous express instructions, given on behalf of the landlord to the bailiff, not to receive rent, but to refer the tenant to the landlord's attorney.—HATCH *v.* HALE, No. 446, *ante*.

448. Broker in possession—Authority personal to broker.]—Deft., the landlord, had authorised W., a broker, to distrain for rent. W. distrained, & put R. into possession. While R. was in possession pltf., the tenant, tendered to R. the amount of rent & expenses. R. told him he had no authority to receive money, & offered to send for W. Pltf. refused that offer, & his goods were sold. In an action for selling after a tender of the rent, the jury found R. had no authority in fact to receive the rent; that W. had such authority; & that at the time when the tender was made W. was within a reasonable distance, & might easily have been applied to; & that pltf. knew all this:—*Held:* (1) R. had no authority in law to receive the rent; (2) the tender to him was not good.—BOULTON (BOLTON) *v.* REYNOLDS (1859), 2 E. & E. 369; 29 L. J. Q. B. 11; 1 L. T. 166; 24 J. P. 53; 6 Jur. N. S. 46; 8 W. R. 62; 121 E. R. 139.

Annotation:—**Expld.** Toms *v.* Wilson (1862), 32 L. J. Q. B. 33.

449. Servant—Express authority.]—Payment of rent to a servant of the lessor authorised to receive it binds the lessor.—CROPP'S CASE (1586), Godb. 38; 78 E. R. 24.

E. Authority to pay Rent.

450. Auctioneer — Authority after sale.]—A., an auctioneer, was employed to sell by auction the stock-in-trade of a firm, & after the sale, but before removal of the goods, the landlord made a claim for rent, threatening that if such rent were not paid he would distrain the goods, whereon A. paid part of the proceeds as rent:—*Held:* as at the time the property in the goods had passed to the purchasers, A. had no implied authority to pay away the money, & was liable to the firm.—SWEETING *v.* TURNER (1872), L. R. 7 Q. B. 310; 41 L. J. Q. B. 58; 25 L. T. 796; 36 J. P. 597; 20 W. R. 185.

F. Authority to distrain for Rent.

451. Agent—Similar acts on previous occasions.]—A warrant of distress was produced by pltf. purporting to be issued by solrs. of the landlords of certain property, the writing being in the hand of a junior partner of the firm. The solrs. had, on previous occasions, issued distress warrants in respect of other property of the landlords:—*Held:* not sufficient evidence of an authority by the landlords to distrain.—JONES *v.* BUCKLEY (1838), 2 Jur. 204.

452. Agent of assignee—Authority to collect rent.]—A., a bkpt., received from his assignees the following memorandum:—"A. having completed an arrangement with B. & Co., his assignees, for 5 houses, & arrears of rent thereon, the tenants on the respective premises are hereby authorised to pay their rents to A., whose receipts shall be their discharge":—*Held:* this memorandum gave A. no authority to distrain in the name of the assignees.—WARD *v.* SHEW (1833), 9 Bing. 608; 2 Moo. & S. 756; 2 L. J. C. P. 58; 131 E. R. 742.

Annotations:—**Distd.** Snell *v.* Finch (1863), 13 C. B. N. S. 651. **Apld.** Woolston *v.* Ross, [1900] 1 Ch. 788.

453. Bailiff of manor—Previous acts.]—Evidence that the person who actually made the return purporting to be made by a lord of a manor to the sheriff's mandate to levy under a writ of *fi. fa.* has acted as bailiff to the lord of the manor for 16 years, & during that time has made the returns for the lord of the manor, is sufficient to charge the lord of the manor with the acts of the bailiff.—TYLER *v.* LEEDS (DUKE) (1817), 2 Stark. 218.

Annotations:—**Refd.** Newland *v.* Cliffe (1832), 3 B. & Ad. 630. **Mentd.** Lane *v.* Chapman (1840), 11 Ad. & El. 966; Imray *v.* Magnay (1843), 11 M. & W. 267.

G. Miscellaneous.

454. Agent determining tenancy—Agent to receive rents & let.]—An agent to receive rents & let

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quit.—WANDESFORDE *v.* WALSHE (1851), 18 L. T. O. S. 45.—IR.

q. *Land agent. Notices signed as such.*] Where a land agent signed notices to quit, stating himself to be such, & an ejectment was subsequently brought on the notices:—*Held:* these acts established a sufficient authority in the agent to serve notices to quit.—COOPER *v.* FLYNN, 3 I. L. R. 472 (C. P.).—IR.

443 i. *Rent collector—Authority to evict.*] An authority to receive rents & to evict certain persons is not a general authority to determine tenancies.—FREWEN *v.* AHERNE (1841), Long. & Town. 264; S. C. 4 I. L. R. 181 (E.).—IR.

443 ii. *Authority to sue & distrain for rents.*]—A notice to quit was signed by an agent who had authority to demand & collect rents, & to sue & distrain for same:—*Held:* (1) the notice to quit was bad; (2) a rent agent had not, as such, power to sign notices to quit.—WHALEY *v.* MACKLIN (1898), 32 I. L. T. 172.—IR.

has authority to determine a tenancy.—DOE d. MANVERS (EARL) *v.* MIZEM (1837), 2 Mood. & R. 56.

455. Agent disclaiming lease—Authority to communicate with landlord.]—Deft.'s father, & after his death deft., had held lands by permission of & under the father of pltf.'s lessor, & after his death deft. continued to hold the lands. To show that the tenancy was determined, pltf.'s lessor offered in evidence a letter written by deft. to pltf. in which, after acknowledging the receipt of a letter from pltf. on the subject of the premises in question, he said: "As the circumstances in it are not within my knowledge, I have placed it in the hands of Messrs. F. & have requested them to communicate with you," & two letters from Messrs. F. alleged to amount to a disclaimer:—*Held:* deft.'s letter did not confer on the agent any authority to bind deft. by making a disclaimer.—DOE d. LEWIS *v.* CAWDOR (LORD) (1834), 1 Cr. M. & R. 398; 4 Tyr. 852; 3 L. J. Ex. 239.

Annotations:—**Refd.** Doe d. Graves *v.* Wells (1839), 3 Jur. 320; Doe d. Gray *v.* Stanton (1836), 1 M. & W. 695. **Mentd.** Harris *v.* Mulkern (1875), 45 L. J. Q. B. 244, Ex. Ch.

456. Agent giving notice of intention to take renewal — Secretary — General authority.]—In a lease for 21 years to the trustees of an insurance co. a covenant was contained that the lessors would, from time to time, before expiration of the lease, whenever thereunto required by the lessees, demise to them a fresh term for 21 years, to commence from expiration of the term thereby demised. Before expiration of the term the co. assigned it to five trustees as security in part for a guarantee fund to certain shareholders. The freehold reversion in the demised property at expiration of the lease was vested as to one moiety in three trustees, of whom S. was one, & as to the other moiety in S. for life, with remainder to his wife for life, with remainder to the three trustees. The day before the lease above mentioned would expire H., the secretary to both the insurance co. & the trustees of the guarantee fund, gave notice by letter to S., on behalf of both the co. & the trustees, of their desire to have a renewal of the lease; for this, however, he had only informal instructions. In an action by the trustees of the fund for specific performance of the covenant to renew:—*Held:* (1) it was a condition precedent that notice should be given of intention to renew before expiration of the term; (2) H. being secretary to both the co. & the trustees, it mattered not on whose behalf instructions were given; (3) it was his duty, although his instructions were informal, to give notice of renewal; (4) the notice given by H. to S. alone was sufficient.—NICHOLSON *v.* SMITH (1882), 22 Ch. D. 640; 52 L. J. Ch. 191; 47 L. T. 650; 31 W. R. 471.

457. Agent giving possession to tenant—Agent to let.]—It is doubtful whether an agent to let a house has an implied general authority to let persons into possession, but slight evidence is sufficient to show an express authority.—SLACK *v.* CREWE, No. 861, *post.*

458. —— ——.]—Deft., having taken an assignment of a lease from A., who had taken from the assignees of the lessee, a bkpt., instructed B., a house agent, to procure a purchaser for the lease, & in Apr. a written agreement was entered into with pltf. by B. to assign the residue of the lease from Lady-day for £50, which was received by B. The contract was—"all rent due to Lady-day being paid, possession to be given immediately." B. let pltf. into possession before any assignment was executed, & the landlord, in July, put in a distress for rent due up to Lady-day, which pltf. paid. In an action against deft., who knew the rent was due, to recover the amount paid as money paid to his use:—*Held:* (1) the agent having authority to let, had authority to let pltf. in; (2) deft. was bound to indemnify pltf.—GREGORY *v.* STANWAY (1860), 2 F. & F. 309.

459. Agent waiving forfeiture—Agent to manage affairs—General authority.]—The lessor being too ill to attend to business, his son, who managed his affairs for him, applied for rent which became due after expiration of 3 months:—*Held:* he had no authority to waive the forfeiture on behalf of lessor, who was not shown to have been aware of its having accrued.—DOE d. NASH *v.* BIRCH (1836), 1 M. & W. 402; Tyr. & Gr. 769; 5 L. J. Ex. 185; 2 Gale, 26; 150 E. R. 490.

For full anns., *see* LANDLORD & TENANT.

SUB-SECT. 9.—AUTHORITY IN CONNECTION WITH LEGAL PROCEEDINGS, PROSECUTIONS, ETC.

460. Agent bringing action for specific performance—Authority to sell.]—The owner of a colliery placed it in the hands of G., an agent, to sell, & G. arranged with R. that (in an event, which happened) R. should buy the property. R. afterwards declined to buy, & G. filed a bill for specific performance of the agreement:—*Held:* G. was a mere agent to sell the property & not entitled to bring such a suit.—GLASBROOK *v.* RICHARDSON (1874), 23 W. R. 51.

461. Agent compromising action for price—Authority to buy.]—Pltf., as agent of deft., ordered from A. certain goods of a particular description & for a particular purpose, deft. undertaking to save pltf. harmless from the consequences. The goods were of a different description from what were ordered, & unfit for the purpose required; but A. contended he had been misled by the misspelling contained in the order given by pltf., who was a very illiterate person, & he refused to take the goods back. An action having been brought by A. against pltf. for the price, & deft. having had notice of same, pltf. compromised such action by returning the goods, & paying a sum of money in discharge of debt & costs:—*Held:* pltf. had authority from deft. to compromise such action.—PETTMAN *v.* KEBLE (1850), 9 C. B. 701; 19 L. J. C. P. 325; 15 Jur. 38; 137 E. R. 1067.

PART V. SECT. 3, SUB-SECT. 9.

r. *Agent agreeing to be bound by evidence of witness—Authority to carry on suits.*]—An agent's assent to be bound by the statement of a particular witness is an act entirely within scope of his general authority as agent to carry on his principal's suits, & to do all acts necessary to that end.—RAJENDER CHUNDER NEWGEE *v.* MAHOMED AGNOODEEN (1864), 1 W. R. 143.—**IND.**

s. *Agent employing vakil — Authority to sue.*]—A mere power to sue does not authorise an agent to do more than employ a vakil on the terms of paying him a reasonable remuneration.—KESHAO BAPUJI *v.* NARAYAN SHAMRAO (1885), I. L. R. 10 Bom. 18.—**IND.**

t. *Agent filing bond on stay of execution —Authority to canvass & to issue bonds.*]—A bond filed to obtain a stay of execution by the local agent of a non-resident co., with power to canvass for the co. & to issue bonds, is binding.—CALHOUN *v.* MARYLAND CASUALTY CO. & FERRIS (1915), 31 W. L. R. 269.—**CAN.**

u. *Agent instructing prosecution — General authority as such.*]—The salesman of a co. which employed pltf. as agent for sale, a considerable time after the commission of the alleged act, caused pltf. to be arrested for converting goods to his own use, from which charge he was acquitted. In an action for malicious prosecution against the co.:—*Held:* the salesman had no authority to prosecute or arrest, either general or special, arising from emergency or exigency, & the action must be dismissed with costs. *Bank of New South Wales* v. *Owston* (1879), 4 App. Cas. 270; *Abrahams* v. *Deakin*, [1891] 1 Q. B. 516; *Henson* v. *Waller*, [1901] 1 K. B. 390; *Stedman* v. *Baker* (1896), 12 T. L. R. 451, refd.—MARCH *v.* STIMPSON COMPUTING SCALE CO. (1913), 24 O. W. R. 591; 11 D. L. R. 343.—**CAN.**

Sect. 3.—*Implied authority: Sub-sects.* 9 & 10, *A.* (*a*), *i.*]

462. Agent contesting adjudication in bankruptcy—Authority to act generally in principal's absence.]—Where a person on leaving England has authorised another, either in writing or verbally, to act for him generally in his absence, the latter has authority to instruct a solr. to appear on behalf of the former to show cause against an adjudication of bkpcy. against him.—*Re* FRAMPTON, *Ex p.* FRAMPTON (1859), 1 De G. F. & J. 263; 28 L. J. Bcy. 21; 33 L. T. O. S. 341; 5 Jur. N. S. 970; 7 W. R. 690; 45 E. R. 359, C. A.

Annotation:—**Refd.** *Re* Wallace, *Ex p.* Wallace (1884), 14 Q. B. D. 22, C. A.

463. Attorney for assignee of debt bringing action in assignor's name—Instructions from assignee.]—An assignee of a debt has a right to use the assignor's name in suing for it, & it is sufficient authority for the attorney if he is instructed by the former to commence proceedings.—PICKFORD *v.* EWINGTON (1835), 4 Dowl. 453; 1 Gale, 357; Tyr. & Gr. 29.

464. Bank manager instituting prosecution—General authority as such.]—In an action for malicious prosecution against an incorporated banking co. the jury found that same had been authorised on behalf of the bank by W., the acting manager, & they were directed by the judge that it was to be inferred from W.'s position as manager that he had sufficient power in the circumstances to direct a prosecution:—*Held:* (1) assuming the prosecution to have been authorised by W., the direction to the jury to the effect that it was to be inferred from W.'s position that he had authority to direct the prosecution was on the evidence incorrect; (2) there must be a new trial.

The arrest, & still less the prosecution of offenders, is not within the ordinary routine of banking business, & not within the ordinary scope of a bank manager's authority. Evidence is required to show that such arrest or prosecution is within the scope of the duties & class of acts such manager is authorised to perform. That authority may be general, or it may be special & derived from the exigency of the particular occasion on which it is exercised. In the former case it is enough to show commonly that the agent was acting in what he did on behalf of the principal; but in the latter case evidence must be given of a state of facts which shows that such exigency is present, or from which it might reasonably be supposed to be present.—BANK OF NEW SOUTH WALES *v.* OWSTON (1879), 4 App. Cas. 270; 48 L. J. P. C. 25; 40 L. T. 500; 43 J. P. 476; 14 Cox, C. C. 267, P. C.

Annotations:—**Apld.** Abrahams *v.* Deakin, [1891] 1 Q. B. 516, C. A. **Consd.** Hanson *v.* Waller, [1901] 1 K. B. 390. **Refd.** Ashton *v.* Spiers & Pond (1893), 9 T. L. R. 606, C. A.; Cornford *v.* Carlton Bank, [1899] 1 Q. B. 392. **Mentd.** Edwards *v.* Midland Ry. Co. (1881), 45 J. P. 374; Dyer *v.* Munday (1895), 64 L. J. Q. B. 448, C. A.

465. Clerk to local authority instituting proceedings—General authority as such.]—By Town Police Clauses Act, 1847 (c. 89), s. 35, incorporated in Lynn Improvement Act, 1859, certain penalties were inflicted on persons keeping any house of public resort who knowingly suffered common prostitutes to assemble there. By s. 120 of the latter Act, these penalties were directed to be paid in some cases to the paving comrs., & in others to the corpn. The paving comrs. had given public notice of their intention to enforce these penalties; & resp., their clerk, took proceedings against applt. under the above sect. of the general Act. For this he had no particular authority, either express or implied:—*Held:* (1) independently of any authority from the comrs., resp. could lay an information under s. 35 of the general Act so long as he claimed the penalty on behalf of either of the bodies mentioned in s. 120 of the later Act (COCKBURN, C.J.).; (2) there was evidence of a general authority to proceed on behalf of the comrs., & for this purpose a general authority was sufficient (CROMPTON, J.).—COLE *v.* COULTON (1860), 2 E. & E. 695; 29 L. J. M. C. 125; 2 L. T. 216; 24 J. P. 596; 6 Jur. N. S. 698; 8 W. R. 412; 121 E. R. 261.

Annotations:—**Apld.** Jobson *v.* Henderson (1900), 82 L. T. 260. **Mentd.** R. *v.* Stewart (1896), 65 L. J. M. C. 83.

466. Vaccination officer instituting prosecution—Signed minutes of board of guardians.]—The minutes of a board of guardians, signed by the chairman, authorising the vaccination officer to institute prosecutions against defaulters, are sufficient authority to the officer.—ROBINSON *v.* LOWE (1896), 60 J. P. 740; 13 T. L. R. 19.

Annotation:—**Expld.** Bramble *v.* Lowe, [1897] 1 Q. B. 283.

SUB-SECT. 10.—AUTHORITY TO PLEDGE.

A. Goods.

(*a*) *Under the Factors Acts.*

The Factors Acts are those of 1823 (c. 83), 1825 (c. 94), 1842 (c. 39), 1877 (c. 39), & 1889 (c. 45).

i. "*Mercantile Agent*"—"*Intrusted.*"

467. Acts of 1823-1825 — Wharfinger accustomed to act as flour factor—Selling flour.]—A wharfinger, having received flour in that capacity, & without any authority to sell, disposed of it to a

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464 i. *Bank manager instituting prosecution—General authority as such.*]—The agent in charge of defts.' bank laid an information against pltf., who was arrested for obtaining discount of notes under false pretences, & on the hearing discharged. Though the agent could have consulted the head office by telegraph before the warrant was taken out, he never reported the matter, & never received any instructions. In an action for malicious prosecution against the bank:—*Held:* (1) there was no presumption that the agent had a general authority to prosecute on behalf of the bank; (2) there was no evidence that such prosecution was within scope of the duties & class of acts he was authorised to perform; (3) the facts did not show an emergency which would give an implied authority.—THOMPSON *v.* BANK OF NOVA SCOTIA (1893), 32 N. B. R. 335.—**CAN.**

v. *Clerk of advocate signing notice of appeal.*]—A charge laid by pltf. against deft. having been dismissed by a justice, pltf. appealed, & the notice of appeal was signed "S., by her advocate R., *per* attorney G.":—*Held:* the notice was insufficient, for though such notice might be signed by an advocate, it could not be signed by the clerk to the advocate unless it were proved the clerk had express authority to sign. *R.* v. *Kent JJ.*, L. R. 8 Q. B. 305, cited.—SCOTT *v.* DALPHIN (1907), 7 Terr. L. R. 401; 6 W. L. R. 371.—**CAN.**

PART V. SECT. 3, SUB-SECT. 10.—A. (a) i.

w. *R. S. Ont.*, 1887, *c.* 121, *ss.* 2, 4, & 5—*Agent intrusted with goods—Authority to sell.*]—F., a teacher of music, wrote to K. & Co. asking them to send him a piano, in order that he might sell it as their agent to a customer whom he had found, the piano to be subject to K. & Co.'s orders, but F. to pay freight. K. & Co. handed this letter to pltfs., piano manufacturers, & the latter shipped a piano to F., authorising the railway co. to deliver it to him on his paying freight. F. acknowledged receipt of the piano, & shipped it to himself at T. under an assumed name. Having paid the freight out of advances obtained at T., he removed the piano & pledged it with D. in return for a loan out of which to pay off the above advances. Pltfs. having brought an action of replevin against D.:—*Held:* F. was not an "agent intrusted with the possession of goods" under Factors Act, R. S. O., 1887, c. 121, ss. 2, 4, & 5 (taken from Factors Acts, 1825 (c. 94) & 1877 (c. 39), s. 4), since his employment did not correspond with that of some known kind of commercial agent. *Higgins* v. *Burton*, 26 L. J. Ex. 342; *Heyman* v. *Flewker*, 13 C. B. N. S. 519; *City Bank* v. *Barrow*, 5 App. Cas. 664; *Sheppard* v. *Union Bank of London*, 7 H. & N. 661; *Baines* v. *Swainson*, 4 B. & S. 270; *Cole* v. *North-Western Bank*, L. R. 9 C. P. 470, L. R. 10 C. P. 354; *Cundy* v. *Lindsay*, 3

purchaser who had no notice of the want of authority. The wharfinger was in the habit of doing business as a flour factor :—*Held :* the Act of 1825, s. 4, which protected purchases made innocently & in the ordinary course of business from agents intrusted with goods, did not apply, the wharfinger not being an agent within the Act.—MONK *v.* WHITTENBURY (1831), 2 B. & Ad. 484 ; 1 Mood. & R. 81 ; 109 E. R. 1222.

Annotations :—**Apld.** Wood *v.* Rowcliffe (1846), 6 Hare, 183. **Consd. & Apld.** Baines *v.* Swainson (1863), 4 B. & S. 270. A person is not an agent intrusted with goods within the stat. unless the specific possession of them was given to him *quâ* agent. That is the effect of the decision in *Monk* v. *Whittenbury* (CROMPTON, J.) ; Cole *v.* North Western Bank (1874), L. R. 9 C. P. 470. It was contended that the two characters (of warehouseman & broker) might be joined together. *Monk* v. *Whittenbury* is an authority to the contrary and has been recognised as binding (BUTT, J.). **Refd.** Johnson *v.* Crédit Lyonnais, Johnson *v.* Blumenthal (1877), 47 L. J. Q. B. 241, C. A. ; Payne *v.* Wilson, [1895] 1 Q. B. 653 ; Oppenheimer *v.* Frazer & Wyatt, [1907] 1 K. B. 519.

468. Acts of 1825-1842—Agent intrusted with goods or symbols of property—Enabled to raise money fraudulently.]—A merchant who has enabled his factor to raise money fraudulently can claim no redress against the party who has *bonâ fide* made the advance. The goods or symbols of property intrusted to the factor may be regarded by unsuspecting third parties as his own, & dealt with under the Act of 1842.—VICKERS *v.* HERTZ (1871), L. R. 2 Sc. & Div. 113.

Annotations :—**Distd.** Farquharson *v.* King, [1901] 2 K. B. 697, C. A. **Apld.** Farquharson *v.* King, [1902] A. C. 325. **Refd.** Cole *v.* North Western Bank (1874), L. R. 9 C. P. 470 ; Babcock *v.* Lawson (1879), 4 Q. B. D. 394 ; Oppenheimer *v.* Frazer & Wyatt, [1907] 1 K. B. 519.

469. —— Agent intrusted with goods—Authority to see work done thereon & deliver same to purchaser—Sale to other parties.]—Pltfs., cloth manufacturers, were applied to by E., a factor & commission agent, for a sample of their cloths, on the representation that he could get them a purchaser. The sample having been sent, E. told pltfs. he had got them an order for a certain number of ends at a stated price. Pltfs. required to know the firm, &, S. being mentioned, they sent the goods to the warehouse of E., who was to pass them on to S., after seeing the process of perching performed upon them, for which he was to receive commission from pltfs. of 1s. per end. E. had no authority from S., & sold the goods to defts., cloth merchants, who bought them *bonâ fide :—Held :* (1) E. was an agent "intrusted" with the cloths within the Acts of 1825 & 1842, s. 4, & the purchase of them from E. by defts. was protected (WIGHTMAN & CROMPTON, JJ.). ; (2) E. being in possession of the goods, he was, according to s. 4 of the latter Act, to be taken to be "intrusted" with them by the owner, unless the contrary was shown, & that was a question for the jury (BLACKBURN, J.).—BAINES *v.* SWAINSON (1863), 4 B. & S. 270 ; 2 New Rep. 357 ; 32 L. J. Q. B. 281 ; 8 L. T. 536 ; 11 W. R. 945 ; 122 E. R. 460.

Annotations :—**Consd.** Fuentes *v.* Montis (1868), L. R. 3 C. P. 268. *Baines* v. *Swainson* is strong to show the extreme limit to which the Factors Acts have been pushed (WILLES, J.). **Distd.** Vaughan *v.* Moffat (1868), 38 L. J. Ch. 144. **Consd.** Cole *v.* North Western Bank (1875), L. R. 10 C. P. 354. **Refd.** Cahn *v.* Pockett's Bristol Channel Steam Packet Co., [1899] 1 Q. B. 643, C. A. ; Oppenheimer *v.* Frazer & Wyatt, [1907] 1 K. B. 519.

470. —— —— Authority to do work & reship goods.]—Where there is a power by law to sell, a

App. Cas. 459, cited.—BUSH *v.* FRY (1887), 15 O. R. 122.—**CAN.**

x. *R. S. Ont.*, 1897, *c.* 150—*Agent obtaining goods without authority.*]—A limited meaning is given to the word "agent" in R. S. O., 1897, c. 150. The agent must be one who is intrusted with the possession as agent in a mercantile transaction for the sale or for an object connected with the sale of the property.

Lumber was shipped by pltf. to himself with the understanding that F. was to load on cars for C. & S., the prospective buyers. Before arrival of the vessel C. & S. informed pltf. that they would not purchase it, & pltf. notified F. not to load it on the cars. F. prevailed on the captain to take payment of the unpaid balance of the freight from him & so obtained possession of the lumber, which he sold to deft. F. advised pltf. of the sale, stating that he expected the money would be sent in a few days, but pltf. did nothing at the time, & his inaction led to deft., in ignorance of the real state of affairs, making the payment :—*Held :* F. had no title to the lumber & no right to sell it under the above Act, & deft. must make good pltf.'s loss, but, in view of pltf.'s own inaction, when he might have warned deft., without costs. *Fuentes* v. *Montis* (1868), L. R. 3 C. P. 278, L. R. 4 C. P. 96 ; *Phillips* v. *Huth* (1840), 6 M. & W. 572 ; *Hatfield* v. *Phillips* (1845), 12 Cl. & Fin. 360 ; *Johnson* v. *Crédit Lyonnais Co.* (1877), 3 C. P. D. 43, refd.—MOSHIER *v.* KEENAN (1900), 31 O. R. 658.—**CAN.**

y. *Factors Act, C. S. C., c.* 59—*Agent intrusted with goods—Authority to sell.*]—C., lessee of a coal yard, assigned the property to S. & H., who agreed to receive as warehousemen therein such coal as C. might deposit, & grant him warehouse receipts therefor. It was expressly agreed between them that all coal taken out for which receipts had been given should be replaced with other coal. C. having become insolvent, a question arose as between his assignee & the receipt-holders & R. as to the right to the coal in the yard, some of it having been sent to C. by R., to sell for him on commission, after the receipts had been given, & were outstanding :—*Held :* (1) C. could not, under the above Act, pledge this coal for the payment of the receipt-holders ; (2) R. was entitled before them to so much of his coal as remained unsold.—*Re* COLEMAN (1875), 36 U. C. R. 559 ; *but see* COCKBURN *v.* SYLVESTER, 1 A. R. 471.—**CAN.**

See, also, BAILMENT ; BILLS OF EXCHANGE, PROMISSORY NOTES & NEGOTIABLE INSTRUMENTS.

z. *Act of* 1889—*Agent intrusted with goods — Authority to obtain orders.*]—C. was employed as agent to procure orders on commission, but was not to receive payment, & the goods were to be sent direct by the firm employing C. to customers. Certain goods were stored with C. to meet orders ; some of these he pawned with K. :—*Held :* C. was a mercantile agent within the above Act, & the firm could not recover them from K.—MIDWOOD *v.* KELLY (1901), 35 I. L. T. 221, 36 I. L. T. 58.—**IR.**

a. *Mercantile Agents Act*, 1908—*Agent intrusted with goods—Authority to do work thereon.*]—A dairy co. received butter fat to be manufactured into butter & cheese from suppliers who were consulted as to its disposal, & between whom the proceeds were divided after the co. had deducted cost of manufacture. To secure advances made by a bank the co. gave a debenture charging all its assets, & further its overdrafts were guaranteed by deft. The bank received bills of lading for shipments, & on receipt of invoices signed by the co. discounted them as drafts on the co.'s brokers, who had opened a credit with the bank. The guarantors having paid off the co.'s indebtedness, received from the bank a transfer of the debenture & also some bills of lading. On insolvency of the co. pltf. on behalf of himself & other suppliers sued for proceeds of butter seized by deft. :—*Held :* the co. was not a mercantile agent within the above Act. *Brundao* v. *Barnett* (1846), 12 Cl. & Fin. 787 ; *Bock* v. *Gorrissen* (1860), 30 L. J. Ch. 39, 44 ; *Farley* v. *Turner* (1857), 26 L. J. Ch. 710 ; *Wylde* v. *Radford* (1863), 33 L. J. Ch. 51 ; *Wilkinson* v. *London & County Banking Co.* (1884), 1 T. L. R. 63 ; *Wolstenholme* v. *Sheffield Union Banking Co.* (1886), 54 L. T. 746 ; *Strathmore* v. *Vane* (1886), 33 Ch. D. 586, applds. ; *Bedford* v. *Ellis*, [1901] A. C. 1, foldd. ; *Markt* v. *Knight S.S. Co.*, [1910] 2 K. B. 1021 ; *Re Postlethwaite*, 60 L. T. 514 ; *Imperial Paper Mills* v. *Quebec Bank*, 83 L. J. P. C. 67, distd. ; *South Australian Insce. Co.* v. *Randell*, L. R. 3 P. C. 101 ; *Exp. White*, 6 Ch. App. 397 ; *Kirkham* v. *Attenborough*, [1897] 1 Q. B. 201, appld.—BRUCE *v.* GOOD, GOOD *v.* BRUCE (1917), L. R. 515.—**N.Z.**

b. *Mercantile Agents Act*, 1890—*Carrier intrusted with article for sale on single occasion.*]—Where on a single occasion a carrier is intrusted with the sale of an article, such carrier is not a mercantile agent within the above Act. —NICHOLSON *v.* BANK OF NEW ZEALAND (1894), 12 L. R. 427.—**N.Z.**

c. —— *Cattle dealer intrusted with cattle—Authority to sell.*]—A. intrusted cattle for sale to G., whose business was the buying of cattle & reselling them on his own account. G. took them to resps., auctioneers, but suppressed the fact that they belonged to A. They had A.'s brand upon them. Resps. sold the cattle, honestly believing them to be G.'s, & made advances to G. against the proceeds :—*Held :* (1) the resps. entitled, as against A., to retain the amount of their advances to G. out of the proceeds ; (2) G. was not a "mercantile agent" within the above Act, it not being in the customary course of his business to act as a mercantile agent, or factor, or sell on account of other people. *Montagu* v. *Forwood*, [1893] 2 Q. B. 350, foldd. ; *Baring* v. *Corrie*, 2 B. & Ald. 137 ; *Cooke* v. *Eshelby*, 12 App. Cas. 271, distd.—KNIGHT *v.* MATSON & CO. (1902), 22 N. Z. L. R. 293, C. A.—**N.Z.**

Sect. 3.—*Implied authority: Sub-sect.* 10, *A.* (*a*), *i.*]

purchaser may obtain from the vendor, even as against the true owner, a good title, but that cannot extend, by implication, to a pledge.

B., a leather merchant in London, agreed to pay C., a tanner in Canada, 1½*d.* per pound for every hide tanned by C. in the mode of the country, & C. was to procure freight & send back the hides. B. sent out a large number of the hides, they were tanned, & freight was procured for them, but, in the meantime, C. had obtained from bankers advances on his own account on bills, & hypothecated the hides to the bankers, as security for such advances, engaging to hand over to them the bills of lading if his bills of exchange were not duly honoured. They were not duly honoured, & the bankers (who had acted in entire ignorance of the transactions between B. & C.) claimed to retain the bills of lading & the hides until their demands were satisfied:—*Held:* (1) in the circumstances C. could not, under any law, English or Canadian, claim to be a factor or agent of B. entitled to pledge B.'s goods; (2) the bankers could not set up any title to the goods, as derived from him, against the real owners.—CITY BANK *v.* BARROW (1880), 5 App. Cas. 664; 43 L. T. 393, H. L.

Annotations:—**Refd.** Nähmaschinen Fabrik Act. *v.* Pickford & Lee & Harris (1888), 4 T. L. R. 617; Williams *v.* Colonial Bank, Williams *v.* London Chartered Bank of Australia (1888), 38 Ch. D. 388, C. A.

471. —— Agent in possession of goods previously sold by him—Authority to distribute amongst purchasers & take further orders.]—Pltfs., silk manufacturers in Germany, appointed (*inter alios*) F. to act as their agent in London. The course of business was as follows. It was F.'s duty to call upon certain named customers of pltfs. & get orders for silks. These orders he then transmitted to pltfs., giving a list of the buyers, & of the quantities ordered by each buyer. The goods ordered were then sent over together from Germany to F., whose duty it then was to forward to each buyer the amount purchased by him. It did not appear that F., in the usual course of business, was allowed to represent himself to buyers as principal in the transactions. F., in the course of the business, from time to time collected the money due from the customers, & accepted the bills drawn upon him by pltfs. for the amount of the invoices of goods sent to him from Germany. F. pledged some of the goods so sent over to him with defts. for advances. The pledging was in fraud of his instructions, but defts. in making the advances acted *bonâ fide*, & without knowledge of the fraud. In an action brought to recover the goods so pledged, or their value:—*Held:* (1) F. was not an agent intrusted with the possession of the goods within the Acts of 1823, 1825, & 1842; (2) he was, in the first portion of his duty, merely an agent to make contracts, & in the second portion merely a forwarding agent.—HELLINGS *v.* RUSSELL (1875), 33 L. T. 380.

472. —— Commission agent intrusted with pictures—Authority to sell—Pledging pictures.]—A., who performed business for two insurance companies, & also other business on commission, but did not ordinarily sell on commission, was intrusted by deft. with some pictures. Then or afterwards A. was directed by deft. to sell the pictures, instead of which A., in fraud of deft., pledged them to pltf.:—*Held:* (1) A. was an agent within the Act of 1842, s. 1; (2) pltf. had a right to detain the pictures until his advance was repaid.—HAYMAN *v.* FLEWKER (1863), 13 C. B. N. S. 519; 1 New Rep. 479; 32 L. J. C. P. 132; 9 Jur. N. S. 895; 143 E. R. 205.

Annotations:—**Consd.** Cole *v.* North Western Bank (1875), L. R. 10 C. P. 354; Hellings *v.* Russell (1875), 33 L. T. 380. **Folld.** Tremoille *v.* Christie (1893), 69 L. T. 338. **Refd.** City Bank *v.* Barrow (1880), 5 App. Cas. 664; Oppenheimer *v.* Frazer & Wyatt, [1907] 1 K. B. 519; Waddington *v.* Neale (1907), 96 L. T. 786.

473. —— Person holding goods not apparently as agent or factor.]—A pledge by a party holding goods, not appearing to hold them as factor or agent for the owner, does not bring the case within the Act of 1825.—JAULLERY (JAULERRY) *v.* BRITTEN (1838), 4 Bing. N. C. 242; 5 Scott, 655; 132 E. R. 781.

474. —— Person intrusted with bill of lading—Authority to sell—Pledging dock warrants.]—A party intrusted with the bill of lading for the purpose of selling the goods mentioned in it is not, in consequence, to be considered as intrusted with the dock warrant, notwithstanding his possession of the bill of lading, & the goods under it, enables him to obtain the dock warrant.

A., residing abroad, being the owner of goods, consigned them by a bill of lading, making them deliverable in London to the consignee or his assigns; & having indorsed the bill of lading in blank, transmitted it to his factor, with instructions to receive & sell the goods. The factor received them, entered them in his own name at the custom-house, & obtained, without the privity or express consent of the owner, a dock warrant in his own name, it being the usage at the docks to give such document to the person in whose name they were entered, & pledged such dock warrant for advances beyond the charges for which the factor had a lien:—*Held:* in these circumstances, the factor was not intrusted with a dock warrant, within the Act of 1825, s. 2.—HATFIELD *v.* PHILLIPS (1845), 12 Cl. & Fin. 343; 14 M. & W. 665; 10 Jur. 189; 153 E. R. 642, H. L.

Annotations:—**Apld.** Bouzi *v.* Stewart (1842), 4 Man. & G. 295; Baines *v.* Swainson (1863), 8 L. T. 536. **Refd.** Sheppard *v.* Union Bank of London (1862), 7 H. & N. 661; Cole *v.* North Western Bank (1875), L. R. 10 C. P. 354.

475. —— Persons intrusted as agents or factors.] — The Acts of 1825 & 1842 are confined to persons intrusted as agents or factors by the true owners, & do not apply to persons who have not been intrusted by the true owners or claim to hold the goods in their own right.—VAN CASTEEL *v.* BOOKER (1848), 2 Exch. 691; 18 L. J. Ex. 9; 12 L. T. O. S. 65; 154 E. R. 668.

Annotations:—**Apld.** Jenkyns *v.* Brown (1849), 14 Q. B. 496. **Consd.** Turner *v.* Liverpool Docks Trustees (1851), 6 Exch. 542; Gumm *v.* Tyrie (1864), 4 B. & S. 680; Schotsmans *v.* L. & Y. Ry. Co. (1867), 2 Ch. App. 332; Berndtson *v.* Strang (1867), L. R. 4 Eq. 481. **Consd. & Expld.** Colonial Insce. of New Zealand *v.* Adelaide Marine Insce. (1886), 12 App. Cas. 128, P. C. **Refd.** Edwards *v.* Glyn (1859), 2 E. & E. 29; Hare *v.* Browne (1859), 33 L. T. O. S. 334, Ex. Ch.; Browne *v.* Hare (1859), 4 H. & N. 822, Ex. Ch.; Graham *v.* Candy (1862), 3 F. & F. 206; Joyce *v.* Swann (1864), 17 C. B. N. S. 84; The Marie Joseph (1864), 5 New Rep. 96; Moakes *v.* Nicholson (1865), 34 L. J. C. P. 273; Shepherd *v.* Harrison (1869), 17 W. R. 609; Ogg *v.* Shuter (1875), L. R. 10 C. P. 159; Gabarron *v.* Kreeft, Kreeft *v.* Thompson (1875), L. R. 10 Exch. 274; Mirabita *v.* Imperial Ottoman Bank (1878), 3 Ex. D. 164, C. A.

476. —— Vendor intrusted with dock warrants for goods sold—Negligence of purchaser.]—Pltf. bought tobacco of H., a tobacco merchant & broker. It was left in a bonded warehouse, & dock warrants were left in possession of H., & no entry of pltf.'s name as owner was made in the books of the dock co. H. afterwards, in fraud of pltf., obtained advances by pledging the tobacco to defts., who took the dock warrants & obtained fresh ones from the dock co.:—*Held:* (1) pltf. had not intrusted H. with the documents of title as factor or agent within the Act of 1825, s. 2; (2) pltf. had not been guilty of such negligence in leaving the dock warrants in the hands of H. as to disentitle him to recover the value of the tobacco from defts.—JOHNSON *v.* CRÉDIT LYONNAIS CO., JOHNSON *v.* BLU-

MENTHAL (1877), 3 C. P. D. 32; 47 L. J. Q. B. 241; 37 L. T. 657; 42 J. P. 548; 26 W. R. 195, C. A.

Annotations:—**Consd. & Distd.** Farquharson *v.* King, [1901] 2 K. B. 697, C. A. **Refd.** Attenborough *v.* London & St. Katherine's Dock Co. (1878), 3 C. P. D. 450, C. A.; Joseph *v.* Webb, Joseph *v.* Lyons, Joseph *v.* Pidcock, Joseph *v.* Jones (1883), Cab. & El. 262; Longman *v.* Bath Electric Tramways, [1905] 1 Ch. 646, C. A. **Mentd.** Schofield *v.* Londesborough, [1895] 1 Q. B. 536, C. A.

See, now, Act of 1877.

477. —— Warehouseman holding goods as such —Accustomed to act as broker on particular occasions on special instructions.]—A warehouse-keeper who has goods deposited with him as such is not "an agent intrusted with possession" of them within the Act of 1842, although he be also a broker, & be usually employed to sell the goods, but always upon specific instructions for that purpose received from the principal.

S. carried on the business of a sheep's wool broker in Liverpool, & also that of a warehouse-keeper. In his capacity of warehouse-keeper he was in the habit of receiving from pltfs., merchants in London, bills of lading for sheep's wool & goats' wool to arrive in Liverpool, which when landed was deposited in his warehouse, under directions to send pltfs. a report & valuation, but he was not authorised to sell without specific instructions. The sheep's wool so deposited with him was usually sold by S. & the proceeds received by him for pltfs. The goats' wool S. never sold, not being a goats' wool broker. Having wools of pltfs. of both descriptions in his warehouse, but not having any instructions for the sale of either, S. professed to pledge the whole with defts., bankers in Liverpool, by a letter in which he undertook to hold it as trustee for defts. to secure the sum advanced:—*Held:* S. was not, as to any of the wools so agreed to be pledged, "an agent intrusted with possession" within the Act.

The intention of the Act was that where a third person has intrusted goods or the documents of title to goods to an agent who in course of such agency sells or pledges them, he should be deemed by that act to have misled anyone who *bonâ fide* deals with the agent & makes a purchase from or an advance to him without notice that he was not authorised to sell the goods or to procure the advance (BLACKBURN, J.).

The Act was meant to apply to those cases where one person has given an apparent authority to another, & a third person has dealt with that other in the belief that authority really existed (BRAMWELL, B.).—COLE *v.* NORTH WESTERN BANK (1875), L. R. 10 C. P. 354; 44 L. J. C. P. 233; 32 L. T. 733, Ex. Ch.

Annotations:—**Folld.** Hellings *v.* Russell (1875), 33 L. T. 380; Johnson *v.* Crédit Lyonnais (1877), 2 C. P. D. 224. **Apprvd. & Apld.** City Bank *v.* Barrow (1880), 5 App. Cas. 664. It is sufficient to say briefly that the decision in *Cole* v. *North Western Bank* comes to this: that an agent who can pledge or sell must be an agent of that class which, like factors, has a business which when carried to its legitimate result would properly end in selling or in receiving payment for goods. If such a person is interested in that capacity, then in the absence of bad faith on the part of the pledgee the pledge is good (BLACKBURN J.). **Consd.** Oppenheimer *v.* Frazer & Wyatt, [1907] 1 K. B. 519. **Refd.** Colonial Bank *v.* Whinney (1886), 11 App. Cas. 426; Nahmaschinen Fabrik Act. *v.* Pickford & Lee & Harris (1888), 4 T. L. R. 617; Williams *v.* Colonial Bank, Williams *v.* London Chartered Bank of Australia (1888), 39 Ch. D. 388, C. A.; London Joint Stock Bank *v.* Simmons, [1892] A. C. 201; Tremoille *v.* Christie (1893), 69 L. T. 338; Brocklesby *v.* Temperance Permanent Bldg. Soc., [1895] A. C. 173; Cahn *v.* Pockett's Bristol Channel Steam Packet Co., [1899] 1 Q. B. 643, C. A. Farquharson *v.* King, [1901] 2 K. B. 697, C. A.; Oppenheimer *v.* Frazer & Wyatt, [1907] 2 K. B. 50, C. A. **Mentd.** Mildred *v.* Maspons (1883), 8 App. Cas. 874.

478. Acts of 1842-1847—Apparent owner of furniture—Authority as such.]—The Act of 1842 applies to mercantile transactions, & not to the case of advances made upon security of furniture used in a furnished house—not in any way of trade—to the apparent owner of such furniture, afterwards appearing to be the agent intrusted with custody of the furniture by the true owner. Such "agent" is not an agent, nor is such furniture "goods & merchandise" within the Act.—WOOD *v.* ROWCLIFFE (ROECLIFFE) (1846), 6 Hare, 183; 11 Jur. 707; *affd.* on another point, 2 Ph. 382.

Annotations:—**Apprvd.** Baines *v.* Swainson (1863), 4 B. & S. 270. **Consd.** Cole *v.* North Western Bank (1875), L. R. 10 C. P. 354. **Refd.** Gobind Chunder Sein *v.* Ryan (1861), 15 Moo. P. C. C. 230; Lamb *v.* Attenborough (1862), 1 B. & S. 831. **Mentd.** Carrington *v.* Pell (1849), 3 De G. & Sm. 512; Daniell *v.* Daniell (1849), 3 De G. & Sm. 337.

479. Act of 1877—Agents & consignees of foreign firm—Authority to sell.]—Agents & consignees for sale in England for a German co.:—*Held:* (1) mercantile agents intrusted; (2) a pledge by them was good.—NÄHMASCHINEN FABRIK (LAJE FRISTER & ROSSMANN) ACT. *v.* PICKFORD & CO. & LEE & HARRIS (1888), 4 T. L. R. 617.

480. —— Grantor of bill of sale left in possession —Authority to carry on business.]—The grantor of a bill of sale of stock in trade left in possession by the grantee for the purpose of carrying on the business is not a mercantile agent within s. 2 of the Act.—JOSEPH *v.* WEBB, JOSEPH *v.* LYONS, JOSEPH *v.* PIDCOCK, JOSEPH *v.* JONES (1884), 1 Cab. & El. 262; *revsd.* on another point, 15 Q. B. D. 280, C. A.

481. Act of 1889—Agent intrusted with samples —Authority to obtain orders.]—An agent employed to obtain orders for furniture, but not to sell, was intrusted with certain furniture to be kept in a showroom for the purpose of being shown to customers. This furniture the agent pledged:—*Held:* (1) he was not an agent intrusted with possession of goods for sale within the Act; (2) the pledge was invalid.—BROWN & CO. *v.* BEDFORD PANTECHNICON CO., LTD. (1889), 5 T. L. R. 449, C. A.

482. —— Agent intrusted with jewellery—Agreement not to deliver without special authority.]—Pltfs., dealers in precious stones, carrying on business in Paris, handed certain pearls to A. in Paris in consequence of a statement made by him to them that he knew of a special merchant likely to give a good price for them. A. signed the following receipt: "Intrusted by J. & Co., the following goods to be sold for cash, which I promise to return on the first demand, & not to give them to any one without their written authority. . . . In case of loss I will repay the full value of the goods. The house reserve to themselves the right of delivering the goods." A. pawned the goods at a Govt. pawnbroking establishment, & subsequently pledged them with M., deft.'s representative in Paris, who sent them to deft. in London. Pltfs. brought an action to recover the pearls or their value from deft., in the course of which BRAY, J. found (*a*) A. from the outset of the transaction intended to misappropriate the pearls; (*b*) M. had not acted in good faith:—*Held:* (1) M. was either agent of deft. or a joint speculator with him, & was not a mercantile agent within Factors Acts, & had not acted in good faith; (2) pltfs. were entitled to recover.—MEHTA *v.* SUTTON (1913), 109 L. T. 529; 58 Sol. Jo. 29; 30 T. L. R. 17, C. A.

483. —— Agent intrusted with pictures—Authority to sell some & exhibit others—Pledge of whole after revocation of authority.]—A French co. sent to their London agents certain pictures, some being for exhibition only & others for sale, but they were to remain the property of the French co. until sold. The co. subsequently revoked their agents' authority, & after the revocation one of the agents pledged the pictures to a person who took them in good faith without notice of any fraud:—*Held:* the pledgee obtained a good title to the goods under s. 2 (2) of the Act, as that enactment applied to all goods in the custody of an agent whether they were

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for sale or not.—MOODY *v.* PALL MALL DEPOSIT & FORWARDING CO., LTD., SOCIÉTÉ DES GALÉRIES GEORGES PETIT *v.* MOODY (1917), 33 T. L. R. 306.

484. —— Clerk having dock warrant in own name—Authority to pledge for business purposes—Pawning warrants.]—The Factors Acts do not apply to the case of master & servant.

Where a wine merchant gave authority to his clerk to sign delivery orders in his master's name, & receive dock warrants in his own, which he authorised him to pledge for the purposes of the master's business, the clerk having fraudulently deposited some of these dock warrants with a pawnbroker as security for money *bonâ fide* lent to him:—*Held:* (1) the clerk was not an agent within the Acts; (2) the merchant was entitled to recover the dock warrants from the pawnbroker.—LAMB *v.* ATTENBOROUGH (1862), 1 B. & S. 831; 31 L. J. Q. B. 41; 8 Jur. N. S. 280; 10 W. R. 211; 121 E. R. 922.

Annotations:—**Consd.** Oppenheimer *v.* Attenborough, [1908] 1 K. B. 221, C. A. **Refd.** Baines *v.* Swainson (1863), 4 B. & S. 270; Heyman *v.* Flewker (1863), 13 C. B. N. S. 519; Cole *v.* North Western Bank (1875), L. R. 10 C. P. 354, Ex. Ch.; Farquharson *v.* King, [1902] A. C. 325, H. L. **Mentd.** Weiner *v.* Harris (1909), 101 L. T. 647, C. A.

485. —— Dealer intrusted with furniture—Authority to obtain offer—Irregular sale & receipt of proceeds.]—B. intrusted a table top to G., a dealer in similar articles. It was not to be sold to any person or at any price without B.'s authorisation. If sold, the cheque was to be handed to B. intact, who was to pay a commission. G. sold the table to E. for £200 without B.'s authorisation. E. was to pay S. £170 to satisfy a judgment S. had against G., & £30 to G. E. gave S. a diamond valued between them at £120 & £50 in cash:—*Held:* (1) as G. was acting outside his authority in selling, E. acquired no title & B. was not estopped from disputing E.'s title; (2) as the table was never intrusted for sale & the mode of payment was not in accordance with the ordinary course of business, E. was not protected by the Act of 1825, s. 4, which was in force at the time.—BIGGS *v.* EVANS, [1894] 1 Q. B. 88; 69 L. T. 723; 58 J. P. 84; 10 T. L. R. 59.

Annotation:—**Dbtd.** Turner *v.* Sampson (1911), 27 T. L. R. 200.

486. —— Dealer in pictures intrusted with painting—Deposited as substituted security for prior advance.]—In 1887 T. intrusted A. with an oil painting for sale. In the same year A., who was a dealer in drawings & etchings, & occasionally sold pictures on commission, deposited the painting with B., in substitution for certain drawings & etchings, as security for a loan. B. died. A. became insolvent. T. brought an action against B.'s exors. for recovery of the picture. The painting was sold & the proceeds paid into ct. B.'s exors. counter-claimed a charge on the fund in ct. for the amount payable in respect of the loan:—*Held:* (1) A. was an agent "intrusted with possession of goods" within the Act of 1842; (2) the pledge was valid; (3) the exors. were entitled to the charge claimed on the fund in ct.—TREMOILLE *v.* CHRISTIE (1893), 69 L. T. 338; 37 Sol. Jo. 650.

487. —— Retail jeweller in possession of jewellery for sale or return—Correspondence regarding same.]—Pltf., manufacturing jeweller, was accustomed to send articles of jewellery to F., retail jeweller, for sale on terms of a letter written by F. to pltf., in which F., after acknowledging he had had from pltf. "on sale or return" goods entered up to date in a book in possession of pltf., & that he was liable to account to pltf. for such goods, continued: "The goods referred to in that book are your property, & are to remain so until sold or paid for, being only left with me for the purpose of sale or return, & not to be kept as my own stock. The goods I receive from you are to be entered at cost price, & my remuneration for selling them is agreed at one half the profit":—*Held:* (1) upon construction of the letter as a whole F. was employed as agent for sale; (2) he was a mercantile agent within the Act, & as such had implied authority to pledge the goods intrusted to him; (3) pltf. could not recover goods pledged by F. with deft. without express authority from pltf. *Haslings, Ltd.* v. *Pearson*, No. 488, *post*, overd.—WEINER *v.* HARRIS, [1910] 1 K. B. 285; 79 L. J. K. B. 342; 101 L. T. 647; 26 T. L. R. 96; 54 Sol. Jo. 81; 15 Com. Cas. 39, C. A.

Annotations:—**Refd.** Janesich *v.* Attenborough (1910), 102 L. T. 605. **Mentd.** *Re* Jane, *Ex p.* Trustee (1913), 109 L. T. 908.

488. —— Traveller intrusted with jewellery—Authority to sell same.]—Pltfs., a firm of jewellers, intrusted B., a traveller in their employ, with certain jewellery to sell for them. B., who had no authority to pledge the goods, nevertheless pawned them with deft., a pawnbroker:—*Held:* the pledge was not made by B. "in the ordinary course of business of a mercantile agent" within s. 2 (1) of the Act, there being no evidence to show that the pledging of jewellery was a recognised business.—HASTINGS, LTD. *v.* PEARSON, [1893] 1 Q. B. 62; 62 L. J. Q. B. 75; 67 L. T. 553; 57 J. P. 70; 41 W. R. 127; 9 T. L. R. 18; 36 Sol. Jo. 866; 5 R. 26, C. A.

Annotations:—**Distd.** Tremoille *v.* Christie (1893), 69 L. T. 338; Shenstone *v.* Hilton, [1894] 2 Q. B. 452; Oppenheimer *v.* Attenborough, [1907] 1 K. B. 510. **Consd.** Oppenheimer *v.* Attenborough, [1908] 1 K. B. 221, C. A. **Overd.** Weiner *v.* Harris, [1910] 1 K. B. 285, C. A.

489. —— Warehouseman.]—The provisions of s. 3 of the Act only apply to "mercantile agents" within that Act, which by Factors (Scotland) Act, 1890 (c. 40), is made applicable to Scotland.

Goods of a debtor were stored in a bonded warehouse. The debtor indorsed delivery orders to applt. in consideration of a loan, & a letter purporting to hypothecate part of the goods. Applt. gave no intimation of his rights to the warehousekeeper. The seller of the goods arrested them in the hands of the warehouse-keeper, & brought an action against debtor. By arrangement the goods were sold & proceeds placed in a bank. In an action of multiple-poinding, in which applt. claimed as pledgee, & resps. as personal creditors of debtor:—*Held:* the property in the goods was not effectually vested in applt. as against the creditors, as the warehouse-keeper was not a "mercantile agent" in the statutory sense.—INGLIS *v.* ROBERTSON & BAXTER, [1898] A. C. 616; 67 L. J. P. C. 108; 79 L. T. 224; 14 T. L. R. 517, H. L.

ii. "*Possession.*"

490. Act of 1842—Factor intrusted with bill of lading—Depositing same with broker—Subsequently pledging margin.]—A factor by pledging goods in his possession, or under his control, as agent, for an amount which does not exhaust their value, has not thereby parted with his control over the goods, so as to preclude himself from making a further pledge for the balance of their value, which shall be valid as against the principal under the Act.

Cotton was consigned for sale by A. to B. B. deposited the bill of lading with C., a broker, & authorised him to receive & sell the cotton, & made a further pledge to D. of the balance of the net proceeds of the cotton, by order in writing communicated to & assented to by C.:—*Held:* the pledge to D. was valid as against A. under the Act.—PORTALIS *v.* TETLEY (1867), L. R. 5 Eq. 140; 37 L. J.

Ch. 139; 17 L. T. 344; 16 W. R. 503; 3 Mar. L. C. 34.

Annotation:—**Reid.** Cole *v.* North Western Bank (1874), L. R. 9 C. P. 470.

iii. "*Goods.*"

491. Act of 1842—Sharebroker pledging stock certificates.]—A sharebroker had, unknown to pltf., his principal, pledged certain certificates of ry. stock belonging to pltf. with deft., as security for his own private debt. The transaction was *bonâ fide*, & without any notice of ownership of the certificates on deft.'s part. In an action of detinue by pltf. against deft. for the certificates:—*Held:* (1) certificates of ry. stock were not "goods" within s. 1 of the Act; (2) a rule to enter a verdict for deft. on a plea raising a defence that they were "goods" within the Act must be refused.—FREEMAN *v.* APPLEYARD (1862), 1 New Rep. 30; 32 L. J. Ex. 175; 7 L. T. 282.

Annotation:—**Apprvd.** Williams *v.* Colonial Bank, Williams *v.* London Chartered Bank of Australia (1888), 38 Ch. D. 388, C. A.

iv. "*Documents of Title.*"

492. Delivery order—Goods not specific.]—A delivery order was given by defts. to F. for 2,640 bags of mowra seed, which formed part of a consignment of 6,400 bags. F. gave defts. a cheque therefor & indorsed the delivery order to pltfs., who took it in good faith & for valuable consideration. F.'s cheque having been dishonoured, defts. refused to give delivery of the seed to pltfs.:—*Held*: (1) the delivery order was a document of title to the goods which had been "transferred" by defts. to F. within the Act of 1889, s. 10, & Sale of Goods Act, 1893 (c. 71), s. 47, & having been transferred by F. to pltfs., who took it in good faith & for valuable consideration, defts.' right of lien as unpaid vendors was defeated; (2) the delivery order was valid notwithstanding that it related to goods which were not specific.—ANT. JURGENS MARGARINEFABRIEKEN *v.* DREYFUS (LOUIS) & CO., [1914] 3 K. B. 40; 83 L. J. K. B. 1344; 111 L. T. 248; 19 Com. Cas. 333.

v. "*Pledge.*"

493. Act of 1825—Transfer of goods held under lien.]—If A., holding B.'s goods with a lien on them against B., transfer them to C., C. cannot hold them against B. to the extent of A.'s lien under s. 5 of the Act, unless the transfer be expressly made as a pledge.—THOMPSON *v.* FARMER (1827), 1 Mood. & M. 48.

494. Act of 1842—Hypothecation.]—A., a factor & warehouse-keeper, by letter of hypothecation pledged to B. certain wools to secure a sum of money. No delivery of the warrants for the wools was made, but a promise to deliver them on the following morning was added at the foot of the letter. After being pressed daily to deliver the warrants, A. absconded. B. obtained from A.'s clerk the keys of the warehouses & possession of the wools. A. was a few days afterwards adjudicated bkpt. The wools belonged to third parties, who had been under advances from the bkpt., & made no claim:—*Held*: (1) the letter created a good equitable charge; (2) it did not require registration under Bills of Sale Act, 1854 (c. 36); (3) the goods were not in the order & disposition of bkpt.; (4) the transaction was a valid pledge under Factors Act, 1842; (5) B. had a good title against the trustee in bkpcy.—*Re* SLEE, *Ex p.* NORTH WESTERN BANK (1872), L. R. 15 Eq. 69; 42 L. J. Bcy. 6; 27 L. T. 461; 21 W. R. 69.

Annotations:—**Distd.** *Re* Steele, *Ex p.* Conning (1873), L. R. 16 Eq. 414. **Consd.** *Re* Hamilton, Young, *Ex p.* Carter, [1905] 2 K. B. 772. **Reid.** *Re* Hall, *Ex p.* Close (1884), 14 Q. B. D. 386. **Mentd.** Reeves *v.* Barlow (1883), 11 Q. B. D. 610.

vi. "*Consent of Owner*"—"*In Possession.*"

495. Acts of 1823—1825—Broker obtaining possession by trick—Authority to sell—Mala fides imputed to purchasers.]—Where a mercantile agent in possession of goods with the owner's consent makes, without authority & in fraud of the owner, a sale of them to joint purchasers, who act as partners in the particular transaction of the purchase of them as a speculation, & one of the joint purchasers does not act in good faith, the other joint purchasers, although they personally act in good faith, are not within the protection given them by the Act of 1889, s. 2 (1).

Pltf., a diamond merchant, intrusted certain diamonds to a broker who stated he had customers for them, & mentioned two firms. The broker did not offer the diamonds to either firm, but gave them to B., asking him to sell them. B. took the diamonds to F. & W., explaining he came from a broker, & asked them to purchase them on joint account with himself. F. & W. agreed, & paid the price required by the broker, debiting B. in their books with one half thereof, & afterwards disposed of the diamonds, crediting B. with half the profits realised. In an action for conversion by pltf. against B. & F. & W., the jury found the broker obtained the diamonds from pltf. by larceny by trick; that F. & W. had acted in good faith, but B. had not:—*Held*: (1) for the particular purpose of purchasing the diamonds B. & F. & W. were partners; & though F. & W. had acted in good faith, B.'s want of good faith deprived them, as well as himself, of the protection of s. 2 (1) of the Act; (2) they were all jointly liable to pltf. for conversion of the diamonds.

A mercantile agent who obtains possession of goods from the owner by means of larceny by a trick is not in possession of them with the "consent" of the owner within s. 2 (1) (FLETCHER MOULTON, L.J.).—OPPENHEIMER *v.* FRAZER &

PART V. SECT. 3, SUB-SECT. 10.—A. (a), iii.

d. *Mercantile Agents Act*, 1908—*Goods must be in existence at time of charge.*]—BRUCE *v.* GOOD (1917), L. R. 515.—**N.Z.**

e. *Factors (Scotland) Act*, 1890 (c. 40), *s.* 1—*Pledge of warehouse warrants.*]—The owner of goods in the custody of a warehouse-keeper under warrants which bore that the goods were held to the order of the owner or his assignees by indorsement, indorsed the warrants to a third party in implement of a contract assigning the goods in security:—*Held*: the above sect. did not dispense with the rule of common law requiring intimation to the warehouse-keeper in order to constitute a real right to the goods in favour of the indorsee of the warrant.—ROBERTSON & BAXTER *v.* INGLIS (1897), 34 Sc. L. R. 577.—**SCOT.**

PART V. SECT. 3, SUB-SECT. 10.—A. (a) iv.

492 i. *Delivery order.*]—An iron manufacturer contracted to supply several parcels of iron to A. A. employed B.' an iron-broker & iron-merchant, to find a purchaser. B. falsely stated that he had found a purchaser, & obtained from A. an order on the manufacturer in these terms: "Please deliver the iron to B." B. upon the delivery order indorsed a delivery order in favour of C., & obtained from him an advance on the security of the iron. C. forwarded the delivery orders to the manufacturer, & obtained from him an obligation to deliver to him, & subsequently, after B. had become bkpt., obtained delivery of the iron. In an action by A. against C. for re-delivery of the iron:—*Held*: the delivery order held by B. was a document of title under Factors Act, 1842 (c. 39), & C. was entitled to retain the iron in security of the advance.—VICKERS *v.* REECE (1871), 9 H. H. L. 65. —**SCOT.**

PART V. SECT. 3, SUB-SECT. 10.—A. (a) vi.

f. *Law Amendment Act*, 1880—*Pledge after revocation of factor's authority.*]—In the absence from the above Act of a provision similar to that in Factors Act, 1877 (c. 39), s. 2, a person, who in good faith makes advances on goods to a factor whose authority has been revoked, is not entitled to hold the goods against the principal, & is liable for converting them.—MERCHANT BANKING CO. *v.* WILSON, TAINE & CO. (1885), L. R. 3 S. C. 451.—**N.Z.**

Sect. 3.—Implied authority: Sub-sect. 10, *A.* (*a*), *vi., vii., viii. & ix.*]

WYATT, [1907] 2 K. B. 50; 76 L. J. K. B. 806; 97 L. T. 3; 23 T. L. R. 410; 51 Sol. Jo. 373; 12 Com. Cas. 147, 280, C. A.

Annotations:—**Refd.** Oppenheimer *v.* Attenborough, [1908] 1 K. B. 221, C. A.; Mehta *v.* Sutton (1913), 108 L. T. 214.

496. —— Dealer in possession of goods—Course of business to sell.]—TURNER *v.* SAMPSON, No. 829, *post.*

497. —— Factor consignee & indorsee of bill of lading—Goods consigned for sale—Pledge of dock warrants.]—Where a factor, the consignee of goods for sale & indorsee of bills of lading, had landed & warehoused goods & taken the wharfingers' certificates & dock warrants in his own name, & then pledged the certificates & warrants with a banking co. for an advance of money on his own account, in an action of trover by the real owner of the goods:—*Held:* such pledge was not protected by s. 2 of the Act of 1825.—CLOSE *v.* HOLMES (1837), 2 Mood. & R. 22.

Annotation:—**Expld.** Phillips *v.* Huth (1840), 10 L. J. Ex. 65.

498. —— Factor indorsee of bill of lading—Authority to sell.]—In order to make the factor a party intrusted with the dock warrant within the Act of 1825, it must appear that the owner of the goods intended the factor should be possessed of it at the time of the pledge, or that he could exercise the power, which possession of the bill of lading gave him, of obtaining the dock warrant whenever he might think fit.

Pltfs., owners of a cargo of tobacco, on arrival of the vessel, placed a bill of lading—indorsed in blank—in the hands of W., as their factor, for sale. W. entered the goods at the custom-house in his own name, & before the cargo was weighed, & without pltfs.' knowledge obtained a dock warrant for it in his own name. W. had previously agreed with defts. for the advance to him (W.) of £20,000, on deposit of other dock warrants as security. Defts., thinking that security insufficient, refused to advance more than £12,000, whereupon W. pledged with them the dock warrant of pltfs.' tobacco as a security for, & obtained thereon, the remaining £8,000:—*Held:* (1) in these circumstances, it did not sufficiently appear that W. was intrusted with the dock warrant within s. 2 of the above Act; (2) plfts. were entitled to recover from defts. the proceeds of the tobacco sold by defts. on W. becoming bkpt.—PHILLIPS *v.* HUTH (1840), 6 M. & W. 572; 10 L. J. Ex. 65; 151 E. R. 540.

Annotations:—**Apprvd.** Hatfield *v.* Phillips (1842), 9 M. & W. 647, Exch. **Apld.** Baines *v.* Swainson (1863), 4 B. & S. 270. **Refd.** Bonzi *v.* Stewart (1842), 4 Man. & G. 295; Hatfield *v.* Phillips (1845), 12 Cl. & Fin. 343, H. L.; Cole *v.* North Western Bank (1875), L. R. 10 C. P. 354; Cahn *v.* Pockett's Bristol Channel Steam Packet Co., [1899] 1 Q. B. 643, C. A.

499. —— Factor obtaining bill of lading by trick.]—M., a merchant & factor of London, employed by V., a merchant in Holland, to negotiate sales as a commission agent, obtained & transmitted to V. an offer from L. & F. to purchase a quantity of oil. V. accepted the offer, & shipped a parcel of oil in pursuance of the contract, & sent the bill of lading, specially indorsed to L. & F., to M. that it might be exchanged for L. & F.'s acceptance of V.'s draft. Before this M., without any authority from V., had agreed to cancel the contract with L. & F., & when the bill of lading arrived M. procured L. & F. to indorse it in blank, & deliver it to him, by falsely representing that the special indorsement had been made by mistake. M. then caused the oil to be warehoused in his own name, & immediately pledged it to pltfs. as security for an advance of £350:—*Held:* the pledge was not protected by the Act of 1825.—VAUGHAN *v.* MOFFAT (1868), 38 L. J. Ch. 144.

500. Act of 1847—Agent in possession of goods after return demanded—Authority to sell revoked.]—An agent "intrusted with & in possession of goods, or of the documents of title to goods," within the Acts of 1825 & 1842, is a person who is intrusted as agent for sale; & one whose authority to sell has been revoked cannot make a valid pledge of goods which had been intrusted to him for sale, but which he has wrongfully retained after his authority has been revoked & the goods demanded from him by his principal.—FUENTES *v.* MONTI (1868), L. R. 4 C. P. 93; 38 L. J. C. P. 95; 19 L. T. 364; 17 W. R. 208, Ex. Ch.

Annotations:—**Apld.** Cole *v.* North Western Bank (1874), L. R. 9 C. P. 470. **Foll.** Johnson *v.* Crédit Lyonnais, Johnson *v.* Blumenthal (1877), 37 L. T. 657. **Consd.** Oppenheimer *v.* Frazer & Wyatt (1906), 76 L. J. K. B. 276. **Refd.** Vickers *v.* Hertz (1871), L. R. 2 Sc. & D. 113, H. L. **Mentd.** Joseph *v.* Webb, Joseph *v.* Lyons, Joseph *v.* Pidcock, Joseph *v.* Jones (1883), Cab. & El. 262.

See, now, Act of 1889, s. 2 (2), & pp. 333, 334, *ante.*

vii. "*Ordinary Course of Business.*"

501. Acts of 1825—1842—Agent—Power of attorney in non-mercantile transaction.]—The above Acts do not empower an agent acting under a power of attorney in a non-mercantile transaction to mtge. the property of the principal.—LEWIS *v.* RAMSDALE, No. 289, *ante.*

502. Act of 1889—Broker's friend pawning jewellery—Power to sell.]—Pltf., a dealer in diamonds at A., sent some diamonds to a diamond broker in London for sale. The broker, without pltf.'s authority, asked a friend to pledge the diamonds for him. The friend pledged them with defts., pawnbrokers. Defts. acted in good faith & without notice that the diamonds were pledged without the owner's authority. In an action to recover the diamonds:—*Held:* (1) though the broker was a mercantile agent within the Act, it was not the ordinary course of business of a mercantile agent to ask a friend to pledge goods intrusted to him, but to pledge them himself; (2) defts. were not protected by s. 2 (1) of the Act.—DE GORTER *v.* ATTENBOROUGH & SON (1904), 21 T. L. R. 19.

503. —— Broker pawning diamonds—Authority to show same with view to sale.]—Although it may not be usual in a particular trade—*e.g.*, the diamond trade—for an agent to have authority from his principal to pledge goods, a pledge by such agent, who is in possession of goods with the owner's consent, is, when acting in the ordinary course of business of a mercantile agent, valid under s. 2 of the Act, provided the pledgee takes in good faith & without notice that the pledgor had no authority to make the pledge.

Pltf., a diamond merchant, intrusted S., a diamond broker, with diamonds to show to certain persons with a view to sale. S., instead of so showing them, pledged them with defts., a firm of pawnbrokers, who took them in good faith. In an action for delivery of the diamonds evidence was given that it was no part of a diamond broker's business to pledge diamonds, & by the custom of the diamond trade (which was not notorious outside the trade) agents had no authority so to do:—*Held:* (1) the pledge by S. was valid under s. 2 (1) of the Act; (2) pltf. was not entitled to recover the diamonds.

The expression "when acting in the ordinary course of business of a mercantile agent" in s. 2 means when acting in such a way as a mercantile agent would act—that is to say, within business hours & at a proper place of business—so that there

is nothing to lead the pledgee to suppose anything is wrong or the disposition is one which the mercantile agent has no authority to make (LORD ALVERSTONE, C.J., & BUCKLEY, L.J.).—OPPENHEIMER *v.* ATTENBOROUGH & SON, [1908] 1 K. B. 221; 77 L. J. K. B. 209; 98 L. T. 94; 24 T. L. R. 115; 52 Sol. Jo. 76; 13 Com. Cas. 125, C. A.

Annotations:—**Distd.** Janesich *v.* Attenborough (1910), 102 L. T. 605; Mehta *v.* Sutton (1913), 29 T. L. R. 185. **Reid.** Weiner *v.* Harris, [1910] 1 K. B. 285; Whitchorn *v.* Davison (1910), 80 L. J. K. B. 425.

504. —— Mercantile agent pledging goods with auctioneer—Power to sell.]—Goods were consigned by pltfs. to H., a mercantile agent, for sale by him on their behalf for cash or on the hire system. H. sent the goods to defts., a firm of auctioneers, for sale by auction, & obtained from them an advance upon the goods in contemplation of their sale. In an action by pltfs. against defts. for conversion of the goods:—*Held:* (1) the transaction was not "a sale, pledge, or other disposition of goods made by a mercantile agent when acting in the ordinary course of business of a mercantile agent" within s. 2 of the Act; (2) defts. were not protected by the Act.—WADDINGTON & SONS *v.* NEALE & SONS (1907), 96 L. T. 786; 23 T. L. R. 464.

505. —— Mercantile agent pawning jewellery at exhorbitant rate—Authority as such.]—Where a mercantile agent in the jewellery trade raises money by pledging goods with a pawnbroker, he is not acting beyond the ordinary course of business. Regard must be had to the actual disposition of the goods, not to the circumstances, when considering whether a particular transaction is within the ordinary course of the mercantile agent's business. A pledge at an unusual rate of interest could be evidence from which an inference may be drawn that the pledgees had notice that the pledgor had no authority to make the pledge.—JANESICH *v.* ATTENBOROUGH & SON (1910), 102 L. T. 605; 26 T. L. R. 278.

viii. *Notice of Want of Authority—Knowledge.*

506. Effect of notice.]—Pltf. consigned pearls to a Liverpool merchant for sale, & drew bills upon him to an amount greater than the value of the pearls, which bills he accepted. The Liverpool merchant handed the pearls to his London agent to be sold, & drew bills upon him, as an advance, upon account of the pearls. The London agent accepted the bills, having notice that the pearls had been consigned by pltf. for sale. The Liverpool merchant became insolvent, & the bills drawn upon him by pltf. were not paid. The London agent sold the goods to recoup himself for the bills drawn upon him by the Liverpool merchant. Upon a bill by the consignor alleging fraud & collusion, & praying the London agent might be decreed to pay him the amount produced by sale of the pearls:—*Held:* the pledge was valid within the Act of 1842, as made *bonâ fide* & in ordinary course of business.

Notice to the pledgee of the fact that the goods were transmitted to the consignee, with directions to sell simply, will not vitiate the pledge; otherwise if the pledgee had notice that the consignee was prohibited from pledging.—NAVULSHAW *v.* BROWNRIGG (1852), 2 De G. M. & G. 441; 21 L. J. Ch. 908; 20 L. T. O. S. 25; 16 Jur. 979; 42 E. R. 943.

Annotations:—**Apprvd.** Gobind Chunder Sein *v.* Ryan (1861), 15 Moo. P. C. C. 230, P. C. **Consd.** Jewan *v.* Whitworth (1866), L. R. 2 Eq. 692; Portalis *v.* Tetley (1867), L. R. 5 Eq. 140; Moxon *v.* Bright (1869), 4 Ch. App. 292; Kaltenbach *v.* Lewis (1885), 10 App. Cas. 617, H. L.

507. ——.]—Applts., foreign merchants, employed a factor to sell goods on their account. The factor employed resps., London brokers, to sell the goods. The factor died on May 5, 1880, insolvent, having pledged the goods to resps., for an advance protected under Factors Acts. The goods were sold by resps. at a price more than sufficient to repay the advance, but the price had not been paid nor the goods delivered when resps. had notice of applts.' claim:—*Held:* (1) resps., the brokers, could not retain the surplus proceeds of sale in discharge of the general balance due to them by the factor; (2) applts. had the right to recover the surplus proceeds of sale under the Act of 1842, s. 7, as money had & received on their account, & also on the grounds of privity of contract & the right to possession of the goods not delivered until after notice of applts.' claim.—KALTENBACH *v.* LEWIS, No. 523, *post.*

508. Effect of knowledge.]—*Qu.:* whether knowledge, however acquired, that goods were not the property of the person dealing as principal, deprives the consignee of his rights of lien for advances made subsequent to the acquiring of such knowledge. The provisions of the Act of 1825, s. 1, which require notice, perhaps modify the common law rule & extend the rights of consignees, since notice & knowledge are not necessarily the same (LORD BLACKBURN).—MILDRED, GOYENECHE & CO. *v.* MASPONS (1883), 8 App. Cas. 874; 53 L. J. Q. B. 33; 49 L. T. 685; 32 W. R. 125; 5 Asp. M. L. C. 182; H. L.

Annotation:—**Distd.** Kaltenbach *v.* Lewis (1883), 24 Ch. D. 54, C. A.

509. Pledgee must produce & prove contract with broker.]—A., owner of certain East India indigo warrants, intrusted them to a broker, without any authority to pledge or sell. The broker pledged them to B. In an action brought by A. against B. for the proceeds of the goods, the broker, called as a witness for pltf., stated he parted with the warrants to deft. under a contract in writing:—*Held:* (1) a deft. seeking to avail himself of the Act of 1825, s. 2, must prove his contract with the broker; (2) it was incumbent on B. to produce the written agreement.—EVANS *v.* TRUMAN (1831), 2 B. & Ad. 886; 1 Mood. & R. 10; 109 E. R. 1371.

Annotations:—**Apprvd.** Navulshaw *v.* Brownrigg (1852), 2 De G. M. & G. 441; Gobind Chunder Sein *v.* Ryan (1861), 9 Moo. Ind. App. 140.

ix. "*Consideration*"—"*Antecedent Debt.*"

510. Acts of 1823-1825—Broker accepting bills—Acceptances provided for by principal.]—A. pur-

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PART V. SECT. 3, SUB-SECT. 10.—A. (a) viii.

506 i. *Effect of notice.*]—A party advancing money upon a deposit by an agent of the goods of his principal will be protected under 5 & 6 Vict. c. 39, unless he had notice that the agent was acting in the transaction without authority, or *mala fides*, as against the owner of the goods; the question of *mala fides* is for the jury.—DOUGLAS *v.* EWING, (1856) 6 I. C. L. R. 395; *affd.* 3 Ir. Jur. 174, Ex. Ch.—**IR.**

g. *Act of 1842—Necessity of notice of agent's mala fides.*]—Where an agent, intrusted with a document of title to goods, pledges it *malâ fide*, or without authority, it is necessary, in order to deprive the transaction of the protection given by s. 1 of the above Act, & to bring it within the proviso of s. 3 of that Act, that the jury should find categorically that the lender had notice of the agent's *mala fides* or want of authority.

To prove such notice it is sufficient to show that the circumstances attending the transaction were such as that a reasonable man of business would infer that the agent had not authority to make the pledge, or that he was acting *malâ fide* in respect thereof, against his principals.—GOBIND CHUNDER SEIN *v.* RYAN (1861), 15 Moo. P. C. C. 230; 9 Moo. Ind. App. 140; 5 L. T. 559; 8 Jur. N. S. 343; 10 W. R. 155; 15 E. R. 482, P. C.—**IND.**

PART V. SECT. 3, SUB-SECT. 10.—A. (a.) ix.

h. *Factors Act (N.S.W.),* 1899 (*No.* 28) *—Factor pledging goods — To secure fluctuating debt.*]—The pledging of goods or documents of title intrusted to a factor allowed by the above Act does

Sect. 3.—Implied authority: Sub-sect. 10, A. (a), ix.]

chased & paid for East India silks, warrants for which he sent to B., his broker, with bills to nearly their value, drawn upon B., which B. accepted. B. did not pay his acceptances when due, but received from A. acceptances of A. to nearly the same amount, for the purpose of taking up his own acceptances, which he applied to his own use, & afterwards pledged the warrants with C. In trover for the warrants by A. against C.:—*Held:* (1) by s. 8 of the Act of 1825, B. not having paid his own acceptances, had no lien upon the warrants which he could transfer to C.; (2) C. had no right to detain them as against A.—FLETCHER *v.* HEATH (1827), 7 B. & C. 517; 1 Man. & Ry. K. B. 335; 6 L. J. O. S. K. B. 95; 108 E. R. 815.

Annotations:—**Folld.** Blandy *v.* Allan (1828), 3 C. & P. 447. **Refd.** Cole *v.* North Western Bank (1875), L. R. 10 C. P. 354. **Mentd.** London Joint Stock Bank *v.* Simmons, [1892] A. C. 201.

511. —— Broker accepting bills on particular account—Balance due to principal on general account—Pledge of goods held on particular account.]—A. being engaged in two separate commercialventures, one on his own account, the other on account of a firm of which he was a member, employed a factor to make sales on account of both, & directed him to keep the account sales of the two concerns distinct. The factor distinguished them by marks but posted up the whole into one general account with A., with whom alone he had correspondence or dealings. The factor pledged goods belonging to one of these accounts in order to meet a bill drawn on him by A. expressly against that account. At that time he owed A. a considerable sum on the general balance, but was his creditor on the account to which the pledged goods belonged:—*Held:* the factor had no lien against A. which he could transfer to the pawnee, for he could not separate the two accounts.—ROBERTSON *v.* KENSINGTON (1830), L. & Welsb. 187; 5 Man. & Ry. K. B. 381; 8 L. J. O. S. K. B. 183.

512. —— Broker pledging goods before Oct. 1, 1826—For debt then due.]—To entitle a person who claims a lien on goods pledged with him by a factor to retain them under the Act of 1825, the debt for which they are pledged must really & substantially have been incurred after Oct. 1, 1826, & the act of pledging must have taken place after that day.

Where goods were pledged before Oct. 1, 1826, for a debt then due, & the debt was continued after that day by the renewal of a bill given before:—*Held:* the pledge was not effectual under the above Act, as against the owners of the goods.—ROSS *v.* WILLIS (1828), Dan. & Ll. 19; 6 L. J. O. S. K. B. 215.

513. —— Factor pledging goods—For antecedent advance.]—Where defts., receiving a pledge from a factor for an antecedent debt, sell it, they cannot under s. 3 of the Act of 1825 hold the proceeds against the real owner, but are liable to trover; but in estimating damages they are entitled to credit for the balance, if any, due from the owner to the factor.—TAYLOR *v.* TRUEMAN (1830), L. & Welsb. 184; Mood. & M. 453.

514. —— Factor pledging warrants—Acceptances given & provided for by principal.]—Acceptances of a factor for his principal, provided for by the principal before they become due, do not constitute such a demand against the principal as to enable the factor previous to Oct. 1, 1826, when the Act of 1825, s. 2, came into operation, to pledge warrants for goods belonging to the principal, as security for advances made to himself. The factor, if he is under acceptances, has a right to detain until those acceptances are discharged, yet he has not any right to enforce, & no right to call for, payment of money.—BLANDY *v.* ALLAN (1828), 3 C. & P. 447; Dan. & Ll. 22.

515. —— —— In exchange for other warrants pledged for antecedent debt.]—N. & Co., commission agents, purchased through defts., brokers, & paid for, 23 chests of indigo, on behalf of pltf., & were paid by him, but retained the warrants, the chests remaining in the East India Co.'s warehouse. Being desirous of withdrawing some other warrants which they had in defts.' hands, N. & Co. deposited these warrants in lieu of them, & afterwards authorised defts. to sell the chests & appropriate the proceeds, which defts. did, not knowing any person was interested in them other than N. & Co. At the time of this transaction N. & Co. were creditors in account with pltf. to an amount much below the value of the indigo:—*Held:* (1) sale of the 23 chests was a conversion; (2) defts. were liable to the principal in trover, for the transfer of these warrants by N. & Co. was not a sale or disposition by factors within the Act of 1825, s. 2, nor a pledge as security for negotiable instruments, within the same sect., East India warrants not being "negotiable instruments"; & if the warrants were deposited as security for a previously existing debt, defts. (by s. 3 of the Act) could have no greater right in respect of them than the factors had at the time of deposit.—TAYLOR *v.* KYMER (1832), 3 B. & Ad. 320; 1 L. J. K. B. 114; 110 E. R. 120.

Annotations:—**Apld.** Bonzi *v.* Stewart (1842), 4 Man. & G. 295. **Refd.** Cole *v.* North Western Bank (1875), L. R. 10 C. P. 354. **Mentd.** Shenstone *v.* Hilton, [1894] 2. Q. B. 452.

516. —— —— ——.]—Pltfs., merchants residing abroad, consigned goods to D. & A., their factors, resident in England. The goods were warehoused in St. Catharine's Dock. Deft. had been in the habit of making advances to D. & A. on security of dock warrants, & under an agreement that he should hold all dock warrants which had been delivered to him by D. & A., as security for the general balance of the money owing him by them. After arrival of pltfs.' goods, D. & A., on Oct. 7, 1836, being indebted to deft., delivered four dock warrants (of part of the goods) in exchange for other warrants held by him. On the 15th, being in want of a further advance, they borrowed an additional sum under a promise of delivering ten other warrants of pltfs.' on the 17th, which was done, & similar transactions took place on the 22nd & 24th with respect to two other warrants. In trover for the whole of the goods included in the sixteen warrants so delivered to him:—*Held:* (1) as to the first four, an exchange was not a pledge within the Act of 1825, s. 2; (2) no money could be considered as advanced on the faith of those warrants.—BONZI *v.* STEWART (1842), 4 Man. & G. 295; 5 Scott, N. R. 1; 11 L. J. C. P. 228; 3 L. T. O. S. 301; 134 E. R. 121.

Annotations:—**Refd.** Cole *v.* North Western Bank (1875), L. R. 10 C. P. 354; **Mentd.** Wills *v.* Murray (1850), 4 Exch. 843.

517. —— —— For new loan to firm—Proceeds applied in repaying old loan to individual partner.]—Defts. advanced to W., who carried on business as a factor, £14,000 on deposit of certain bonds. W. & C. afterwards entered into partnership & agreed with defts., in consideration of defts. discounting W. & C.'s acceptances for £14,000, to deposit with defts. as security dock warrants for goods held by W. & C. Pltfs., owners of a cargo of tobacco, on

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not enable the factor to pledge such goods or documents of title with other goods or documents of title for a fluctuating debt: *Kaltenbach* v. *Lewis* (1883), 10 App. Cas. 617, apld.—*Re* FARMERS, & SETTLERS' CO-OPERATIVE SOCIETY, LTD., CITY BANK OF SYDNEY *v.* BARDEN, SAME *v.* PENFOLD, SAME *v.* MOLONEY (1908), 9 S. R. (N. S. W.) 41.—AUS.

arrival of the vessel, had handed over the bill of lading to W. & C., as their factors, for sale, & W. & C. had entered the cargo in the custom-house in their own names, &, without pltfs.' knowledge, had obtained a dock warrant for it in their own names. W. & C. deposited this dock warrant with defts., who gave up to W. the bonds & paid over to W. & C. the balance, after deducting the debt due to them from W. & discount:—*Held:* (1) if, according to the intention of both parties, the £14,000 was to be placed entirely at the disposal of W. & C. to apply to any purpose of their own & they directed its payment in account to defts. in satisfaction of W.'s debt, this was an advance of money to W. & C. within the Act of 1825, s. 2; (2) if their intention was that the new advance was only for the purpose of satisfying W.'s former debt, & would not have been made except on the understanding it should be so applied, & the application of it otherwise would have been a breach of agreement, it was not an advance within the Act.—PHILLIPS *v.* HUTH, No. 498, *ante*.

For full anns., *see* S. C. No. 498, *ante*.

518. Act of 1825—Factor transferring goods—In consideration of antecedent debt.]—It is not necessary in order that a purchase may be protected under s. 4 that money should actually pass; the sect. applies equally where goods are transferred in consideration of an antecedent debt.—THACKRAH *v.* FERGUSSON (1877), 25 W. R. 307.

519. Act of 1842—Agent pledging goods—For new loan—Proceeds applied in meeting bill on which agent & pledgee liable.]—An agent of pltf., intrusted with his goods, & being liable, with deft., on a bill of exchange, which had become due, obtained money from deft. for the purpose of paying the bill, & deposited with him pltf.'s goods. The judge having told the jury that if the transaction was only a circuitous mode of paying the bill, on which deft. was liable, it was not within the Act:—*Held:* (1) not a misdirection; (2) the transaction was not protected by the Act.—LEAROYD *v.* ROBINSON (1844), 12 M. & W. 745; 13 L. J. Ex. 213.

Annotations:—**Consd.** Macnee *v.* Gorst (1867), L. R. 4 Eq. 315; Kaltenbach *v.* Lewis (1885), 10 App. Cas. 617. **Mentd.** Cole *v.* North Western Bank (1874), L. R. 9 C. P. 470.

520. —— —— In exchange for other goods previously pledged & for additional advance.]—To a count for detinue of goods defts. pleaded they were bankers, & whilst S. had dealings with them as such bankers, L. was intrusted by pltf. with the goods as his agent; that defts. were possessed of other goods upon which they as such bankers had a valid lien in respect of previous advances to S. at request of L.; that it was agreed between L. & defts., as such bankers, that in consideration of delivery by defts. to L. of the other goods he would deliver to defts. as such bankers, by way of pledge, the goods in the count mentioned, & defts. should hold same as a lien, instead of the other goods, in respect of the previous advance & also such further advances as defts. might make to L., which L. then requested defts. to make; that defts., in pursuance of the agreement, delivered up to L. the other goods, & L. delivered to defts. the goods in the count mentioned as such pledge, & defts. advanced to S. further sums of money which were still owing. Replications: (1) pltf. was induced to trust L. with possession of the goods in the count mentioned by fraud, misrepresentation & covin of L.; (2) the agreement by L. to deliver to defts. by way of pledge the goods in the count mentioned was not made, nor were the goods delivered to defts. by L. by way of pledge, in the usual & ordinary course of business; (3) the other goods in the plea mentioned were not the goods of L. or pledged with defts. by L., nor had defts. any lien upon same from L.:—*Held:* (1) the transaction disclosed by the plea was a good defence under s. 2 of the Act; (2) neither of the replications was an answer to the plea.—SHEPPARD *v.* UNION BANK OF LONDON, No. 17, *ante*.

Annotations:—**Consd.** Oppenheimer *v.* Frazer & Wyatt, [1907] 1 K. B. 519. **Refd.** Heyman *v.* Flewker (1863), 13 C. B. N. S. 519; Baines *v.* Swainson (1863), 4 B. & S. 270; Cole *v.* North Western Bank (1875), L. R. 10 C. P. 354; Cahn *v.* Pockett's Bristol Channel Steam Packet Co., [1899] 1 Q. B. 643, C. A.

521. —— Factor depositing bill of lading & unconditional power of sale—In security of payment to be made on antecedent contracts.]—H., a speculator in cotton, in July, 1864, requested W. to purchase for him, in W.'s name, 400 bales of Egyptian cotton, for delivery in Sept. following. W. assented, employing for the purpose (with the knowledge of H.), as his broker, C., who knew W. was acting as agent, & W. became liable on a series of contracts, the first of which was due on Sept. 9. The price of cotton falling, C. refused to take up the contracts unless he was secured from loss, & W. applied to H., who, on Sept. 8, promised to give some security, & on Sept. 26 deposited with W., & W. deposited with C., with unconditional power of sale, a bill of lading of a cargo of Surat cotton of which H. was consignee from pltfs., a firm at Bombay, as their factor; but H. was not known either to W. or to C. to be other than the true owner. On the same day C. made a first payment on account of W.'s indebtedness under the contracts; & continued to make other payments, W. not advancing anything. In Oct. H. stopped payment, & the proceeds of the cargo of Surat cotton were then claimed by pltfs.:—*Held:* (1) the deposit of the bill of lading by H. was not made in respect of an antecedent debt of H. to W. within the Acts of 1825 & 1842; (2) having been made by H. in respect of an advance by C. on behalf of W., within the same Acts, it was binding on pltfs.—JEWAN *v.* WHITWORTH (1866), L. R. 2 Eq. 692; 36 L. J. Ch. 127; 14 W. R. 1020.

Annotations:—**Consd.** Macnee *v.* Gorst (1867), L. R. 4 Eq. 315; Kaltenbach *v.* Lewis (1885), 10 App. Cas. 617.

522. —— Factor pledging goods—To secure payment of bill not then due & repay sum due for previous losses.]—The Act of 1842 does not apply to pledges for antecedent liabilities (whether they may or may not have ripened into debts) where no actual advance is made at the time of the pledge.

Where H., a factor, pledged goods of his principal to G. (1) to secure payment of an acceptance of H. in G.'s hands, not then due, given to protect G.'s liability on a contract as H.'s broker; (2) to repay to G. his loss on resale of goods G. had purchased for H. in his own name:—*Held:* the transaction was not protected by the Act. *Semble:* both liabilities were antecedent debts.—MACNEE *v.* GORST (1867), L. R. 4 Eq. 315; 15 W. R. 1197.

Annotations:—**Consd.** Kaltenbach *v.* Lewis (1885), 10 App. Cas. 617. **Distd.** Thackrah *v.* Fergusson (1877), 25 W. R. 307.

523. —— —— To broker buying them on factor's instructions—In security of advance by broker where latter liable to vendor.]—A broker, who in purchasing goods for a factor has made himself responsible to the vendor, may thereafter make an advance *bonâ fide* to the factor to enable him to pay for the goods bought on his account; & a pledge to secure repayment of such advance is protected by the Act.

Applts., merchants at Singapore, employed M. in London as agent to sell, without authority to pledge, cargoes which they consigned to him. M. employed resps., London brokers, to sell applts.' consignments, & also in speculative purchases on his own account. Resps. purchased shellac for M. without disclosing that they were buying as agents

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& were personally liable to the vendors on the contracts. Subsequently they made advances to M. to enable him to pay deposits on the shellac, & took as security bills of lading of some of applts.' cargoes. They had no notice that M. was acting improperly in pledging the cargoes. On obtaining the advances M. gave resps. cheques for the amount of the deposits which were then paid by resps.:—*Held:* (1) the obligation under which M. lay to resps. to pay the deposits & thus prevent their being called upon to pay them did not constitute an antecedent debt within s. 3; (2) the pledges were made in respect of *bonâ fide* advances, not of antecedent debts, & were valid against applts.—KALTENBACH *v.* LEWIS (1885), 10 App. Cas. 617; 55 L. J. Ch. 58; 53 L. T. 787; 34 W. R. 477, H. L.

x. *Consignees.*

524. Bill of lading pledged by consignee—Agent.]—A consignee, although only an agent, is entitled under the Act of 1842 to pledge the goods & indorse the bill of lading to the pawnee; & the pawnee is entitled to demand the goods from the master on arrival.—TINDALL (TINDAL) *v.* TAYLOR (1854), 4 E. & B. 219; 24 L. J. Q. B. 12; 24 L. T. O. S. 144; 1 Jur. N. S. 112; 3 C. L. R. 199; 119 E. R. 85.

Annotations:—**Refd.** The Bahia (1864), Brown. & Lush. 292; Pearson *v.* Göschen (1864), 4 New Rep. 404; *Re* Webster (1864), 11 L. T. 547; Casebourne *v.* Avery & Houston (1887), 3 T. L. R. 795, C. A.

xi. *Buyers and Sellers of Goods.*

See SALE OF GOODS.

(*b*) *Apart from the Factors Acts.*

(NOTE.—*The following cases, though to a great extent rendered obsolete by the Factors Acts, are still often referred to & are therefore retained.*)

525. Agent—Ostensible right to pledge.]—Acceptance of pledge from a person ostensibly with the right to pledge held good in favour of the pledgee, & sale of goods by the latter on non-payment of the money at the time agreed on upheld.—METCALF *v.* ROYAL EXCHANGE ASSCE. CO. (1740), Barn. Ch. 343; 27 E. R. 672.

526. —— General powers to sell, assign, & transfer.]—Under a general power to sell, assign, & transfer an agent cannot pledge for his own debt.—DE BOUCHOUT *v.* GOLDSMID (1800), 5 Ves. 211; 31 E. R. 551.

Annotations:—**Consd.** Wilson *v.* Moore (1834), 1 My. & K. 337. **Distd.** Bank of Bengal *v.* Fagan (1849), 5 Moo. Ind. App. 27.

527. —— Holding out—Effect of.]—Where A. pledges B.'s property with C., & B. brings an action of detinue against A. & C., the jury, if satisfied that B. held out A. as a person authorised to pledge his property for the purpose of raising money, may find a verdict for both defts.—GARTH *v.* HOWARD & FLEMING (1832), 8 Bing. 451; 1 Moo. & S. 628; 1 L. J. C. P. 129; 131 E. R. 468.

Annotations:—**Distd.** G. W. Ry. Co. *v.* Willis (1865), 18 C. B. N. S. 748. **Refd.** Udell *v.* Atherton (1861), 7 H. & N. 172.

528. Agent for management of property consigned from abroad—Possession of bill of lading—Advance by way of acceptance.]—Sugars were shipped from abroad under a bill of lading, which expressed they were on account of pltfs., & were to be delivered to W. & Co., their assigns. W. & Co., agents of pltfs. for management of their property consigned from abroad, indorsed the bill of lading, together with other bills of lading comprising the rest of the cargo, to defts., & drew bills upon them for the amount of the whole cargo. Defts. accepted & paid the bills & sold the sugars at two months' credit, at expiration of which they carried the amount of proceeds to the account of W. & Co., who in the interval between sale & expiration of credit had become bkpts.:—*Held:* pltfs. entitled to recover proceeds of such sale from defts.—SHIPLEY *v.* KYMER (1813), 1 M. & S. 484; 105 E. R. 181.

Annotation:—**Refd.** Graham *v.* Dyster (1817), 6 M. & S. 1.

529. Agent or factor—Possession of goods or symbol of them.]—Before the Factors Acts a factor, or agent for sale, had no power to pledge, whether he was in possession either of the goods themselves or the symbol of them, even though the symbol might bear on the face of it some evidence of the property being in himself as in the case of a bill of lading in which he was consignee or indorsee. This was in accordance with the general rule that he who deals with one acting *ex mandato* can obtain from him no better title than his mandate enables him to bestow (PARKE, B.).—PHILLIPS *v.* HUTH, No. 498, *ante*.

Annotations:—**Refd.** Bonzi *v.* Stewart (1842), 4 Man. & G. 295; Hatfield *v.* Phillips (1842), 9 M. & W. 647, Ex. Ch. For full anns., *see* S. C. No. 498, *ante*.

530. Broker—Authority as such—Borrowing on his lien on principal's goods.]—Where a broker pledges the goods of his principal as his own, the pawnee, who claims by such tortious act of the broker, cannot claim to retain against the principal in trover for the amount of the lien which the broker had on the goods for his general balance at the time of such pledge. It may be otherwise where one who has a lien delivers the goods to a third person as a security, with notice of his lien, & appoints him to continue his possession as his servant for the preservation of his lien.—MCCOMBIE *v.* DAVIES (1805), 6 East, 538; 2 Smith, K. B. 557; 102 E. R. 1393.

Annotations:—**Distd.** Pickering *v.* Busk (1812), 15 East, 38. **Consd.** Mallalieu *v.* Laugher (1828), 3 C. & P. 551. **Expld** Towne *v.* Lewis (1849), 7 C. B. 608. **Consd.** Donald *v.* Suckling (1866), L. R. 1 Q. B. 585. The case of *McCombie v. Davies* shows that the factor's or broker's lien, although simply a right to retain possession as between him & his principal, might be transferred & made a security to a third party, provided he proposed to assign it only as a security to the like amount as that due to himself (MELLOR J.); Cole *v.* North Western Bank (1875), L. R. 10 C. P. 354, Ex. Ch. **Expld. & Distd.** Spackman *v.* Foster (1883), 11 Q. B. D. 99. **Refd.** Weeding *v.* Aldrich (1839), 9 Ad. & El. 861; Bird *v.* Bond (1863), 1 New Rep. 444; Fine Art Soc. *v.* Union Bank of London (1886), 17 Q. B. D. 705; Gordon *v.* London City & Midland Bank, Gordon *v.* Capital & Counties Bank, [1902] 1 K. B. 242; Morison *v.* London County & Westminster Bank, [1914] 3 K. B. 356, C. A. **Mentd.** Featherstonehaugh *v.* Johnston (1818), 2 Moore, C. P. 181; Clayton *v.* Le Roy (1911), 81 L. J. K. B. 49.

531. —— Goods consigned to him & drawn for by principal.]—A. consigned to B., a broker, a quantity of hides, desiring him to act according to his discretion. Soon afterwards A. drew upon B. for the amount, & B. accepted bills for the amount:—*Held:* B. was not entitled to pledge the goods in order to raise money to meet these bills, although it had been the usual course for A. to draw bills, & for B. to accept them, upon every consignment of goods.—GRAHAM *v.* DYSTER (1817), 6 M. & S. 1; 105 E. R. 1143.

Annotations:—**Consd.** Smart *v.* Sandars (1848), 5 C. B. 895. **Refd.** Hornby *v.* Lacy (1817), 6 M. & S. 166.

532. —— Advances made against goods bought from & left with him for resale.]—Defts., as

k. *Commercial traveller—Intrusted with samples.*]—A commercial traveller cannot pledge his employer's samples as security for his personal debt.—GILMOUR *v.* SNOW (1905), 27 Q. R. S. C. 39.—CAN.

brokers for B. & Co., effected two purchases of seed, which were paid for by B. & Co. & left in defts.' warehouses for resale; the first was made on account of B. & Co., the other for pltfs., resident abroad, by their express order; but both invoices were made out in the name of B. & Co., who did not inform defts. that the latter purchase was not made on their account:—*Held:* defts., having made advances to B. & Co., could not retain possession of the seed against pltfs., on the ground that a factor has no authority to pledge his principal's goods.—GUICHARD *v.* MORGAN (1819), 4 Moore, C. P. 36.

Annotation:—**Apld.** Gill *v.* Kymer (1821), 5 Moore, C. P. 503.

533. —— **Possession of warrants of two joint principals—Warrants divided & warrants of one pledged for debt of other.**]—A. & B. having, by their brokers, purchased cottons, warrants or orders for delivery were made out in the name of the brokers, & the cottons were left in their possession, as the brokers of A. Immediately after the purchase B. paid A. one-half the value. When considerable purchases had been made, the brokers were informed that B. had an interest in the goods purchased, &, upon directions from A. & B., they divided the goods held on their joint account by appropriating specific warrants to each party; A., after this, directed the brokers to procure him a loan on the security of the warrants, & C. advanced money by discounting bills drawn by A. upon the brokers; as a security for which, the whole of the warrants were deposited with C. by the brokers. Before the bills became due the brokers were directed by A. to get one-half renewed. C. having discounted fresh bills for this purpose, the brokers, who had obtained the warrants from C. for the purpose of dividing them & returning him one-half, left in the hands of C., as a security, the warrants belonging to B., C. not knowing that B. had any interest in them:—*Held:* B. might recover from C. in respect of the goods thus pledged with him by A.—WILLIAMS *v.* BARTON (1825), 3 Bing. 139; M'Cle. & Yo. 406; 10 Moore, C. P. 506; 130 E. R. 466, Ex. Ch.

Annotations:—**Distd.** Kingsford *v.* Merry (1856), 11 Exch. 577. **Mentd.** Henderson *v.* Williams, [1895] 1 Q. B. 521, C. A.; Farquharson *v.* King, [1901] 2 K. B. 697, C. A.

534. —— **Goods pledged to him for advances—Repledge of goods as his own.**]—A., owner of certain chattels, pledged them to B., a broker, to secure advances made on his behalf by B., & B. afterwards in his own name, & unknown to A., repledged the same chattels to C., to secure advances made by C. to B. of which, unknown to C., A. was to have the benefit. C. having subsequently applied in vain to B. for payment of his advances threatened to realise his security by a sale, which he was from time to time induced to postpone, by the solicitations of B. & his assurances of speedy payment; & this was communicated by B. to A., his principal. In a suit by A. against B. & C. praying to redeem the property in pledge on payment of any balance found due on the account between himself & B.:—*Held:* A. had no equity to restrain C. from proceeding to an immediate sale. *Qu.:* whether, in the circumstances, C. could make a good title to a purchaser.—NICHOLSON *v.* HOOPER (1838), 4 My. & Cr. 179; 41 E. R. 70.

535. **Commission agent—Power to sell & request for advance against price.**]—Where foreign merchants consigned goods, on their own account & risk, to a commission agent in England for sale only, & in the letter of advice wrote, "We expect you will send us some remittances on account of proceeds consigned to you, though they be not yet sold, as is customary, in order to encourage us thereby to send you more frequent consignments"; & the agent pledged the goods for advances to himself, being in embarrassed circumstances:—*Held:* (1) the agent was a factor for sale only & had no authority to pledge the goods; (2) the consignor might recover the net proceeds from the pawnee, deducting only so much as the agent could have retained; (3) the shipper's letter to the agent did not amount to an authority to pledge the goods.—QUEIROZ *v.* TRUEMAN (1824), 3 B. & C. 342; 5 Dow. & Ry. K. B. 192; 3 L. J. O. S. K. B. 36; 107 E. R. 760.

536. **Correspondent of foreign merchant.**]—Where a foreign merchant consigned goods to his correspondent in London, who pledged them with a factor, as & for his own property, received the amount in advance, & afterwards became bkpt.:—*Held:* the factor was liable to the foreign merchant in trover for the goods.—DUCLOS *v.* RYLAND (1821), 5 Moore, C. P. 518, n.

Annotation:—**Refd.** Fielding *v.* Kymer (1821), 2 Brod. & Bing. 639.

537. **Factor—Express authority to appear as owner.**]—Where a factor by the assent of his principal exhibits himself to the world as owner & by that means obtains credit as owner, the principal will be liable to him who furnished the means.—DE LEUD *v.* EDWARDS (undated), 1 M. & S. 147.

538. —— **Authority as such.**]—Though a factor has power to sell, & thereby bind his principal, yet he cannot bind or affect the property of the goods by pledging them as a security for his own debt, though there is the formality of a bill of parcels & a receipt (LEE, C.J.).—PATERSON *v.* TASH (1743), 2 Stra. 1178; 93 E. R. 1110.

Annotations:—**Apprvd.** Daubigny *v.* Duval (1794), 5 Term Rep. 604. **Refd.** Mason *v.* Lickbarrow (1790), 1 Hy. Bl. 357; Pickering *v.* Busk (1812), 15 East, 38; Whitehead *v.* Tuckett (1812), 15 East, 400; Martini *v.* Coles (1813), 1 M. & S. 140; Wilson *v.* Moore (1834), 1 My. & K. 337; Cole *v.* North Western Bank (1875), L. R. 10 C. P. 354.

539. —— —— **Effect of factor's lien.**]—If a factor pledge the goods of his principal, the latter may recover the value of them in trover against the pawnee, on tendering to the factor what is due to him, without any tender to the pawnee.—DAU-

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537 i. *Factor — Advances by factor against goods stored.*]—A co. offered to store all wheat consigned to it free of storage charges on condition that the wheat when sold should bear a net commission of 2½ per cent., & that the co. should have eight months in which to sell the wheat unless the consignor instructed the co. to sell earlier, & the co. promised to make liberal advances on all consignments. All wheat when received by the co. from the consignors was placed in one large stack, which also included wheat belonging to the co., & when a sale was made by them wheat was taken indiscriminately from the stack. The co. made advances to consignors upon the wheat received, borrowing the money from deft. bank & giving the bank as security in respect of each advance a certificate that the co. held a certain number of bags of wheat which they would deliver to the bank's order on return of the certificate. Pltf. consigned 7,000 bags of wheat to the co. & received an advance of 14s. per bag upon it & it was dealt with by the co. as above stated. Pltf. sued the bank for conversion of his wheat:—*Held:* pltf. must be nonsuited.—SHORT *v.* CITY BANK OF SYDNEY (1912), 15 C. L. R. 148, *affg.* 12 S. R. N. S. W 186.—**AUS.**

l. *Mortgagor — Authority from mortgagee to deal with goods — Pledge for Crown dues.*]—By virtue of conditions in a mtge. of logs & timber given by S. to appits. as security for a debt, S. continued in possession with powers to deal with the property. To pay certain dues he made an arrangement with the Govt., as appits. averred unknown to them & never ratified by them. On S.'s insolvency his equity of redemption was released by his assignee to appits., & on their beginning to ship the timber the collector claimed the dues agreed to be paid under S.'s agreement with the Govt. To get the logs through appits. paid a sum which they claimed to be repaid:—*Held:* S. had no authority, express or implied, from appits. to pledge the property for payment of arrears of Crown dues or create any lien thereon other than the law attached to it.—MERCHANTS' BANK OF CANADA *v.* R. (1882), Cass. Dig. 2nd ed. 636.—**CAN.**

Sect. 3.—Implied authority: Sub-sect. 10, A. (b) & B.]

BIGNY *v.* DUVAL (1794), 5 Term Rep. 604; 101 E. R. 338.

Annotations :—**Consd.** M'Combie *v.* Davies (1805), 7 East, 5. **Apld.** Gill *v.* Kymer (1821), 5 Moore, C. P. 503. **Consd.** Donald *v.* Suckling (1866), L. R. 1 Q. B. 585.

540. —— —— Position of pledgee before & after sale of goods pledged.]—There is a wide distinction to be made between a factor pledging goods & the person to whom he pledges them insisting on holding the goods so pledged, while they remain in substance, for the money advanced, & a factor selling the goods through the medium of a broker, & the broker insisting upon holding the price after he has given credit for it to the factor in his account; & for this reason: a factor has no reason to pledge the goods of his principal, nor has he a right to do so; & as he has no right to pledge the goods of his principal, he cannot give to a pawnee a title which he has not himself, &, therefore, if it rested upon a pledge no property could be given. But a factor has a right to sell the goods, & if the principal's name does not appear, but he sells them as his own, he has a right to the money (GIBBS, C.J.).—WHITTENBURY *v.* FORRESTER (1816), 6 M. & S. 7 n.; 105 E. R. 1145 n.

541. —— —— Bill drawn on factor by principal —Sale by pledgee after notice of revocation.]—Where pltfs. consigned goods to their factor & at the same time drew bills upon him for the amount, which they themselves ultimately paid, & the factor sent them to deft., with whom he had general dealings, without intimating they were the property of a third person, & drew a bill upon him for the amount which deft. accepted & paid; after which the factor became insolvent, having before that time appraised deft. he had received a notice of countermand of sale from pltfs., but deft. afterwards sold the goods :—*Held :* (1) deft. was liable for the value of the goods, in an action for money had & received; (2) he would have been equally liable had he not known the goods were pltfs.' property.—JACKSON *v.* CLARKE (1827), 1 Y. & J. 216; 148 E. R. 651.

542. —— Authority as such & possession of bill of lading.]—Where goods were consigned from abroad to a factor to be sold on account of the consignor, & a bill of lading was sent to deliver the goods to the factor or his assigns, & the factor afterwards indorsed & delivered the bill of lading together with the goods to defts., as brokers, with instructions to do the needful, & defts. made advances to him on the credit of those & other goods, without knowing that he was not the owner of them :—*Held :* (1) a factor cannot pledge the goods of his principal; (2) defts. could not retain the goods against the consignor until payment of the debt due to them from the factor on account of those advances.—MARTINI *v.* COLES (1813), 1 M. & S. 140; 105 E. R. 53.

Annotations :—**Folld.** Guichard *v.* Morgan (1819), 4 Moore, C. P. 36. **Apld.** Fielding *v.* Kymer (1821), 2 Brod. & Bing. 639. **Folld.** Mellish *v.* Cattley (1826), 5 L. J. O. S. K. B. 74. **Refd.** Wilson *v.* Moore (1834), 1 My. & K. 337.

543. —— Power to sell—Transaction carried through in form of sale.]—A quantity of oats having been consigned by a merchant abroad, to be sold by B., a merchant as well as factor, he placed them in the hands of A., a corn factor, as security for advances made by him; but the oats were not to be sold without B.'s consent. They remained in A.'s possession, upon these terms, for 9 months, when they were transferred to A. by a sale at the market price. No money actually passed, nor were any account sales rendered; but the amount of the price was allowed in account between B. & A., leaving a balance in favour of A. :—*Held :* (1) this was in substance a pledge, & not a sale by the factor; (2) no property passed to A., although the jury had found it to be a *bonâ fide* transaction.—KUCKEIN *v.* WILSON (1821), 4 B. & Ald. 443; 106 E. R. 999.

544. —— —— Possession of bill of lading—Goods sold by pledgee—Proper remedy.]—Where goods were placed in the hands of a factor for sale, & he indorsed the bills of lading to defts., who accepted a bill for him, & he at the same time directed defts. to sell the goods & reimburse themselves the amount of the bill out of the proceeds :—*Held :* defts., having sold the goods, could not be sued for them in trover by the original owner. *Semble :* (1) he might have maintained money had & received for the proceeds; (2) defts. could not have retained the amount of money advanced to the factor.—STIERNELD *v.* HOLDEN (1825), 4 B. & C. 5; 6 Dow. & Ry. K. B. 17; Ry. & M. 219; 3 L. J. O. S. K. B. 127; 107 E. R. 961.

Annotations :—**Refd.** Sellick *v.* Smith (1826), 3 Bing. 603; Heald *v.* Carey (1852), 11 C. B. 977.

545. —— Goods consigned on joint account—Indorsement of bill of lading.]—A factor cannot pledge the goods of his principal by indorsement & delivery of the bill of lading, any more than by the delivery of the goods themselves, though the indorsee knew not that he was factor.

Where goods were consigned on the joint account of the consignors & consignee, & a bill of lading was sent to deliver the goods to the consignee or his assigns, who afterwards indorsed & delivered it to defts. upon condition of their making an advance to him on it, which they failed to do, but claimed to retain it as a security for prior advances :—*Held :* such indorsement & delivery of the bill of lading did not devest the consignors' right to stop the goods *in transitu* upon the insolvency of the consignee, who had not paid for them.—NEWSOM *v.* THORNTON (1805), 6 East, 17; 2 Smith, K. B. 207; 102 E. R. 1189.

Annotations :—**Folld.** Martini *v.* Coles (1813), 1 M. & S. 140. **Consd.** Sewell *v.* Burdick (1884), 10 App. Cas. 74. **Mentd.** Rodger *v.* Comptoir D'Escompte de Paris (1869), L. R. 2 P. C. 393, C. A.

546. —— Intrusted with indicia of property.]—A factor cannot pledge, unless the owner of the goods arm him with such *indicia* of property as to enable him to deal with it as his own.

Where pltfs., having gums for sale warehoused in their names at the London Docks, received from C., a broker, a sold note, not disclosing the name of any purchaser, & gave C. an order on the docks for the weighing & transfer of the gums to his order, & sent him an invoice as for gums bought of them by C., & having called upon him to settle for the gums as per contract, drew on H. for the price, which bills were accepted by H., & guaranteed by C., who afterwards pledged the goods for valuable consideration to deft., handing over to him the transfer order of pltfs., together with a transfer order from himself, & afterwards, & before the bills became due, became bkpt. :—*Held :* pltfs. were entitled to maintain trover against deft. for the gums.—BOYSON *v.* COLES (1817), 6 M. & S. 14; 105 E. R. 1148.

Annotations :—**Distd.** Kingsford *v.* Merry (1856), 11 Exch. 577. **Consd.** Johnson *v.* Crédit Lyonnais (1877), 2 C. P. D. 224.

547. —— Goods consigned & drawn for by principal—Bill to be met out of proceeds.]—The mere circumstance of a principal's drawing bills on his factor to whom goods were consigned, to be provided for out of the proceeds of such goods, does not authorise the factor to pledge them for the purpose of raising money to meet the bills; & where the factor had become bkpt., & the pawnee had afterwards sold the goods :—*Held :* the principal might recover as against him the whole proceeds of such sale, in an action for money had & received,

although the factor had appropriated part of the money advanced by the pawnee to the payment of one of the bills drawn by his principal.—GILL *v.* KYMER (1821), 5 Moore, C. P. 503.

548. ——— ——— ———.]—The circumstances of a principal's drawing bills on his factor, to be provided for out of proceeds of goods consigned, does not authorise the factor to pledge the goods.

A. consigned goods to B. for the purpose of sale, at the same time drawing bills to the amount of £1,588 5*s.* 7*d.* on B., to be provided for out of the proceeds. B. pledged the goods for £2,500 to C. (who knew A. was the owner), & paid £294 in discharge of one of the bills; & C. sold the goods for B. for £4,033:—*Held:* A. was entitled to recover from C., in an action for money had & received (in which £1,533 was paid into ct.), the whole balance of £2,500.—FIELDING *v.* KYMER (1821), 2 Brod. & Bing. 639; 129 E. R. 1112; *sub nom.* GILL *v.* KYMER, 5 Moore, C. P. 503.

Annotation:—**Refd.** Wilson *v.* Moore (1834), 1 My. & K. 337.

549. Manager of business—Full power to manage business during principal's illness.]—A., during a long illness of his father, was employed at a fixed salary to carry on his father's business, & in general to meet all engagements connected with it, & for that purpose to draw cheques on his father's bankers, & accept bills. A. being in need of money for carrying on the business, made deposits of goods with deft. for moneys advanced by deft. to him. In an action by the assignees in bkpcy. of the father against deft. for conversion of the goods deposited:—*Semble:* it was within scope of the son's authority to pledge the goods.—DICKSON *v.* DOBREE (1867), 16 L. T. 831.

B. Bills of Exchange and other negotiable Instruments.

550. Agent—Holding bill of exchange indorsed in blank.]—D. holds a bill of exchange indorsed in blank as agent for C. D. wrongfully pledges it with E. E. is a holder for value to the extent of the sum he advanced, & if he took it without notice of the fraud he can retain the bill as against C. the true owner.—COLLINS *v.* MARTIN (1797), 1 Bos. & P. 648; 2 Esp. 520; 126 E. R. 1113.

Annotations:—**Distd.** Treuttel *v.* Barandon (1817), 8 Taunt. 100. **Apld.** Wookey *v.* Pole (1820), 4 B. & Ald. 1. **Refd.** Heath *v.* Sanson (1831), 2 B. & Ad. 291; Bank of Bengal *v.* Macleod (1849), 5 Moo. Ind. App. 1; Bank of Bengal *v.* Fagan (1849), 5 Moo. Ind. App. 27; Barber *v.* Richards (1851), 6 Exch. 63; *Re* Boldero, *Ex p.* Pease (1872), 19 Ves. 25; Goodwin *v.* Robarts (1875), L. R. 10 Exch. 337; Dawson *v.* Isle (1906), 75 L. J. Ch. 338.

551. ——— **Holding bill of exchange indorsed for principal's account.**]—Trover will lie for bills of exchange indorsed to an agent of pltfs. or order for their account, & deposited with defts. by such agent, as a security for past & future advances by defts. to him.—TRUETTEL (TREUTTEL) *v.* BARANDON (1817), 1 Moore, C. P. 543; 8 Taunt. 100; 129 E. R. 320.

Annotation:—**Folld.** Wookey *v.* Pole (1820), 4 B. & Ald. 1.

552. ——— ———.]—A bill of exchange, drawn in America on a house in London, payable to order, was indorsed by the payee generally to A. & by him in these words: "Pay to B. or his order for my use." B. applied to his bankers to discount the bill, & they, without making any inquiry, did so & applied the proceeds to the use of B.:—*Held:* (1) the indorsement was restrictive; (2) the property in the bill remained in A.; (3) he was entitled to recover the amount from the bankers.—LLOYD *v.* SIGOURNEY (1829), 5 Bing. 525; 3 Y. & J. 220; 3 Moo. & P. 229; 130 E. R. 1164, Ex. Ch.

Annotations:—**Distd.** Bellamy *v.* Marjoribanks (1852), 7 Exch. 389. **Apld.** Williams, Deacon *v.* Shadbolt (1885), Cab. & El. 529. **Mentd.** Bank of Bengal *v.* Macleod (1849), 5 Moo. Ind. App. 1.

553. ——— **Holding Exchequer bill in blank—Power to sell.**]—An Exchequer bill, the blank of which was not filled up, having been placed for sale in the hands of A., he, instead of selling it, deposited it at his banker's, who made him advances to the amount of its value. A. afterwards becoming bkpt.:—*Held* (BAYLEY, J., *diss.*): the owner of the Exchequer bill could not maintain trover against the bankers, the property in such Exchequer bill, like bank notes & bills of exchange indorsed in blank, passing by delivery.—WOOKEY *v.* POLE (1820), 4 B. & Ald. 1; 106 E. R. 839.

Annotations:—**Consd.** Goodwin *v.* Robarts (1875), L. R. 10 Exch. 337. **Refd.** Lang *v.* Smyth (1831), 7 Bing. 284; Barnett *v.* Brandao (1843), 6 Man. & G. 630; Picker *v.* London & County Banking Co. (1887), 18 Q. B. D. 515. C. A. **Mentd.** Muttyloll Seal *v.* Dent (1853), 5 Moo. Ind. App. 328, P. C.

554. ——— **Holding East India Company's promissory notes—Authority to sell, indorse or assign.**]—BANK OF BENGAL *v.* MACLEOD, No. 271, *ante*.

For full anns., *see* S. C. No. 271, *ante*.

555. ——— **Possession of bonds with bearer coupons but not certificate as to conversion rights.**]—Pltf. placed in the hands of his agent Neapolitan bonds, with coupons or receipts for half-yearly interest payable to bearer of the coupon; the coupon referred to a certificate which gave the holder the option of converting his bonds into a funded debt; interest was paid to the holder of the coupon without production of the certificate, but the bonds were never sold in the market without the certificate. Pltf. kept the certificates in his own hands, but his agent, without authority, fraudulently pledged the bonds to deft. as security for a debt:—*Held:* (1) it was correctly left to the jury to determine whether these instruments passed by delivery & whether deft. had acted with due caution in receiving the coupons without requiring the certificate; (2) the jury having found both questions in the negative, the ct. would not set aside a verdict for pltf.—LANG *v.* SMYTH (1831), 7 Bing. 284; 5 Moo. & P. 78; 9 L. J. O. S. C. P. 91; 131 E. R. 109.

Annotations:—**Folld.** Goodwin *v.* Robarts (1876), 1 App. Cas. 476, H. L. **Refd.** Johnson *v.* Windle (1836), 3 Bing. N. C. 225; Partridge *v.* Bank of England (1846), 10 Jur. 1031. **Mentd.** Pinard *v.* Klockmann (1863), 3 B. & S. 388; Picker *v.* London & County Banking Co. (1887), 18 Q. B. D. 515, C. A.; Williams *v.* Colonial Bank (1888), 4 T. L. R. 497, C. A.

PART V. SECT. 3, SUB-SECT. 10.—B.

550 i. *Agent—Holding note payable to pledgee—Authority to deposit same as collateral.*]—Defts., directors of a co., placed in the hands of C., their secretary, their promissory note for $8,000, payable to pltfs. on demand, which note C. deposited with pltfs., having a receipt written under it, & signed by their agent, which expressed that the note was to be held by pltfs. as collateral security for any unretired paper they might at any time hold of the co. Defts. pleaded as an equitable defence, & desired to prove, that the note was given in consequence of a doubt as to their power to become parties to a note, & as security only against the want of such power, & until it should be conferred upon them by the legislature:—*Held:* such evidence was rightly rejected, for defts., having intrusted C. with their note, were bound by his agreement, on which pltfs. had advanced their money, & which could not be varied by parol testimony.—COMMERCIAL BANK OF CANADA *v.* MERRITT (1862), 21 U. C. R. 358.—**CAN.**

m. *Manager of company — Holding out.*]—The C. Bank having refused further loans to a trading co. until its current liability was reduced, a note by the co. in favour of its directors was specially indorsed by them & handed to their manager for discount & not for pledge. Without informing the C. Bank of his authority, the manager pledged it as collateral security for the co.'s current liability. At the maturity of the note, the co.'s trade paper had been retired, & an overdraft covered, but there was a general indebtness on former loans:—*Held:* so far as the bank was aware, the manager had ostensible authority to pledge the note as collateral security, & the bank could enforce it.—COX *v.* CANADIAN BANK OF COMMERCE (1912), 46 S. C. R. 564; 22 W. L. R. 226; 9 D. L. R. 846; 3 W. W. R. 397.—**CAN.**

Sect. 3.—Implied authority: Sub-sect. 10, B.]

556. Agent for special purpose—Possession of bond payable to holder.]—Where a foreign prince gave bonds, whereby he declared himself & successors bound to every person who was for the time being holder of the bonds for payment of principal & interest in a certain manner:—*Held:* (1) the property in those instruments passed by delivery as property in bank notes, Exchequer bills, or bills of exchange, payable to bearer; (2) an agent in whose hands such a bond was placed for a special purpose might confer a good title by pledging it to a person who did not know the party pledging was not the real owner.—GORGIER *v.* MIEVILLE (1824), 3 B. & C. 45; 4 Dow. & Ry. K. B. 641; 2 L. J. O. S. K. B. 206; 107 E. R. 651.

Annotations:—**Distd.** Lang *v.* Smyth (1831), 7 Bing. 284; Crouch *v.* Crédit Foncier of England (1873), L. R. 8 Q. B. 374. **Foll.** Goodwin *v.* Robarts (1876), 1 App. Cas. 476, H. L. **Distd.** Picker *v.* London & County Banking Co. (1887), 56 L. J. K. B. 299, C. A. **Apld.** London Joint Stock Bank *v.* Simmons, [1892] A. C. 201. **Distd.** Webb, Hale *v.* Alexandria Water Co. (1905), 21 T. L. R. 572. **Refd.** Bechuanaland Exploration Co. *v.* London Trading Bank, [1898] 2 Q. B. 658. **Mentd.** London & County Banking Co. *v.* London & River Plate Bank (1887), 20 Q. B. D. 232.

557. Bill-broker—Authority to get bill discounted—Mixture with other bills & pledge of whole in mass for antecedent debt.]—A bill-broker, who receives a bill from a customer merely for the purpose of procuring it to be discounted, has no right to mix it with other bills of other customers, & pledge the whole mass as a security for an advance of moneys to himself; still less has he a right to deposit bills which are received merely for the purpose of discount as security or part security for money previously due from him. If the pledgee of the bills in such circumstances receives them from the bill-broker, with knowledge or reasonable ground of suspicion, he cannot hold them as against the customer.—HAYNES *v.* FOSTER (1833), 2 Cr. & M. 237; 4 Tyr. 65; 3 L. J. Ex. 153; 149 E. R. 748.

Annotations:—**Expld. & Distd.** Foster *v.* Pearson, Stephens *v.* Foster (1835), 1 Cr. M. & R. 849. **Refd.** Muttyloll Seal *v.* Dent (1853), 5 Moo. Ind. App. 328, P. C.

558. ——— ——— ———.]—C. & Co., merchants & capitalists, had large transactions with A. & B., bill-brokers in London, who were possessed of bills amounting to nearly £3,000, which had been placed in their hands by different customers to raise money on for the latter. A. & B. having mixed these bills with others belonging to themselves, handed over the whole to defts., as a security for £3,000, then advanced, as well as for two sums of £2,000 & £550, previously advanced them, on their engagement to give bills to cover the amount in a short time. It was proved to be customary for bill-brokers in London to pledge bills of their various customers together for an advance to themselves of one gross sum on all of them, or even to pledge them as security for former advances made to the bill-brokers; & each customer looked only to the bill-broker, to whom he had given dominion over his bill. In an action of *assumpsit* brought by C. & Co. on one of the bills thus handed over by A. & B. against one of A. & B.'s customers, whose name was on it, the judge left it to the jury to say whether pltfs. took the bills from A. & B., the bill-brokers, with due caution & in the ordinary course of business. The jury having found a verdict for pltfs.:—*Held:* the direction was right.

In an action of trover brought by a customer (himself a bill-broker) against C. & Co. to recover the value of some bills thus handed over to them, the judge told the jury that a bill-broker, being an agent for the purpose of getting bills discounted, had by the general law no right to mix bills received by him from his customers merely to get discounted with bills of other customers, & to pledge the whole in a mass, in order to obtain a loan of money to himself, & still less had he a right to deposit bills received merely for the purposes of discount as security or part security for money previously due from him; but added that parties might, by contract between themselves, avoid the general rule of law. He left it to them to say whether the usage alleged to exist in London, viz., that by putting a bill into a bill-broker's hands the customer gave him an absolute dominion over it to do with it as he liked, looking to the credit of the bill-broker only as the person responsible either for the money or the return of the bill, was proved to their satisfaction, & if they thought it was, whether they thought pltf., himself a bill-broker, had contracted with reference to that usage. The jury having found for defts., the ct. refused to disturb the verdict.—FOSTER *v.* PEARSON, STEPHENS *v.* FOSTER (1835), 1 Cr. M. & R. 849; 5 Tyr. 255; 4 L. J. Ex. 120; 149 E. R. 1324.

Annotations:—**Apprvd.** London Joint Stock Bank *v.* Simmons, [1892] A. C. 201. **Refd.** Muttyloll Seal *v.* Dent (1853), 5 Moo. Ind. App. 328; Sheffield *v.* London Joint Stock Bank (1888), 13 App. Cas. 333. **Mentd.** Bentinck *v.* London Joint Stock Bank, [1893] 2 Ch. 120.

559. ——— ——— ———.]—A person receiving a bill to get it discounted has no authority to deal with it otherwise than for discount, & a deposit of it, along with other bills, with a bill-broker as security for advances, the broker having notice that it was delivered for discount, is beyond scope of the authority, & passes no property.—HERSCHFELD *v.* BROWN (1862), 2 F. & F. 219.

Blank transfer of shares.]—*See* STOCK EXCHANGE.

560. Secretary of company—Access to debentures—Fraud.]—Pltfs., a limited co., were possessed of certain debentures, issued by an English co. in England & payable to bearer, which by reason of the conditions indorsed thereon were not promissory notes. These debentures were kept in a safe, the key of which was intrusted to pltfs.' secretary. The secretary, in fraud of pltfs., took the debentures from the safe & pledged them with defts. for advances made to him by them. Defts. received the debentures in good faith. It was proved that the usage in the mercantile world & on the Stock Exchange for many years had been to treat such debentures as negotiable instruments transferable by mere delivery:—*Held:* although pltfs. were not estopped by their conduct from denying defts.' title, yet defts. were entitled to the debentures as against pltfs. on the ground that the debentures were negotiable instruments transferable by delivery.—BECHUANALAND EXPLORATION CO. *v.* LONDON TRADING BANK, LTD., [1898] 2 Q. B. 658; 67 L. J. Q. B. 986; 79 L. T. 270; 14 T. L. R. 587; 3 Com. Cas. 285.

Annotations:—**Refd.** Edelstein *v.* Schuler, [1902] 2 K. B. 144. **Mentd.** Webb, Hale *v.* Alexandria Water Co. (1905), 21 T. L. R. 572; Clayton *v.* Le Roy, [1911] 2 K. B. 1031, C. A.

561. Stock-broker—Possession of scrip—Authority to sell or exchange same for bonds.]—G. purchased through his broker some Russian & Hungarian scrip; the undertaking in the scrip was to give bearer a bond for money advanced payable with interest in the way there stated. G. left the scrip, to be exchanged for bonds or sold, as he should direct, in the hands of his broker, who fraudulently deposited it with a banker as security for a loan to himself:—*Held:* (1) the scrip was a negotiable instrument, transferable by mere delivery; (2) the banker, being a *bonâ fide* holder for value, was not liable to G., either in trover for the scrip itself, or in *assumpsit* for value received upon it.—GOODWIN *v.* ROBARTS (1876), 1 App. Cas. 476; 45 L. J. Q. B. 748; 35 L. T. 179; 24 W. R. 987, H. L.

Annotations:—**Apld.** Rumball *v.* Metropolitan Bank (1877), 2 Q. B. D. 194. **Distd.** France *v.* Clark (1884), 26 Ch. D.

257, C. A.; Fine Art Soc. *v.* Union Bank of London (1886), 17 Q. B. D. 705, C. A. **Apld.** Easton *v.* London Joint Stock Bank (1886), 34 Ch. D. 95, C. A. **Distd.** Colonial Bank *v.* Hepworth (1887), 36 Ch. D. 36. **Consd.** London & County Banking Co. *v.* London & River Plate Bank (1887), 20 Q. B. D. 232. **Apld.** Sheffield *v.* London Joint Stock Bank (1888), 13 App. Cas. 333; London Joint Stock Bank *v.* Simmons, [1892] A. C. 201. **Consd.** Bechuanaland Exploration Co. *v.* London Trading Bank, [1898] 2 Q. B. 658. **Refd.** Willans *v.* Ayers (1877), 3 App. Cas. 133, P. C.; Bickerton *v.* Walker (1885), 31 Ch. D. 151, C. A.; Picker *v.* London & County Bank Co. (1887), 18 Q. B. D. 515, C. A.; Williams *v.* Colonial Bank, Williams *v.* London Chartered Bank of Australia (1888), 38 Ch. D. 388, C. A.; Colonial Bank *v.* Cady, London Chartered Bank of Australia *v.* Cady (1890), 15 App. Cas. 267; Simmons *v.* London Joint Stock Bank; Little *v.* London Joint Stock Bank, [1891] 1 Ch. 270, C. A.; Bentinck *v.* London Joint Stock Bank, [1893] 2 Ch. 120.

See, further, STOCK EXCHANGE.

562. Good faith—Question for jury.]—In an action by the indorsee of a bill who has given value, if his title be disputed on the ground that his indorser obtained the discount of such bill in fraud of the right owner, the question for the jury is, whether the indorsee acted with good faith in taking the bill. The question whether or not he was guilty of gross negligence is improper. Gross negligence may be evidence of *mala fides*, but is not equivalent to it.—GOODMAN *v.* HARVEY (1836), 4 Ad. & El. 870; 6 Nev. & M. K. B. 372; 6 L. J. K. B. 63, 260; 111 E. R. 1011.

Annotations :—**Apld.** Uther *v.* Rich (1839), 10 Ad. & El. 784; Arbouin *v.* Anderson (1841), 1 Q. B. 498; Jones *v.* Smith (1841), 1 Hare, 43. **Consd.** *Re* Acraman, *Ex p.* Bushell (1844), 3 Mont. D. & De G. 615. **Mentd.** *Re* Lowenthal, *Ex p.* Lowenthal (1874), 9 Ch. App. 591.

563. ——— ———.]—Where goods or documents of title are pledged by an agent & the principal alleges that the pledgee did not take them in good faith, the question for the jury is whether deft. as a reasonable man must have known that the goods did not belong to the agent.—COMPAGNA GENERAL DE TABACOS DE FILIPINAS *v.* BERNSTONE (1887), 3 T. L. R. 631.

564. ——— **Onus of proof.**]—An agent, was intrusted by his principals with a bill of lading for a particular purpose, & he pledged same *malâ fide*, without the consent of his principals, to a banker, for advances made to himself :—*Held :* (1) in order to invalidate a pledge so made under Factors Act, 1842 (c. 39), s. 3, it was necessary that the ct. or jury should find that the lender had notice of the agent's *mala fides*, or want of authority to pledge the goods; (2) to establish such notice, it was sufficient to show that the circumstances attending the transaction were such that a reasonable man of business, applying his understanding to them, would certainly know that the agent had not authority to make the pledge, even if the agent was not also acting *malâ fide* towards his principals.—GOBIND CHUNDER SEIN *v.* RYAN (1861), 15 Moo. P. C. C. 230; 9 Moo. Ind. App. 141; 5 L. T. 559; 19 E. R. 695, P. C.; *sub nom.* GOBIND CHUNDER SEIN *v.* BENGAL ADMINISTRATOR GENERAL (1861), 8 Jur. N. S. 343; 10 W. R. 155, P. C.

565. Notice of want of authority.]—S. gave E. certificates of ry. stock with transfers thereof executed by him in blank, & bonds of foreign cos. (alleged to be negotiable securities) for the purpose of raising £26,000. E. gave these securities to M., a money-dealer in London, to secure £26,000 advanced by M. to E. M. deposited the transfers & securities, with other securities of his customers, with various banks, as security for large loan accounts running between him & them, the blanks in the transfers of stock being filled up with the names of nominees of the banks. The banks in dealing either actually knew, or had reason to believe, the securities did or might belong not to M., but to his customers. M. having become bkpt., the banks sold some of S.'s securities, & claimed to hold the proceeds & unsold remainder as security for all the debt due from M. to them :—*Held :* (1) though the banks had legal title to the securities, they were not purchasers for value without notice, but ought to have inquired into the extent of M.'s authority, & this whether the securities were negotiable or not; (2) upon payment to the banks of the money advanced by M. to E., S. was entitled to the value of such securities as had been sold by the banks, & to redeem the remainder.—SHEFFIELD (EARL) *v.* LONDON JOINT STOCK BANK, LTD. (1888), 13 App. Cas. 333; 57 L. J. Ch. 986; 58 L. T. 735; 37 W. R. 33; 4 T. L. R. 389, H. L.

Annotations :—**Consd.** Kaemena *v.* Central Bank of London (1888), 4 T. L. R. 657; Levy *v.* Richardson (1889), 5 T. L. R. 236. **Expld.** London Joint Stock Bank *v.* Simmons, [1892] A. C. 201. **Refd.** Williams *v.* Colonial Bank, Williams *v.* London Chartered Bank of Australia (1888), 38 Ch. D. 388, C. A.; Simmons *v.* London Joint Stock Bank, Little *v.* London Joint Stock Bank, [1891] 1 Ch. 270, C. A.; Venables *v.* Baring, [1892] 3 Ch. 527; Bentinck *v.* London Joint Stock Bank, [1893] 2 Ch. 120; Redfern *v.* Rosenthal (1901), 85 L. T. 313; Cuthbert *v.* Robarts, Lubbock (1909), 78 L. J. Ch. 529, C. A.; Jameson *v.* Union Bank of Scotland (1913), 109 L. T. 850; Fuller *v.* Glyn, Mills, Currie, [1914] 2 K. B. 168. **Mentd.** Colonial Bank *v.* Cady (1890), 15 App. Cas. 267.

566. Knowledge that pledgor is broker not sufficient.]—Pltf. gave B., a broker, certain bonds to be exchanged for certificates. These bonds, by custom & usage of the Stock Exchange, passed from hand to hand by delivery without transfer. The broker deposited the bonds with defts., his bankers, in exchange for certain other securities for his private account, which had been overdrawn for some time. Defts.' manager was aware that B. was a broker, but not aware he was depositing his customer's securities. B. having failed to repay the overdraft on his account, the bank claimed to hold the securities, & refused to deliver them to pltf. In an action by pltf. against the bank to recover the securities or their equivalent :—*Held :* (1) pltf. was not entitled to recover as against the bank, as the securities were negotiable instruments, & the bank was a *bonâ fide* holder for value; (2) the mere fact that the bank manager knew the pledgor of the securities was a broker was not enough to affect the bank with notice that the securities were not his own, or to cast on the bank the duty of making inquiry.—BAKER *v.* NOTTINGHAM & NOTTINGHAMSHIRE BANKING CO., LTD. (1891), 60 L. J. Q. B. 542; 7 T. L. R. 235.

567. Agent pledging store warrant—Instructed to deposit cash to meet principal's cheques.]—Pltf.'s agent obtained from deft. bank a promise to pay certain cheques drawn by pltf. in consideration of his depositing with it a store warrant in lieu of the cash which pltf. had instructed him to pay to the credit of pltf.'s account. The store warrant belonged to pltf., was under pledge to the agent, & was accepted by the bank with full knowledge of the circumstances. In an action for dishonouring the cheques :—*Held :* the agent in substituting the deposit for cash had not exceeded his authority, but, even if he had, the contract was complete, for there was consideration for the bank's promise, as the deposit conferred on the bank some right, interest, profit, or benefit, within the legal meaning of consideration; & in the circumstances it could not be heard to say that that consideration did not move from pltf.—FLEMING *v.* BANK OF NEW ZEALAND, [1900] A. C. 577; 69 L. J. P. C. 120; 33 L. T. 1; 16 T. L. R. 469, P. C.

Annotation :—**Refd.** *Re* Gloucester Municipal Petn., 1900, Ford *v.* Newth, [1901] 1 K. B. 683.

568. Agent transferring Lloyd's bond—Deposited as conditional security.]—D. obtained a Lloyd's bond from defts. as security for money due. He deposited it with C. & Co., with a signed blank transfer as security for their acceptances of certain

Sect. 3.—*Implied authority: Sub-sect.* 10, *B.; sub-sect.* 11.]

bills, on the terms that they were not to transfer it unless he failed to provide money to meet the bills. C. & Co. transferred the bond to pltf. before D. had made any default in respect of the bills, & in breach of authority:—*Held:* defts. were not estopped from denying the authority of C. & Co. to transfer the bonds.

It might be that if a bond with a blank transfer on its back were handed to anyone with the transfer executed by the owner, the owner would be estopped from denying the authority of the person so entitled to deal with it, but that would only be because of the inference in favour of such an authority which could be drawn from the deposit of bonds in that particular form (BIGHAM, J.).—MONTAGU, SAMUEL & CO. *v.* WESTON, CLEVEDON, & PORTISHEAD LIGHT RY. CO. (1903), 19 T. L. R. 272.

569. Army agent pledging clothing issue certificates—Authority to receive allowances.]—The colonel of a regiment, by power of attorney, authorised his agent to receive the allowances, issued by the Paymaster-General of the Forces, for supply of clothing & accoutrements to the regiment. The agent assigned the certificates, which authorised the issue, to his banker as security for his account, & the banker received the money. The agent directed the supply, by tradesmen, of the clothing & accoutrements; & he, from time to time, transmitted accounts to the colonel, representing those supplies as having been paid for; but they had not been. The agent became bkpt.; the tradesmen sued the colonel for the amount of supplies; & the colonel brought an action against the banker to recover the money for those supplies:—*Held:* the action could not be maintained against the banker until the colonel had paid the tradesmen. *Qu.:* whether it could be then maintained.—DALHOUSIE (EARL) *v.* CHAPMAN (1829), 7 L. J. O. S. K. B. 233.

570. Insurance broker pledging policy with loss due thereon—Policy in broker's name.]—A broker having effected an insurance in his own name on behalf of his principal, had the policy left in his hands for the purpose of his receiving the proceeds; & having, upon advice of the loss, pledged the policy with another broker, obtained an advance thereon, received as on account of the loss:—*Held:* the latter might retain the amount so advanced, & the principal could not recover it from him, but must resort to his own broker for it.—CALLOW *v.* KELSON (1862), 10 W. R. 193.

Pledge of certificates & blank transfers.]—*See* ESTOPPEL; STOCK EXCHANGE.

SUB-SECT. 11.—AUTHORITY TO PURCHASE.

571. Agent—Authority to act "in & about" purchase of property.]—A statement of claim alleged that deft. "duly authorised J. to act as his agent in & about the purchase of a certain property":—*Held:* an insufficient averment of an authority to purchase.—VALE OF NEATH COLLIERY CO. *v.* FURNESS (1876), 45 L. J. Ch. 276; 34 L. T. 231; 24 W. R. 631.

572. —— Authority to bid at auction—Purchase subject to conditions not in particulars.]—A brewer sent an agent to bid for him at a sale by auction for a lot, comprising a public-house, described in the particulars of sale as in occupation of S., at the low rental of £20 a year, & two cottages, described in the particulars as each let at 2*s.* a week, & in occupation of B. & T. The property was in reality subject to a lease (of which 9 years were unexpired) to another brewer, & S., B. & T. were his under-tenants. The lease was read at the sale, & the auctioneer stated that he sold the lot subject to it. The lot was knocked down to the brewer's agent, & he signed a contract which made no mention of the lease. The vendor filed a bill for specific performance of the contract, subject to the lease:—*Held:* (1) the brewer was not bound by the unauthorised act of his agent; (2) the notice that the property was in occupation of persons mentioned in the particulars did not fix him with constructive notice of the lease.—CABALLERO *v.* HENTY (1874), 9 Ch. App. 447; 43 L. J. Ch. 635; 30 L. T. 314; 22 W. R. 446, C. A.

Annotations:—**Distd.** L. & N. W. Ry. Co. *v.* Boulton (1890), 62 L. T. 393. **Refd.** Phillips *v.* Miller (1875), L. R. 10

PART V. SECT. 3, SUB-SECT. 11.

571 i. *Agent—Authority to ascertain price.*]—Deft. wrote to his agent: "You had better see what you can secure 1,000 barrels more of the best oil at, or, if there be a tank that you come across with from 2,000 to 5,000 genuine oil, I would buy it, & pay, say, $1,000, $2,000, or $3,000 down, or, if need be, the whole. I don't think oil can be much higher, but I don't look for it to be cheaper; therefore would not think it bad policy to secure enough to keep me running through the winter. Please post me what you can":—*Held:* no authority was conferred by this letter to complete a purchase of 3,000 barrels.—PRINCE *v.* LEWIS (1870), 21 C. P. 63; 31 U. C. R. 244.—**CAN.**

571 ii. —— *Authority to carry on business in own name.*]—B. was in charge of a supply store, selling the goods of defts. & receiving his remuneration from the excess of the selling price over the invoice price for which W. was to account. He had no authority to pledge defts.' credit. B. bought the goods in respect of which pltfs. sought to make defts. liable for himself, & not for defts., & credit was given to B. by pltfs., who at the time knew nothing of defts.:—*Held:* as there had not been any holding out by defts., & the goods were sold to B. as principal, *Watteau v. Fenwick*, [1893] 1 Q. B. 344, did not apply, & defts. were not liable. *Miles v. McIlwraith*, 8 App. Cas. 120, folld.; *Pole v. Leask*, 9 Jur. N. S. 829, H. L., refd.—BECHERER *v.* ASHER (1896), 23 A. R. 202.—**CAN.**

571 iii. —— *Authority to contract for cultivation.*]—A general agency; "I authorise you to conclude all contracts that you shall deem fit with the cultivators for the cultivation this year of sugar-beet, & also the labour for its cultivation," does not authorise the agent to buy from the cultivators, & could not bind the principal with third parties for the purchase price of such beet.—JARRY *v.* SENECAL (1885), M. L. R. 1 S. C. 400; 8 L. N. 331.—**CAN.**

571 iv. —— *Holding out.*]—Deft. employed for purchase of horses O., to whom he made required advances, & deft. did not conceal from anyone that the advances were made by him, a fact which was generally known. The greater part of the payments were made in the office of deft., who in one instance had given his personal note to settle for a sale of horses, & the invoices for the transport of them to England, although made in the name of O., were drawn to deft.'s order. O., having bought these horses from pltf. in the name of deft., & an action having been brought for the price:—*Held:* deft., having given the public reason to believe that O. was his agent, was responsible for the purchase of horses made by O. from pltf. in deft.'s name.—BISAILLON *v.* ELLIOTT (1898), Q. R. 13 S. C. 289.—**CAN.**

571 v. —— *Authority to buy certain goods—Purchase of other goods.*]—D. was agent for deft., who had sanctioned his purchasing certain goods:—*Held:* the circumstances gave no implied authority to D. to purchase goods of pltf.—HEATHFIELD *v.* VAN ALLEN (1857), 7 U. C. R. 346.—**CAN.**

571 vi. —— *Authority to buy for cash.*]—Defts. employed B. to buy wheat for them, & supplied him with ready money to pay for it. B. then, with the knowledge of defts., & on their instructions, made arrangements with C. to receive the wheat for them, & to give out tickets to the persons delivering the grain, signed by him as defts.' agent, showing names of purchasers, quantity & grade of wheat, price, & total amount of the purchase. These tickets were furnished to B. by defts. The custom was for the farmers to take these tickets to B. or his bankers & get their money. Pltf.'s claim was for the amount of two tickets:—*Held:* pltf. could not recover, as B. had no authority to buy except for cash, & defts. had supplied him with the cash. If pltf. chose to deliver his wheat to B. without getting his money for it, he did so at his own risk, & could not then look to defts. for the money.—BENNETT *v.* ATKINSON. (1894), 10 M. R. 48.—**CAN.**

572 i. —— *Authority to bid at auction.*]—Sending a man to bid at an auction cannot be considered as conduct calculated, in the language of Contract Act, s. 237, to induce third persons to believe he had general authority to buy.—MACKENZIE, LYALL & CO. *v.* MOSES (1874), 22 W. R. 156.—**IND.**

C. P. 420. **Mentd.** Manson *v.* Thacker (1878), 7 Ch. D. 620.

573. —— Authority to buy at discretion—Secret limitations.]—Where a purchase is made by an agent, he is not a special agent if he has discretion to exceed the sum ordered to be given by his principal; if he has such discretion, the principal is bound by his contracts, though they exceed the sum which he is ordered by his principal to give.—HICKS *v.* HANKIN, No. 159, *ante*.

574. —— —— ——.]—Where an agent is employed from time to time to purchase goods at his discretion, although he may, in a particular transaction, have received orders which he may have violated, the principal will be bound by a purchase made by him contrary to his order.—SMETHURST *v.* TAYLOR (1844), 12 M. & W. 545; 14 L. J. Ex. 86; 2 L. T. O. S. 348; 152 E. R. 1314.

Annotations :—**Mentd.** Gray *v.* Taylor (1844), 2 L. T. O. S. 349; Wilton *v.* Snook (1844), 3 L. T. O. S. 105; Mercy *v.* Galot (1849), 3 Exch. 851.

575. —— Authority to buy land—Contracting in own name.]—Where an agent authorised to buy land contracts in his own name & then discloses his principal, the principal is bound.—WALLER *v.* HENDON & COX, No. 149, *ante*.

576. —— Authority to buy on credit on previous occasions.]—Deft., a linen-draper in Yorkshire, had in several instances employed B. as his agent to purchase on credit goods of pltfs., linen-drapers in London. B., without authority of deft., ordered goods in his name to be sent by the usual conveyance, & intercepted them to his own use :—*Held* : deft. was liable for such goods, having by previous dealings with pltfs. & with other persons held out B. as his general agent to purchase goods.—GILLMAN (GILMAN) *v.* ROBINSON (1825), 1 C. & P. 642; Ry. & M. 226.

Annotation :—**Refd.** *Re* Acraman, *Ex p.* Bushell (1844), 3 Mont. D. & De G. 615.

577. *S. P.* TODD *v.* ROBINSON (1825), Ry. & M. 217.

For full anns., *see* MASTER & SERVANT.

578. —— Authority to buy on usual trade terms.]—Goods were shipped at Bombay on board a ship of pltf., shipowner in Liverpool, & by the bill of lading were to be delivered "unto order, or to his & their assigns, on paying freight for same." The bill of lading was indorsed by the shipper & forwarded to defts., East India agents in London, who indorsed it in blank to C. & Co., their factors in Liverpool. On arrival of the goods at Liverpool C. & Co. presented the bill of lading to pltf., & received the goods, pltf. debiting C. & Co. with the freight. Afterwards C. & Co. became bkpt. without having paid the freight, whereupon defts. claimed the goods from them, & took possession of them :—*Held* : defts. not liable to pltf. for the unpaid freight.

A person who employs an agent to purchase goods on usual terms of any particular trade doubtless gives the agent authority to pledge his credit. But it is by no means a matter of course that credit shall be given for freight under bills of lading which make the goods deliverable on paying freight, & it is plain that where such credit is given it is on the responsibility of the individuals actually receiving the goods, or in consequence of the usual course of dealing between them & the shipowner (TINDAL, C.J.).—TOBIN *v.* CRAWFORD (1842), 9 M. & W. 716; 12 L. J. Ex. 490; 152 E. R. 303, Ex. Ch.

579. —— General authority in widest terms—Purchase of such title as vendor had.]—If an agent for a purchaser, having a general authority in writing in the widest terms, which includes an authority to conclude a contract on such terms as he in his discretion should think fit, contracts to purchase such title as the vendor has, the ct. will compel specific performance of the contract without any inquiry into vendor's title.—ST. JOHN *v.* STIRLING (1829), 7 L. J. O. S. Ch. 189.

580. —— Occasional authority to buy—No notice of revocation.]—W. as agent for deft. occasionally employed B. to purchase wools, which purchases had been ratified by deft. In June, 1839, deft. wrote to B. to say he would have nothing to do with any purchases made by him. This letter had been communicated to pltf., but at what time was left uncertain. In July B. bought wools of pltf. then lying at his premises, & they were sent to a warehouse of another person, where they were weighed & packed by B. in sheets, which deft. was in the habit of sending there for the purpose of packing such wools. The wools in question were not paid for, & it was the course of dealing that wools were not to be removed from such warehouse till payment. In an action to recover the price of the wools :—*Held* : (1) there was sufficient evidence to warrant the jury in finding B. was deft.'s agent acting within scope of his authority.—CRIBB *v.* DWYER (1909), S. Q. R. 242.—**AUS.**

575 i. —— *Authority to buy land—Purchase subject to reservation unknown to principal.*]—A. authorised C. to purchase certain land from B. at £2 per acre if C. approved of the purchase. C. inspected the land, & purchased the property for £1 17*s.* per acre. The purchase-money was paid, & the land transferred. During a period of four months after the completion of the purchase B. removed timber from the land. B. gave evidence that in selling the land he expressly reserved (with the concurrence of C.) the right to remove timber for four months, & that this condition was excluded from the signed memorandum because it was contained in the offer of sale by him, & he was told by C. that it was unnecessary to insert it in the memorandum also. The jury found that in allowing this term C. was acting within scope of his authority, but that it was omitted from the memorandum by C.'s fraud, & that A. did not know of the existence of this term of the contract :—*Held* : (1) there was evidence to support the finding that C. was acting within scope of his authority in authorising B. to remove the timber; (2) the memorandum was not extended to embody the whole of the contract; but if on the contract so limited B. was liable to A., A. was liable in damages to an equal amount to B. for loss caused by the fraud of A.'s

575 ii. —— —— *Purchase subject to lease.*]—Pltfs. having been recommended by C., their agent, to purchase certain lands, authorised him to buy same. The agent purchased the lands, which were subject to a mining lease for one hundred years, of which pltfs. had no knowledge, & as to which nothing was said in the agreement :—*Held* : the agent had no authority to buy anything less than the whole interest in the property, & pltfs. were not bound by their agent's unauthorised act.—GREIG *v.* FRANCO-CANADIAN MTGE. CO. (1916), 34 W. L. R. 1102.—**CAN.**

576 i. —— *Authority to buy on credit on previous occasions.*]—R., representing himself as agent of deft., purchased goods from pltfs. for defts., pltfs. taking in payment a draft drawn by R. on defts. payable to pltfs., & pltfs. shipped the goods to defts. & placed the draft in the bank for collection. Defts. accepted the goods & paid the draft. Two other sales were made & settled in a similar manner. The drafts were on special forms of defts., furnished by defts. to R. Upon pltfs. making a further similar sale & shipment defts. refused the draft & returned the draft, asserting that R. had no instructions to purchase them :—*Held* : (1) R. was the authorised agent of defts.; (2) in any case defts. were by their conduct estopped from denying the agency.—RAMELSON *v.* NORTH-WEST HIDE & FUR CO. (1914), 27 W. L. R. 160; 15 D. L. R. 905.—**CAN.**

m. —— *Managing estate—Principal benefited by purchase.*] — Pltf. sued deft. for price of doors supplied to an estate bungalow. The doors were supplied upon the order of L., who at the time managed the estate for deft., then absent in England. Deft. disputed his liability on the ground that his name did not appear in the contract or receipts for the doors, those documents having been signed by L., who was managing the estate, but held no power of attorney or legal authority to incur debt. It was not disputed that the bungalow was built with the authority of deft., who resided there; nor was it disputed that the doors were necessary :—*Held* : when a person takes advantage of the management of his affairs by another he must fulfil the engagements which that other has contracted in his name, provided such engagements be within the proper limits of the manager's authority & be for the benefit of the estate.—KOORA *v.* ROBINSON (1867), 2 Agra Mis. 2.—**IND.**

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agent for the purchase, & that pltf. had not had notice of the countermand of his authority.—DODSLEY *v.* VARLEY (1840), 12 Ad. & El. 632; Arn. & H. 128; 4 Per. & Dav. 448; 5 Jur. 316; 113 E. R. 954.

Annotations:—**Expld.** Dyer *v.* Cowley (1848), 12 Jur. 776. **Refd.** Bushel *v.* Wheeler (1844), 15 Q. B. 442.

581. Agent abroad—Authority to buy at auction—Purchase by private bargain.]—It is within the authority of an agent abroad, instructed to buy goods at a sale by auction, to buy them before the sale by auction by private contract at less than the price to which he is limited by his instructions.—STEIN *v.* COPE (1883), Cab. & El. 63.

582. Agent of seller—Held out by buyer as his agent.]—G., foreman of pltf., a lithographic printer, employed by him to get orders for printing, being desirous of publishing certain maps & other works for himself, agreed with deft., a publisher, to supply maps, etc., to him to be sold on commission. He entered an order as from deft. in pltf.'s order book. Maps & other goods were supplied to deft. from pltf.'s premises, some of them accompanied by delivery notes requesting deft. to receive the goods from pltf. Receipts to the same effect were signed by deft. Pltf. made out an account amounting to £108, charging deft., & handed it to G., who showed it to deft. Deft. accepted bills for part of the amount of this account & gave the balance in cash to G., who handed the cash & bills to pltf. Other goods being supplied, pltf. sent the invoice of them to deft., charging him with the price. Deft. applied to G. for an explanation, &, on being told by G. it was a mistake, took no steps to inform pltf. The jury found deft. did not authorise G. to use his name in ordering the goods, but from the manner in which deft. had acted pltf. believed he was selling the goods to deft.:—*Held:* deft. liable to pltf. for the price of the goods.—CORNISH *v.* ABINGTON (1859), 4 H. & N. 549; 28 L. J. Ex. 262; 7 W. R. 504; 157 E. R. 956.

Annotations:—**Apld.** Thomas *v.* Brown (1876), 1 Q. B. D. 714; Henderson *v.* Williams, [1895] 1 Q. B. 521, C. A. **Folld.** Fracis, Times *v.* Carr (1899), 81 L. T. 50. **Refd.** Sarat Chunder Dey *v.* Chunder Lala (1892), 56 J. P. 741, P. C.

583. Bankrupt—Authority from assignee to carry on business for creditors.]—A bkpt. carried on the business of a coachmaker for the benefit of the creditors, as their agent, under the authority of the assignee, & ordered goods in his own name, which were used in the business:—*Held:* the assignee was liable for goods bought for the use of the business.—KINDER *v.* HOWARTH (1818), 2 Stark. 354.

584. Broker—Authority to buy on certain terms—Substantial compliance.]—In an action for goods sold, a letter from defts.' broker announcing to his principals a purchase on their account, on certain terms stated, & from which they did not dissent:—*Held:* evidence of a precedent authority to purchase, not merely on precisely the terms stated, but upon terms not unusual nor unreasonable, & in substance the same.—CAMPBELL *v.* HICKS (1858), 28 L. J. Ex. 70.

For full anns., *see* Part IX., Sect. 3, Sub-sect. 2, F. (b), *post.*

585. —— —— Purchase on other terms.]—A., in London, authorised B., a broker in Liverpool, to buy goods for him on certain terms. B. bought the goods on terms which so far differed from the authority as to omit a stipulation contained in the authority, & to express one not therein mentioned; both these were stipulations which would have been by custom annexed to the contract, unless expressly excluded:—*Held:* as the effect was the same as if the contract had been made in the very words of the authority, it was within scope of the broker's authority to make such a contract binding on the principal.

If a broker has authority to enter into a contract, & he does so according to the usual terms of the business in which he is engaged, the principal is bound, unless the person with whom the broker contracts has notice of the broker's limited authority (BYLES, J.).—HEYWORTH *v.* KNIGHT (1864), 17 C. B. N. S. 298; 4 New Rep. 288; 33 L. J. C. P. 298; 10 Jur. N. S. 866; 144 E. R. 120.

Annotations:—**Mentd.** Chinnock *v.* Ely (1864), 11 L. T. 536.

586. —— Authority to buy under supervision of agent—Agent's authority revoked without notice.]—P. & Co. employed L. as broker to buy imported goods for them "under superintendence of A." L. dealt with A. above a year, there being an unbroken series of transactions, & all payments & receipts passing between A. & L. & no interference made by P. & Co. P. & Co. opened no account with L. in their books & agreed with A. to give him half profits:—*Held:* (1) L. had a right to infer that A. was either a partner of B. & Co. or their general agent; (2) if A. was agent, L. was entitled to notice that A.'s authority was determined.—POLE *v.* LEASK, No. 1, *ante.*

587. —— Usage—Wool market.]—Pltfs. employed defts. as brokers to buy wool in the Liverpool wool market, & defts. bought from A. The bought note sent to pltfs. ran, "Bought of A. for account of B. & Co." (pltfs.), etc.; but the sold note sent to A. ran, "Sold for you to our principals," etc. Pltfs. did not know their names had not been given to A. Defts. paid A. for the wool, of which pltfs. had the benefit, & to an action by pltfs. on the common counts pleaded a set-off by money paid for their use:—*Held:* (1) notwithstanding the variance between the bought & sold notes, evidence was admissible to establish a custom for brokers in the Liverpoool wool market to give sellers the names of their principals or their own names at their option, & in the latter case not to communicate the fact to their principals; (2) pltfs. must be taken to have authorised defts. to contract according to this usage; (3) the set-off was admissible.—CROPPER *v.* COOK (1868), L. R. 3 C. P. 194; 17 L. T. 603; 16 W. R. 596.

Annotations:—**Consd.** Mollett *v.* Robinson (1870), L. R. 5 C. P. 646. **Refd.** Calder *v.* Dobell (1871), L. R. 6 C. P. 486.

588. —— —— Tallow market.]—A custom in a particular market that a broker who has purchased, & is purchasing, goods of a particular kind, in his own name, may take portions of those goods & supply them to principals who have employed him in his character of broker to buy such goods for them, is one of a peculiar nature, & cannot be supported as against a principal not proved to have been acquainted with it when he gave his order.

R., a merchant in Liverpool, gave orders to a tallow broker in London to buy certain quantities of tallow for him. The broker did not buy the specified quantities from any person, though he sent bought-notes in the usual form, "Bought of A. on your account": both before & after the order he bought from various persons, in his own name, larger quantities of tallow, proposing to allot to R. the quantities R. had desired to be bought. On R.'s refusal to accept, the broker sold the tallow, & brought an action for the differences:—*Held:* though the evidence showed such a mode of dealing to be the usage in the London tallow market, the action was not maintainable against a principal who did not appear to have had knowledge of its existence.—ROBINSON *v.* MOLLETT, No. 317, *ante.*

Annotations: **Expld.** *Re* Simpson, *Ex p.* Morgan (1876), 34 L. T. 329, C. A. **Expld. & Distd.** *Re* Rogers, *Ex p.*

Rogers (1880), 15 Ch. D. 207, C. A. **Apld.** Perry *v.* Barnett (1885), 14 Q. B. D. 467. **Distd.** Sachs *v.* Spielmann (1889), 5 T. L. R. 487. **Consd. & Expld.** May & Hart *v.* Angeli (1898), 14 T. L. R. 551, H. L.; Levitt *v.* Hamblett, [1901] 2 K. B. 53, C. A. **Distd.** Scott & Horton *v.* Godfrey, [1901] 2 K. B. 726. **Consd.** Matveieff *v.* Crossfield (1903), 51 W. R. 365. **Refd.** Anderson *v.* Beard (1900), 5 Com. Cas. 261; Johnson *v.* Kearley, [1908] 2 K. B. 514, C. A.

589. Brother acting for brother—Correspondence amounting to authority.]—Pltf. having entered into a contract with C., brother of deft., for sale of some hay, brought an action against deft. for not accepting. There was evidence that C. was acting as agent to his brother in the course of his dealing. The judge at the trial admitted letters & telegrams signed by C. as evidence against deft., & the jury found for pltf.:—*Held:* (1) there was sufficient evidence of the authority; (2) two telegrams, of which one was signed in C.'s name, & in the other the name of deft. was not mentioned as buyer, together constituted a sufficient memorandum of contract to satisfy Stat. Frauds, on the ground that deft. might be treated as the undisclosed principal of C., who appeared on the telegrams to be liable as principal.—MCBLAIN *v.* CROSS (1871), 25 L. T. 804.

Charterer of ship under charterparty by demise.]—*See* SHIPPING & NAVIGATION.

590. Child—Implied authority from relationship—Father's liability for debt.]—The moral obligation a father is under to provide for his child imposes upon him no liability to pay the debts incurred by the child, & he is not so liable unless he has given the child authority & has contracted to pay them. A father who gives no authority & enters into no contract is no more liable for goods supplied to his son than a brother, or an uncle, or a mere stranger would be (LORD ABINGER, C.B.).—MORTIMORE *v.* WRIGHT (1840), 6 M. & W. 482; 9 L. J. Ex. 158; 4 Jur. 465; 151 E. R. 502.

Annotations:—**Folld.** Shelton *v.* Springett (1851), 11 C. B. 452. **Apprvd.** Bazeley *v.* Forder (1868), 9 B. & S. 599. **Apld.** Healing *v.* Healing (1902), 51 W. R. 221. **Mentd.** Linegar *v.* Hodd (1848), 17 L. J. C. P. 106; Dickenson *v.* Wright (1860), 5 H. & N. 401.

591. Employee—Holding out.]—Applt. had been in the habit of personally ordering goods from resps., & he had an employee, C., who had no authority to order goods. Applt. dismissed C. & the latter subsequently obtained goods from resps. on the representation that applt. had sent him for them. When applt. was paying resps.' account he did not notice the items for these articles & he paid the account in full. A second account containing charges for further articles fraudulently obtained by C. in the name of applt. was looked over by applt.'s clerk, but was not properly checked, & applt. paid it in full. Applt. claimed to recover back from resps. the sum overpaid:—*Held:* applt. was entitled to recover the sum, as he had not held out C. as his agent & there was no estoppel.—BAILEY & WHITES, LTD. *v.* HOUSE (1915), 31 T. L. R. 583, D. C.

592. Factor—Habitually buying one kind of goods—Purchasing different kind of goods.]—If one be factor for a merchant to buy one kind of stuff, as tin, or other such like, & the factor has not used to buy any other kind of wares but this kind only for his master, if now the factor buy sales or other commodities for his master, & assume to pay money for that, the master shall be charged in an *assumpsit* for the money, & for that let the master take heed what factor he makes.—PETTIES *v.* SOAM (1601), Gouldsb. 138; 75 E. R. 1049.

593. Manager of business—Authority to superintend & transact business under control of board.]—A co. established for manufacture of glass, registered under Cos. Act, 1844 (c. 110), had power under a clause in its deed of settlement to appoint a manager of its works & factories to "superintend & transact, under control of a board of directors, the manufacturing business of the co.," to whom the board of directors was by another clause authorised to delegate "such & so many of the powers thereby given to them as would enable him to carry on the works & manufacturing business in an efficient manner":—*Held:* the co. was liable for goods supplied to it for purposes of its manufactures upon orders given by such manager, although there was no express delegation of authority, since such orders fell within scope of his authority.—SMITH *v.* HULL GLASS CO., No. 1087, *post.*

Annotations:—**Consd.** *Re* Sea, Fire & Life Assce., Greenwood's Case (1854), 3 De G. M. & G. 459; Forbes *v.* Marshall (1855), 11 Exch. 166. **Consd. & Expld.** Ernest *v.* Nicholls (1857), 6 H. L. C. 401, H. L. **Consd. & Distd.** Sea, Fire, Life Assce. Soc. *v.* Port of London Ship Owners' Loan & Assce. Soc. (1857), 6 W. R. 24, H. L. **Consd.** Prince of Wales Assce. *v.* Harding (1858), E. B. & E. 183; Allard *v.* Bourne (1863), 15 C. B. N. S. 468. **Apld.** *Re* County Palatine Loan & Discount Co., Cartmell's Case (1874), 9 Ch. App. 691. **Consd.** Biggerstaff *v.* Rowatt's Wharf, [1896] 2 Ch. 104. **Refd.** Royal British Bank *v.* Turquand (1855), 5 E. & B. 248; Reuter *v.* Electric Telegraph Co. (1856), 6 E. & B. 341; Peddyl *v.* Gwyn, Gordon *v.* Sea, Fire & Life Assce. Soc. (1857), 3 Jur. N. S. 188; *Re* Athenæum Life Assce. Co., *Ex p.* Eagle Insce. (1858), 27 L. J. Ch. 829.
For full anns., *see* S. C. No. 1087, *post.*

594. —— Holding out—Seller relying on credit of principal.]—A., a dealer in china, being insolvent, assigned his business & stock-in-trade to his brother B., a carver & gilder, & entered into a composition with his creditors to pay them 5*s.* in the pound; B. undertaking to pay 2*s.* 6*d.* in the

591 i. *Employee—Authority as such.*]—It is not within reasonable scope of the authority of an assistant in an indigo factory to purchase any amount of indigo seed for his master & to make his master liable, particularly when the seed is not purchased or used for the factory; & though the assistant, in writing to the vendor for the seed, style himself in the body of the letter as the manager of the concern, yet his signing himself for another person, & not for the owner of the factory, discloses to the vendor that the other person, & not the owner of the factory, is his principal.—ROGHOOBURDYAL MUNDUR *v.* CHRISTIAN (1865), 3 W. R. 123.—**IND.**

593 i. *Manager of business—Authority as such—Purchase outside ordinary mercantile transaction.*]—The manager of a co. has no implied power to bind the co. other than in its ordinary mercantile dealings, & the manager of a retail meat co. has no implied power to purchase lands & the goodwill of a retail meat business situate thereon.—BIRD *v.* HUSSEY FERRIER MEAT CO., LTD. 1913), 25 O. W. R. 13.—**CAN.**

594 i. —— *Holding out.*]—A retail merchant who warrants a sale by a wholesale merchant of certain goods to another merchant, & who subsequently purchases the latter's business, under reserve of redemption, leaving him in possession to manage the business, gives the wholesale merchant sufficient reason to believe that the other merchant is the former's agent, & may be held liable for goods sold & delivered to such agent.—DUBOIS *v.* BAILEY (1915), Q. R. 47 S. C. 349.—**CAN.**

594 ii. —— ——.]—By an agreement between G., the proprietor of an hotel, & M., the occupant, it was acknowledged by M. that the whole furniture & effects in the hotel belonged to G., & he agreed to transfer to G. the licence for the hotel. M. further agreed to manage the hotel for G., & to account to him for the drawings, for which he was to be paid a weekly wage, & G. agreed not to charge rent for M.'s possession from the term immediately preceding the agreement, & M. agreed to account to G. for the stock in the hotel as at a certain date. The licence was thereafter transferred to G. Subsequently goods were supplied to M. for the purposes of the hotel on his order, & by a firm who were in ignorance of G.'s connection with the hotel. On learning of the agreement they raised an action against G. for the price of the goods:—*Held:* G. was liable.—DAWSON & CO. *v.* GOLD (1888), 25 Sc. L. R. 268.—**SCOT.**

594 iii. —— ——.]—Pltf.'s claim was for goods sold to P., who had been carrying on business as a general trader, but shortly before sale had made a transfer of his stock-in-trade & other property to deft. in trust for creditors. Pltf. was unaware of the transfer, & sold the goods as he had frequently done before the transfer, believing that P. was still the principal & not an agent, as deft. had left him in charge of the business & employed him to carry it on on his behalf, in accordance with instructions to be received. The goods

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pound, & A. himself the remainder. A. continued to manage the business in the shop for B., B.'s wife occasionally going there, & B.'s name appearing over the door. One of A.'s creditors applied to him at that shop, & pressed for payment of his share of the composition. A. offered a bill of exchange in payment, on which B.'s name had been put, but without his authority, as indorser, & as the amount exceeded the amount due for composition, A., & B.'s wife, who was then in the shop, proposed that goods should be supplied to the shop for the amount of the balance, which was agreed to, & goods were sent to the amount of the balance. The bill having been dishonoured, B. was sued, & pleaded that he never indorsed the bill, & no notice of dishonour had been given to him; the jury found both those issues in his favour. Evidence was given that B. had held himself out as responsible for all goods supplied at that shop. The jury found that A. had a general authority to buy goods for B., & that pltf. did not sell the goods on the credit of the bill alone, but on the credit of B.:—*Held:* the value of the goods sent was recoverable on a count for goods sold & delivered in the action against B.—ROSE *v.* EDWARDS (1836), 1 M. & W. 734; 1 Tyr. & Gr. 975; 2 Gale, 123; 5 L. J. Ex. 268; 150 E. R. 629.

595. —— ——.]—Deft. had a jeweller's shop at Lewes, he residing near London; the business at Lewes was managed by A., who, by deft.'s authority, was in the habit of giving orders at Lewes, verbally & by letter, for goods to be sent to the shop; & A. had given such orders to pltf., who resided in London, & who had, in compliance with them, sent goods to the shop, which deft. had accepted. A. absconded from the shop, came to London, verbally ordered goods, consisting of jewellery, of pltf., as for deft., & took them away, saying he was going to Lewes:—*Held:* (1) upon these facts, a jury might find deft. had so conducted himself as to make pltf. believe that A., whilst in deft.'s employment, had authority to order goods as he did; (2) on such finding, pltf., not having had notice of the termination of the authority, would be entitled to recover the price from deft. —SUMMERS *v.* SOLOMON (1857), 7 E. & B. 879; 26 L. J. Q. B. 301; 3 Jur. N. S. 962; 5 W. R. 660; 119 E. R. 1474.

Annotations:—**Dbtd.** Hambro *v.* Hull & London Fire Insce. (1858), 3 H. & N. 789. **Distd.** Hambro *v.* Burnand, [1903] 2 K. B. 399.

596. —— ——.]—Where A. allows B. to put his, A.'s, name on the door of his place of business, & a third person sells goods to B., believing from seeing his name on the door that A. is B.'s principal, this is evidence from which a jury may infer A. was holding himself out to the world as a principal, & as such was liable for goods sold to B. in that belief.—WARD *v.* COX (1867), 15 L. T. 515.

597. —— ——.]—Holding out is a form of estoppel, & means there has been some form of representation by the principal to the other party by which that other has been induced to act.

H. being about to erect a factory for the purpose of carrying on the business of manufacturing explosives under the name of deft. co., appointed a manager to have sole charge of the business. The manager's office was used as the office of the co. The manager without express authority from H. entered into a contract for the purchase by the co. from pltfs. of all the co.'s "requirements" of nitric & sulphuric acid, estimated at 500 & 750 tons respectively, during 12 months from date of the contract. The manager gave notice to pltfs. to deliver 15 tons under the contract. The co. never started business, & the undertaking was abandoned by H. within the 12 months. Acceptance of the 15 tons was refused. In an action by pltfs. against the co. for breach of the contract to purchase 500 & 750 tons:—*Held:* (1) the manager had been held out by H. as having authority to enter into the contract; (2) the contract was binding on H.; (3) by the contract the co. had only agreed to buy such acid as might be required; (4) none having been in fact required, there had been no breach, except as to the 15 tons for which H. was liable.—BERK & Co., LTD. *v.* INTERNATIONAL EXPLOSIVES CO. (1901), 7 Com. Cas. 20.

598. Manager of farm—Holding out.]—Where cattle had been sold by pltf. to A., & it appeared at the time of sale that A. managed deft.'s farm; that he had always his money in hand, & he had then to the credit of his account more than the value of the cattle; that deft. had never authorised him to buy on credit; that he had sometimes bought for deft. & sometimes for himself; that the cattle had been paid for by bills drawn on A. which had been dishonoured when due, afterwards renewed by pltf.:—*Held:* (1) it was sufficient to leave it to the jury to say whether the cattle had been sold on the credit of deft. or of A.; (2) it was not necessary it should be left to the jury to say whether pltf. at the time of sale was aware A. was acting as agent of deft.—EDWARDS *v.* SMITH (1826), 12 Moore, C. P. 59; 5 L. J. O. S. C. P. 11.

599. Manager of public-house—Authority as such—Secret limitations.]—The ordinary rule of law that a principal is liable for the acts of his agent within the authority usually confided to an agent of that character, notwithstanding secret limitations upon that authority, applies also where the existence of any principal is unknown to the person contracting with, & giving credit to, the agent alone.

H., owner of a public-house, sold it to defts., who retained H. as manager at a salary, his name being over the door & the licence continuing in his name. Pltf., who knew nothing of defts., sold cigars to H. for the use of the public-house. H. had been expressly forbidden by defts. to purchase cigars on credit. Being unable to obtain payment from H., to whom alone he had given credit, pltf., finding H. was manager to defts., sued them:—*Held:* (1) as the cigars were such as would usually be dealt in at such a house as defts', H. was acting within scope of his implied authority as manager in ordering them; (2) defts. could not as against pltf. set up

p urchased from pltf. were such as would be reasonably required in the business, & pltf. supposed that they had been ordered for it:—*Held:* deft. had constituted P. as his general agent for taking charge of & carrying on the business, & was liable to pltf. for the price of the goods furnished by him. *Armstrong* v. *Stokes* (1877), L. R. 7 Q. B. 598, & *Watteau* v. *Fenwick*, [1893] 1 Q. B. 349, folld.—HUTCHINGS *v.* ADAMS (1898), 12 M. R. 118 (3).—**CAN.**

598 i. *Manager of farm—Authority as such—Holding out.*]—Pltf. sued for $38.15, price of goods sold & delivered. Deft. was owner of a farm, of which M. was lessee, on terms of having half the crop & use of machinery, keeping it in good repair & leaving it as good as he got it. The goods supplied were for repairs to the machinery. During deft.'s absence his wife received the accounts sent in by pltf., but did not bring them to his notice, but deft. knew that M. was pledging his credit, & on one occasion came in & paid for repairs, while M. was in pltf.'s store selecting goods:—*Held:* deft. permitted M. to hold himself out as his agent & was estopped from denying liability. *Heywcrth* v. *Knight*, 32 L. J. C. P. 298; *Brazier* v. *Camp*, 63 L. J. Q. B. 257, C. A., apld.—AGNEW *v.* DAVIS (1911), 17 W. L. R. 571, Dist. C.—**CAN.**

599 i. *Manager of public-house—Holding out.*]—Deft., licensee of an hotel, kept his name up over the door, but was not really interested in the business, which was carried on by others who were supplied with liquor by pltfs.:—*Held:* deft. was estopped from denying that the persons carrying on the business were his agents for the purchase of such liquor.—TOOTH *v.* LAWS (1888), 9 N. S. W. 154.—**AUS.**

any secret limitation of that authority.—WATTEAU *v.* FENWICK, No. 305, *ante*.

For full anns., *see* S. C. No. 305, *ante*.

600. —— Authority to buy from certain persons —Purchase from other persons.]—The licensed owner of a public-house is not liable for spirits supplied to the person whom he left in possession of the premises as manager of the business, although the invoices are made out in his name, if he has only authorised such manager to deal with particular persons, & the spirits were not supplied by one of them. In such case there is no evidence of liability on the owner's part to be left to the jury.—DAUN *v.* SIMMINS (1879), 41 L. T. 783; 44 J. P. 264; 28 W. R. 129, C. A.

Annotations:—**Distd.** Kinahan *v.* Parry, [1910] 2 K. B. 389.

601. —— —— ——.]—Defts., owners of an hotel, appointed a manager of it; the licence was taken out in the name of the manager, whose name also appeared over the door. The manager had been told by defts. to order spirits from a certain brewery (with which pltfs. were in no way connected) & from no other place, but, in contravention of his instructions, the manager ordered whisky from pltfs. Pltfs., who did not know that defts. had prohibited the manager from buying spirits from any other place than the particular brewery, supplied whisky to the manager at the hotel & gave credit to him only. Upon discovering defts. were the real owners of the hotel, pltfs. sued them for the price of the whisky:—*Held*: pltfs. were entitled to maintain the action, as there was no presumption, where a person dealt with the licensee of an hotel & knew nothing of the real owner, that the licensee was a mere manager with limited authority, & that the hotel was tied.—KINAHAN & Co. *v.* PARRY, [1910] 2 K. B. 389; 79 L. J. K. B. 1083; 102 L. T. 826; *revsd.* on ground of no agency in point of fact, [1911] 1 K. B. 459, C. A.

602. Manager of mine—Authority as such.]—Deft. was shareholder in a joint stock mining co., the prospectus & certificates of which provided that all supplies for the mine were to be purchased for cash & no debt was to be incurred. Pltf. supplied goods for the necessary working of the mine on the orders of a resident agent appointed by the directors to manage the mine, which was the customary course in such concerns:—*Held*: deft. was liable to pltf. for the price of such goods, notwithstanding the statements in the prospectus & certificates, unless it was shown that the agent had in fact no authority from deft. & that pltf. had notice thereof.—HAWKER *v.* BOURNE (1841), 8 M. & W. 703; 151 E. R. 1223; *sub nom.* OATEY *v.* BOURNE, HAWKEN *v.* BOURNE, 10 L. J. Ex. 361.

Annotations:—**Consd.** Ricketts *v.* Bennett (1847), 4 C. B. 686. **Distd.** Smith *v.* Archibald (1849), 14 L. T. O. S. 174. **Apld.** Hallett *v.* Dowdall (1852), 18 Q. B. 2, Ex. Ch. **Expld.** *Re* German Mining Co., *Ex p.* Chippendale (1854), 4 De G. M. & G. 19. **Apld.** Peel *v.* Thomas (1855), 15 C. B. 714. **Reid.** Smith *v.* M'Guire (1858), 3 H. & N. 554; Hambro *v.* Hull & London Fire Insce. (1858), 3 H. & N. 789.

603. —— ——.]—Deft. was a shareholder & also secretary of a mine conducted on the cost-book principle, under which the mine agents made monthly or quarterly estimates of the money required to carry on the business, & raised the amount by calls on the shareholders. It was also the practice when sufficient funds were not forthcoming to obtain goods on credit; & deft. had, as secretary, entered the order for goods. The question was left to the jury whether the captain had authority to pledge the credit of the shareholders for goods which were necessary & the jury gave a verdict for pltf.—NEWTON *v.* DALY (1858), 1 F. & F. 26.

604. —— Holding out.]—Deft. advanced money to G., who was engaged in getting up a co. to work a mine in Cornwall, receiving as a security a deposit of 250 shares in the mine, with an option to take the shares in satisfaction *pro tanto*, such option to be declared within 14 days. Deft. never in terms declared his option to accept the shares; but he went down to the mine, made inquiries & obtained reports as to the condition & prospects of the mine & as to the cost of an engine to be used there, & on one occasion assisted in paying the miners' wages; he also permitted the captain of the mine, in his presence, without contradiction, to represent him as a capitalist from London who had a large interest in the mine, & intended to work it vigorously. In an action by a person who had supplied goods to the mine upon the faith of representations by the captain that the mine was being worked by a person of substance whose name he was not authorised to give:—*Held*: the above was evidence from which the jury were warranted in inferring that deft. was a partner, although his name was never mentioned, personal identification being sufficient.—MARTYN *v.* GRAY (1863), 14 C. B. N. S. 824; 143 E. R. 667.

605. Mistress—Express authority not revoked.]—A. authorised B. to supply goods from time to time upon A.'s credit to a woman, with whom A. cohabited, & who was known by B. not to be A.'s wife:—*Held*: A. was liable for goods supplied to the woman after a separation between them, no notice being given to B. determining the agency of the woman in binding A.'s credit.—RYAN *v.* SAMS (1848), 12 Q. B. D. 460; 17 L. J. Q. B. 271; 11 L. T. O. S. 221; 12 Jur. 745; 116 E. R. 940.

606. Newspaper editor—Authority implied from resolution at meeting at which he was appointed.]—Where at a meeting held at B. resolutions were passed for the purpose of continuing publication of a certain newspaper, some of the resolutions being that J. should be appointed editor, & a person found to undertake the printing & publishing, & that the B. committee, or some members thereof & members of some other committee, should give a guarantee to the publisher against loss to the extent of £300, & no guarantee had been given:—*Held*: (1) the persons present at such meeting gave J. authority to employ a printer & publisher; (2) they were liable for work done by him until such guarantee was given.—WATERLOW *v.* COTTON (1854), 2 W. R. 562.

607. Parish officers paying interest on vestry debt—Authority from form of document of debt.]—A parish vestry having resolved to borrow money for the purpose of building almshouses, the money was in 1830 advanced by pltf. upon the security of a promissory note payable to him, or bearer, on demand, with interest, & signed by defts. thus:—"J. H., Churchwarden, J. E., overseer, or others for the time being." The interest had been regularly paid by the overseers for the time being up to 1847, but defts. had never paid the interest, or in express terms authorised the parish officers to pay it for them. The defts. having pleaded Stat. Limitations to an action on the note:—*Held*: it was a question for the jury whether by the form of the note defts. had not constituted the parish officers for the time being their agents for the payment of interest, so as to take the case out of the stat.—JONES *v.* HUGHES & EVANS (1850), 5 Exch. 104; 19 L. J. Ex. 200; 155 E. R. 45.

608. Stockbroker—Authority to buy on certain market conditions.]—Deft. gave pltf. the following order:—"You may buy 500 Mexican Rails at 102-103, 104-105, provided a recovery from the severe fall is pretty certain; but if Mexicans are going lower do not buy at present." Pltf. having purchased the shares:—*Held*: (1) deft.'s order was not an authority to buy in a falling market; (2) as

Sect. 3.—Implied authority : Sub-sects. 11 & 12, A.]

the market was falling, pltf. could not recover the price paid for same.—TALLENTIRE *v.* AYRE (1884), 1 T. L. R. 143, C. A.

See, further, STOCK EXCHANGE.

609. Wife—Carrying on business during husband's imprisonment.]—A wife carried on business on her own account during the imprisonment of her husband, & he returned to live with her after his discharge. On motion for a new trial, after a verdict against him :—*Held :* he was liable for articles furnished in this business, with his knowledge, after his return, though the invoices & receipts were in the name of the wife, & she was rated to & paid the poor & paving rates.—PETTY *v.* ANDERSON (1825), 3 Bing. 170 ; 2 C. & P. 38 ; 10 Moore, C. P. 577 ; 3 L. J. O. S. C. P. 223 ; 130 E. R. 479.

SUB-SECT. 12.—AUTHORITY TO PLEDGE CREDIT.

A. In General.

610. Agent—Authority to collect rent & keep houses in repair.]—Deft.'s agent, to whom the collection of rent & keeping of houses, among them pltf.'s house, in repair, was intrusted by deft., the landlord thereof, had ordered sewerage work to be done, & had authorised pltf. to pay for beer to the workmen, promising that the amount so paid should be deducted out of the rent. No rent was due at the time of the authority thus given. Pltf. had paid for the beer. In an action for wrongful distress, on the ground that the promised allowance had not been made :—*Held :* (1) the agent had no authority to borrow money, or to get others to pay for beer ; (2) it might have been different if there had been any rent due.—CROOKE *v.* WILSON (1844), 4 L. T. O. S. 98.

611. —— General authority to act on behalf of principal.]—Deft.'s agent, having general authority to act on behalf of deft., instructed pltf. (but without any written retainer) to commence an action on behalf of deft., which resulted in judgment by consent against deft. In an action against deft. for the costs :—*Held :* pltf. entitled to recover.—MAY *v.* SHERWIN (1883), 27 Sol. Jo. 278, C. A.

612. Agent for foreign principal—Authority as such.]—Where an agent in England contracts on behalf of a foreign principal he is presumed to contract personally unless a contrary intention plainly appears from evidence contained in the document itself or in the surrounding circumstances. If there is no such evidence the presumption prevails that the agent has no authority to pledge the credit of the foreign principal in such way as to establish privity between such principal & the other party, & that he is personally liable on the contract.—HARPER & SONS *v.* KELLER, BRYANT & Co., LTD. (1915), 84 L. J. K. B. 1696 ; 113 L. T. 175 ; 31 T. L. R. 284 ; 13 Asp. M. L. C. 98 ; 20 Com. Cas. 291.

Annotations :—**Consd.** Mercer *v.* Wright, Graham (1917), 33 T. L. R. 343 ; Miller, Gibb *v.* Smith & Tyrer, [1917] 2 K. B. 141, C. A.

See, further, Part X., Sect. 1, Sub-sect. 4, *post.*

613 Co-adventurers in building speculation.]—An agreement between B. & deft., after reciting an agreement between B. & E., by which B. was to erect six houses on the land of E., & E. was to grant a lease of same to B. when completed, also an agreement between B. & deft., by which deft. was to advance necessary funds, & B. & deft. were to be jointly interested in the houses on terms therein-

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PART V. SECT. 3, SUB-SECT. 12.—A.

n. *Agent—Authority to drive—Obtaining horse.*]—Deft. employed R. to drive some persons into the country. One of the horses was injured & R. obtained a horse from pltf., giving a memorandum that $140 would be paid for it :—*Held :* deft. not liable for the price of the horse.—L'HIRONDELLE *v.* TAFT (1909), 10 W. L. R. 398.—**CAN.**

o. —— —— *Ordering goods.*]—A waggoner, without being authorised by his employer, ordered oats, etc., for his employer's horses :—*Held :* the fact that these goods were supplied to the waggoner for his employer's horses did not make the employer liable for the price. *Wright* v. *Glyn,* [1902] 1 K. B. 745, followed—BARY & Co. *v.* BRYANT (1906), 26 N. Z. L. R. 232.—**N.Z.**

p. —— *Express authority to prepare lease—Ordering building work.*]—An express authority to an agent to prepare a lease of a farm does not give him authority to pledge his principal's credit for the building of a barn or repairing the house.—DUTTON WALL LUMBER Co. *v.* FERGUSON (1915), 31 W. L. R. 812 ; 23 D. L. R. 100.—**CAN.**

q. *Book-keeper—Authority as such—Payment for medical services to injured employee.*]—GUY *v.* BRADY, *infra.*—**CAN.**

r. *Foreman—Holding out.*]—A contractor employed A., a person in insolvent circumstances, to execute a portion of the work contracted for, & supplied him with materials for so doing. He took no steps to prevent A. from being considered his foreman, with power to order materials, & a belief to that effect became current in the district. A. having absconded without paying for certain furnishings made by pursuer for the work at which A. was engaged, pursuer sued the contractor for his account :—*Held :* defender had so acted as to incur liability for pursuer's account.—SMITH *v.* SCOTT & BEST (1881), 18 Sc. L. R. 355.—**SCOT.**

s. *Manager of bank—Authority as such—Employing architect.*]—The authority of a branch-manager of a bank does not include the employment of an architect to make plans for a new office building.—WOODMAN *v.* HOME BANK (1915), 33 W. L. R. 917.—**CAN.**

t. *Manager of business—Authority as such.*]—Deft.'s son, L., carried on a meat business in the firm name of L. & Co., & pltfs. supplied goods to him for that business. Deft., the principal creditor of L., employed S. to manage the business. S. represented to pltfs., that deft. would be responsible for future goods supplied for the business, & that he, S., would see pltfs. paid, & he then ordered more goods, which pltfs. supplied. They charged these goods to L. & Co., & not to deft. : —*Held :* the facts did not warrant the inference that S. had any authority to order goods from pltfs. on deft.'s credit. —GORDON *v.* LEARY (1908), 7 W. L. R. 533 ; 17 Man. L. R. 383.—**CAN.**

u. —— —— *Payment for medical services to injured employee.*]—Deft. carried on a business managed by A., there being also a bookkeeper, B., at the mill. A workman in deft.'s employ at the mill having been injured, A. & B. employed pltf., a surgeon, to attend him :—*Held :* such engagement was beyond scope of their duties as agents, & deft. was not bound by it.—GUY *v.* BRADY (1885), 24 N. B. R. 563.—**CAN.**

v. —— —— ——.]—In an action brought to recover compensation from deft. co. for surgical attendance rendered by pltf. at request of defts.' general manager to an employee, injured whilst in defts.' works :—*Held :* the manager had implied authority to employ a physician in the circumstances.—LEDWELL *v.* CHARLOTTETOWN LIGHT & POWER Co. (1913), 13 E. L. R. 225.—**CAN.**

w. *Manager of mine—Authority as such.*]—The manager of defts.' mine ordered from pltf. material for the construction of a boarding-house for the accommodation of men employed in connection with the mine :—*Held :* (1) the erection of the boarding-house appearing necessary for the efficient operation of the mine, the manager had authority to bind defts. ; (2) the burden was on pltf. to show authority on the part of the manager to pledge the credit of defts. for material supplied to a third person, such power not being within apparent scope of his authority. —MILLER *v.* COCHRAN HILL GOLD MINING Co. (1896), 29 N. S. R. 304.—**CAN.**

x. *Provincial Secretary of Government—Assent of colleagues, but no authority by Order in Council.*]—The Provincial Secretary of Quebec, with the assent of his colleagues, but not being authorised by Order in Council, wrote to D. saying that the Govt. was going to vote a sum for certain work with which D. would be intrusted, & that the money would be paid to any bearer of the letter to whom D. indorsed it :—*Held :* the Provincial Secretary had no power to bind the Crown, & the letter was no contract between D. & the Govt.—JACQUES CARTIER BANK *v.* R., 25 S. C. R. 84.—**CAN.**

y. *Public agent—Authority as such.*]—A Govt. officer as such has no authority to pledge the Govt. credit.—SECRETARY OF STATE FOR INDIA *v.* SULEMANJI MOOBAGI (1912), L. R. 26 Bom. 801. —**IND.**

after mentioned, went on to provide that B. was to continue the erection of the houses, & purchase materials, etc., for the purpose, & give the whole of his time thereto; that deft. should from time to time provide the necessary moneys; that as soon as B., under his agreement with E., should become entitled to the lease of the houses, he should procure the leases to be granted to deft., but B. & deft. should be deemed in equity tenants in common of the premises; that when the leases in question should be obtained the premises comprised in them should be let or sold, & the proceeds of such letting or sale should be brought into account between B. & deft.; that deft. in such account should be credited with all moneys advanced, & if B. should use any of the materials, etc., purchased for the purposes of the agreement for any other purpose, he should in such account be debited with same; that the account should from time to time be balanced & the balance of profit or loss there appearing should be equally divided between B. & deft.; that B. should draw 40*s.* per week for his personal requirements, & be debited in the account when the houses should be finished, & the residue of materials, etc., should be deemed the joint property of B. & deft.; that an account should be opened at the bank in the joint names of B. & deft., on which either party might draw for purposes of the agreement. B. purchased materials, etc., for the houses in question on credit. In an action for the price of same, Brett, J. ruled that the above agreement did not make B. & deft. such partners in the erection of the houses as to authorise B., without more, & did not otherwise authorise B., to pledge deft.'s credit for the materials, etc., thus purchased. On a bill of exceptions to the above ruling:—*Held:* (1) the direction was wrong; (2) the agreement did authorise B. to pledge deft.'s credit for the price of the materials, etc., in question.—NOAKES *v.* BARLOW (1872), 26 L. T. 136; 20 W. R. 388, Ex. Ch.

614. Co-adventurers in mining company.]—The members of a mining co. have authority by law, in absence of proof of a more limited authority, to bind each other on dealings of credit for the purpose of working the mines, if that appears to be necessary or usual in the management of mines.—TREDWEN *v.* BOURNE (1840), 6 M. & W. 461; 9 L. J. Ex. 290; 4 Jur. 747; 151 E. R. 493.

Annotations:—**Consd.** Barnett *v.* Lambert (1846), 15 M. & W. 489; Ricketts *v.* Bennett (1847), 4 C. B. 686. There is nothing in *Tredwen* v. *Bourne* that is inconsistent with the proposition that the degree of authority is to be judged by the nature of the concern & the mode in which it has been carried on (WILDE, C.J.). **Expld.** *Re* Bradbury, *Ex p.* Emery (1854), 4 De G. M. & G. 901. **Apld.** Forbes *v.* Marshall (1855), 3 W. R. 480. **Reid.** *Re* German Mining Co. (1854), 2 Eq. Rep. 983; Peel *v.* Thomas (1855), 3 C. L. R. 397.

615. Commercial traveller—Custom.]—There is no general custom authorising a commercial traveller to bind his principal by contracts for vehicles on credit, & a traveller has no implied authority so to pledge his principal's credit, especially where there is an express agreement by the traveller to pay his own expenses.—JOHNSTON *v.* READING (1893), 9 T. L. R. 200, D. C.

616. Commission merchant—Authority to purchase goods on joint account with foreign principal.]—There is a presumption that a foreign principal does not give the English commission merchant any authority to pledge his credit to those from whom the commission merchant buys on his account

H. F. & Co. were merchants in London, & deft was a partner in the firm of H. B. & Co., carrying on business at Rangoon. Goods were supplied by pltf. to H. F. & Co., on their order given in consequence of an arrangement between the two firms, as disclosed in letters, that H. F. & Co. should "purchase" & send out goods on "the joint account" of the two firms, 2 per cent. to be charged on the invoice by the London firm, & 5 per cent. by the Rangoon firm, including guarantee. Pltf. had no knowledge of deft., or that the Rangoon firm were in any way interested in the transaction, until after the goods were supplied:—*Held:* deft. was not, as an undisclosed principal, a party to the contract under which the goods were supplied by pltf., for, on the true construction of the correspondence, the Rangoon firm did not give authority to the London firm to establish privity of contract & pledge their credit with the English suppliers of the goods.—HUTTON *v.* BULLOCK (1874), L. R. 9 Q. B. 572; 30 L. T. 648; 22 W. R. 956, Ex. Ch.

Annotations:—**Distd.** Maspons *v.* Mildred, Goyeneche (1882), 47 L. T. 318, C. A. **Reid.** Robinson *v.* Mollett (1875), L. R. 7 H. L. 802; Miller, Gibb *v.* Smith & Tyrer, [1917] 2 K. B. 141, C. A.

See, further, Part X., Sect. 1, Sub-sect. 4, *post.*

617. Company promoter—Holding out.]—Deft., chairman of the directors of a proposed co., signed with his initials a prospectus which was approved by the directors, & resolutions that the prospectus should be printed were passed & signed by deft. W., who was not a director or officer of the co., took the prospectus to pltf., & ordered him to print it, stating he had authority to give the order, & pointing out the initials of deft. The resolutions were not shown to pltf., but copies of the prospectus, when printed, were delivered at the offices of the proposed co., & deft. saw them in use there; it was proved that some of them were circulated by deft. There was an arrangement between the directors & W. that he should pay all preliminary expenses, but this was not communicated to pltf.:—*Held:* this was evidence for the jury that deft. had given express or implied authority to pledge his credit for the price of the printing.—RILEY *v.* PACKINGTON (PAKINGTON) (1867), L. R. 2 C. P. 536; 36 L. J. C. P. 204; 16 L. T. 382; 15 W. R. 746.

618. Manager of fête—Authority from appointment as such by stewards.]—On a programme for a jubilee fête the names of two of defts. appeared as stewards, & the name of P. as "general manager." P. ordered tents & flags from pltf. for use at the fête. On the programme was a statement that the stewards reserved the right of altering the programme, that five should form a quorum, & tents would be provided. At the fête defts. took an active part. Pltf. sent in his bill to the stewards. The stewards stated that everyone providing things for the fête would be paid:—*Held:* (1) there was evidence on which the cty. ct. judge might find that P. was authorised to pledge the credit of defts. for the tents; (2) they were liable.

There is a broad distinction between acting stewards, such as those mentioned, & provisional committeemen, who only lend their names (WILLS, J.).—PILOT *v.* CRAZE (1888), 52 J. P. 311; 4 T. L. R. 453.

619. Manager of ship—Appointment as agent.]—In an action for repairs to a ship ordered by a manager, the owner is liable if he has in fact made the manager his agent, although he has never held him out as his agent.—TYNESIDE ENGINE WORKS CO. *v.* GOLDSMITH, No. 308, *ante.*

620. Matron of hospital—Authority as such.]—Where the matron of a hospital orders meat for the use of the hospital, it is to be inferred that in so doing she acted under the direction of the managing committee, & the managing committee intended to bind itself for payment.—REAL & PERSONAL ADVANCE CO. *v.* PHALEMPIN (1893), 9 T. L. R. 569, C. A.

621. Mercantile correspondent of foreign house—Usage.]—A merchant in England, correspondent of

Sect. 3.—Implied authority: Sub-sect. 12, A.]

a foreign house, is not, by *mercantile usage*, authorised on that ground only to pledge the credit of the foreign house for goods bought by him on their account in England.

A. & Co., American merchants, were indebted to B. & Co., of Paris, & C. & Co., of London, & being pressed for payment by B. & Co., remitted funds to C. & Co., who paid & overpaid them, with a direction to remit the balance to B. & Co. in Paris. In order so to do, C. & Co. bought in London, in the ordinary course of business, a bill on Paris, drawn by D. & Co. to the order of C. & Co., to be remitted at once to Paris, but to be paid for by C. & Co. on the next foreign post-day. The bill was so remitted, but before the next foreign post-day C. & Co. failed, & thereupon D. & Co. refused to pay the bill. B. & Co. were afterwards paid by A. & Co. in full. In an action by B. & Co. on behalf of A. & Co. against D. & Co. on the bill:—*Held:* pltfs. were entitled to recover; for if the action were to be considered personally theirs, they were holders for value of the bill; & if not theirs, but really the action of A. & Co., C. & Co. were only correspondents of A. & Co. to remit the bill, & not their agents to pledge their credit for the price of the bill. —POIRIER *v.* MORRIS (1853), 2 E. & B. 89; 22 L. J. Q. B. 313; 17 Jur. 1116; 1 W. R. 349; 1 C. L. R. 429; 118 E. R. 702.

For full anns., *see* BILLS OF EXCHANGE, PROMISSORY NOTES & NEGOTIABLE INSTRUMENTS.

See, further, Part X., Sect. 1, Sub-sect. 4, *post*.

622. Part-owner of ship—Authority as such.]—A part-owner of a ship has no general authority to bind his co-owners for repairs. It is a question of fact whether a part-owner has given another part-owner authority expressly or impliedly to pledge his credit for repairs. A part-owner does not require to give express notice that he will not be liable for repairs ordered by another part-owner in order to exonerate himself from liability.—BRODIE *v.* HOWARD (1855), 17 C. B. 109; 25 L. J. C. P. 57; 26 L. T. O. S. 91; 1 Jur. N. S. 1209; 4 W. R. 44; 139 E. R. 1010.

Annotations:—**Refd.** Whitwell *v.* Perrin (1858), 4 C. B. N. S. 412. **Mentd.** Barker *v.* Highley (1863), 11 W. R. 968.

623. Railway manager—General powers—Payment for medical services to injured employee.]—The general manager of a ry. co. has, as incidental to his employment, authority to bind the co. to pay for surgical attendance bestowed at his request on a servant of the co. injured by an accident on their ry.—WALKER *v.* GREAT WESTERN RY. CO. (1867), L. R. 2 Exch. 228; 36 L. J. Ex. 123; 16 L. T. 327; 15 W. R. 769.

Annotations:—**Consd.** Langan *v.* G. W. Ry. Co. (1873), 30 L. T. 173, Ex. Ch.

624. Railway police inspector—Authority as such—Supplies for injured in accident.]—Certain persons injured by a collision on defts.' ry. line were carried into pltf.'s inn, partly by the help of the station-master. A., a sub-inspector of ry. police for the district, whose duty it was to attend on the spot where an accident occurred, being at such place & time the superior of all station-masters & other servants of the ry. co., ordered some brandy to be given to one of the injured persons, & in reply to a question of pltf.'s as to who would pay for the maintenance of the injured persons, replied, "Don't trouble yourself about that; we'll see that all is right." Pltf. having brought an action against the ry. co. for board, lodging, necessaries, & goods supplied to the injured persons:—*Held:* there was sufficient evidence to go to the jury in support of pltf.'s claim, & to prove the authority of A. to pledge the credit of the co. for board, etc., supplied to the persons injured (the question of *quantum* not being raised).—LANGAN *v.* GREAT WESTERN RY. CO. (1873), 30 L. T. 173, Ex. Ch.

625. Railway servant—Authority as such.]—It is not within the implied authority of a ry. guard, station-master, or other servant of a ry. co. to bind the co. by contracts for surgical attendance on injured passengers; & the co. is not liable for such attendance without evidence of express authority to employ the surgeon.—COX *v.* MIDLAND COUNTIES RY. CO. (1849), 3 Exch. 268; 5 Ry. & Can. Cas. 583; 18 L. J. Ex. 65; 12 L. T. O. S. 403; 13 Jur. 65; 12 J. P. Jo. 820; 154 E. R. 884.

Annotations:—**Consd.** Cope *v.* Thames Haven Dock & Ry. Co. (1849), 3 Exch. 841; Cort *v.* Ambergate, Nottingham etc., Ry. Co. (1851), 17 Q. B. 127. **Expld.** Walker *v.* G. W. Ry. Co. (1867), L. R. 2 Exch. 228. **Distd.** Langan *v.* G. W. Ry. Co. (1872), 26 L. T. 577. **Consd. & Folld.** Houghton *v.* Pilkington, [1912] 3 K. B. 308.

626. Servant—Authority to carry on business in firm name.]—C., a butter dealer near M., had got S., his paid servant, to take a warehouse there, & start a business under the name & firm of "S. & Co.," as "merchants." Goods were supplied there, on the

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z. *Railway inspector of work—Authority as such — Ordering goods.*] — Pltf., acting under a written contract for the delivery of stone for the piers of a bridge which defts. were building on their line of railway, delivered the amount, & was paid by defts. therefor, as well as for an additional quantity & some sand subsequently ordered by the inspector. The inspector then ordered pltf. to deliver some more stone & sand. On observing, however, that defts. had stopped work on the bridge, pltf. ceased delivering. He was paid for what had been delivered up to that time. On the work being renewed, & on being ordered by the inspector to continue delivering, he delivered further stone & sand. Defts. then refused to pay for the latter delivery:—*Held:* there was sufficient evidence of authority on the part of the inspector to bind defts.—O'BRIEN *v.* CREDIT VALLEY RY. CO. (1875), 25 C. P. 275.—**CAN.**

625 i. *Railway servant—Authority as such—Payment for medical services.*]—Where a person has been injured by a railway accident, the highest official of the co. on the ground has authority to bind the co. for the cost of such medical services & attendance as may be immediately requisite. — GAUDREAU *v.* CANADA ATLANTIC RY. CO. (1903), Q. R. 24 S. C. 337.—**CAN.**

625 ii. —— *Authority to employ doctor for one visit only—Subsequent visits.*]—A station-master employed for a servant of the co. injured on the railway a doctor, who attended him for a long time. A rule of the co. gave the co.'s officers express authority to employ a doctor for a first visit only & provided that station agents would be responsible for making the doctor acquainted with this regulation:—*Held:* the co. not liable for fees after the first visit, & even if the doctor were not made aware of the rule he could not imply an authority of the agent to employ him.—MONTGOMERY *v.* N. B. RY. CO. (1878), 5 R. 796; 15 Sc. L. R. 557.—**SCOT.**

a. *Ranchman's servant—Authority as such.*]—Pltf. claimed $153 for pasturage of deft.'s cattle on an agreement made by S. in the hired employ of deft., a ranchman:—*Held:* deft. bound by the act of S. in arranging for the pasturage of his cattle, S. having acted in a reasonable & proper manner & in accordance with his instructions.—CAMPBELL *v.* NEWBOLT (1914), 28 W. L. R. 784; 20 D. L. R. 897. —**CAN.**

b. *Salesman—Authority as such.*]—In an action by A. against B. to compel him to fulfil a written obligation bearing to be signed by C., a salesman, as follows: "I hold at the credit of A., & will deliver to his order on demand, 750 tons of pig-iron. (signed) for B., C.," pursuer averred that he had lent money to D. on the security of this obligation, that C. was defender's manager, & was in the practice of granting such obligations in the name of B., for the purpose of enabling D. to raise funds:—*Held:* C.'s authority could not extend to an obligation of this kind *ex facie* gratuitous unless there were (1) special assent by B., & (2) specific explanation as to how the obligation was entered into.—HAMILTON *v.* DIXON (1873), 11 Sc. L. R. 39; 1 R. (Ct. of Sess.) 72.—**SCOT.**

c. *Tenant—Authority to have repairs executed.*]—SULTE DIT VADEBONCOEUR & BELL (1878), 3 R. L. 535, Q. B. 1878.—**CAN.**

d. *Travelling agent—Authority to solicit custom.*]—A travelling agent, employed by a life assurance society to solicit applications for policies of assurance on its behalf has no implied authority to pledge the credit of the society for travelling expenses, *e.g.*, horse-hire.—NATIONAL MUTUAL LIFE ASSOCN. OF AUSTRALIA *v.* ANGELO (1912), 14 W. A. R. 52.—**AUS.**

orders of S., by pltfs., merchants at L., who knew nothing of C. In an action by pltfs., C. said he had no partnership with S., & S. had no authority from him except to sell, & not to buy:—*Held:* though not partners, C. & S. were jointly liable; S. as holding himself out as a partner, & C. as real principal.—KIRKWOOD *v.* CHEETHAM (1862), 2 F. & F. 798; 10 W. R. 670.

627. Servant depositing master's goods for repair—No special instructions.]—Where a servant takes a chaise to a coachbuilder, who is unknown to the master, & never employed by him, the coachbuilder cannot hold the chaise by virtue of his lien for work done on it.

Unless the master has been in the habit of employing the tradesman in the way of his trade, it shall not be in the power of the servant to bind him to contracts of which he has no knowledge, nor to which he gave his assent (LORD ELLENBOROUGH, C.J.).—HISCOX *v.* GREENWOOD (1802), 4 Esp. 174.

628. Servant ordering goods—Not contracting in own name.]—If a man sends his servant to a draper to buy cloth, & he buys cloth for the master, & does not make the contract in his own name, the master will be liable & not the servant (RICHARDSON, C.J.).—ANON. (1631), Litt. 374; Het. 168; 124 E. R. 291, 427.

629. —— Accustomed to buy on credit.]—Where a servant usually buys for his master upon credit & takes up things in his master's name, but for his own use, the master is liable.—BOULTON *v.* ARLSDEN (1697), Holt, K. B. 641; 3 Salk. 234; 91 E. R. 797.

630. —— Accustomed to buy for ready money.]—When the master of a family is in the habit of paying ready money for articles furnished in certain quantities to them, if the tradesmen suffer other goods of the same sort to be delivered, without informing the master or satisfying himself they were for his use, when in fact they were not, the master shall not be liable.—PEARCE *v.* ROGERS (1800), 3 Esp. 214.

631. —— Money given at same time as authority to buy.]—If I give my servant money I shall not answer for what he buyeth on trust, but if I send sometimes on trust, or pay scores, I shall answer (WELD, J.).—SOUTHBY (SOUTHY) *v.* WISEMAN (1676), 3 Keb. 625, 630; 84 E. R. 917, 920.

632. —— ——.]—Where a master delivers money to his servant to provide victuals, the master is liable if the servant does not pay, if the victuals come to his own use, unless he has forbidden the tradesman to give goods to the servant without payment.—DOWCKRAY'S CASE (1623), 1 Brownl. 64; 123 E. R. 667.

633. —— ——.]—If a man sends his servant with ready money to buy meat & the servant buys on credit, the master is not chargeable unless the servant generally buys for the master on credit & credit is given to the master.—ANON. (1690), Show. 95; Holt, K. B. 641; *sub nom.* AISHCOMBE *v.* SPELHOLME HUNDRED, Holt, K. B. 460; 90 E. R. 1153, 1254.

634. —— —.]—When a master gives his servant money wherewith to buy goods, but the servant converts the money to his own use & buys goods on credit, the master is only liable if the goods come to his use.—BOULTON *v.* ARLSDEN, No. 629, *ante*.

635. —— ——.]—If, when a master gives his servant money to buy meat for the use of the family, the servant, instead of paying ready money, orders the meat on credit & embezzles the money, the master is not liable.—STUBBING *v.* HEINTZ (1791), Peake, 66.

636. —— ——.]—The master is discharged from payment of debts contracted by his servant where he gives the servant money beforehand to pay for goods & the servant embezzles the money; it is otherwise if he authorises the servant to take up goods, & gives him money to pay.—RUSBY *v.* SCARLETT (1803), 5 Esp. 76.

637. —— Payment by master on previous instances.]—Where the master has once paid for goods delivered to the servant on trust, the tradesman may trust him after.—HAZARD *v.* TREADWELL (1722), 1 Stra. 506; 93 E. R. 665.

Annotation:—**Apld.** Summers *v.* Solomon (1857), 26 L. J. Q. B. 301.

638. —— ——.]—A master is not responsible for liquors ordered by his butler in the name of the master but without his authority, unless he has on former occasions paid for goods ordered by him, or there is some other evidence to show the butler had authority for what he did.—MAUNDER *v.* CONYERS (1817), 2 Stark. 281.

639. —— Servant under contract to supply master.]—Where articles are furnished to the use of a master, though the servant was by agreement to provide them, the master is liable to the tradesman who furnished them.—PRECIOUS *v.* ABEL (1795), 1 Esp. 350.

Annotation:—**Distd.** Wright *v.* Glyn, [1902] 1 K. B. 745, C. A. *Precious* v. *Abel* must be taken to have been decided on special facts.

640. —— ——.]—If the coachman of a party go in his master's livery & hire horses, which his master uses, the master will be bound to pay for the hire of the horses, though he has agreed with the coachman that he will pay him a large salary to provide horses, unless the lender of the horses had some notice that the coachman hired them on his own account, & not for his master.—RIMELL *v.* SAMPAYO (1824), 1 C. & P. 254.

Annotations:—**Distd.** Wright *v.* Glyn (1902), 71 L. J. K. B. 497, C. A. **Mentd.** Brazier *v.* Camp (1894), 63 L. J. Q. B. 257, C. A.

641. —— ——.]—Deft. employed a coachman under an arrangement whereby the coachman was to be paid a weekly sum including the cost of foraging deft.'s horses. The coachman ordered forage for deft.'s horses from pltf. without mentioning the arrangement, & pltf. supplied forage for several months, giving credit to deft. Deft. duly paid the agreed weekly sums to his coachman, & did not know from whom he ordered forage:—*Held:* (1) the mere relation of master & coachman did not of itself involve as a matter of law ostensible authority on the coachman's part to pledge the master's credit for forage supplied for his horses; (2) there was no evidence of a holding out by deft. of his coachman as having such authority.—WRIGHT *v.* GLYN, [1902] 1 K. B. 745; 71 L. J. K. B. 497; 86 L. T. 373; 50 W. R. 402; 18 T. L. R. 404, C. A.

Solicitor—Authority of solicitor to pledge client's credit.]—*See* SOLICITORS.

642. Trustee agent for co-trustee—Authority to buy for business carried on by trust.]—Defts., mother & son, as trustees under a will, were joint owners of a business which, by trusts of the will, was carried on by the mother as agent for the trustees. The mother employed the son to purchase goods for purposes of the business which were paid for by the son at time of purchase by cheques bearing the signatures of mother & son as drawers. In an action for the price of goods sold & delivered by a person who on previous occasions had received these cheques in payment:—*Held:* there was evidence that the son was held out by the mother as having authority to pledge their joint credit.

Where trustees who are carrying on a business permit one of their number to go into the market & purchase goods required for carrying on the business, the trustee who is armed with authority to

Sect 3.—Implied authority: Sub-sect. 12, A. & B. (a) i., ii. & iii.]

purchase goods for the purpose of carrying on business is also armed with authority to pledge the credit of the other trustees for that purpose (DAVEY, L.J.)—BRAZIER *v.* CAMP (1894), 63 L. J. Q. B. 257; 9 R. 852, C. A.

B. Provisional, Managing, and other Committees.

(a) Provisional Committees.

i. *Authority of Committee to pledge Credit of individual Members.*

643. General rule.]—In an action against ry. provisional committee-men, under contracts entered into by the committee:—*Held:* to render defts. liable, it was necessary to prove not only that they were members of the committee, but that they knew it to be still in operation, & that the expenses incurred were reasonable & usual.—BARRETT *v.* BLUNT (1846), 2 Car. & Kir. 271.

644. ——.]—The bare fact of a consent to join a provisional committee is evidence to go to the jury of authority given to the rest of the committee to pledge deft.'s credit.—COOPER *v.* LAMB (1846), 8 L. T. O. S. 278.

645. ——.]—In an action by the solr. of an intended co. for preparing its co-partnership deed, a person may be liable without being one of the directors. The persons who are directors are liable; other persons may be liable also, if they interfere in the management & hold themselves out as persons giving the order: in such case the question will be, whether such persons as were not directors so acted as to become employers of the solr. in preparing the deed.—BELL *v.* FRANCIS (1839), 9 C. & P. 66.

646. ——.]—A member of a provisional committee of a ry., or other joint-stock co. not completely formed but in course of formation, is not liable for any acts or expenses not done or authorised by him. By consenting to be a provisional committee-man he only testifies his approbation of the scheme, & that he will concur in such acts as he may approve of in order to carry it into effect. By such consent he does not make himself liable to be sued for contribution to expenses he has not sanctioned, nor does he thereby give any authority to the rest of the committee to bind him by their acts. A committee-man is not liable for the acts of his fellows, the law not implying from his mere consent to be a provisional committee-man either an authority from him to make contracts by those other committee-men, or by the solrs. to the committee, or to the solrs. to make contracts on behalf of the committee; but merely a promise to act with those others to carry the scheme into effect. The publication of the prospectus with his name makes no difference.—*Re* WOLVERHAMPTON, CHESTER & BIRKENHEAD JUNCTION RY. CO., NORRIS *v.* COTTLE (1850), 2 H. L. Cas. 647; 6 Ry. & Can. Cas. 317; 15 L. T. O. S. 471, H. L.

Annotations:—**Apld.** *Re* Irish West Coast Ry. Co., Carmichael's Case (1850), 17 Sim. 163; *Re* Direct Birmingham, Oxford, Reading & Brighton Ry. Co., *Ex p.* Best (1850), 15 L. T. O. S. 431; *Re* Direct Exeter, Plymouth & Devonport Ry. Co., *Ex p.* Besley (1851), 3 Mac. & G. 287. **Refd.** Hutton *v.* Upfill (1850), 2 H. L. Cas. 674; Great North of England & Yorkshire & Glasgow Union Junction Ry. Co., Carrick's Case (1851), 17 L. T. O. S. 209.

647. —— **Debt incurred before membership.**]—A member of a committee, formed for the purpose of promoting an improvement bill in Parliament, is not liable to the solr. of the committee, for work done by him for the committee as such solr., before he became a member of the committee.—BREMNER *v.* CHAMBERLAYNE (1848), 2 Car. & Kir. 560.

648. *S. P.* BARKER *v.* GODDED (1850), 14 L. T. O. S. 374.

649. —— **Each liable for his own acts.**]—The transactions of a body of persons, associated to form a co. which ultimately turns out to be abortive, are not entire, as in the case of a partnership, but are rather a series of transactions affecting only the parties severally acting therein, & for which the members of the body are liable piecemeal. They are not partners, nor are they agents for each other with respect to all matters properly done for the formation of the co. Each in law is liable only for his own acts, whether express or implied. A., B. & C. may be liable to the engineer; D., E. & F. to the parliamentary agent; G. & H. to the advertising agent; & so on.—*Re* HARBOROUGH & WATLINGHAM RY. CO. & WOLVERHAMPTON, WALSALL, LEICESTER, PETERBOROUGH, NORWICH & GREAT YARMOUTH JUNCTION RY. CO. (1850), 16 L. T. O. S. 297.

650. —— **Proper question for jury.**]—In an action for goods sold & delivered against a member of the provisional committee of a projected ry. co. it is a proper direction to the jury that if deft. had held himself out to the world or to pltf. as one of the directors of the proposed co., or knowingly suffered others so to do, & pltf. has given credit to him, & if the goods are such as might reasonably be required for purposes of the co., & if the person who gave the order had authority so to do, pltf. is entitled to a verdict.—PHILLIPS *v.* COLLINS (1846), 8 L. T. O. S. 116.

651. —— ——.]—In actions by tradesmen against individual members of a provisional or managing committee for work done or goods supplied to a proposed co., the proper question to be decided by the jury is, whether deft. either personally or by his authorised agent entered into a contract with pltf. for the goods or services in question. A person by merely becoming a provisional committee-man incurs no liability; but his consenting to become so may be important, if it be shown that in so doing he knew of & authorised the incurring of expenses necessary to the formation of the co. & that the goods & services sued for were so necessary. A person by acting on a provisional committee may authorise an agent to issue orders on his credit, without giving or intending to give him any direct authority to that effect; & it is immaterial whether deft. in acting as he did intended to pledge his individual credit or whether pltf. knew who were the particular per-

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PART V. SECT. 3, SUB-SECT. 12.—B. (a) i.

643 i. *General rule—Pleading.*]—In an action by solrs. employed by the provisional committee of a projected railway, & whose employment had been recognised by several members of the committee, against the other members of the committee who repudiated all connection with the employment, concluding that defenders were conjunctly & severally liable for the account due to pursuers:—*Held:* no averments had been made relevant to support the conclusions, although it was set forth that all defenders had, without objection, allowed their names to be used & set forth as members of the provisional committee; & although, in regard to one defender, it was set forth that his name was put on the committee at his own request, & that for some time he attended meetings & advised & acted in favour of the scheme as freely as any other member of the committee, there being no statement, however, of the business done at any of the meetings at which he was present, or that he had been present at any meeting at which the employment of pursuers was authorised.—CAMPBELL *v.* LAUDER (1852), 15 D. 117; 25 Sc. Jur. 81.—**SCOT.**

649 i. —— *Each liable for his own acts.*]—In an action brought against members of a provisional committee of the projectors of a railway, which was never carried into effect, by the secretary & law-agent, for payment of his accounts:—*Held:* in order to render a committee-man liable, it was not enough that he acted as such, but it was necessary to aver & prove a separate & special contract of employment on his part, in regard to the piece of business sued for.—M'EWAN *v.* CAMPBELL (1857), 29 Sc. Jur. 222; 19 D. (H. L.) 12; 2 Macq. 499.—**SCOT.**

sons forming the committee. A previous authority to the agent to contract on his behalf may be inferred from the subsequent conduct or admissions of deft., but to render him answerable by reason of such admissions they must appear to have been made from a consciousness of a legal personal liability to pltf. in respect of the particular demand, & not merely from a desire by paying a proportion of the demand to prevent litigation or from a misconception of the law as to the liability of provisional committee-men merely as such. If it appears that pltf. in supplying goods & performing services looked only to the deposits as a fund from which payment was to be made, he has no cause of action against individual members of the committee.—BAILEY *v.* MACAULAY (1849), 13 Q. B. 815; 19 L. J. Q. B. 73; 14 Jur. 80; 116 E. R. 1475.

Annotations:—**Distd.** Patrick *v.* Reynolds (1857), 1 C. B. N. S. 727. **Apld.** Pilot *v.* Craze (1888), 4 T. L. R. 453. **Refd.** *Re* Wolverhampton, Chester & Birkenhead Junction Ry. Co., Norris *v.* Cottle (1850), 2 H. L. Cas. 647.

652. Attendance at meetings—Debt incurred during period of attendances.]—A member of a provisional committee of a joint-stock co. having signed the consent to act, & attended & taken part in the proceedings, is liable for debts incurred by & on behalf of the committee during the period he was a member, but not for contracts made & debts incurred previous to his becoming a member thereof.—BARNETT *v.* BURDETT (1846), 6 L. T. O. S. 326.

653. —— ——.]—In an action by a solr. against provisional committee-man upon his bill, it appeared that B. was instructed by the committee, at a meeting at which deft. was not present, to write to pltf. for his bill, that the bill was received by B. at his house, & laid before the committee more than a month before action brought at a meeting attended by deft., when B. was instructed to write to pltf. asking what deductions he would make:—*Held:* a sufficient delivery of the bill as against deft.—EGGINGTON *v.* CUMBERLAGE (1847), 1 Exch. 271; 5 Ry. & Can. Cas. 113; 2 New Pract. Cas. 456; 16 L. J. Ex. 283; 10 L. T. O. S. 113; 11 Jur. 932.

654. —— ——.]—Deft. had authorised a friend to add his name to a provisional committee; he attended several preliminary meetings during the period of the insertion of certain advertisements by order of other members of the committee. Deft. personally gave no orders. The board was formed, & deft. became a member of it, but did not attend until after the date of the last order in the account for which the action was brought. Upon these facts:—*Held:* deft.'s liability was established.—CHAPMAN *v.* LAMBERT (1847), 8 L. T. O. S. 371.

655. —— **Debt incurred before period covered—Consent to join given previously.**]—It is a question for the jury whether the fact of attending a meeting of a projected ry. co. in the character of provisional committee-man is sufficient evidence of a liability for goods ordered & supplied to the co. previous to that attendance, there being also evidence to show that deft. had consented to become a member of the committee before the goods were ordered, & that the goods were necessary for purposes of the co.—WARRINGTON *v.* LAMBERT (1848), 10 L. T. O. S. 414.

656. Name inserted in prospectus—Withdrawal at first meeting.]—In an action to charge deft. as a provisional committee-man, it appeared that his name was inserted in the prospectus, but there was no evidence as to the authority by which it was placed there; he had once called at the co.'s office & asked for a prospectus, but there was no evidence that he knew his name was in it; & on a claim being made against him, he had replied that he retired from the first meeting of the concern, as to which meeting there was no evidence:—*Held:* pltf. must be non-suited.—PARRATT *v.* BLUNT & CARNFORT (1847), 9 L. T. O. S. 103; 2 Cox, C. C. 242.

ii. *Authority of individual Member to pledge Credit of other Members.*

657. General rule.]—One member of a provisional committee cannot bind another member so as to render him liable for orders he may give.—BAILEY *v.* STEVENSON (1847), 8 L. T. O. S. 368.

658. —— **Proper question for jury.**]—In an action by a surveyor against one of the managing committee of a ry. co. for surveying the line, pltf. was employed by one of the committee, which appointment was ratified by a resolution of the committee, at which deft. presided:—*Held:* the question for the jury was whether deft. meant to pledge his own personal credit, or merely the credit of the funds of the co.—HIGGINS *v.* HOPKINS (1848), 3 Exch. 163; 6 Ry. & Can. Cas. 75; 18 L. J. Ex. 113; 12 L. T. O. S. 245.

Annotations:—**Dbtd.** Bailey *v.* Macaulay, Bailey *v.* Pearson, Bailey *v.* Haines, Bailey *v.* Bracebridge, Dawson *v.* Hay, Wilson *v.* Holden (1849), 13 Q. B. 815. **Refd.** Caldicott *v.* Griffiths & Lowe (1853), 1 C. L. R. 715; Collingridge *v.* Gladstone (1890), 7 T. L. R. 60, C. A.

659. *S. P.* DAY *v.* RAWORTH (1847), 9 L. T. O. S. 53.

660. *S. P.* PARRATT *v.* COON (1847), 9 L. T. O. S. 72.

661. —— **Admissibility of evidence.**]—In an action by engineers against a provisional committee-man, pltfs. having put in evidence the resolutions of the committee, at which deft. was present, deft. tendered in evidence a resolution made in absence of pltfs. to the effect that the committee was not to incur any personal liability:—*Held:* evidence was receivable for the purpose of showing that the committee-men were not to be personally responsible, & that each member was not to have the power of binding the rest.—RENNIE *v.* CLARKE (1850), 5 Exch. 292; 19 L. J. Ex. 278; 15 L. T. O. S. 186; 155 E. R. 125.

Annotation:—**Refd.** Maddick *v.* Marshall (1864), 12 W. R. 687.

662. Becoming a member—Work started before but finished after member joining.]—In an action for work & labour as surveyor against a provisional committee-man, pltf. claimed an entire sum of £600 for surveying from Sept. 1 to the end of Oct., within which interval deft. joined the scheme:—*Held:* (1) if pltf. had entered into a single & entire contract to survey the line before deft. joined the co., deft. was not responsible, though part of the work was done after he had joined it; (2) pltf.'s remedy was against the actual contractors.—TOOTEL *v.* FREWEN (1847), 10 L. T. O. S. 269.

663. *S. P.* BAYLEY *v.* STEVENSON (1846), 8 L. T. O. S. 92.

664. *S. P.* WORTH *v.* GRESHAM (1846), 7 L. T. O. S. 62.

iii. *Authority of Officers to pledge Credit of Members.*

665. General rule.]—The mere fact of a person agreeing to become a member of the provisional

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PART V. SECT. 3, SUB-SECT. 12.—B. (a) iii.

665 i. *General rule.*]—The mere fact that persons agree to become provisional directors of a co. does not render them liable for goods supplied on the order of the attorney or secretary of the co., & they are not necessarily rendered liable by allowing their names to appear as provisional directors on the prospectus. If it merely states that they are provisional directors they will not be liable. If it represents that the attorney or secretary is not merely to act as such when the co. is formed, but is already appointed to act for such provisional directors, they will be liable for such

Sect. 3.—Implied authority: Sub-sect. 12, B. (a) iii., (b) i. & ii.]

committee of an intended ry. co. amounts to no more than a promise that he will act with other persons, appointed or to be appointed, for the purpose of carrying the scheme into effect.

In an action against a provisional committeeman for goods supplied on the order of the co.'s solr. :—*Held:* the law would not imply, from the mere fact of his agreeing to be a member of such committee, an authority from him to the other members of it to make contracts by himself or by the solr., nor an authority to the solr. to make them on behalf of the committee.

If the party not only consents to be a provisional committee-man, but authorises his name to be inserted & published in a prospectus, which merely states the names of the members of the provisional committee, & nothing more, that fact does not alter the liability. If it states the names of an acting or managing committee also, it is a question for the jury to say whether it means that the latter are to take upon themselves the whole management of the concern, or that the former have constituted the latter their agents to manage it on their behalf, in which case the former would be liable for the contracts of the latter. Or, if the solr.'s name were mentioned in it, the question for the jury would be whether it meant that he was to be employed by those of the committee who acted, or that he was already appointed by all whose names were mentioned, as their solr., to do all solr.'s work on their behalf; & further, what was the business then usually transacted by solrs., in such undertakings, on behalf of the co., & the same as to the secretary. Where there is also evidence that deft. has acted with relation to the proposed scheme, it is a question for the jury whether, by his consent & acts, he has authorised the solr., or secretary, or any member of the committee, to pledge his credit for the necessary & ordinary expenses to be incurred in forming such a co.; & if so, whether the work was done, & the credit given, on the faith of his being liable.—REYNELL *v.* LEWIS, WYLD *v.* HOPKINS (1846), 15 M. & W. 517; 4 Ry. & Can. Cas. 351; 16 L. J. Ex. 25; 8 L. T. O. S. 167; 10 J. P. 775; 10 Jur. 1097; 153 E. R. 954.

Annotations:—**Distd.** Symmonds *v.* Muntz (1846), 8 L. T. O. S. 237. **Expld.** Lewis *v.* Armstrong (1846), 8 L. T. O. S. 257. The question determined by the Ct. of Exch. in the cases of *Reynell* v. *Lewis & Wyld* v. *Hopkins* was that provisional committees were not partnerships & that such bodies were not so constituted as to entitle one or more of their members to pledge the credit of the others (POLLOCK, C.B.). **Folld.** Frost *v.* Stanley (1847), 8 L. T. O. S. 451. **Distd.** Parratt *v.* Blunt & Cornfoot (1847), 2 Cox, C. C. 242. **Consd.** Wallington *v.* Lambert (1847), 9 L. T. O. S. 171. **Folld.** Barker *v.* Stead (1847), 3 C. B. 946. **Consd.** Nevins *v.* Henderson (1848), 12 J. P. Jo. 802, Ex. Ch.; Bailey *v.* Macaulay, Bailey *v.* Pearson, Bailey *v.* Haines, Bailey *v.* Bracebridge, Dawson *v.* Hay, Wilson *v.* Holden (1849), 13 Q. B. 815; *Re* Wolverhampton, Chester & Birkenhead Junction Ry. Co., Norris *v.* Cottle (1850), 2 H. L. Cas. 647, H. L.; *Re* Direct Exeter, Plymouth & Devonport Ry. Co., Tanner's Case (1852), 5 De G. & Sm. 182. As was pointed out in the judgment in the Ct. of Exch., it by no means necessarily follows from thence that the parties appointing the committee of management gave them authority to make contracts (PARKER, V.-C.). **Distd.** Maddick *v.* Marshall (1864), 12 W. R. 687. **Reid.** Banks *v.* Goode (1846), 7 L. T. O. S. 286; Waddy *v.* Dillon (1846), 8 L. T. O. S. 218; Mitchell *v.* Moore (1847), 8 L. T. O. S. 385; Williams *v.* Pigott (1848), 2 Exch. 201; Rennie & Remington *v.* Wynn (1849), 19 L. J. Ex. 2, Ex. Ch.; *Re* Falmouth, Helston & Penzance Ry. Co., *Ex p.* Clarke (1850), 20 L. J. Ch. 14; *Re* Direct Exeter, Plymouth & Devonport Ry. Co., *Ex p.* Roberts (1850), 2 H. & Tw. 391; *Re* Direct Exeter, Plymouth & Devonport Ry. Co., *Ex p.* Besley (1851), 3 Mac. & G. 287; Collingwood *v.* Berkeley (1863), 15 C. B. N. S. 145; Burbidge *v.* Morris (1865), 13 W. R. 921.

666. ——.]—One who merely assents to his name being published in a list of the provisional committee of a projected ry. co. does not thereby impliedly authorise the secretary or any other person to pledge his credit for goods supplied to or work done for the co.—BARKER *v.* STEAD (1847), 3 C. B. 946; 5 Ry. & Can. Cas. 45; 16 L. J. C. P. 160; 8 L. T. O. S. 390; 11 Jur. 90; 136 E. R. 379.

Annotation:—**Reid.** Norris *v.* Cottle (1850), 2 H. L. Cas. 647, H. L.

667. *S. P.* SHERIDAN *v.* WHITINGTON (1846), 7 L. T. O. S. 433.

668. *S. P.* WEBB *v.* WATTS (1846), 7 L. T. O. S. 409; (1847) 8 L. T. O. S. 93, 451.

669. *S. P.* BROOMFIELD *v.* BURLY (1847), 10 L. T. O. S. 166.

670. ——.]—A provisional committee of a ry. co. is not a partnership, & its members cannot be made liable for the acts of the body or of individuals, or of anyone connected with the co., unless he has done some act to give authority to pledge his credit. If it appears that orders for the work in respect of which an action is brought against a member of a provisional committee of a ry. scheme were given by the projectors, who also induced deft. to become a member of the committee on an indemnity, the questions are whether the projectors had the authority of deft. to pledge his credit, or whether, if the credit was given originally to the projectors, deft. has done any act whereby that credit might be shifted from the projectors to himself.—REYNELL *v.* LEWIS (1848), 10 L. T. O. S. 424.

671. —— **Officer giving orders primâ facie liable.**]—Where a ry. co. has been projected & a committee formed, but not registered, & the solr. who is registered as the solr. to the co. gives an order, he is *primâ facie* liable for such order.—COON *v.* SMITH (1847), 9 L. T. O. S. 81.

672. Acting as chairman when secretary appointed.]—Deft. had acted as chairman of a provisional committee & had been a party to the appointment of the secretary, who had engaged to look for payment only out of the funds of the co., & who employed pltf. as clerk at a salary:—*Held:* the secretary was not an agent of deft. for purpose of such appointment so as to render deft. liable to pltf. for the wages so contracted for by the secretary.—WEBB *v.* HARRIES (1848), 12 L. T. O. S. 275.

673. *S. P.* SYKES *v.* COOPER (1846), 7 L. T. O. S. 452.

674. Allowing name to appear in prospectus—& acting as chairman on one occasion.]—Deft.'s name was advertised with his consent as one of a provisional committee, & on one occasion he attended & acted as chairman at a meeting of the committee:—*Held:* he was liable for the price of stationery supplied by pltf. on the order of the secretary, & used by the committee, after the date of a letter from him to the secretary stating that he concluded his liability would be limited to the amount of his shares.—BARNETT *v.* LAMBERT (1846), 15 M. & W. 489; 4 Ry. & Can. Cas. 308; 15 L. J. Ex. 305; 7 L. T. O. S. 186; *sub nom.* BARTLETT *v.* LAMBERT, 10 Jur. 416.

Annotations:—**Distd.** Reynell *v.* Lewis, Wyld *v.* Hopkins,

business as is usually done by the attorney or secretary of persons who are forming a co.

Where provisional directors of a projected co. made it clear *inter se* & their agent that they would not hold themselves for the expenses of flotation & that the agent had not authority to pledge their credit, but an advertised prospectus disclosed that defts. were already engaged in functions usually discharged by promoters, & that the agent had already assumed the duties of his office:—*Held:* defts. were promoting the co., & their agent was authorised to incur on their behalf such expenses as an agent would usually incur.—DE DRUKPERS MAATSCHAPPY *v.* OOSTHUIZEN, S. A. L. R. (1915) C. P. D. 401.—S. AF.

(1846), 4 Ry. & Can. Cas. 351. **Dbtd. & Distd.** Wallington *v.* Lambert (1847), 9 L. T. O. S. 171. The judgment there is certainly at conflict with the judgment in *Reynell* v. *Lewis & Wyld* v. *Hopkins* (ERLE, J.). **N.F.** Williams *v.* Pigott (1848), 11 L. T. O. S. 68. **Dbtd.** Norris *v.* Cottle (1850), 2 H. L. Cas. 647. **Refd.** *Re* Falmouth, Helston & Penzance Ry. Co., *Ex p.* Clarke (1850), 20 L. J. Ch. 14.

675. —— & making suggestions as to form of same.]—Deft. allowed his name to appear as a provisional director upon the prospectus of an intended co. He also wrote a letter to the secretary of the co., making suggestions as to the form of the prospectus, & the newspapers in which it should be advertised :—*Held :* this was no evidence to charge deft. personally for advertisements of the co. inserted by order of the secretary.—BURBIDGE *v.* MORRIS (1865), 3 H. & C. 664 ; 34 L. J. Ex. 131 ; 12 L. T. 426 ; 13 W. R. 921.

676. Attendance at meetings when orders discussed.]—Deft. joined a provisional committee, & attended many meetings at which the subject of advertising was discussed, & papers containing advertisements of the project lay upon the table ; but it was not shown that deft. was actually present when orders were given to the secretary to advertise in pltf.'s newspaper. Deft. attended a meeting for the appointment of a managing committee, & retired because he was not elected :—*Held :* these facts were sufficient to raise a reasonable presumption that deft. was cognisant of the advertisements, & sanctioned their insertion by the secretary. —CHAPMAN *v.* LAMBERT (1846), 8 L. T. O. S. 237.

677. Attendance at meetings of provisional committee—Not member of managing committee.]—Deft. was member of the provisional committee of a projected ry. co., which ceased to act on the appointment of a managing committee. The solr. to the co., who had been appointed by the provisional committee, gave orders for publication of advertisements. Deft. had attended two meetings of the provisional committee, but was not a member of the managing committee :—*Held :* there was no evidence for a jury that deft. had authorised insertion of the advertisements or that he was liable to pay for them.—COOKE *v.* TONKIN (1847), 9 Q. B. 936 ; 4 Ry. & Can. Cas. 704 ; 16 L. J. Q. B. 153 ; 8 L. T. O. S. 387 ; 11 Jur. 304 ; 115 E. R. 1534.

678. Instructing secretary to advertise.]—Deft. & others, as provisional directors of a projected joint-stock co., resolved at a meeting that the co. should be advertised in several newspapers, & directed their secretary to take the necessary steps for that purpose. He applied to an advertising agent, to whom (on his calling at the co.'s offices to inquire under what authority the secretary was acting) he showed the prospectus & the above resolutions :—*Held :* there was evidence to go to the jury that the directors who were parties to the resolutions were responsible for the debt thereby incurred, notwithstanding they had been induced to allow their names to appear as directors upon the faith of the secretary's assurance that all the preliminary expenses would be provided for by him, & that they would incur no liability, there being nothing to show that the secretary, in giving the orders, or in communicating to pltfs. the resolutions of the directors, had acted beyond scope of his actual or apparent authority as secretary.—MADDICK *v.* MARSHALL (1864), 17 C. B. N. S. 829 ; 5 New Rep. 250 ; 11 L. T. 611 ; 10 Jur. N. S. 1201 ; 13 W. R. 205 ; 144 E. R. 332, Ex. Ch.

Annotations :—**Distd.** Burbidge *v.* Morris (1865), 3 H. & C. 664. **Foll.** Riley *v.* Packington (1867), L. R. 2 C. P. 536.

(*b*) *Managing Committees.*

i. *Authority of Committee to pledge Credit of its Members.*

679 General rule.]—A member of a managing committee is not answerable for debts contracted by the committee generally, or by its agents, unless he has by his own acts avowed his responsibility or given special authority to pledge his credit.—LEWIS *v.* ARMSTRONG (1846), 8 L. T. O. S. 257 ; 11 J. P. 23.

680. *S. P.* SYMMONDS *v.* MUNTZ (1846-7), 8 L. T. O. S. 237, 344 ; 11 J. P. 9.

681. Appointed without consent—No meetings attended.]—Defts., provisional committee-men of a ry. co., were appointed, but without their consent being obtained, members of the acting committee. Advertisements published to that effect became known to them, but they never attended any meetings of the co. or the committees :—*Held :* they were not liable for contracts made in their absence.—GRIFFIN *v.* BEVERLEY (1847), 2 Car. & Kir. 648 ; *sub nom.* GRIFFIN *v.* JACKSON & BEVERLEY, 8 L. T. O. S. 416.

682. Attendance at meeting where advertisement resolved on.]—At some of the meetings of the managing committee of a provisionally registered ry. co. at which A., one of the committee, was present, it was resolved that certain proceedings should be advertised. At another meeting attended by four of the body but not by A., it was resolved that a circular should be sent to the members of the provisional committee, which included the members of the managing committee, stating that on payment of £160 each, they should be released from all liability. A. & others paid this amount, & A. never attended any subsequent meeting. Meetings of the managing committee were afterwards held, at which some of these payments were referred to, & the terms of the circular were recognised & acted upon. The co. was wound up, under the Winding-up Acts, & it appeared that one of the provisional committee had been compelled, by proceedings at law, to pay the bill of the advertising agent :—*Held :* A. was *primâ facie* liable for some part of the demand, & was not exonerated by his payment of £160, & the subsequent conduct of his co-committeemen, but had been properly placed on the list of contributories.—PEARSON'S EXECUTORS' CASE (1853), 3 De G. M. & G. 241 ; 20 L. T. O. S. 254 ; 43 E. R. 95.

ii. *Authority of Committee to pledge Credit of Members of Provisional Committee.*

683. General rule.]—Where in the case of a projected co., there is both a managing committee & a provisional committee, a member of the provisional committee, who has never taken any part in the management, is not liable for debts incurred by the managing committee. Where a man merely allows his name to be inserted in the list of provisional committee-men, he does not thereby make himself responsible for every act or every liability of a managing committee, unless it is proved that he has acted in the conduct of the concern, or unless it is shown that, when deft. consented to become a member of the provisional committee, he intended to take upon himself all the responsibilities which the managing committee might think proper to incur.—LAW *v.* WILSON (1846), 7 L. T. O. S. 236.

Annotation :—**Refd.** Reynell *v.* Lewis, Wyld *v.* Hopkins (1846), 10 Jur. 1097.

684. *S. P.* BANKS *v.* GOODE (1846), 7 L. T. O. S. 286.

Sect. 3.—*Implied authority: 'Sub-sect.* 12, *B.* (*b*) *ii. & (c); sub-sect.* 13, *A.*]

685. *S. P.* LEE *v.* NICHOLSON (1846), 8 L. T. O. S. 198.

686. *S. P.* FROST *v.* STANLEY (1846), 8 L. T. O. S. 92, 451.

687. ——.]—In an action against a provisional committee-man on a contract entered into by the committee of management appointed by the provisional committee, it is a question for the jury whether deft. appointed the managing committee his agent to pledge his credit. Where nothing else appears than that there was a managing committee appointed by the provisional committee, the jury ought not to conclude that the former is agent for the latter to pledge their credit.—WILLIAMS *v.* PIGGOTT (1848), 2 Exch. 201; 5 Ry. & Can. Cas. 544; 17 L. J. Ex. 196; 11 L. T. O. S. 68; 12 Jur. 313; 154 E. R. 464.

688. *S. P.* LAMBERT *v.* KNILL (1846), 7 L. T. O. S. 409.

689. Attendance at meeting at which managing committee appointed.]—Deft. had attended a meeting of a provisional committee at which a committee of management was appointed, by whom orders for insertion of advertisements were given to pltf. Upon this evidence:—*Held:* (1) deft. was liable for orders given by the managing committee after that day; (2) he was not liable for advertisements inserted before that day, although a member of the provisional commitee, having taken no part in the conduct of the concern, or done any act showing authority given to others to pledge his credit.—WOOD *v.* HARDING (1846), 8 L. T O. S. 237.

Annotation:—Refd. Williams *v.* Pigott (1848), 2 Exch. 201.

690. *S. P.* BARKER *v.* WHITWORTH (1850), 14 L. T. O. S. 550.

691. Attendance at meetings before & after appointment of managing committee.]—Deft. was sued as a member of a provisional committee; & attendances by him at the board were proved both before & after the appointment of a managing committee. The question left to the jury was whether deft. had by his acts made himself liable notwithstanding the appointment of the managing committee:—*Held:* a proper question for the jury.—FLOWER *v.* ROPER (1848), 10 L. T. O. S. 344.

692. Power given to managing committee to apply funds in paying expenses.]—A prospectus issued by a projected co. gave the names of a provisional committee, & also of a committee of management, & one of the clauses of the prospectus empowered the committee of management to apply the funds of the co. for all the expenses incurred in the formation of the co.:—*Held:* (1) the committee of management were not thereby empowered to pledge the credit of the provisional committee for advertisments inserted in a newspaper; (2) a verdict of a jury to this effect was right.—DAWSON *v.* MORRISON (1847), 5 Ry. & Can. Cas. 62; 16 L. J. C. P. 240; 9 L. T. O. S. 222; 11 J. P. 789.

693. Acceptance of shares & payment of deposit.]—A. was a member of the provisional committee of a projected ry. co., which had been provisionally registered, & the affairs of which were put under the authority of a managing committee. He accepted shares, & paid a deposit on them; but did no further act. The scheme was abandoned:—*Held:* (1) he was not liable to a creditor for business done under the orders of the managing committee towards completing the projected undertaking & converting the assocn. into a regular co.; (2) he was not liable as a contributory under the Winding-up Acts.—BRIGHT *v.* HUTTON (1852), 3 H. L. Cas. 341; 7 Ry. & Can. Cas. 325; 19 L. T. O. S. 249; 16 Jur. 695; 10 E. R. 133, H. L.

Annotations:—**Consd.** *Re* Rugby, Warwick & Worcester Ry. Co., Preece & Evans's Case (1852), 2 De G. M. & G. 374; *Re* Direct Birmingham, Oxford, etc. Ry. Co., Spottiswoode's Case (1855), 6 De G. M. & G. 345. **Folld.** Burbidge *v.* Morris (1865), 3 H. & C. 664. **Refd.** *Re* Midland Union, Burton-upon-Trent, Ashby-de-la-Zouch & Leicester Ry. Co., Lucy's Case (1853), 4 De G. M. & G. 356. **Mentd.** Quartermaine *v.* Bittleston (1853), 13 C. B. 133; Paul *v.* Joel (1858), 3 H. & N. 455; Hebbert *v.* Purchas (1871), L. R. 3 P. C. 664, C. A.; I. R. Comrs. *v.* Harrison (1874), L. R. 7 H. L. 1; The Vera Cruz (1884), 9 P. D. 96, C. A.; London Tramways Co. *v.* L. C. C. (1898), 78 L. T. 361, H. L.

(*c*) *Other Committees.*

See, also, CLUBS.

694. General rule—Acting as chairman.]—When persons meet to prepare measures for calling a society into existence, attendance at such meeting, & concurrence in such measures, may be strong evidence that any individual there present held himself out as paymaster to all who executed their orders.

The acts of a nobleman, in declaring his intention to become president, & reading a resolution when presiding, afford material evidence that he authorised contracts for services required by the constituent body, although the general object was a public one. Each case must depend on its own circumstances.—LAKE *v.* ARGYLE (DUKE) (1844), 6 Q. B. 477; 14 L. J. Q. B. 73; 4 L. T. O. S. 171; 9 Jur. 295; 115 E. R. 178.

695. —— ——.]—ROYAL ALBERT HALL CORPN. *v.* WINCHILSEA, No. 1067, *post.*

696. Church building committee—Contract signed on behalf of building committee.]—A church building committee was appointed, of which deft. was a member, & it was resolved to open a subscription list to raise a fund for a new permanent church. Deft. attended a committee meeting at which plans were submitted for approval, when it was resolved that the plan approved of should be accepted, provided a tender could be obtained not exceeding £5,500. Pltf's. tender was accepted, & a contract made between pltf. & R. on behalf of the building committee. The subscriptions proved inadequate to pay pltf. Deft. ceased to attend the committee before the contract was made & never did any act to ratify it, or to authorise any one to pledge his credit:—*Held:* deft. not liable to pltf. for the money remaining unpaid.—WHILLIER *v.* ROBERTS (1873), 28 L. T. 668; 37 J. P. 583.

697. Dispensary committee—Goods ordered by members of.]—An action may be maintained against the medical officers of a dispensary (who were also members of the managing committee) for drugs supplied for the dispensary on the orders of others of its medical officers on behalf of the committee & with the knowledge of defts., the jury being directed that defts. would be personally liable unless they made pltfs. understand that they were to look only to the funds of the institution.—LUCKOMBE *v.* ASHTON (1862), 2 F. & F. 705.

Annotation:—**Folld.** Steele *v.* Gourley & Davis (1887), 3 T. L. R. 772, C. A.

698. Committee of charitable institution—Goods previously supplied & paid for before formation of committee.]—A member of a committee of management, taking an active part in the concerns of a charitable institution supported by voluntary contributions, is liable for goods furnished by a tradesman for the use of the institution, although it appears that such tradesman did not furnish them on any contract with the committee, but, having at first furnished goods on the credit of an individual, who, previously to the formation of the committee, had the sole management, continued to send them in afterwards on orders given,

as before, by the servants of the institution, without any inquiry as to who was liable to pay him.—GLENESTER *v.* HUNTER (1831), 5 C. & P. 62.

Annotation :—**Refd.** Royal Albert Hall Corpn. *v.* Winchilsea (1891), 7 T. L. R. 362, C. A.

699. Committee to assist editor—Authority to assist but not to interfere in management.]—Certain persons of whom deft. was one associated themselves together for the publication of a work, under certain regulations, one of which was that a committee (naming them) "should assist the editor in promoting the prosperity & circulation of the work, in obtaining, as far as possible without expense, literary contributions, & in all such matters connected with the work as the editor might require aid in, but not interfere with, the editorial department" :—*Held :* this gave no authority to one member of the committee to contract for articles to be paid for, so as to charge the proprietors.—HERAUD *v.* LEAF (1847), 5 C. B. 157 ; 17 L. J. C. P. 57 ; 10 L. T. O. S. 163 ; 136 E. R. 835.

700. Election committee—Goods supplied to voters.]—In an action by an inn-keeper against A., one of the committee of a candidate at a contested election, for refreshments supplied to voters, which were in fact ordered through M. :—*Held :* (1) pltf. was bound, in order to recover in the action, to prove that M. was employed by A. alone, or by A. & others, to give the order, & that A. in so employing M. was not acting as agent for any other person ; or else that M. was a principal jointly with A., or with A. & others ; (2) it would make no difference that pltf. at the time considered M. as authorised to contract on behalf of the candidate, if in fact he was not so authorised.—THOMAS *v.* EDWARDS (1836), 2 M. & W. 215 ; Tyr. & Gr. 872 ; 150 E. R. 734.

Annotations :—**Refd.** Higgins *v.* Hopkins (1848), 3 Exch. 163 ; Thöl *v.* Leask (1855), 1 Jur. N. S. 117 ; Byrne *v.* White (1867), 16 W. R. 255, Ex. Ch.

701. Exhibition committee—Work performed partly before & partly after company formed.]—Those who attend a meeting & give authority to an agent are answerable for the order which they have authorised the agent to give.

Early in 1888 defts. & others formed a committee for the purpose of arranging for an exhibition, & on June 23 a co. was incorporated to carry it out. Pltf. did work in connection with the exhibition between March 16 & Oct. 13 on the orders of the secretary. Defts. disputed liability for orders given after June 23 :—*Held :* as no notice of the change of circumstances had been given to pltf. the personal liability of defts. continued.—COLLINGRIDGE *v.* GLADSTONE (1890), 7 T. L. R. 60, C. A.

702. —— Company subsequently formed.]—Defts., six influential gentlemen, desirous to promote an Irish exhibition, procured an overdraft from Messrs. C., bankers, & shortly afterwards opened an account in the name of the Irish Exhibition, which was registered as a co. The exhibition proved financially unsuccessful, & Messrs. C. brought an action against defts. as personally liable for the overdraft. Defts. contended that Messrs. C. did not look to them for payment, & that, in any case, there was a novation of contract on the formation of the co. :—*Held :* Messrs. C. had contracted with defts. personally & never substituted the co. as their debtors, & defts. were liable.—COUTTS & Co. *v.* IRISH EXHIBITION IN LONDON (1891), 7 T. L. R. 313, C. A.

703. Finance committee of volunteer corps—Holding out.]—The monetary transactions of a volunteer corps were managed by a finance committee of which the colonel was *ex officio* a member. Orders for goods & cheques were signed by the colonel & two members of the committee, but since a period previous to Feb. 11, 1889 (goods having been delivered between that date & July, 1890), the colonel, owing to illness, had not attended any meeting of the committee & had not been cognisant of any transactions by them :—*Held :* (1) the colonel as a member of the finance committee must be taken to have intrusted them with the general agency on his behalf ; (2) he was liable for goods ordered by the committee, whether he was present at meetings of the committee or not ; (3) he had a right to be indemnified by other members of the committee against all but his quota of the expenses.—HEBBERT & Co. *v.* SILVER (1892), 8 T. L. R. 234.

704. Hospital committee—Work ordered by.]—If a builder do work at an intended hospital on the order of the physician & surgeon, they being announced to deliver lectures there & being members of the provisional committee, such builder is not bound to look solely to the funds of the hospital for payment, but may sue the persons who gave the orders, unless he was distinctly informed that the dealing was to be on the terms of looking for payment to the funds of the hospital only.—PINK *v.* SCUDAMORE, HICKS & SLEIGH (1831), 5 C. & P. 71.

Annotation :—**Refd.** Steele *v.* Gourley & Davis (1887), 3 T. L. R. 772, C. A.

SUB-SECT. 13.—AUTHORITY TO RECEIVE PAYMENT.

A. In what Cases Agent authorised to receive Payment.

705. Agent—Authority to carry on business as principal.]—If one allow another to trade in his own name, & as carrying on the business for himself, a payment to such person is a good bar to an action by the person so allowing him to trade ; & for goods sold in the trade the person so carrying it on may recover, unless the person for whom it is carried on assert his or her own right to the sum due.—GARDINER *v.* DAVIS (1825), 2 C. & P. 49.

706. —— Authority to convey goods to salesman.]—A person instructed by the owner to take cattle to a salesman for market has no implied authority (in absence of proof of a custom to pay the servant) to receive proceeds of sale.—LETTICE *v.* JUDKINS (1840), 9 L. J. Ex. 142.

707. —— Authority to invest money—Custody of security.]—A., guardian of D., an infant, authorised B. to invest D.'s money by lending it to C. on C.'s promissory note. The note was not negotiable but was payable to A. "as guardian of" D. one day after date, though A. gave an undertaking not to call up the money without giving 3 months' notice. B. kept possession of the note, & drew the interest, & gave receipts for same, but subsequently, without A.'s knowledge, asked C. to dispense with the 3 months' notice, & pay up the principal, which C. did on getting the note delivered up & B.'s dis-

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PART V. SECT. 3, SUB-SECT. 13.—A.

a. *Agent—Authority to collect rent & to contract for sale & receive "down" payments—Receipt of mortgage money.*]—A. had authority to collect rent & to contract for the sale of property & to receive the "down" payments :—*Held :* such authority did not entitle him to receive payments on a mtge. given for unpaid purchase-money.—GREENWOOD *v.* COMMERCIAL BANK OF CANADA (1867), 14 Gr. 40.—**CAN.**

b. —— *Authority to receive payment in cash & grain.*]—A principal agreed to accept payment for lands sold by him partly in cash & partly in grain, & having authorised his agent to collect in cash a grain payment, the debtor concluded the agent had authority to collect the other grain payments also in cash :—*Held :* he was entitled so to conclude until he received notice to the contrary.—WILLETT *v.* ROSE (1915), 31 W. L. R. 528.—**CAN.**

Sect. 3.—*Implied authority: Sub-sect.* 13, *A.*]

charge. B. died insolvent, having misappropriated the funds, when A. sued C. on the note:—*Held:* (1) B. had no implied authority to discharge the principal; (2) C. was still liable for the amount.—RIVER CLYDE TRUSTEES *v.* DUNCAN (1853), 21 L. T. O. S. 37; 15 Jur. 701; *sub nom.* CLYDE TRUSTEES *v.* DUNCAN, 1 W. R. 538, H. L.

708. —— Authority to obtain orders.]—A clerk employed by his master to obtain orders for goods is not authorised by reason thereof, without a special authority, to receive payment for goods so ordered.—PUTTOCK *v.* WARR (1858), 31 L. T. O. S. 86.

709. —— Authority to receive interest—Receipt of principal.]—Where, on a loan to a public authority, interest is by law not payable without an instalment of the principal, an agent authorised to receive the interest has implied authority to receive the amount payable in respect of the principal.—R. *v.* TENBURY GUARDIANS (1849), 15 L. T. O. S. 23; *sub nom.* R. *v.* TISBURY UNION, 12 J. P. Jo. 474.

710. —— —— ——.]—An agent employed by a mtgee. to receive the interest on the mtge. debt has no authority to receive the principal.—KENT *v.* THOMAS, No. 1098, *post.*

711. —— Authority to sell.]—A person authorised to sell is impliedly authorised to receive the money.—ANON. (1698), 12 Mod. Rep. 230; 88 E. R. 1282.

712. —— ——.]—An agent authorised to sell goods has (in absence of advice to the contrary) an implied authority to receive proceeds of such sale. A person cannot avow the acts of his agent as to one part of the transaction & repudiate them as to another part.—CAPEL *v.* THORNTON (1828), 3 C. & P. 352.

Annotations:—**Distd.** Sykes *v.* Giles (1839), 5 M. & W. 645; Drakeford *v.* Piercy (1866), 7 B. & S. 515. **Refd.** Jackson *v.* Jacob (1837), 5 Scott, 79.

713. —— ——.]—A contract in writing was made between A. on behalf of B. for the sale of lands to C., and payment of the purchase-money was to be made at a future day. Before that day A., the solr. & general agent of B., applied to C. for payment of part of the purchase-money to him, which application C. complied with; afterwards C. entered into a sub-contract for sale of the purchased lands to W. & sought to have paid him by W. that part of the purchase-money which he had already paid to B.'s agent & solr. in the transaction:—*Held:* the general agency of A. on behalf of B. did not justify payment to him by C. of part of the purchase-money agreed to be paid originally by C., & C. had no claim against W., nor any lien on the lands sold, for the amount paid by him to the agent of B. on the original purchase.—COTMAN *v.* ORTON (1840), 10 L. J. Ch. 18; 5 Jur. 142.

714. —— —— Form of plea.]—An agent employed to sell goods has no authority as such to receive payment. A plea to an action for goods sold, that they were sold by D. as apparent principal, & bought by deft. from him as such, & on D.'s own account, & without notice that he was agent merely, & that deft. paid D. before notice that he was agent, but not alleging that D. was a factor, or that pltf. authorised him to represent himself as the principal or to receive or hold himself out as entitled to receive payment, is bad.—DRAKEFORD *v.* PIERCY (1866), 7 B. & S. 515; 14 L. T. 403.

715. —— Previous instances.]—CROPP'S CASE, No. 449, *ante.*

716. Agent of husband & wife—Joint power of attorney—Wife's separate estate.]—KENRICK *v.* WOOD, No. 284, *ante.*

For full anns., *see* S. C. No. 284, *ante.*

717. Agent of trustees—Express authority.]—Where an agent is authorised by trustees to receive trust money & receives it, receipt of the money by the agent binds the trustees & discharges the person who paid it.—ROBERTSON *v.* ARMSTRONG (1860), 28 Beav. 123; 54 E. R. 313.

Annotations:—**Consd.** *Re* Bellamy & Metropolitan Board of Works (1883), 24 Ch. D. 387, C. A.; Doar *v.* Ashwell, [1893] 2 Q. B. 390, C. A.

718. Agent receiving payment of principal—Possession of mortgage deed & receipt of interest.]—Pltf. lent to deft. £1,000 upon the security of an indenture which contained a covenant by deft. to surrender certain copyhold premises to pltf.'s use. No surrender was made. D., who acted as attorney for both parties, signed a receipt for the money, & the title-deeds were delivered to him, & he pre-

708 i. —— *Authority to obtain orders.*]—Deft. had bought goods of pltf. through pltf.'s agent who came to deft. to take an order. The goods were delivered to deft. by the agent accompanied by a signed invoice of pltf., upon which was written, "Pay no account without my written authority." Afterwards the agent of pltf. came to collect the amount due for the purchase, & deft. said that he would pay him upon an order or receipt of pltf. The agent came back with an account receipted & signed with the name of pltf., & deft. paid him. The signature of pltf. was forged, & the agent was not authorised to receive payment of the account:—*Held:* deft., having been warned not to pay without an order signed by pltf., should have assured himself that the signature presented to him was really that of pltf., & the latter was entitled to recover the amount of the account.—GIRARD *v.* BEAUCHEMIN (1896), Q. R. 18 S. C. 111.—**CAN.**

708 ii. —— ——.]—A person employed to solicit advertisements is not authorised to collect the amount agreed upon in the written contract made payable to the principal.—ROUILLARD *v.* MARIOTTI (1889), 12 L. N. 259.—**CAN.**

711 i. —— *Authority to sell.*]—Where a principal makes out & sends to an agent for sale an account against the purchaser for the amount of the sale made by the agent, & the agent presents the account to the purchaser with a request for payment, the purchaser is justified in assuming that the agent has authority to receive payment, & if he pays the amount to the agent the principal will be estopped from denying that the agent had authority to collect.

Where an agent has authority to receive a portion of an account, & same is paid to him & credit given therefor by the principal, the debtor is justified in assuming that the agent has authority to receive the balance unless he knew of the limitation of the agent's authority or was subsequently notified that he was not authorised to receive same.—KAESTNER *v.* HOSIE (1914), 29 W. L. R. 532; 7 W. W. R. 236.—**CAN.**

711 ii. —— ——.]—O. was pltfs.' agent to sell & sold waggons to defts., who gave promissory notes for the price. In an action on the notes defts. pleaded payment to O., who they alleged was the agent of pltfs. to collect the amounts of the notes & it was proved that many persons had previously paid O. money & that pltfs. had received money from O. from time to time as it had come into his hands, but it was not shown that defts. knew of this last circumstance, so as to be led by it to make payments to O. O. had not remitted to pltfs. the money paid to him by defts.:—*Held:* pltfs. being the legal holders & having the notes in their possession, in the absence of direct authority to the agent to collect, or of estoppel, defts. were liable.—MCLAUGHLIN CARRIAGE CO. *v.* PETTIPAS, MCLAUGHLIN CARRIAGE CO. *v.* HAVERSTOCK, 20 C. L. T. Occ. N. 137.—**CAN.**

711 iii. —— *Sale in own name.*]—A sale of goods belonging to a principal, made by the agent in his own name, the agent receiving the price, leaves the principal without recourse against purchaser, even when the principal himself has made the shipment & delivery of the goods sold.—HUARD *v.* BANVILLE (1907), Q. R. 31 S. C. 27.—**CAN.**

711 iv. —— —— *& convey.*]—Where an agent is empowered not merely to sell, but "to sell & convey," authority to receive payment of the purchase-money is implied.—FARQUHARSON *v.* WILLIAMSON (1849), 1 Gr. 93.—**CAN.**

715 i. —— *Previous instances.*]—Deft. remitted the price of goods purchased from pltf. by the Dominion Express Co., as he had been instructed by the vendor to do on previous occasions. Vendor was notified that the money had been sent, but did not call for it for two or three days, when the parcel had disappeared from the express office:—*Held:* the purchaser was not responsible for the loss, vendor having constituted the co. his agent to receive the money.—LEPAGE *v.* ALEXANDER (1897), Q. R. 12 S. C. 279.—**CAN.**

pared & delivered to deft., but without pltf.'s knowledge, a schedule of the deeds, at the foot of which was a memorandum, signed by D., acknowledging the receipt of the deeds, & undertaking to deliver them up on payment of the principal money & interest. The mtge. deed remained in D.'s possession, & he from time to time received the interest & paid it over to pltf. The principal money was paid to D., who appropriated it to his own use, & died insolvent:—*Held:* (1) D.'s receipt for the principal & the memorandum signed by him were admissible in evidence for deft.; (2) neither the possession of the mtge. deed nor the receipt of interest was any evidence of an authority to D. to receive the principal, & pltf. was entitled to recover it from deft.—WILKINSON *v.* CANDLISH (1850), 5 Exch. 91; 19 L. J. Ex. 166: 155 E. R. 39.

Annotations:—**Refd.** Sims *v.* Brutton & Clipperton (1850), 5 Exch. 802; Kent *v.* Thomas (1856), 1 H. & N. 473; Bourdillon *v.* Roche (1858), 27 L. J. Ch. 681; Sweeting *v.* Pearce (1859), 29 L. J. C. P. 265.

719. Bailiff—Power under distress warrant.]—HATCH *v.* HALE, No. 446, *ante*.

See, further, SHERIFFS & BAILIFFS.

720. Bank clerk—Authority to receive money for deposit.]—A clerk was sent to a customer at his request to fetch money to be deposited at the bank, & through some cause for which he did not account, the money was lost on his return:—*Held:* (1) the receipt of the money from the customer was in the course of his employ as clerk of the bank; (2) the surety for the clerk was liable for it.—MELVILLE *v.* DOIDGE (DODGE) (1848), 6 C. B. 450; 18 L. J. C. P. 7; 12 L. T. O. S. 127; 12 Jur. 922; 136 E. R. 1324.

721. Bank compradore or Chinese agent—Authority to arrange details of transfer of funds—Third party's knowledge of limited authority.]—In an action by resp. to recover from applt. bank moneys paid to their compradore or Chinese agent at their Hong Kong branch for the purpose of a telegraphic transfer to pltf.'s nominee at Shanghai, it appeared that the compradore, to the knowledge of pltf., had no authority without the express approval of the bank manager to receive the money or to fix the rate of exchange or other terms on which the transfer was to be effected:—*Held:* (1) the bank was not liable for the compradore's misappropriation of the moneys, as his authority was limited to arranging the details of the proposed transaction & did not extend to receiving money on account of the bank until a binding contract had been made with the bank manager; (2) there had been no holding out through any negligent or improper act by the bank of the compradore as apparently invested with an authority greater than the limited authority which pltf. knew him to possess.—RUSSO-CHINESE BANK *v.* LI YAU SAM, [1910] A. C. 174; 79 L. J. P. C. 60; 101 L. T. 689; 26 T. L. R. 203, P. C.

Annotations:—**Refd.** Lloyd *v.* Grace, Smith, [1911] 2 K. B. 489, C. A.; Willis, Faber *v.* Joyce (1911), 104 L. T. 576.

722. Broker—Authority as such when principal undisclosed.]—Where goods were sold by a broker for a principal not named upon the terms, as specified in the usual bought & sold notes (delivered over to the respective parties by the broker), of "payment in one month, money":—*Held:* they might be paid for by the buyer to the broker within the month, & that by bill of exchange accepted by buyer & discounted by him within the month, though having to run a longer time before it was due.

Where the buyer was also indebted to the same broker for another parcel of goods, the property of a different person, & he made a payment to the broker, generally, larger than the amount of either demand, but less than the two together, & afterwards the broker stopped payment:—*Held:* such payment ought to be equitably apportioned as between the several owners of the goods sold, who were only respectively entitled to recover the difference from the buyer.—FAVENC *v.* BENNETT (1809), 11 East, 36; 103 E. R. 917.

Annotation:—**Refd.** Spence *v.* Union Marine Insce. (1868), L. R. 3 C. P. 427.

723. —— ——.]—If the owner of goods allows the broker through whom he sells them to sell them as principal, the purchaser is discharged by payment to the broker in any way sufficient had he been real owner.—COATES *v.* LEWES (1808), 1 Camp. 444.

Annotation:—**Refd.** Warner *v.* M'Kay (1836), Tyr. & Gr. 965.

724. —— ——.]—If goods are sold by a broker without disclosing his principal, the purchaser is justified in paying him in a different manner from that stipulated for by the terms of the contract; it is otherwise where the principal is disclosed at the time of the sale. The circumstance of persons selling goods being described in the catalogue of sale as sworn brokers is not sufficient notice to purchaser that they are only agents to prevent him from dealing with them as principals.—BLACKBURN *v.* SCHOLES (1810), 2 Camp. 341.

Annotations:—**Distd.** Ravenscroft *v.* Wise (1834), 4 Tyr. 741. **Dbtd.** Warner *v.* M'Kay (1836), 5 L. J. Ex. 276. **Refd.** Seaton *v.* Benedict (1828), 5 Bing. 28.

725. —— ——.]—A payment by the buyer of goods to a broker is good if the name of the principal is not disclosed, although the buyer knows that the broker sells for some unknown principal; & it makes no difference whether or not the broker acts under a *del credere* commission.—CAMPBELL *v.* HASSELL, No. 762, *post*.

For full anns., *see* S. C. No. 762, *post*.

726. —— **Previous dealings.**]—Under a contract of sale made through a broker payment was to be made to the seller. On a previous sale the seller had authorised the broker to receive payment, & the money so received had been duly paid over:—*Held:* payment to the broker was not valid.—LINCK, MOELLER & Co. *v.* JAMESON & Co. (1885), 2 T. L. R. 206, C. A.

727. Broker's man in possession—Authority as such — Third party's knowledge of limited authority.]—BOULTON *v.* REYNOLDS, No. 448, *ante*.

For full anns., *see* S. C. No. 448, *ante*.

Building society secretary.]—*See* BUILDING SOCIETIES.

728. Clerk—Authority to sell & possession of scrip.]—The proprietor of a share in the London Institution, which cannot be transferred until the proprietor shall by writing, under his hand, signify his desire so to do to the committee of

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720 i. *Bank cashier—Authority as such—Collection of draft.*]—A bill indorsed to a bank was sued on by W., the cashier of the bank, in his own name. The bill was paid by the acceptor, who, in turn, sued the drawer to recover the amount paid. The statement of claim alleged that the bill had been indorsed to W. & this was not denied by deft.:—*Held:* as the facts in proof showed payment to W., the cashier of the bank, it was a fair inference that this was payment to the bank.—SEELEY *v.* COX (1896), 28 N. S. R. 210; *affd.* S. C. of Canada, May 6th, 1896, unreported.

722 i. *Broker—Authority as such when principal undisclosed.*]—A person who purchases goods from a person both banker & broker, upon the belief authorised by the facts that he was the principal & not merely a broker, & pays him in good faith the price thereof, cannot be held liable to the real principal's claim.—PETUMBER BHUGUTT *v.* MUTHOORA DASS (1866), 1 Agra, 121.—**IND.**

728 i. *Clerk—Authority as such.*]—Payment made to & receipt granted by a subordinate of the payee on his behalf is good against the payee himself, if either (1) the subordinate receives the money & grants the receipt in the payee's place of business, or (2) he receives the money & grants the receipt away from the payee's place of business,

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managers, & mention therein the name, etc., of the person to whom he is desirous the same should be transferred, which person is to be approved by the committee, addressed a note to the committee in these words: "Having disposed of my share in the London Institution to [leaving a blank for the name], I beg leave to recommend him to be elected in my place, as a proprietor," etc., & signed it. The note was left in the hands of an agent (clerk of the society), for the purpose of selling the share:—*Held:* (1) the agent had no authority, before the transfer was so completed, to receive the money of the purchaser & to insert his name in the blank unknown to the proprietor; (2) if the purchaser pays the money before the time of payment, when the transfer from the proprietor was complete, he pays it at his own risk to the agent, whom he thereby makes his own for that purpose.—PARNTHER *v.* GAITSKELL (1811), 13 East, 432; 104 E. R. 439.

Annotation:—**Apld.** Cotman *v.* Orton (1840), 10 L. J. Ch. 18.

729. Clerk in counting-house—Apparent control of conduct of business.]—Payment to a person found in a merchant's counting-house, & appearing to be intrusted with conduct of the business there, is good payment to the merchant, though it turns out that the person was never employed by him.—BARRETT *v.* DEERE (1828), Mood. & M. 200.

Annotations:—**Expld.** Finch *v.* Boning (1879), 43 J. P. 527. **Distd.** Graves *v.* Masters (1883), Cab. & El. 73. **Refd.** Corfield *v.* Parsons (1833), 1 Cr. & M. 730.

730. —— —— Transaction not in ordinary course of business.]—Although payment to an apprentice at the counting-house of his master in the ordinary course of business may be good payment to the master:—*Semble:* (1) it is not, if made upon a collateral transaction; (2) payment of a deposit by a stakeholder to the apprentice of the party who has made the deposit, at his counting-house, is not a good payment.—SANDERSON *v.* BELL (1833), 2 Cr. & M. 304; 4 Tyr. 244; 3 L. J. Ex. 66.

For full anns., *see* MASTER & SERVANT.

731. Estate agent—Authority to sell estate.]—An agent employed to sell an estate has not, as such, authority to receive payment.—MYNN *v.* JOLIFFE (1834), 1 Mood. & R. 326.

Annotations:—**Refd.** Ireland *v.* Thomson (1847), 4 C. B. 149; Drakeford *v.* Piercy (1866), 7 B. & S. 515.

732. General agent—Authority as such.]—The character of a general agent is sufficient to authorise him to demand & receive the fines, payable on renewal of a lease.—MOUNTNORRIS (EARL) *v.* WHITE (1814), 2 Dow, 459; 3 E. R. 931.

For full anns., *see* LANDLORD & TENANT.

733. —— Authority to receive principal & interest—Waiver of notice before redemption.]—By deed securing an annuity which A. had granted to B., who resided abroad, power was given to A. to redeem the annuity upon paying a certain sum of money, giving B. six months' notice in writing. C., B.'s general agent in England, received the redemption money from A., & delivered up to him the annuity deed without the notice required by the deed, & B. had no notice whatever that the money was about to be paid. C. had a general authority to invest & also to receive principal moneys as well as interest for B.:—*Held:* C. had authority to waive the stipulation as to notice, & to receive the redemption money as he did for B.—WEBBER *v.* GRANVILLE (1860), 30 L. J. C. P. 92; 7 Jur. N. S. 420.

734. Managing clerk of attorney—Holding out.]—Where the managing clerk of attorneys had, without their knowledge, received money for the purpose of investment:—*Held:* the question was (in absence of any actual authority) whether they had held him out as having authority so to receive it on their behalf.

It requires a special authority, beyond that of a mere managing clerk, to entitle him to receive money, so as to bind his employers, for the purpose of investment. It does not matter that pltfs. believed he had such authority. The question is, did defts. hold him out, or allow him to hold himself out, as having such authority (EARLE, C.J.)—CORNELIUS *v.* HARRISON (1862), 2 F. & F. 758.

See, further, SOLICITORS.

735. Insurance company's agent—Authority expressly limited—Notice to third party.]—In 1853 R. effected a life policy with the N. Society, premiums being payable half-yearly. In 1857 the N. Society transferred its business to the A. Co., & when R. paid at the branch office the next half-yearly premium, he received a printed receipt, stated to be issued for the A. Co., "with which was incorporated the business of the N. Society." At the foot of this receipt was a printed memorandum that no receipts were valid unless printed, signed by the secretary & issued from the London office. On paying a subsequent premium to the branch office R. accepted a written receipt signed by the local agent only, & not issued from London:—*Held:* (1) the former receipt was a notice to R. of the only form of receipt that was valid; (2) the second payment was nothing more than a payment to the agent personally & not to the co.; (3) the policy lapsed by reason of non-payment of premium when due.

Although a general agent may bind his principal as to third persons, notwithstanding the principal may have limited his authority, this rule does not apply where the limit of the agent's authority is known to the persons dealing with him (TURNER, L.J.).—TOWLE *v.* NATIONAL GUARDIAN ASSURANCE SOCIETY & ALBERT LIFE ASSURANCE & GUARANTEE CO. (1861), 30 L. J. Ch. 900; 5 L. T. 193; 7 Jur. N. S. 1109, L.JJ.

London agent for country solicitor.] — *See* SOLICITORS.

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provided that the payer knows him to be engaged in the carrying on of the payee's business, & has no reason to doubt his authority to receive the money.—GEMMELL *v.* ANNANDALE & SON, LTD. (1899), 36 Sc. L. R. 658.—**SCOT.**

728 ii. —— ——.]—Deft. through a broker purchased from pltfs. goods, to be paid for before removal. Both deft. & his broker knew that pltfs. had a separate cash office where payments for goods purchased were usually made, & the broker knew that the delivery clerk had no authority to deliver goods without a special order from pltfs. A portion of the goods was paid for & delivery obtained in the usual way. As to the remainder, the broker, on behalf, but without the knowledge, of deft., paid the delivery clerk & obtained delivery without any order from pltfs. Pltfs., a year subsequently, discovered that the delivery clerk had embezzled the money paid to him:—*Held:* they were entitled to recover the balance of the price of the goods from deft. in an action for goods sold & delivered.—MACKENZIE LYALL *v.* SHIB CHUNDER SEAL (1874), 12 B. L. R. 360.—**IND.**

c. *Consignee of bill of lading—Express authority.*] — The purchaser of barley paid the vendor's agent who was the consignee of the bill of lading:—*Held:* the bill of lading was a written authority to receive the price; & his receipt was a valid discharge to the purchaser.—LAMBERT *v.* SCOTT (1886), M. L. R. 2 Q. B. 340.—**CAN.**

d. *Notary — Authority as such — Possession of a bond—Receipt of interest.*] —A notary who receives a bond has not implied authority to obtain from the obligor the interest on the moneys secured by the bond, & if such interest is handed to him for the lender the obligor will not thereby be discharged of his obligation to the lender if the notary fails to pay.—WEBSTER *v.* DUFRESNE (1887), 15 R. L. 210, Q. B. 1887.—**CAN.**

e. *Wharfinger — Authority to deliver to consignee.*]—*Semble:* a wharfinger is not an agent of the consignor to whom the consignee is authorised to make payment, after delivery of the goods to the consignee & after an account has been stated between him & the consignor.—TORRANCE *v.* HAYES (1852), 3 C. P. 274.—**CAN.**

Master of ship selling ship.]—*See* SHIPPING & NAVIGATION.

Revocation of authority.]—*See* Part XI., *post.*

736. Scrivener—Authority to invest money.]—Where a scrivener is employed generally to place money to someone's use, & the money is paid to him, the payment is not good if he misapplies the money.—JUDGMENT IN DEBT CASE (1627), Het. 46; 24 E. R. 331; *sub nom.* ANON. Litt. 54; 124 E. R. 133.

737. —— ——.]—Payment by the borrower to the scrivener is no good payment to conclude the lender.—DEGG *v.* OSBASTON (1668), 1 Cas. in Ch. 111; 22 E. R. 719.

738. —— ——.]—Deft. placed money in the hands of Y., a scrivener, to be put out on bond. The money was lent to pltf. Subsequently pltf. repaid the loan to Y., without getting back the bond, which deft. kept himself & did not entrust to Y.:—*Held:* the payment to Y. did not conclude deft.—HENN *v.* CONISBY (1667), 1 Cas. in Ch. 93; 1 Eq. Cas. Abr. 145; 22 E. R. 710.

Annotation:—**Follo.** Degg *v.* Osbaston (1668), 1 Cas. in Ch. 111.

739. —— —— **Scrivener retaining security.**]—A. entrusted a scrivener with money for investment, & the scrivener lent it on bond in A.'s name & handed the bond to A. The scrivener received the interest & called in the principal. The obligor paid the scrivener, & took a note from him for delivery of the bond. The scrivener got the bond from A. on giving a note either to give back the bond or pay the money. Before the money was paid, the scrivener failed:—*Held:* A. could not enforce the bond, since he had trusted the scrivener, not only with the putting out of his money, but with custody of his security.—ABBINGTON *v.* ORME (1691), 1 Eq. Cas. Abr. 145; 21 E. R. 946.

740. —— —— ——.]—Pltf., having an annuity granted to her & her heirs out of the excise or customs, & having occasion to borrow a sum of money, procured the same of R., a scrivener, who was employed to let out money for defts., & gave him £100 for procuration; the security given for it was out of this annuity, a proportion whereof was set apart, to be yearly applied towards this debt, till the whole principal & interest were discharged. R. had received £2,900 for the use of defts. & gave his receipts & had accounted to defts. for above £1,700, but about £1,100 remained in his hands unaccounted for, & he died insolvent; & the only question was, whether this loss should fall upon pltf. or defts. It appeared that R. was agent for defts., not only in this but in other affairs, & that he transacted this matter on their behalf, save the writings executed, & paid the money lent, & that the money was appointed to be paid at his house, & that the writings were left with him, & apparently continued at his house:—*Held:* the loss ought to fall upon defts., & not upon pltf., who for all that appeared was an utter stranger to R. before the borrowing of this money.

If a bond is left with a scrivener, that is sufficient for him to receive the principal & interest, & the delivery up of the bond is a sufficient discharge to him that pays it. But if a mtge. were left with a scrivener, this is a sufficient authority to him to receive the interest, but not the principal; & the delivery up of the mtge. by him is no sufficient discharge to the mtgor., because the estate ought to be reassigned; which cannot be done but by the party himself (TREVOR, M.R.).

There is no reason for this difference; in equity it would be all one, the money being really paid to the person who had the deeds in his custody (WRIGHT, Lord Keeper).—CLEVELAND (DUCHESS) *v.* DASHWOOD'S EXECUTORS (1701), Freem. Ch. 249; 22 E. R. 1189.

741. —— —— ——.]—If one trusts his scrivener (who puts out money for him) with the custody of his bond, & the scrivener receives the money & delivers up the bond, the obligee is barred as against the obligor for ever; but it is otherwise in the case of a mtge. because a legal estate is vested, & cannot be divested without assignment.—MARTYN *v.* KINGSLY (1702), Prec. Ch. 209; 24 E. R. 102.

Annotations:—**Consd.** Wilkinson *v.* Candlish (1850), 5 Exch. 91. **Refd.** Beaufort *v.* Neeld (1845), 12 Cl. & Fin. 248, H. L.

742. —— —— ——.]—A., having borrowed from B., through C., a scrivener, £100 on a bond which was handed over to B., paid the interest for several years to C. & also £50, part of the principal, which C. paid over to B. A. paid the remaining £50 to C., who failed before paying it over to B.:—*Held:* not a good payment.

If the person to whom the security is made trust his security in the hands of the scrivener, payment to the scrivener is good; but if he take his security into his own keeping, payment to the scrivener will not be good, unless it can be proved that the scrivener had authority to receive it. In this case the scrivener received the interest & part of the principal & paid it to the obligee; that does not imply that he had any authority to receive it. As long as he paid it over all was well, & anyone else might have carried it to the principal as well as he (TREVOR, M.R.).—WOLSTENHOLM *v.* DAVIES (1705), Freem. Ch. 289; 22 E. R. 1217.

Annotation:—**Distd.** Wilkinson *v.* Candlish (1850), 5 Exch. 91.

743. —— —— ——.]—Payment of interest of mtge. to the scrivener is good, if he has the bond or mtge.-deed. So of principal, if he deliver up the bond.—WHITLOCK *v.* WALTHAM (1708), 1 Salk. 157 91 E. R. 146.

Annotations:—**Distd.** Wilkinson *v.* Candlish (1850), 5 Exch. 91; River Clyde Trustees *v.* Duncan (1853), 21 L. T. O. S. 37, H. L.

Solicitor.]—*See* SOLICITORS.

—— **Authority to receive mortgage money or interest.**]—*See* MORTGAGE; SOLICITORS.

—— **Authority to receive purchase money on sale of land.**]—*See* Conveyancing & Law of Property Act, 1881 (c. 41), s. 56; SALE OF LAND.

Stockbroker.]—*See* STOCK EXCHANGE.

744. Traveller—Employed to sell but accustomed to receive payment—Notice to third parties as to manner of payment.]—Where limitations are placed on the authority of an agent or traveller, the extent of those limitations must be brought home to the customer's mind if he is to be bound by them.

Applts. employed a traveller for the sale of their goods. The statements of account intimated to customers that cheques were to be crossed. In some cases a special crossing with the names of the bank & of the payees was requested. The traveller in some cases received payment in the form of cheques payable to himself, & in another case in the form of notes & gold. He fraudulently appropriated the money so paid. In an action by applts. for the money so paid to the traveller by resps.:—*Held:* resps. were not liable to pay the money the second time, as they had not, when they made the original payments, been informed that neither cash nor any payment save in the prescribed form would be accepted.—INTERNATIONAL SPONGE IMPORTERS, LTD. *v.* WATT (ANDREW) & SONS, [1911] A. C. 279; 81 L. J. P. C. 12; 27 T. L. R. 364; 55 Sol. Jo. 422; 16 Com. Cas. 224, H. L.

745. Trustee agent for co-trustee—Management of trust estate & choice of investments.]—A. & B., trustees of a will under which pltf. was entitled to a share of residue, which she had assigned to C. & D., trustees of her marriage settlement, paid it to C.

Sect. 3.—Implied authority: Sub-sect. 13, A. B. & C.]

alone, without the knowledge of D. They afterwards transferred a legacy of stock settled upon similar trusts to C. & D., by whom it was sold out, & the proceeds were received by C. alone. It appeared that D. left to C. the general management of the trust estate, & the choice of investments. Both funds were partially misapplied & lost by C. Pltf. sought to have both funds made good:—*Held:* the conduct of D. did not justify A. & B. in considering C. as his agent authorised to receive the money.—MARGETTS *v.* PERKS (1864), 34 L. J. Ch. 109; 10 L. T. 85; 12 W. R. 517.

B. Authority to receive Payment by Cheque.

746. Agent—Custom.]—An agent authorised to receive payment has ordinarily authority to receive it only in cash. If the payment had been by cheque, then it might be a question for the jury, since it is the custom to pay by cheque, whether the payment would be good or not (BLACKBURN, J.).—WILLIAMS *v.* EVANS (1866), L. R. 1 Q. B. 352; 35 L. J. Q. B. 111; 13 L. T. 753; 30 J. P. 692; 14 W. R. 330.

747. —— Entrusted with document of title to be delivered on payment.]—A tenant, restrained by terms of his lease from assigning without the consent in writing of his lessor, applied to lessor for leave to assign, who signed a licence to assign, & handed it to an agent with instructions not to part with it until he got payment of the rent then due from the tenant. The agent, in presence of the intending assignee, handed over the licence to the tenant on receipt of a cheque, drawn by the tenant to the order of the agent, for the rent & his professional charges, & the assignment was then completed. The cheque was dishonoured:—*Held:* (1) the agent being entrusted to hand over a document of title as well as to receive payment, there was no general usage authorising him to take a cheque in payment in lieu of cash; (2) as the cheque was for charges as well as rent, it was not in a form in which it could be handed over to the principal; (3) the agent was responsible to his principal for the rent.—PAPÉ *v.* WESTACOTT, [1894] 1 Q. B. 272; 63 L. J. Q. B. 222; 70 L. T. 18; 42 W. R. 130; 10 T. L. R. 51; 38 Sol. Jo. 39; 9 R. 35, C. A.

Annotation:—**Refd.** Hine *v.* S.S. Insce. Syndicate (1894), 72 L. T. 79.

Auctioneer.]—*See* AUCTION & AUCTIONEERS.

748. Clerk—Authority to receive money paid over counter.]—Goods were left by pltf. in the warehouse of E. & Co., at H., for sale. Deft., who resided in London, purchased a parcel of the goods, & remitted the price to pltf. Deft. having afterwards purchased more goods, received a letter from T., clerk of E. & Co., inclosing an invoice & purporting to be written by E. & Co., by the procuration of pltf., stating they were authorised by pltf. to receive payment for him, & requesting deft. to remit the money to them. Deft. remitted the amount by cheque, inclosed in a letter addressed to E. & Co., which was delivered at their counting-house; but T. intercepted the letter, & appropriated the money to his own use. T. had authority from pltf. to receive money paid over the counter for goods sold in the warehouse, but in no other way:—*Held:* the receipt by T. was no payment to pltf.—KAYE *v.* BRETT (1850), 5 Exch. 269; 19 L. J. Ex. 346; 15 L. T. O. S. 185; 155 E. R. 116.

749. Servant—Instructions to collect debt—Cheque not promptly cashed.]—*Qu.:* whether, if a creditor sends his servant to receive money from a debtor, & the servant receives a banker's cheque, & keeps it an unreasonable time until the banker fails, this is payment to the master.—THOROLD *v.* SMITH (1706), 11 Mod. Rep. 71, 87; Holt, K. B. 462; 88 E. R. 896, 912.

Annotations:—**Refd.** Nickson *v.* Brohan (1713), 10 Mod. Rep. 109; Williams *v.* Evans (1866), L. R. 1 Q. B. 352.

750. Shop assistant—Authority to receive cheque drawn to principal—Embezzlement.]—Deft. paid for certain jewellery he had purchased at pltf.'s shop, by a cheque drawn in favour of, & handed to, a shop assistant. The assistant had authority to receive payment in cash or by a cheque drawn in favour of pltf. The cheque was cashed by the assistant, who embezzled the proceeds:—*Held:* there was evidence that the cheque when cashed amounted to payment.—WALKER *v.* BARKER (1900), 16 T. L. R. 393.

751. Solicitor—Authority to receive payment of mortgage money.]—A solr. authorised to receive payment of mtge. money on payment off of the mtge. is not entitled to receive such payment in the form of a cheque.—BLUMBERG *v.* LIFE INTERESTS & REVERSIONARY SECURITIES CORPN., LTD., [1897] 1 Ch. 171; 66 L. J. Ch. 127; 75 L. T. 627; 45 W. R. 246; 41 Sol. Jo. 130; *affd.* on another point, [1898] 1 Ch. 27, C. A.

Annotation:—**Apld.** Johnston *v.* Noyes, [1899] 2 Ch. 73.

See, further, MORTGAGE; SOLICITORS.

752. Steward—Authority to admit to copyhold—Crossed cheque for fine.]—Deft. having purchased a copyhold in a manor, of which pltf. was lord, the steward appointed C., deft.'s solr., deputy steward to admit. Some time after admittance, deft. sent C. a crossed cheque including the amount of the fine. This cheque C. paid into his bankers, & they, having got the cash for it, kept the money, as C.'s account was overdrawn. Pltf. sued for the fine:—*Held:* (1) whether C. was originally authorised to receive the fine, whether his authority continued to the time of actual payment, & whether he received under such authority, were questions of fact; (2) as on the facts of the particular case there was evidence for the jury in the affirmative, the ct. could not interfere with its so finding; (3) taking this finding as correct, the payment by a crossed cheque eventually cashed was good against pltf., though such cash was afterwards kept by C.'s bankers.—BRIDGES *v.* GARRETT, No. 31, *ante.*

Annotations:—**Consd.** Pearson *v.* Scott (1878), 9 Ch. D. 198. **Distd.** Crossley *v.* Magniac, [1893] 1 Ch. 594. **Consd.** Papé *v.* Westacott, [1894] 1 Q. B. 272, C. A. I entirely agree with the view that that case turns on the fact of the cheque having been honoured so as to make it in fact payment in cash (DAVEY, L.J.) **Expld.** The Netherholme, Glen Holme & Rydal Holme (1895), 72 L. T. 79, C. A. **Consd.** *Re* Heath, Parker & Brett (1898), 43 Sol. Jo. 98, C. A. **Apld.** Walker *v.* Barker (1900), 16 T. L. R. 393.

753. Theatrical booking agent—Authority to let seats.]—By a verbal agreement an agent of pltfs. contracted with an agent of defts., whose business was a theatrical agency for sale of theatre tickets, that defts. should let certain seats erected by pltfs. in consideration of an agreed rate of commission. Nothing was said by either party as to whether payment for seats was to be in cash or whether credit should be allowed. Pltfs.' town clerk saw cheques being taken by defts. at their stand & made no protest. An action was brought claiming from defts. the price of seats sold by them, but for which they had not been paid:—*Held:* (1) there was no custom, usage of trade, or habit of dealing in this case to give credit; (2) the general rule applied, & the agents had only authority to receive payment in cash; (3) cheques must for such purpose as this be considered as cash.—WESTMINSTER CITY CORPN. *v.* LEADER & CO. (1903), 67 J. P. Jo. 183; 47 Sol. Jo. 419.

C. Authority to receive Payment by Bill of Exchange, etc.

754. Agent—Express authority—Bill discounted.]—Where the seller's agent, acting within his authority, takes the buyer's promissory note in payment, & discounts it, there is, as against the seller, payment, & the seller cannot whilst the note is outstanding exercise any lien over the goods.—BUNNEY *v.* POYNTZ (1833), 4 B. & Ad. 568; 1 Nev. & M. K. B. 229; 2 L. J. K. B. 55; 110 E. R. 569.

Annotations:—**Distd.** Sykes *v.* Giles (1839), 5 M. & W. 645. **Apld.** Pooley *v.* Budd (1851), 14 Beav. 34. **Distd.** Gunn *v.* Bolckow, Vaughan (1875), 32 L. T. 781, C. A. **Dbtd. & N.F.** *Re* Defries, Eicholz *v.* Defries, [1909] 2 Ch. 423. The case of *Bunney* v. *Poyntz* is inconsistent with, if not expressly overruled by *Gunn* v. *Bolckow, Vaughan & Co.* (WARRINGTON J.). **Mentd.** Dixon *v.* Yates (1833), 5 B. & Ad. 313; Tanner *v.* Scovell (1845), 14 M. & W. 28; Nicholl *v.* Thomas (1850), 15 L. T. O. S. 50; *Re* McLaren, *Ex p.* Cooper (1879), 11 Ch. D. 68, C. A.

755. —— Authority to collect bill.]—If the holder of a bill of exchange for £60 sends his servant with it to the payee for payment, & the payee gives the servant a draft on his banker for £100, & the banker writes off £60 from £100 draft, but the servant, instead of receiving the money, takes a note of £60 from the banker on a merchant who immediately after becomes insolvent & refuses to pay it, the act of the servant shall not, in such case, bind his master; for the servant was sent to receive the money from the payee & not the note from the banker; & the master may recover the £60 from the banker in an action of *assumpsit* as money had & received from the payee of the bill to his use.—WARD *v.* EVANS (1703), 1 Com. 138; 2 Ld. Raym. 928; 6 Mod. Rep. 36; 2 Salk. 442; Holt, K. B. 120; 92 E. R. 1002.

Annotations:—**Distd.** Nickson *v.* Brohan (1713), 10 Mod. Rep. 109. **Apld.** Tatlock *v.* Harris (1789), 3 Term Rep. 174; Hennings *v.* Rothschild (1827), 4 Bing. 315. **Refd.** Thorold *v.* Smith (1706), Holt, K. B. 462; Smith *v.* Wilson (1738), Andr. 187; Grant *v.* Vaughan (1764), 3 Burr. 1516.

756. —— Authority to receive payment in ordinary course of business.]—Where a man has authority to receive money he cannot receive anything else. But where by the course of the world & trade a servant has a general authority to do what his master would have done, then it may be different. Where a servant had many times received bills for his master:—*Held:* this was an authority for that purpose.—THOROLD *v.* SMITH, No. 749, *ante*.

Annotations:—**Folld.** Williams *v.* Evans (1866), L. R. 1 Q. B. 352. **Refd.** Nickson *v.* Brohan (1713), 10 Mod. Rep. 109.

757. —— ——.]—Where an agent has authority to receive payment, the ordinary rule of law, in absence of evidence of a special authority, is, that the authority is to receive payment in the ordinary course of business. It is not in the ordinary course of business that an agent should receive money before it is due for his own accommodation, taking a bill & allowing discount.—BREMING *v.* MACKIE (1862), 3 F. & F. 197.

758. —— Entrusted with goods for sale.]—DARTON *v.* SADOCK, No. 803, *post*.

For full anns., *see* S. C. No. 803, *post*.

759. Agent of shipowner—Authority as such.]—Freight was paid to a shipbroker, who acted as agent for the shipowner, by promissory note. On the shipbroker's bkpcy.:—*Held:* the charterers not liable for freight to the shipowner.—THE ASSYRIAN (1856), 6 L. T. 867.

760. Auctioneer—Authority to receive purchase-money.]—An auctioneer authorised to receive payment of the purchase-money must receive it in cash; he has no authority to receive payment by bill of exchange or to take security for payment.—SYKES *v.* GILES (1839), 5 M. & W. 645; 9 L. J. Ex. 106; 151 E. R. 273.

Annotations:—**Folld.** Williams *v.* Evans (1866), L. R. 1 Q. B. 352. **Refd.** Sweeting *v.* Pearce (1859), 7 C. B. N. S. 449.

761. —— Authority to receive deposit & balance against delivery.]—An auctioneer authorised to sell goods on conditions that purchasers shall pay a deposit at once, & the remainder of the purchase-money to the auctioneer on or before delivery of the goods, has no authority to receive payment by a bill of exchange; & such payment will not discharge purchaser.—WILLIAMS *v.* EVANS, No. 746, *ante*.

See, further, AUCTION & AUCTIONEERS.

762. Broker—Authority to take bill of particular currency.]—A payment by the buyer of goods to the broker is not good, if it varies from the original terms of the contract; & evidence of a custom to that effect is not admissible. Where the terms are a bill at 4 months, & 2½ discount for ready money, prompt in 14 days, a payment by bill at 2 months, deducting 1½ discount, is no payment as against the principal, although he make no demand till after expiration of the time of credit.—CAMPBELL *v.* HASSELL (1816), 1 Stark. 233.

Annotation:—**Distd.** Scott *v.* Irving (1830), 1 B. & Ad. 605.

763. —— Custom as to date of payment.]—Freight of a cargo from the West Indies having been paid by consignees to brokers within 2 months from the date of sending in the report, the broker subsequently absconding, this was found by the jury to be a legal payment, although it was alleged to be the custom of the trade to pay it after a lapse of 2 months from that date.—GRAHAM *v.* KENSINGTON (1842), 6 L. T. 867.

764. —— Previous dealings—Bill drawn in broker's name.]—A. was employed by B. & Co. as their broker. He sold goods, the property of his principals, lying in the London Docks, to C., & drew a bill of exchange in his own name, which bill C. accepted for the amount, & paid. A. became bkpt.; B. & Co. disavowed the transaction, & called upon C. for payment; C. refused to pay, alleging he had already paid the broker, & brought trover for the goods against B. & Co.:—*Held:* (1) as B. & Co. had suffered their broker upon some occasions to draw bills in his own name, without mention of them as his principals, they were bound by the payment which had been made to him by C. in the present case; (2) the action well lay against B. & Co.—TOWNSEND *v.* INGLIS (1816), Holt, N. P. 278.

Annotation:—**Consd.** Glyn, Mills, Currie *v.* East & West India Dock Co. (1882), 7 App. Cas. 591.

765. Clerk—Authority to collect note.]—If a master sends a clerk, who has general management of his cash concerns, with a note to a banker to receive money, & the servant, instead of so doing,

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PART V. SECT. 3, SUB-SECT. 13.—C.

f. Agent—Authority to sell for cash.]—An agent to sell land for cash has no authority to receive payment on behalf of his principal by way of a promissory note.—WALDER *v.* CUTTS (1908-9), V. L. R. 261.—AUS.

g. —— ——.]—Where an agent for sale of land for cash accepted bills for purchase-money & applied them to his own use:—*Held:* there was no payment to the principal who was not bound to convey.—BROWN *v.* SMART (1846), 1 E. & A. 148.—CAN.

h. —— —— *& partly by promissory notes—Promissory notes to be made payable to principal.*]—An agent with authority to sell land & take payment partly in cash & partly by promissory notes is only entitled to take promissory notes payable to his principal.—GOURLAY *v.* CARSON (1890), 16 V. L. R. 850.—AUS.

i. —— *Authority to make inquiries concerning debtor.*]—Pltfs. hearing a debtor was fraudulently making away with his property sent a clerk to make inquiries, but without special instructions, & he took a promissory note as a composition for 5*s.* in the pound which pltfs. refused:—*Held:* pltfs. not barred from suing for the original debt.—SEYMOUR *v.* WOODBURY (1860), 11 L. C. R. 71.—CAN.

Sect. 3.—Implied authority: Sub-sect. 13, C. & D.]

gets another to give him a draft upon the banker for it, & the banker fails before the draft is presented, the master is liable for the loss.—NICKSON *v.* BROHAN (1712), 10 Mod. Rep. 109; 88 E. R. 649.

766. Insurance broker—Authority to collect loss—Personal liability.]—If an insurance broker debit the underwriter with a loss, & take his acceptance for the balance of account between broker & underwriter, payable at a later date than the time when the loss would be payable in cash, the assured may maintain an action against the broker for money had & received; though the acceptance was dishonoured, & the broker never received any money.—WILKINSON *v.* CLAY (1815), 6 Taunt. 110; 128 E. R. 974.

Annotation:—**Expld.** Atkins *v.* Owen (1836), 4 Ad. & El. 819.

767. —— Authority to settle claim against underwriters.]—Policies of insurance upon certain of pltfs.' ships were effected with defts. by a firm of insurance brokers on behalf of pltfs. Pltfs. subsequently authorised the brokers to settle their claim against defts. under these policies, & to receive payment in cash in accordance with the recognised custom. Instead of cash the brokers took a bill of exchange at 3 months in payment of a general account, including pltfs.' This bill they afterwards discounted, & it was eventually paid by defts. The brokers failed without having paid pltfs. In an action by pltfs. to recover the amount due to them from defts.:—*Held:* (1) taking the bill was not within the authority conferred upon the brokers by pltfs.; (2) it was contrary to the recognised business custom, & even when discounted it did not constitute a payment to pltfs.—THE NETHERHOLME, THE GLEN HOLME, & THE RYDAL HOLME (1895), 72 L. T. 79; 11 T. L. R. 224; 7 Asp. M. L. C. 558; 11 R. 777, C. A.

Master of ship—Authority to collect freight.]—*See* SHIPPING & NAVIGATION.

D. Authority to receive Payment by Set-off, Writing off Debts, or Settlement in Account.

768. Agent—Authority to receive debt—& pay thereout sum due to himself.]—If a principal, being indebted to his agent, authorise that agent generally to receive moneys due to him from his (the principal's) debtor, intending he should thereout pay himself his own debt, he authorises that agent, impliedly, to the extent of that debt, to receive payment in any way he may think fit, even by way of set-off as between the agent & debtor.

B. being indebted to C., his solr., instructed G., his debtor, to pay the balance due to him to C., & sums were written off by C. in account with G.:—*Held:* a good payment against B.—BARKER *v.* GREENWOOD, No. 769, *post.*

For full anns., *see* S. C. No. 769, *post.*

769. Agent receiving payment otherwise than in cash—Authority to receive payment—Onus of proof.]—A debtor who pays the amount of his debt to his creditor's agent must pay it in cash unless he can show the agent had authority to receive payment in any other manner. If he pays by a settlement in account, the onus is on him to show the debt due from the principal to the agent, & the specific circumstances in which the agent was appointed to receive the money.—BARKER *v.* GREENWOOD (1837), 2 Y. & C. Ex. 414; 6 L. J. Ex. Eq. 54; 1 Jur. 541.

Annotations:—**Apld.** Bridges *v.* Garrett (1869), L. R. 4 C. P. 580. **Consd.** Pearson *v.* Scott (1878), 9 Ch. D. 198. **Apld.** Coupé *v.* Collyer (1890), 62 L. T. 927. **Mentd.** Hanley *v.* Corsam (1847), 2 New Pract. Cas. 431; Muttyloll Seal *v.* Dent (1853), 5 Moo. Ind. App. 328; Sweeting *v.* Pearce (1859), 7 C. B. N. S. 449; *Re* Shanks, *Ex p.* Swimbanks (1879), 11 Ch. D. 525, C. A.

770. —— ——.]—If a creditor employs an agent to receive money of a debtor, & the agent, instead of receiving the money, writes off a debt due from himself to debtor, the latter is not thereby discharged.

Where C., employed by pltf. generally to obtain orders & to receive payment of a debt from deft., accepted as payment a cheque of his own, which deft. had previously cashed for his accommodation:—*Held:* as pltf. had not ratified C.'s act, deft. was not discharged.—UNDERWOOD *v.* NICHOLLS (1855), 17 C. B. 239; 25 L. J. C. P. 79; 26 L. T. O. S. 106; 4 W. R. 153; 139 E. R. 1062.

Annotation:—**Consd.** Catterall *v.* Hindle (1866), L. R. 1 C. P. 186.

771. —— Authority to sell estate & receive price.]—A purchaser being a creditor of the agent of the vendor of an estate, is not entitled, by agreement with the agent alone, to place the debt due to the agent to the debit of the principal on account of the purchase-money.

A. employed B. to sell his estate, & to receive the purchase-money. B. sold it to C. An account was afterwards settled between B. & C. whereby, after giving credit for moneys paid on account of the purchase, & a private debt of £550 due from B. to C., a small balance appeared due on account of the purchase-money, which balance C. then paid to B. A., in ignorance of the arrangements between B. & C., executed the conveyance, & signed a receipt for the whole purchase-money; these were handed over by B. to C.:—*Held:* (1) the arrangement for setting off B.'s private debt was invalid; (2) C. was still liable to A. for the £550.—YOUNG *v.* WHITE, WHITE *v.* YOUNG (1844), 7 Beav. 506; 13 L. J. Ch. 418; 3 L. T. O. S. 339; 8 Jur. 654; 49 E. R. 1162.

Annotation:—**Refd.** Wrout *v.* Dawes (1858), 25 Beav. 369.

772. —— Full powers to act for principal.]—Where a foreign merchant wrote to his English correspondent directing the latter to consider any consignment from him as the property of his son, then residing in England, so that the son might place & dispose of the father's money as if it were the son's own property, & stating that, as the son informed the father of everything, the consignor would not continue writing, but that whatever the son said for him was to be the same as if he had said it himself, & must guide the consignee:—*Held:* (1) the son was thus constituted not merely

PART V. SECT. 3, SUB-SECT. 13.—D.

768 i. *Agent—Authority to receive debt.*]—An authority given by a principal to his agent to receive money cannot be construed into an agreement not to receive money but to allow the debtor to write off so much as may be due from the agent to him. *Barnett* v. *Pentland*, 10 B. & C. 760, folld.—WYLIE *v.* JONES (1915), 32 W. L. R. 635; 9 W. W. R. 367.—**CAN.**

768 ii. —— *Authority to receive price.*]—Deft., being indebted to pltfs. for the purchase price of a certain lot of land & expenses went to the office of the co. appointed to receive the money. He there saw D., the secretary, who held the general power of one of pltfs., & upon D.'s suggestion an arrangement was made between them that D. should pay the co. the amount due upon the lot & that deft. should cancel a corresponding portion of a debt which D. owed him. Thereafter transfer of the lot, containing an acknowledgment that the purchase price had been paid, was passed to deft. D. failed to settle with the co., & deft. with knowledge of this fact took no proceedings against him & allowed him to leave the country without discharging the debt:—*Held:* (1) the arrangement between D. & deft. did not constitute a payment to pltfs.; (2) in all the circumstances deft. was not entitled to raise the defence that D. by virtue of the general power held by him had authority to enter into the arrangement as to payment.—HEYMAN & NAPIER *v.* ROUNTHWAITE, S. A. L. R. (1917), Appellate Div. 456.—**S. AF.**

an agent with full powers to act for his father, but the consignee was justified in setting off, with the son's concurrence, a debt due to the father against one due from the son; (2) although on one or two occasions the consignee had required a written authority from the son before so acting, neither this circumstance nor the terms of the letters rendered any writing necessary, but a verbal direction or subsequent adoption by the son was sufficient; (3) the consignee's firm having been changed by the death of a member of it, subsequently to the date of the letters, made no difference in these respects, the letters having imposed a duty on the consignee's house, which continued as long as the relation between pltf. & it, however it might be composed.—PARIENTE *v.* LUBBOCK (1856), 8 De G. M. & G. 5; 44 E. R. 290, L.JJ.

773. Agent acting for both parties—Authority from one to apply funds in his hands & from other to receive payment.]—The agent of vendors, who had authority to receive the purchase-money, had in his hands a sum belonging to the purchaser sufficient for that purpose & was directed by him to apply it in payment. The agent debited purchaser's account & credited the vendors' account with the amount, & he rendered to vendors an account, charging himself with that sum as received from purchaser:—*Held:* (1) this was not a valid payment to vendors; (2) they had still a lien on the estate for part of the money lost by the agent's bkpcy.; (3) the facts that vendors had executed the conveyance & signed a receipt, which remained in the hands of the common agent of vendors & purchaser, & that purchaser had been admitted to the copyhold estate & obtained possession, did not vary the case.—WROUT *v.* DAWES (1858), 25 Beav. 369; 27 L. J. Ch. 635; 31 L. T. O. S. 261; 4 Jur. N. S. 396; 53 E. R. 678.

Annotation:—**Distd.** Wall *v.* Cockerell (1860), 29 L. J. Ch. 816.

774. Broker—Authority to sell goods.]—A. having purchased goods of B. through a broker, paid the broker for them, partly by an advance on his general account with the broker before delivery of the goods, & partly by cash on a settlement of accounts after delivery. The broker did not pay over the money to B., & became bkpt. In an action by B. to recover from A. the price of the goods except so much as had been paid in cash:—*Held:* it was a question of fact for the jury whether payment to a broker in advance was a good payment as against the principal, depending on the usage of the trade.—CATTERALL *v.* HINDLE (1867), L. R. 2 C. P. 368, Ex. Ch.

775. —— Authority to sell shares according to custom.]—An alleged custom amongst stockbrokers that a member of the London Stock Exchange, who has sold shares on instructions of a country broker, acting for an undisclosed principal, is entitled to set off against the price of the shares a debt due to him from the country broker in respect of previous Stock Exchange transactions, is unreasonable, & will not bind the principal of the country broker unless he is proved to have known of the alleged custom, & agreed to be bound by it.—BLACKBURN *v.* MASON (1893), 68 L. T. 510; 9 T. L. R. 286; 37 Sol. Jo. 283; 4 R. 297, C. A.

Annotation:—**Refd.** Anderson *v.* Sutherland (1897), 13 T. L. R. 163.

776. —— ——.]—A London broker, employed by a country broker to sell stock which he knows, or ought as a reasonable man to know, belongs to a client of the country broker, cannot discharge himself from liability to such client for the proceeds of the sale by selling same in account with the country broker.—ANDERSON *v.* SUTHERLAND, CRAIG *v.* SUTHERLAND (1897), 13 T. L. R. 163; 41 Sol. Jo. 226; 2 Com. Cas. 65.

777. Broker for foreign principal—Authority to sell shares.]—C., living in Canada, sent through X., a country stockbroker in England, a power of attorney for sale of £1,000 Goschens standing in the name of C. to defts., the London agents of X., with instructions to sell. Defts. sold the stock for £970, with which (less commission) they credited X. in his general account with them. The account between X. & defts. was ultimately balanced by subsequent entries, including two bills drawn by X. & accepted & paid by defts., but no payment expressly on account of the sale of Consols. The fact of the sale of the stock was not discovered by C. for several months, when X. was insolvent; & no part of the proceeds of sale was received by C.:—*Held:* (1) defts. were not relieved either by the transactions between them & X., or by the fact that C. was a foreign principal, from liability; (2) judgment must be given for the proceeds of the stock with interest at 4 per cent.—CROSSLEY *v.* MAGNIAC, No. 780, *post.*

See, further, STOCK EXCHANGE.

Insurance broker—Authority to settle loss.]—*See* INSURANCE.

778. Solicitor—Instructed to sell shares.]—A person owing money to an agent, knowing him to be such, must pay in such a manner as to facilitate the money reaching the principal's hands, & cannot pay by a settlement of accounts between himself & the agent.

Pltfs., as exors., instructed S., a solr., to sell certain shares. S. employed deft., a stockbroker, with whom he had at the time a current account for differences upon private speculative transactions on the Stock Exchange. Deft. having sold the shares paid part of the proceeds to S., & by his directions placed the balance to credit of S. in the current account, which was afterwards settled by a payment made to deft. S. never paid the balance to pltfs., but absconded & was declared bkpt.:—*Held:* (1) in the circumstances deft. must be taken to have had notice that the shares were not the property of S.; (2) though S. had authority from pltfs. to receive the proceeds of sale, payment to him, by giving him credit in an account between him & deft., was not sufficient to discharge deft.; (3) deft. was liable for the balance.—PEARSON (PIERSON) *v.* SCOTT (1878), 9 Ch. D. 198; 47 L. J. Ch. 705; 38 L. T. 747; 26 W. R. 796.

Annotations:—**Refd.** Papé *v.* Westacott, [1894] 1 Q. B. 272, C. A.; The Netherholme, Glen Holme & Rydal Holme (1895), 72 L. T. 79, C. A.; Craig *v.* Sutherland (1897), 2 Com. Cas. 65; Walker *v.* Barker (1900), 16 T. L. R.

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773 i. *Agent acting for both parties—Authority from one to apply funds in his hands & from other to receive payment—Acting as bankers.*]—Where a co. acting as general business agents, & as bankers for its clients, is authorised to collect money due by one of its clients, A., to another, B., it is within scope of its authority, as agent for B., to receive the money by debiting the account of A. with the amount, at his request, & crediting the account of B.; & such entries amount to payment as between A. & B. *Pearson* v. *Scott* (1878), 9 Ch. D. 198, & that class of cases distd.—ELLIS *v.* BATGER (1898), 17 L. R. 65.—N.Z.

j. *Commission agent — Authority to sell goods.*]—A. consigned goods to commission agents for sale. The latter sold the goods to a customer who was cashier to certain creditors of the agents without disclosing the factorial capacity in which they acted. The commission agents became insolvent. The customer thereafter called on the agents, & tendered them a receipt, signed by himself as cashier for his employers, of so much of the debt due to them by the commission agents as equalled the sum he himself was due to the latter; they accepted the receipt, & on their side by entries in their books acknowledged payment of his debt. The cashier then debited himself in the books of his employers with the debt:—*Held:* A. could not on the bkpcy. of the agents recover from the person who purchased the goods.—SMITH *v.* ANDERSON, MCGREGOR & Co. (1847), 9 D. 702.—SCOT.

Sect. 3.—Implied authority: Sub-sect. 13, D. & E.; sub-sect. 14.]

393. **Mentd.** Blackburn *v.* Mason (1893), 4 R. 297, C. A.

779. —— Agent of both parties—Transfer of mortgage.]— Pltf. & defts. employed in the transfer of a mtge. the same firm of solrs., who were then in good credit. On Oct. 20, 1888, pltf. executed the transfer, which expressed that the money was paid, & handed the transfer & title deeds to the solrs., they undertaking either to return them or pay the money. Pltf. did not make any inquiry till Feb. 5, 1889, the solrs. telling him so much notice was required. On Feb. 22, the solrs. handed over the deeds & transfer to defts. On Mar. 15, the solrs. filed their petition in bkpcy. Defts. never paid the money in cash to the solrs., but they set off in their books part of a sum owed by them to defts. In an action by pltf. against defts., seeking for payment of the money which was the consideration of transfer, or to have his mtge. & other deeds back again:—*Held:* (1) defts. ought to have paid the solrs. in cash & were not entitled to set off a debt due to them from the solrs.; (2) there had been no negligence on pltf.'s part: (3) the deed was an escrow until defts. had paid the money to the solrs. in cash.—COUPE *v.* COLLYER (1890), 62 L. T. 927.

Annotation:—**Distd.** London Freehold & Leasehold Property Co. *v.* Suffield, [1897] 2 Ch. 608, C. A.

780. Stockbroker] — Pltf., who lived abroad, being owner of a sum of Consols, gave to defts., a firm of stockbrokers in London, a power of attorney appointing one of defts. his attorney to sell the Consols. The power of attorney was sent originally to pltf.'s brother in England, & by him to C., a country stockbroker. C. sent it to defts., who were his London agents. Defts. sold the stock & credited C. with it in his account with them, & the sum went in reduction of sums due to them by him, or sums paid to C. by them. C. became bkpt., & pltf. sued defts. for proceeds of sale of the Consols, less commission:—*Held:* (1) defts. liable to refund the money to pltf., as the crediting it in their account with their country client C. was not a payment to pltf.; (2) though the power of attorney to sell came to them through C., defts. not entitled to treat pltf. as a foreign principal, or so to act as if C. only were their principal.—CROSSLEY *v.* MAGNIAC, [1893] 1 Ch. 594; 67 L. T. 798; 41 W. R. 598; 9 T. L. R. 126; 3 R. 202.

E. Authority to receive payment in other manners.

781. Agent receiving payment in other goods—Authority to receive payment.]—An agent authorised to receive payment must do so in cash; he has no authority to do so in other goods.—HOWARD *v.* CHAPMAN (1831), 4 C. & P. 508.

782. Agent receiving payment by dividend warrant—Power of attorney.]—A power of attorney to receive & give receipts for all dividends due or to become due upon stock standing in the name of pltf. in the books of the Bank of England does not authorise the attorney to receive payment otherwise than in money or in some usual manner.

Where the attorney received in payment of dividends due a dividend warrant, & it did not appear either by plea or by stat. that payment by dividend warrant was a usual manner of payment:—*Held:* the payment was not a good payment.—PARTRIDGE *v.* BANK OF ENGLAND (1846), 9 Q. B. 396; 15 L. J. Q. B. 395; 8 L. T. O. S. 195; 10 Jur. 1031; 115 E. R. 1324, Ex. Ch.

Annotations:—**Expld.** Graves *v.* Legg (1857), 5 W. R. 597, Ex. Ch. **Consd. & Expld.** Crouch *v.* Crédit Foncier of England (1873), L. R. 8 Q. B. 374; Goodwin *v.* Robarts (1875), L. R. 10 Exch. 337.

783. Agent receiving payment subject to condition—Employed to collect bill from acceptor.]—Where an agent is employed by the holder of a bill to receive payment from the acceptor, & receives payment from him clogged with a condition without assent to which the holder is not entitled to retain the money paid, the agent is not entitled to treat such conditional payment as if it were an absolute payment, & to cancel the bill as paid before he has received the assent to the condition.

The agent of a bank offered to try to obtain payment of a bill which had been protested for non-payment, & the holders accepted the offer. The acceptors offered to pay the bill & the protest charges on condition they should not be called upon to pay interest & expenses. The bank's agent communicated this condition to the holders, & without waiting for authority took payment of the bill & protest charges, marked the bill paid & delivered it to the acceptors, who deleted their names thereon. The holders intimated their refusal to agree to the conditions on which payment had been made, refused to accept the sum tendered to them by the agent of the bank, & received back the bill cancelled. They raised an action against the acceptors for the amount of the bill, with interest, & for expenses of the action, & obtained a decree, but the acceptors became bkpt. The holders thereupon raised an action against the bank concluding for the amount of the bill, with interest, & for expenses of their action against the acceptors:—*Held:* the bank was liable, but entitled to assignment of the rights of holders against drawers of the bill.—BANK OF SCOTLAND *v.* DOMINION BANK, TORONTO, [1891] A. C. 592, H. L.

784. Factor receiving payment before due date—Custom.]—By custom in the corn market, a buyer may pay the factor upon discount, within the two months which constitute the ordinary time of payment, either for his own accommodation or that of the factor, & where a factor stopped payment after he had received the money for corn sold, but before the expiration of the two months:—*Held:* the principal could not sue the buyer, but must look to the factor.—HEISCH *v.* CARRINGTON (1835), 11 Ad. & El. 555; 1 Har. & W. 306; 113 E. R. 526.

SUB-SECT. 14.—AUTHORITY TO MAKE PAYMENT.

785. Agent—Instructions to pay "for our account."]—A. & Co., of Liverpool, employed R. & Co., as their bankers there; R. & Co. kept an account in London with J. & L. A. & Co. had no account with J. & L. A. & Co. directed their agents in London to pay moneys for "our account"

PART V. SECT. 3, SUB-SECT. 13.—E.

781 l. *Agent receiving payment in other goods & in form of a lease—Authority to sell.*]—MCLAUGHLIN CARRIAGE CO. *v.* PETTIPAS, MCLAUGHLIN CARRIAGE CO. *v.* HAVERSTOCK, 20 C. L. T. Occ. N. 137.—**CAN.**

k. *Agent contracting to receive payment in kind—Authority to take orders.*]—An agent charged with taking orders for the business of his employer has not the right to make conditions as to payment, *e.g.*, to stipulate that for such payment he will board with purchaser.—MARCOTTE *v.* GUILBAULT (1889), 12 L. N. 267,—**CAN.**

l. *Agent receiving payment otherwise than in cash—Authority to receive payment.*]—An agent instructed to receive payment for his principal cannot as a general rule accept anything but money.—FRAZER *v.* GORE DISTRICT MUTUAL FIRE INSURANCE CO. (1883), 2 O. R. 416.—**CAN.**

m. —— —— .]—An agent authorised to collect a debt can receive it in money only.—PAISLEY *v.* BANNATYNE (1887), 4 M. R. 255.—**CAN.**

PART V. SECT. 3, SUB-SECT. 14.

n. *Agent—Authority to buy—Payment made to obtain delivery.*]—JOHN-

at the house of J. & L. As A. & Co. had no account of their own with J. & L., but through the medium of R. & Co., of Liverpool, & as their agents had been in the habit of paying moneys of A. & Co. at the house of the London bankers of R. & Co. :—*Held :* the direction of A. & Co. to their agents to pay for "our account" was sufficiently complied with by a payment made to the account of R. & Co., as the agents had been in the habit of doing.—BREED *v.* GREEN (1816), Holt, N. P. 204.

786. —— Instructions to offer part of debt for whole.]—Deft.'s agent had instructions to offer claimant part of the debt in discharge of the whole ; claimant refusing to take the money on those terms, the agent paid it in part discharge :—*Held :* this was not a part payment by deft. to take the case out of the operation of Stat. Limitations, as it was outside the agent's authority.—LINSELL (LINLEY) *v.* BONSOR (1835), 2 Bing. N. C. 241 ; 132 E. R. 95.

787. Partner—Carrying on partnership business after dissolution.]—W. & B., partners, were employed by X. as his solrs. & general agents to receive moneys for him from time to time & apply them according to his directions. By a dissolution deed of June 1, 1866, it was agreed that W. should retire from the firm, & the business should belong exclusively to B. ; & B. covenanted to pay out of the partnership assets, or out of his own moneys, all debts due from the partnership, & also to pay W. a moiety of the profits made by B. between June 1 & Dec. 31, 1866. B. thereupon continued to act alone as X.'s solr. & agent from June 1, 1866, to X.'s death in 1870, & W. shortly after the date of the dissolution deed advanced various sums to B. to enable him to pay the partnership debts. At the date of the deed a considerable sum was due to X. from the partnership, & in reduction of the debt B. on July 20, 1866, gave X. a cheque drawn in his favour by B. for £300, which was paid on the following day out of moneys standing to B.'s credit at his banker's, though B. was at that time in embarrassed circumstances. A bill was filed on July 20, 1872, by X.'s residuary legatee, to compel W. to pay the balance of the debt :—*Held :* (1) the debt was barred by Stat. Limitations & Mercantile Law Amendment Act, 1856 (c. 97), s. 14 ; (2) there was no evidence that B. was acting as W.'s agent in paying the £300 ; (3) the bill must be dismissed.—WATSON *v.* WOODMAN (1875), L. R. 20 Eq. 721 ; 45 L. J. Ch. 57 ; 24 W. R. 47.

Annotations :—**Expld. & Distd.** *Re* Tucker, Tucker *v.* Tucker, [1894] 1 Ch. 724. **Distd.** *Re* Tucker, Tucker *v.* Tucker, [1894] 3 Ch. 429, C. A. **Expld. & Distd.** North American Land & Timber Co. *v.* Watkins, [1904] 1 Ch. 242. **Refd.** Friend *v.* Young, [1897] 2 Ch. 421.

788. —— Authority to apply remittances for specific purpose.]—E., carrying on business on his own account in America, & being also a partner in the firm of T. & Co. in England, drew bills on T. & Co., which he employed T. & B., another American firm, to sell for him, undertaking to provide T. & Co. with remittances to meet them at maturity. T. & B., in accordance with their usual course of dealing with E., indorsed the bills & sold them, giving to E. bills on their agent in England for the amount. E., being on the eve of insolvency, sent the bills so received from T. & B. to the English firm of T. & Co., with instructions to accept the bills drawn by himself & to hold the remittance for the purpose of meeting payment. On receipt of the remittance T & Co. accepted the bills drawn by E., & disregarding instructions, handed the bills of T. & B. to L., in accordance with a previous promise made to him, in order to enable him to meet some liabilities incurred by him on behalf of T. & Co. :—*Held :* (1) these bills were specifically appropriated by E. to meeting the bills drawn by him ; (2) T. & Co. had received the remittances as agents of E., who had remitted them in a character distinct from his partnership in the firm of T. & Co. ; (3) T. & Co. had no authority to apply the remittances to any other purpose than that directed ; (4) L., who was held on the evidence to have had notice of the specific appropriation, was bound to account to T. & B. for the proceeds ; (5) the above transaction did not amount to a voluntary preference by E. in favour of T. & B.—THAYER *v.* LISTER (1861), 30 L. J. Ch. 427 ; 4 L. T. 50 ; 9 W. R. 360.

Annotation :—**Refd.** Miller *v.* Barlow (1871), 14 Moo. Ind. App. 209.

789. Agent for maker of promissory note—Instructions to pay both principal & interest.]—In an action by the indorsee's exor. against the maker of a promissory note pltf., in answer to a plea of Stat. Limitations, proved payment of interest by deft.'s agent within six years ; deft. swore the agent had received from him both principal & interest to be paid to testator, & contended that the agent had no authority to pay the interest only, & that the unauthorised payment was no evidence of a new promise by deft. :—*Held :* (1) the agent was not the less authorised to pay the interest because he was authorised also to pay the principal ; (2) the agent paid the interest *quâ* interest ; (3) pltf. was entitled to recover.—HALL *v.* THORNTON (1852), 19 L. T. O. S. 184.

790. —— Discounting the promissory note.]—Deft. in order to obtain an advance of money gave a promissory note to H., a customer of pltfs., bankers. H. indorsed the note to pltfs. on obtaining the money, & they debited him with the amount. Deft. was debited with the amount by H., who had paid interest on the note to pltfs. within six years. Shortly after the loan was made the money was repaid H., as appeared in an account given by H. to deft., but H. neglected to redeem the note :—*Held :* (1) the mere discounting of a bill gave no authority to pay interest ; (2) after the loan was repaid any authority to pay was revoked ; (3) the action being brought more than six years afterwards, the payments by H. did not take the note out of the Act as against deft., H. not being his agent for that purpose.—HARDING *v.* EDGECUMBE (1859), 28 L. J. Ex. 313.

791. Agent repaying mortgage—Authority to collect rents & make payments.]—Pltf. at request of M., her solr., lent to deft. £200 on security of his bond. M. was also deft.'s solr., & was accustomed to receive his rents, & make payments on his account. Pltf. applied to M. for payment of the bond. M., who was then indebted to deft., borrowed the amount from a bank, with which he deposited the bond as a security, & with the money so borrowed paid the bond. Deft. had no knowledge of this transaction. M. afterwards died insolvent, & the bank sued deft. on the bond in pltf.'s name :—*Held :* there was no payment of the bond by deft.

The bond was not discharged, since payment was not made by the obligor or any person authorised by him (BRAMWELL, B.).—LUCAS *v.* WILKINSON (1856), 1 H. & N. 420 ; 26 L. J. Ex. 13 ; 5 W. R. 197 ; 156 E. R. 1265.

792. Agent to receive rents—Instructions to repay party in advance.]—Deft., being agent to receive rents for A., undertook, upon A. giving him autho-

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STON *v.* CANADIAN KLONDYKE MINING Co. (1911), 19 W. L. R. 60.—**CAN.**

o. —— Authority to pay off mortgages—Agent applying balance to pay other debts.]—Where a notary receives part of the purchase price of land & proceeds to pay off certain mtges. affecting it, &, with the balance of the moneys, but without express authorisation therefor, pays other debts of the seller, he will be held to the reimbursement of such other debts for exceeding his powers.—MALO *v.* ARCHAMBAULT (1917), 52 Que. S. C 363.—**CAN.**

Sect. 3.—Implied authority: Sub-sects. 14 & 15.]

rity to do so, to repay pltf., out of the first money received on A.'s account, anything pltf. might be pleased to advance to A. A. gave deft. this authority: "Please to pay (pltf.), the sum of £20 by four instalments, namely, £5 each quarter, from my estate, commencing from Sept. 29, 1852, until Sept., 1853; & should any money be owing by me to her after that time, please to pay same way as above":—*Held:* the authority was not confined to payment of the £20, but authorised the payment of further advances made by pltf. to A.—HORLOR *v.* CARPENTER (1857), 3 C. B. N. S. 172; 27 L. J. C. P. 1; 140 E. R. 705.

793. Agent to sell securities & reinvest—Possession of proceeds.]—A person who takes money from another in discharge of a debt is not bound to inquire how the money was acquired, & is entitled to retain it in discharge of the debt. Nor is the knowledge that the money has been received, by the person paying it, on account of other persons, sufficient of itself to prevent payment from being good in discharge of the debt. When a broker or other agent intrusted with possession & apparent ownership of money pays it away in the ordinary course of his business for good consideration, the transaction, although fraudulent as between the agent & his employer, will bind the latter, unless he can show that the recipient of the money did not act in good faith.

A broker was instructed by trustees to sell shares & reinvest proceeds in the names of the trustees. Instead, he paid the money into his own account with resp. bank, where his account was largely overdrawn. The bank knew the money was the proceeds of the sale of shares, but did not know & had made no inquiry whether the money belonged to the broker or was only in his hands as agent:—*Held:* the bank were entitled to apply the money in satisfaction of the broker's overdraft.—THOMSON *v.* CLYDESDALE BANK, LTD., [1893] A. C. 282; 62 L. J. P. C. 91; 69 L. T. 156; 1 R. 255, H. L.

Annotations:—**Apld.** *Re* Sangster, Green *v.* Mockett (1894), 10 T. L. R. 184. **Refd.** Rainford *v.* Keith & Blackman, [1905] 2 Ch. 147, C. A.; Hooper *v.* Herts (1906), 94 L. T 324, C. A. **Mentd.** Bank of New South Wales *v.* Goulburn Valley Butter Co., [1902] A. C. 543, P. C.

794. ——— ———.]—A person who had overdrawn his account at a bank paid in sums of money representing the proceeds of shares belonging to his brother, who was abroad. This money was paid in with the object of its being kept at the bank till it should be reinvested, but it was not paid to a separate account:—*Held:* though the bank knew the money did not belong to their customer, they were entitled to assume that his brother had authorised him to pay it into his own account.—*Re* SANGSTER, GREEN *v.* MOCKETT (1894), 10 T. L. R. 184.

795. Agent for two parties—Authority as such—set-off.]—In general, an agent is not warranted in paying a debt due from his principal without previous authority, or subsequent assent. But where a person fills the character of agent to two parties, & receives from one a sum on account of the other, which sum he carries to the account:—*Semble:* he may make any deductions afterwards from that sum which the person who paid it would have had a right to make in the form of set-off.—WEMYS *v.* GREENWOOD, COX & HAMMERSLEY (1827), 5 L. J. O. S. K. B. 257.

796. Bankers repaying debenture.]—Where a correspondence as to the conversion of a ry. debenture payable in London had been carried on between the owner, pltf., & his brother, a clerk in the office of a stockbroker, in the stockbroker's name, & the debenture had been remitted by pltf. to his brother to get it cashed &, falling into the hands of his employer, the stockbroker, was by him presented to defts., bankers in Liverpool, who cashed it (less the discount) & were sued by pltf. for the amount, the stockbroker having failed:—*Held:* it was a question of fact for the jury whether defts. were authorised to cash it.—CROXON *v.* MOSS (1859-1861), 2 F. & F. 539; 4 L. T. 515; 7 Jur. N. S. 194.

797. Bank cashier—General authority—Payment on forged order.]—A cashier of a bank paid the contents of a deposit receipt on a forged order:—*Held:* as the cashier had general authority to pay away moneys of the bank on orders believed to be genuine, this payment was within such authority.—R. *v.* PRINCE (1868), L. R. 1 C. C. R. 150; 38 L. J. M. C. 8; 19 L. T. 364; 33 J. P. 21; 17 W. R. 179; 11 Cox, C. C. 193.

Annotations:—**Distd.** R. *v.* Cooke (1871), 40 L. J. M. C. 68, C. C. R.; R. *v.* Middleton (1873), L. R. 2 C. C. R. 38.

See, further, BANKERS & BANKING.

798. Betting agent—Power to bet in own name.]—The employment of an agent to make a bet in his own name on behalf of his principal implies an authority to pay the bet if lost, & on the making of the bet that authority becomes irrevocable.—READ *v.* ANDERSON (1884), 13 Q. B. D. 779; 53 L. J. Q. B. 532; 51 L. T. 55; 49 J. P. 4; 32 W. R. 950, C. A.

Annotations:—**Folld.** Seymour *v.* Bridge (1885), 14 Q. B. D. 460. **Distd.** Perry *v.* Barnett (1885), 14 Q. B. D. 467. **Expld.** Bridge *v.* Savage (1885), 15 Q. B. D. 363. The decision in the case of *Read* v. *Anderson* is founded on this, that the contract between the principal & the agent who is employed by him to make bets for him is not affected by Gaming Act, 1845 (c. 109), & is therefore valid (BRETT, M.R.); Thomas *v.* Hawkins (1889), 5 T. L. R. 551; The Vindobala (1889), 37 W. R. 409, C. A. **Consd. & Dbtd.** Cohen *v.* Kittell (1889), 22 Q. B. D. 680. **Distd.** Coates *v.* Pacey (1892), 8 T. L. R. 474, C. A. **Expld.** Knight *v.* Lee (1892), 5 R. 54. **Consd. & Dbtd.** Tatam *v.* Reeve (1892), 57 J. P. 118. **Consd. & Expld.** Harvey *v.* Hart (1894), 38 Sol. Jo. 418; Burge *v.* Ashley & Smith, [1900] 1 Q. B. 744, C. A. **Expld.** Davis *v.* Stoddart (1902), 18 T. L. R. 260. **Consd. & Expld.** Lennox *v.* Stoddart, Davis *v.* Stoddart, [1902] 2 K. B. 21, C. A. In consequence of the case of *Read* v. *Anderson* & in order to meet the decision in that case the legislature passed the enactment contained in s. 1 of Gaming Act, 1892 (c. 9) (MATHEW, L.J.). **Distd.** Frith *v.* Frith, [1906] A. C. 254, P. C. **Refd.** Leigh *v.* Dickeson (1884), 15 Q. B. D. 60, C. A.; North *v.* Walthamstow U. D. C. (1898), 62 J. P. 836; Renton *v.* King (1905), 49 Sol. Jo. 552.

See, further, GAMING & WAGERING, & *see, now,* GAMING ACT, 1892 (c. 9).

799. Consignee for sale abroad—Custom.]—A cargo was consigned to a foreign merchant for sale; the owner drew a bill on the merchant, who accepted it & sold the cargo, & the merchant subsequently dishonoured the acceptance & suspended payment:—*Held:* the goods were consigned by the owner subject, according to the evidence, to a usage that foreign merchants, where bills were drawn on them against consignments, paid the proceeds of such consignments to their own account with their bankers, & credited their correspondents in current account with the proceeds, & they did not apply the proceeds specifically in meeting the drafts drawn against the shipments.—SPARTALI *v.* CRÉDIT LYONNAIS (1885), 2 T. L. R. 178, C. A.

800. Solicitor—Acting for both parties.]—S., a client of N., a solr., in 1863 mtged. property to A., also a client of N. N. paid interest on the mtge. & charged S. with it in account till 1866. After this N. went on paying interest to A., who believed that it came from S., but it was not shown that N. had ever acted as solr. to S. after 1866, nor was there anything showing that N. was authorised to make the payments as agent for S.:—*Held:* the payments of interest after 1866 did not take the case out of Stat. Limitations.—NEWBOULD *v.* SMITH (1886), 33 Ch. D. 127; 55 L. J. Ch. 778; 55 L. T. 194; 34 W. R. 690, C. A.; *affd.* on another point (1889), 14 App. Cas. 423, H. L.

801. Postal clerk—Power to pay specific sum.]—Prisoner was a depositor in the Post Office Savings

Bank, in which 11*s.* stood to his credit. He gave notice in the ordinary form to withdraw 10*s.*, stating in his notice the number of his depositor's book & the amount to be withdrawn. A warrant for 10*s.* was duly issued to prisoner, & a letter of advice was duly sent to the post office at N. to pay him 10*s.* He went to that office, & handed his depositor's book & the warrant to the clerk, who, instead of referring to the proper letter of advice for 10*s.*, referred by mistake to another letter of advice for £8 16*s.* 10*d.*, & placed the latter amount upon the counter. The clerk entered the amount paid, £8 16*s.* 10*d.*, in prisoner's deposit book & stamped it. Prisoner took up the money & went away, having at the moment of taking it up an *animus furandi*, & knowing the money to be the money of the Postmaster-General:—*Held:* prisoner was guilty of larceny on the grounds, (1) even assuming the clerk to have the same authority to part with the possession of & property in the money which the Postmaster-General would have had, the mere delivery under a mistake, though with the intention of passing the property, did not pass the property; & the possession being obtained *animo furandi*, there was both a taking & a stealing within the definition of larceny; (2) the clerk had only a limited authority to part with the money to the person named in the letter of advice, & no property passed to prisoner, & the possession was obtained *animo furandi*.—R. *v.* MIDDLETON (1873), L. R. 2 C. C. R. 38; 42 L. J. M. C. 73; 28 L. T. 777; 12 Cox, C. C. 260.

Receiver.]—*See* RECEIVERS.

802. Regimental agent—Payment forbidden by officer's executors.]—By the articles of war, & by several royal warrants, certain regulations were made with respect to payment & assignment of allowance to colonels of regiments, called off-reckonings. A colonel died in Feb., 1822, & a few days after a successor was appointed; but no inspection or return of the state of regimental appointments or accoutrements was made until Jan., 1823, when they were reported serviceable, except in event of the regiment being ordered on a foreign station. In Apr. & Sept. of the same year other inspections & returns were made, by which it appeared that numerous articles were unfit for service, & the agents of the late colonel (who had also received a power from his exors. to assign the off-reckonings, which they had done, to two of their clerks), contrary to the direction of his exors., but in conformity with the decision of the consolidated board of general officers, paid for articles supplied to make up the deficiency:—*Held:* such agents might set off this payment against the off-reckonings, but not against the private account of testator.—WEMYS *v.* GREENWOOD, COX & HAMMERSLEY, No. 795, *ante*.

SUB-SECT. 15.—AUTHORITY TO SELL.

803. Agent—Intrusted with goods for sale.]—A person intrusted with goods for sale must sell them for ready money; he cannot give credit or take a bill in payment: in cases of authorities given to one to sell any thing, as a factor, in due execution of this authority, he ought presently upon sale thereof to have & receive *quid pro quo*, otherwise he doth not well perform the authority thus given to him, neither ought he upon sale thereof to give the vendee any further time, or day of payment, but as he delivers the one, so he ought then presently, at the same time, to receive the money for the same for which it was sold (*per* CUR.).—BARTON *v.* SADOCK (1611), 1 Bulst. 103; 80 E. R. 800; *sub nom.* SADOCK *v.* BURTON (1610), Yelv. 202; 80 E. R. 133.

Annotations:—**Folld.** Anon. (1676), 2 Mod. Rep. 100. **Mentd.** *Re* Beverley Comrs., *Ex p.* Fitzgerald, *Ex p.* Flint (1869), 10 B. & S. 813.

804. —— Implied authority from circumstances.]—An agent cannot sell the goods of his principal without authority for that purpose; but an authority to sell may be implied from circumstances.—DYER *v.* PEARSON, No. 807, *post*.

For full anns., *see* S. C. No. 807, *post*.

805. —— Similar acts on previous occasions.]—In an action against a ry. co. to recover a piece of superfluous land which the co. was bound to dispose of within 10 years after it had been acquired, pltf. proposed to show that, 13 years after that time, the co. put the land up for sale by public auction as superfluous land. In order to prove this, the auctioneer was called as a witness, & deposed he had received his instructions for the sale from a person who had acted as its solr. on former sales of land:—*Held:* the fact that the solr. had acted in former sales did not raise an inference that he had authority to bind the co. in this instance.—MOODY *v.* LONDON, BRIGHTON & SOUTH COAST RY. CO. (1861), 1 B. & S. 290; 31 L. J. Q. B. 54; 9 W. R. 780; 121 E. R. 722.

806. Agent to exhibit—With view to sale.]—Where a horse was left with a servant to show with a view to a sale, & the servant was allowed to appear as having authority to sell, though he had no such authority in fact:—*Held:* a sale by the servant was valid.—STEWART *v.* BEAUMONT (1866), 4 F. & F. 1034.

807. Agent to import goods—Retention of bill of lading.]—Where a London agent was employed by his principal in the country to import goods from abroad, & send them to their destination; & by the bill of lading the goods were deliverable to order or assigns, & indorsed in blank by the shipper, & the agent, after being allowed to retain possession of the bill of lading for five months, sold the goods without any authority for that purpose:—*Held:* it was a question for the jury whether the principal had not by his conduct enabled his agent to hold himself out to the world as a person having authority to sell, & thereby to convey a title to the vendee.—DYER *v.* PEARSON (1824), 3 B. & C. 38; 4 Dow. & Ry. K. B. 648; 107 E. R. 648.

Annotations:—**Distd.** White *v.* Garden (1851), 10 C. B. 919; Kingsford *v.* Merry (1856), 11 Exch. 577. **Consd.** Cole *v.* North Western Bank (1875), L. R. 10 C. P. 354. The provisions of Factors Act, 1825 (c. 94), s. 2, solved one of the doubts

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PART V. SECT. 3, SUB-SECT. 15.

803 i. *Agent—Authority to find purchaser.*]—A. entered into a contract with B., the agent of C., for the purchase of C.'s land. A. & C. agreed as to terms, but the contract was signed by A. & B. in the absence of C., who had not authorised B. to sign it. No copy of the contract was given to C., & it did not embody all the terms agreed on:—*Held:* B. was not C.'s agent to sign, but only to find a purchaser.—O'BRIEN *v.* GOODSELL (1878), I. N. S. W. S. C. R. N. S. Eq. 6.—**AUS.**

803 ii. —— *Authority to sell—Sale of different kinds of goods for lump sum.*]—Pltf., wishing to equip a sawmill, made a contract with M. & Co., agents for defts. & for D. & Co. under separate & distinct authorities, for the supply of plant for a lump sum. The agreement was signed by M. & Co. as agents for defts. & D. & Co., who supplied part of the plant, & defts. supplied the rest of the plant. The plant supplied by defts. was defective, & pltf. sued defts.:—*Held:* M. & Co. had not authority, either express or implied to bind defts. by such contract as they had entered into, & the verdict for pltf. must be set aside.—CAMERON *v.* TATE (1888), 15 S. C. R. 622; 9 C. L. T. Occ. N. 19.—**CAN.**

803 iii. —— *Authority to carry on trading business—Sale of land.*]—A general agent employed to carry on a trading business has no authority to deal with immovable property by sale.—DOORGA CHURN *v.* KOONJBEHAREE PANDEY (1868), 3 Agra, 23.—**IND.**

803 iv. —— *Invested with title of Land Commissioner.*]—ELK LUMBER CO. *v.* CROW'S NEST PASS COAL CO. (1907), 12 B. C. R. 433 39 S. C. R. 169.—**CAN.**

Sect. 3.—Implied authority: Sub-sect. 15.]

expressed in *Dyer* v. *Pearson* by enacting that the possession of the documents of title might enable the person so possessed to deal with others as if he were the owner of the goods; it was confined, however, to the possession by persons intrusted with these documents of title. The provisions of s. 4 solve the second doubt in *Dyer* v. *Pearson* by declaring that, if the evidence should be such as to show that the person in possession of the goods was intrusted as an agent, a sale by him should bind the true owner (BLACKBURN, J.); Johnson v. Crédit Lyonnais Co., Johnson v. Blumenthal (1877), 3 C. P. D. 32, C. A. **Reid.** The Marie Joseph (1866), L. R. 1 P. C. 219; Henderson v. Williams, [1895] 1 Q. B. 521, C. A.; Farquharson v. King, [1902] A. C. 325.

808. Agent to sell—Express authority—Alleged custom.]—The appointment of a general agent for sale of goods implies an authority to sell according to the ordinary course of trade.

Where an agent sold timber of his principal at one of a number of sales, held at the same place & by the same person, on behalf of himself & other vendors, at which it was alleged to be the custom that purchasers should be liable for the purchase-money to holder of the sale only & not to the real vendor; & it was proved that the agent had himself sold goods on his own account in conformity with this alleged usage:—*Held:* the principal vendor was entitled to look for his purchase-money beyond the holder of the sales, to the real buyer of timber.—*Re* WILLIAMS, *Ex p.* HOWELL (1865), 12 L. T. 785, C. A.

809. —— —— Subject to conditions.]—Deft. instructed her solrs. to sell a house for £10,000, subject to the stipulations & conditions under which she had purchased same (which were very special). The solrs. employed a house agent, telling him that he was not to enter into any contract, for they (the solrs.) could only advise deft. to sell subject to conditions similar to those under which she had purchased. Pltf. having offered to purchase the house for £10,000, asked the house agent to accept the offer, which the house agent declined to do on the ground that he was not authorised, & any contract must be prepared by the solrs. After this the solrs. wrote to pltf. saying: "We have been instructed to proceed with the sale to you of these premises. The draft contract is being prepared, & will be forwarded to you for your approval in a few days":—*Held:* (1) in whatever sense (as to which there was some doubt) the words "proceed with the sale" might be construed with reference to the preceding circumstances, the intimation that a draft contract was being prepared was sufficient to show that by the word "sale" was meant no more than either "negotiations for a sale," or "a sale subject to the conditions"; (2) hitherto there had been no binding agreement between the parties; (3) as the solrs. of deft. had only authority to sell subject to conditions, deft. would not have been bound by a contract for sale free from such conditions had such a contract been entered into on her behalf.—CHINNOCK *v.* ELY (MARCHIONESS) (1865), 4 De G. J. & Sm. 638; 6 New Rep. 1; 12 L. T. 251; 29 J. P. 279; 11 Jur. N. S. 329; 13 W. R. 597; 46 E. R. 1066, C. A.

For full anns., *see* LANDLORD & TENANT.

810. —— —— —— As to mode of payment.]—BOORMAN *v.* BROWN (1842), 3 Q. B. 511; 2 Gal. & Dav. 793; 11 L. J. Ex. 437; 114 E. R. 603, Exch.; *affd. sub nom.* BROWN *v.* BOORMAN (1844), 11 Cl. & Fin. 1, H. L.

811. —— —— —— As to proprietorship of goods sold.]—A plea of set-off stated that pltfs. authorised G. W., trading as G. W. & Co., to sell the goods for the price of which the action was

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808 i. *Agent to sell—Express authority.*]—Where a principal gives authority in writing to an agent in general terms to sell certain land at a fixed price he will not be bound by any contract of sale signed by the agent unless it be a reasonable & proper contract, having regard to the nature of the property, the circumstances of the case, the practice of the market, & the views of the principal where they are known to the agent.

A. signed an authority to B. to sell land at £7 per acre. B. on same day signed a contract for sale to C. One of the conditions of this contract embodied Transfer of Law Act 1890, Table A, & fixed the time for completion at one month. All parties had notice that A. had only bought that day under similar conditions:—*Held:* this was not in the circumstances a reasonable contract, & not one which the agent was authorised to make.—MOORE *v.* NELSON (1903), 29 V. L. R. 387.—**AUS.**

808 ii. —— —— *Discretion of agent to sell.*]—In the absence of an agreement to the contrary an agent for sale has authority to sell in such manner & at such times as he thinks best.—*Re* M. (1909) 10 S. R. N. S. W. 175.— **AUS.**

808 iii. —— —— *To sell within limited time—Agent giving option.*]—Deft. instructed an agent to sell certain property within two weeks. No sale was effected within that time, but the agent gave an option, & before it expired the agent informed deft. that he had sold the property & that he would get his money within ten days, handing to him $15 which had been paid on the option. The balance was not paid within the ten days:—*Held:* the agent's authority was to sell within two weeks, & he exceeded his authority in giving the option. *Hamer* v. *Sharp* (1874), L. R. 19 Eq. 108; *Rosenbaum* v. *Belson*, [1900] 2 Ch. 267; *Godwin* v. *Brind* (1868), L. R. 5 C. P. 299; *Chadburn* v. *Moore* (1892), 61 L. J. Ch. 674; *Prior* v. *Moore* (1887), 3 T. L. R. 624; *Wild* v. *Watson* (1878), 1 L. R. Ir. 402; *Saunders* v. *Dence* (1885), 52 L. T. 644; *Holland* v. *King* (1848), 6 C. B. 727; *Friary Brewer* v. *Langdon*, [1899] 1 Ch. 86; *Dibbins* v. *Dibbins*, [1896] 2 Ch. 348; *Larkington* v. *Magee*, [1902] 2 K. B. 427; *Bateman* v. *Hunt*, [1904] 2 K. B. 530; *Meynell* v. *Surtee* (1854), 3 Sm. & G. 101, 117; *Boulton* v. *Jones* (1857), 2 H. & N. 564, cited.—CANADIAN PACIFIC RY. CO. *v.* ROSIN (1911), 18 O. W. R. 387; 2 O. W. N. 610.—**CAN.**

808 iv. —— —— *To sell certain quantity — Sale of less quantity — Buyer allowed to select.*]—An agent instructed to sell two hundred head of cattle at certain prices sold one hundred & thirty at the prices fixed, but allowed purchaser to select from the herd the cattle bought:—*Held:* the agent had authority so to sell.—STEPHENSON *v.* SHAND (1882), L. R. 1 S. C. 125.—**N.Z.**

809 i. —— —— *Subject to conditions.*]—SHAW & PERRAULT (1889), 33 L. C. J. 92, Q. B.; 17 L. R. 659, Q. B.—**CAN.**

809 ii. —— —— ——.]—He who is appointed an agent by a manufacturing co. to sell its products, & to whom the employer furnishes blank forms of sale, containing restrictive conditions, only enjoys limited powers. He cannot make a sale otherwise than within the conditions set forth in the blank forms. He cannot, without further instructions from the co., sell an excessive quantity of goods, nor under conditions foreign to the usual custom of trade. Sales made by him in these circumstances are not binding upon the co.—RONDEAU *v.* ROBITAILLE EUREKA CO. (1913), Q. R. 44 S. C. 91.—**CAN.**

810 i. —— —— —— *As to mode of payment.*]—An agent authorised to sell partly for cash & partly on credit is not warranted in selling wholly for cash; nor can an agent for sale of land sell conditionally on purchaser's solr. approving the title.—RONALD *v.* LALOR (1872), 3 V. R. 98.—**AUS.**

810 ii. —— —— —— ——.]—A vendor instructed his agent to sell his property for £10 per acre, half cash & the balance by bills for two or three years bearing interest at 5 per cent. per annum. The agent sold to a purchaser at the rate of £10 an acre, by a contract the conditions of which provided that purchaser should pay a deposit in cash of £50, & in one month a further sum of £407 1*s.* 3*d.*, & then give his acceptance for the residue in one amount of £457 1*s.* 3*d.* at thirty-six months with interest at the rate of 5 per cent. per annum added to such acceptance, & that purchaser might at any time during currency retire the acceptance, being allowed a rebate of interest at 5 per cent. per annum:—*Held:* the agent had not exceeded his authority.—DONALDSON *v.* NOBLE (1888), 14 V. L. R. 1021.—**AUS.**

810 iii. —— —— —— ——.]—An authority to sell on time with interest on deferred payments does not authorise the agent to sign an agreement of sale by which the purchaser gets the privilege of payment in advance.—GILMOUR *v.* SIMON, No. 833 vi., *post.*—**CAN.**

810 iv. —— —— —— ——.]—Pltf. employed W. as agent to carry on his business, & deft. purchased goods from W. under a special contract by which, he alleged, W. had agreed to sell to him, allowing him to credit half the price on an antecedent debt due by W. to him:—*Held:* C. S. C., c. 59, did not apply, & the jury should have been directed to find whether pltf. had permitted W. so to carry on the business as to allow him to make these special terms.—MCGUIRE *v.* SHAW (1865), 15 C. P. 310.—**CAN.**

brought as & for the proper goods of him, G. W., & that he so sold them; & that G. W. was indebted to deft., etc. The evidence was that pltfs. authorised G. W. to sell the goods as & for the goods of G. W. & Co., which firm consisted of G. W. & L. S.: —*Held:* this was a material variance.—ADDINGTON *v.* MAGAN (1851), 10 C. B. 576; 20 L. J. C. P. 82; 16 L. T. O. S. 487; 138 E. R. 228.

812. —— —— —— **As to manner of sale.**]—A husband & wife, having joint power to sell her estate, gave authority to an agent to sell by auction; he sold by private contract, for more than the price they required:—*Held:* (1) buyer not entitled to specific performance; (2) the husband's delivering his wife's compliments in a letter to the agent was not proof of her joining in giving authority to him.—DANIEL *v.* ADAMS (1764), Amb. 495; 27 E. R. 322.

813. —— —— —— ——.]—A., a solr. & one of three exors. & trustees for sale, acted professionally in the management of the personal estate, & also by the authority of his co-trustees conducted an attempted sale by auction of the real estate. B., another of the trustees, hearing that his son was in treaty for the purchase of the estate, wrote to A. to say he, B., would not take any interest either directly or indirectly in the matter. A., with the concurrence of the co-trustee, contracted to sell the estate by private contract to another person. On a bill filed by the purchaser to compel performance of this contract:—*Held:* (1) A. had not derived any general authority to sell by private contract, by reason of his employment as solr. to the trust estate or as agent to sell by public auction; (2) he had derived no special authority from B.'s letter to sell to any one but B.'s son. —BULTEEL *v.* ABINGER (LORD) (1842), 6 Jur. 410.

814. —— —— —— ——.]—An authority to a servant to sell in market overt is not to be construed as a continuing authority so as to justify a sale by him elsewhere.—METCALFE *v.* LUMSDEN (1844), 1 Car. & Kir. 309.

815. —— —— **Secret limitation—As to price.**]—A servant was sent with a horse to a fair with an express order from the master not to sell it under a certain sum; the servant notwithstanding sold it for less. In an action of trover against purchaser:—*Held:* the master was entitled to recover, for the servant was not his general agent.—ANON. (1792-3), cited 15 East, 407.

816. —— —— —— ——.]—If a horse dealer send his servant to market to sell a horse, & the servant sell on credit, though told to sell for cash, the dealer will be bound by it.—SLACK *v.* CREWE, No. 861, *post*.

817. Broker—Custom—Sale on credit.]—As stock is sold usually for ready money only, a broker employed to sell stock cannot sell it upon credit without special authority, although acting *bonâ fide* & with a view to his principal's benefit.—WILTSHIRE *v.* SIMS (1808), 1 Camp. 258.

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812 i. —— —— —— *As to manner of sale.*]—M., who had no authority to sell deft.'s real estate, was instructed by deft.'s solr. to divide the property into lots & sell at the best prices he could get. Before receiving a power of attorney which he had applied for to enable him to sell M. sold the property *en bloc* to pltf., part of the price only to be paid in cash, & a commission to go to an intermediary. Deft. refused to complete the sale:—*Held:* even if the instructions given to M. by deft.'s solr. constituted M. an agent for sale, the fact that M. had not complied with the request to divide the land into lots, & had given time for part of the price, & agreed to pay a commission, justified deft. in refusing to complete the sale.—AMYOT *v.* DAULNAIS (1898), Q. R. 15 S. C. 311.—**CAN.**

812 ii. —— —— —— *As to sale of specific lots.*]—MESSIER *v.* CHENERY (1914), 21 R. L. N. S. 73.—**CAN.**

812 iii. —— —— —— *Agent adding unauthorised condition.*]—On June 1 deft. telegraphed to B. & G., stock & station agents, that he had two hundred bullocks for sale at £4, average 700 lbs. fully. On July 5 B. & G. asked whether they could offer eight days for inspection. On July 7 D. went on behalf of pltf. to inspect. On July 12 deft. wired to B. & G. that they could offer his cattle at £4, clear of commission. On July 12 B. & G. signed on behalf of deft. a contract of sale to pltf. of the cattle at £4, to be delivered on deft.'s station in two drafts on July 26 & Aug. 11, to average 700 lbs.; and they further agreed that pltf. should have the first draft, & no other bullocks to be removed until his two hundred head were taken off. Deft. afterwards refused to deliver the cattle, alleging that he had none up to the weight:—*Held:* B. & G. had no authority from deft. to enter into the contract of July 12.—TUCK *v.* BROWN (1882), 3 N. S. W. 339.—**AUS.**

812 iv. —— —— —— *No restriction as to purchaser.*]—Deft. wrote to a real estate agent as follows: "I will sell ten acres of land (including the water lots), as also two & three-quarters acres of land belonging to J. adjoining, for $430 per acre, equal to $5,482.50, & on which sum I will allow you a commission of 2 per cent." The memorandum then specified the terms of sale. The agent entered into a written agreement with pltf. for the sale of the land on the terms mentioned. The agreement not being carried out, pltf. brought a suit for specific performance, setting out the two agreements:—*Held:* the authority given empowered the agent to sell on the prescribed terms without restriction as to purchaser.—HORNSBY *v.* JOHNSTONE, 3 N. S. D. 1.—**CAN.**

815 i. —— —— *Secret limitation.*]—A., B. & C. purchased property, the purchase being made in A.'s name only, who gave a declaration of trust to B. & C., but there was nothing in the agreement to show that any person other than A. had any interest in the property. B. was the agent of his co-owners for purposes of dealing with the property. P., a real estate agent, had the property for sale, & endeavoured to interest pltf. in it, & S., another estate agent, took part in the negotiations. Pltf. offered to purchase, provided the vendors would agree to re-purchase in two years' time. This offer was communicated to P., & then, at the request of P., S. discussed it with B., & the latter then informed S. that he had an interest in the property. A re-purchase agreement was drawn up, & places left for two signatures only, as C.'s interest had not been disclosed. A. then executed the agreement for sale, & also signed the re-purchase agreement, on the understanding that B. & also C. should sign as well. Neither B. nor C. ever signed the re-purchase agreement, & pltf., knowing nothing about C., & thinking B.'s signature perhaps unimportant, let the matter remain. At the end of two years, pltf. requested the re-purchase to be carried out, but A. refused on the ground that he only signed the re-purchase agreement on the understanding that B. & C. signed also, & further, that pltf. had knowledge of this, at least as far as B. was concerned:—*Held:* (1) B. was A.'s agent for carrying out the transaction, & was clothed with ostensible authority, & pltf. could not be affected by any private instructions given to B.; (2) A. could not plead the default of his own agent in not carrying out his instructions. *National Bolivian Navigation Co. v. Wilson*, 5 App. Cas. at p. 209; *Strickett v. Tomlinson*, 13 C. B. N. S. 663; *Beaufort v. Nedd*, 12 Cl. & Fin. 248, apld.—CLARK *v.* LATHAM (1915), 32 W. L. R. 549.—**CAN.**

815 ii. —— —— —— *As to price.*]—Deft. put a mob of sheep into the hands of a stock & station agent for sale, with instructions by telegram to accept five shillings a head, net cash payable in Sydney & droving expenses from a certain date, but the stock & station agent sold to pltf. for five shillings cash, saying nothing about the other terms:—*Held:* the stock & station agent was deft.'s general agent to sell the sheep, with power to bind him to any contract made in the ordinary scope of his business, & deft.'s instructions as to terms, which were private & did not come to pltf.'s knowledge, did not limit his general authority.—BOWMAN *v.* BACON (1897), 18 N. S. W. 12.—**AUS.**

815 iii. —— —— —— ——.] Resp. authorised S., a solr., to sell her property, & offered to sell at $585, but S. interpreted this as an offer to sell at $275:—*Held:* S. had no authority to contract to sell for less than $585. *Hesse v. Briant*, 6 De G. M. & G. 623, cited.—CLERGUE *v.* MURRAY (1902), 32 S. C. R. 450.—**CAN.**

815 iv. —— —— —— *As to minerals.*]—A railway co. having instructed its agent to sell land belonging to it, but to reserve the mineral rights, the agent contracted to sell without expressly reserving the minerals:—*Held:* purchaser was entitled to assume that "land" meant not merely the surface but also the minerals, & the co. was bound by the agent's contract.—HOBBS *v.* ESQUIMALT & NANAIMO RY. CO. (1898), 6 B. C. R. 228; 29 S. C. R. 453 (leave to appeal refused by P. C.). —**CAN.**

817 i. *Broker—Express authority—To sell on particular contract—Sale on different contract.*]—Deft., having barley in his elevator, employed A. & K., brokers, to sell same, giving them a sample. On June 8 A. & K. wrote deft.:

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818. ——— Question for jury.]—In an action against an agent by his employer for selling goods bought for his principal, a usage was allowed as a defence that, in case of default by the principal, the agent might (being personally liable on the purchase) sell on his account. The question should be put to witnesses proving such usage as follows: "Where there is a bargain by an agent for an unnamed principal, for the purchase of tallow, deliverable at a future day, & the principal fails before the time for delivery, is there a usage by which the agent has a right to close the transaction by reselling?"—LIENARD *v.* DRESSLAR (1862), 3 F. & F. 212.

819. —— General authority—Secret limitations.]—Where a broker is allowed by the principal to appear as having a general authority to sell, the principal is bound, notwithstanding the broker has exceeded private instructions in the particular case.

A. & Co., brokers, were in the habit of buying & paying for & of selling & receiving the value for sugars, on speculation, in their own names & upon their own judgment, for their principal, sometimes, when the market was low, under an unlimited authority as to quantity & price, at other times under special instructions to buy. They were guided from time to time by special instructions to sell, limited in respect of price, & advised from time to time by their principal as to the probable rise or fall of the market. They kept only a general account with their principal of the sums advanced to & received for him, without accounting separately for each particular lot purchased & resold:—*Held:* (1) the general authority of the brokers to sell so as to bind their principal in respect of the purchaser was to be collected from their general dealing, not merely from their private instructions as to the particular parcels of goods; (2) the principal was bound by a resale of a particular parcel of sugars before purchased & paid for in their own names, & lodged in their warehouse, though sold under the price directed by their principal, for whom they received the money, but afterwards failed.—WHITEHEAD *v.* TUCKETT (1812), 15 East, 400; 104 E. R. 896.

Annotations:—**Consd.** Cotman *v.* Orton (1840), 10 L. J. Ch. 18. **Expld.** Needl *v.* Beaufort, Beaufort *v.* Taylor (1841), 5 Jur. 1123. **Apprvd.** Beaufort *v.* Needl (1844-5), 12 Cl. & Fin. 248, H. L. **Apld.** Smith *v.* East India Co. (1847), 16 Sim. 76. **Reid.** Trueman *v.* Loder (1840), 11 Ad. & El. 589. **Mentd.** Ricketts *v.* Bennett (1847), 4 C. B. 686.

820. ——— ——— ———.]—No private instructions given to a broker can limit the general authority which, by employing him as his broker to sell on the Stock Exchange, the principal gives to the broker to sell according to the usage of the Stock Exchange (LORD CAIRNS, C.).—COLES *v.* BRISTOWE, No. 321, *ante*.

Annotations:—**Consd.** Maxted *v.* Paine (1871), L. R. 6 Exch. 132, Ex. Ch. **Reid.** Maxted *v.* Paine (1869), L. R. 4 Exch. 81, 203; *Re* Asiatic Banking Corpn., Royal Bank of India's Case (1869), 4 Ch. App. 252.
For full anns., *see* S. C. No. 321, *ante*.

821. ——— ——— Sale in own name.]—The character of a broker is materially different from that of a factor; & where a broker sold goods without disclosing the name of his principal:—*Held:* (1) the broker acted beyond the scope of his authority; (2) the buyer could not set off a debt due from the broker to him against the demand for the goods made by the principal.—BARING *v.* CORRIE (1818), 2 B. & Ald. 137; 106 E. R. 317.

Annotations:—**Apld.** Carr *v.* Hinchliffe (1825), 4 B. & C. 547; Drakeford *v.* Piercy (1866), 7 B. & C. 515. **Consd.** Fairlie *v.* Fenton (1870), L. R. 5 Exch. 169. The case of *Baring* v. *Corrie* shows the difference between the position of a broker & a factor, & that the broker has no right to sell in his own name (PIGOTT, B.). **Apld.** Pearson *v.* Scott (1878), 9 Ch. D. 198. **Apprvd.** Cooke *v.* Eshelby (1887), 12 App. Cas. 271. **Refd.** Warner *v.* M'Kay (1836), 2 Gall. 86; Milford *v.* Hughes (1846), 16 M. & W. 174; Fish *v.* Kempton (1849), 7 C. B. 687; Dresser *v.* Norwood (1863), 11 W. R. 624; Borries *v.* Imperial Ottoman Bank (1873), L. R. 9 C. P. 38; Montague *v.* Forwood, [1893] 2 Q. B. 350.

822. —— Goods warehoused in broker's name.]—Where a purchaser of hemp lying at wharfs in London had, at the time of purchase, the hemp transferred in the wharfinger's books into the name of the broker who effected the purchase for him, whose ordinary business it was to buy & sell hemp:—*Held:* (1) the broker had an implied authority to sell it; (2) his sale & receipt of the money bound his unknown principal; (3) the broker would have had a similar authority if the hemp had been transferred into the name of the principal or broker.—PICKERING *v.* BUSK, No. 315, *ante*.

Annotations:—**Consd.** Martini *v.* Coles (1813), 1 M. & S. 140. **Distd.** Shipley *v.* Kymer (1813), 1 M. & S. 484; Guichard *v.* Morgan (1819), 4 Moore, C. P. 36. **Apld.** Collen *v.* Gardner (1856), 21 Beav. 540. **Distd.** Brady *v.* Todd (1861), 9 C. B. N. S. 592. **Consd.** Cole *v.* North Western Bank (1875), L. R. 10 C. P. 354. The legislature by Factors Act, 1825 (c. 94), s. 4, intended to confirm the common law as laid down in *Pickering* v. *Busk*, but did not mean to extend it to all cases in which any person is intrusted with the custody of goods, though that person may in one sense be an agent for the intruster (BLACKBURN, J.). **Distd.** Johnson *v.* Crédit Lyonnais Co. (1877), 3 C. P. D. 32, C. A. **Refd.** Coleman *v.* Riches (1855), 16 C. B. 104.
For full anns., *see* S. C. No. 315, *ante*.

823. —— Possession of indicia of title—Secret limitation.]—Where an owner of property gives all the indicia of title to another person with intention he should deal with the property, the principles of agency apply; any limit which he has imposed on his agent's dealing cannot be enforced against an innocent purchaser or mtgee. from the agent, who has no notice of the limit. If the owner has not only transferred property to an agent or trustee, but has acknowledged that the transferee has paid full consideration for it, he is estopped from asserting his equitable title against a person to whom the transferee has disposed of the property for value. The statement in a transfer of mtge. made in a form prescribed by stat., that the mtge. is transferred in consideration of £ paid by A. to B., without any express receipt clause, is sufficient to create this estoppel.

R. delivered to a stockbroker a mtge. bond for £2,000 with instructions to sell it. The bond was one of a series issued by the Tyne Improvement Comrs. under a private Act which incorporated Comrs. Clauses Act, 1847 (c. 16). That Act required all transfers of mtges. to be registered. Induced by false representations of the broker, R. executed two deeds of transfer, by which the mtge. bond was transferred to the broker in two portions of £1,500 & £500 respectively paid by the broker to R. They were duly registered. The broker borrowed £1,000 from deft. W. & executed a formal sub-mtge. of the bond to him, producing the transfers as proof of title. This mtge. was not

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"We have put under offer, subject to your approval, your lot of barley, say 4,000 to 5,000 bushels, cash 50c. net to you in your elevator; answer to be given to-morrow, if accepted" (which was taken to mean the answer of the person having the offer). On June 9 deft. wrote a letter giving his approval, which was received on June 10, & on June 11 A. & K. made a contract for the sale of the barley to pltf., no counter-instructions having been received by them from deft. Pltf. had seen the letters of June 8 & 9 before the contract was signed:—*Held:* the authority of A. & K. was to sell on the terms mentioned on June 10, & deft. was not liable on the contract of June 11, which was for 50 cents per bushel free on cars.—FARRELL *v.* HUNT, 21 C. P. 117.—CAN.

registered. The broker had applied the money to his own use & absconded. An action was brought by R. for retransfer of the bond free from the mtge. to W.:—*Held:* the equitable title of R. was postponed to W.'s charge.—RIMMER *v.* WEBSTER, [1902] 2 Ch. 163; 71 L. J. Ch. 561; 86 L. T. 491; 50 W. R. 517; 18 T. L. R. 548.

Annotations:—**Distd.** Burgis *v.* Constantine, [1908] 2 K. B. 484, C. A. **Consd.** Truman *v.* Attenborough (1910), 103 L. T. 218. **Foll.** Fry *v.* Smellie, [1912] 3 K. B. 282, C. A. **Refd.** Weiner *v.* Gill, Weiner *v.* Smith, [1906] 2 K. B. 574, C. A.; Lloyd *v.* Grace, Smith, [1911] 2 K. B. 489; Lloyds Bank *v.* Swiss Bankverein, Union of London & Smiths Bank *v.* Swiss Bankverein (1912), 107 L. T. 309.

824. —— ——.]—The owner of goods lying at a warehouse was induced by the fraud of F. to instruct the warehouseman to transfer the goods to the order of F., & the goods were accordingly placed at F.'s disposal. F. then sold the goods to an innocent purchaser, who, before paying the price, obtained a statement from the warehouseman that he held the goods at the purchaser's order. On the discovery of F.'s fraud, the warehouseman refused to deliver the goods to the purchaser. In an action by the purchaser against the warehouseman:—*Held:* (1) the warehouseman, having attorned to the purchaser, was estopped from impeaching his title; (2) the refusal to deliver was a conversion; (3) the measure of damages was the market value of the goods at the date of the refusal; (4) the true owner, having enabled F. to hold himself out as the owner, could not set up his title against that of the purchaser (LORD HALSBURY); (5) it should be so held on principle, but *qu.* whether the facts were distinguishable from those of *Kingsford* v. *Merry* (1856), 1 H. & N. 503 (LINDLEY, L.J.).—HENDERSON & Co. *v.* WILLIAMS, [1895] 1 Q. B. 521; 64 L. J. Q. B. 308; 72 L. T. 98; 43 W. R. 274; 11 T. L. R. 148; 14 R. 375, C. A.

Annotations:—**Consd.** Farquharson *v.* King, [1901] 2 K. B. 697, C. A. I think that it is impossible in the face of various authorities on the subject to say that in every case in which the act of one of two innocent persons has enabled a third person to occasion loss the first-mentioned person must sustain the loss (VAUGHAN WILLIAMS, L.J.) **Refd.** Farquharson *v.* King, [1902] A. C. 325; Compania Naviera Vasconzada *v.* Churchill & Sim, [1906] 1 K. B. 237. **Mentd.** Herdman *v.* Wheeler, [1902] 1 K. B. 361.

825. —— **Previous dealings—Sale in own name.**]—A broker is authorised from a previous course of dealing between himself & his principal (on approval of a purchase by the latter) to make out a contract note in his own name without inserting that of his principal.—KEMBLE *v.* ATKINS (1817), 1 Moore, C. P. 6; 7 Taunt. 260; 129 E. R. 104.

Annotations:—**Expld. & Foll.** Wilson *v.* Hart (1817), 7 Taunt. 295. **Expld.** Armstrong *v.* Stokes (1872), L. R. 7 Q. B. 598.

826. Cashier—Holding out.]—A cashier employed by a picture engraver has no implied authority to sell engravings.—GRAVES *v.* MASTERS (1883), Cab. & El. 73.

827. Clerk—Holding out.]—In an action by an undisclosed principal for goods supplied to defts. by his clerk, A., it appeared A. was indebted to defts., & upon B., one of defts., applying to him for payment, he represented himself to be sole proprietor of a business called "The C. Wine Co.," & got him to take some wine & spirits in part payment of the debt; there was no evidence to show that defts. knew A. was only clerk to pltf. The judge's direction to the jury was, if they believed the C. Wine Co. was, at the time of the contract being entered into, carried on by pltf., he was entitled to recover, notwithstanding A. represented himself to be the C. Wine Co. & the principal in the contract:—*Held:* (1) the direction was wrong; (2) the proper question to be left to the jury was, whether pltf. allowed A. to hold himself out as owner of the C. Wine Co., so that a person dealing with him might suppose he was dealing with the principal.—RAMAZZOTTI (RAMOSOTTI) *v.* BOWRING (1859), 7 C. B. N. S. 851; 29 L. J. C. P. 30; 6 Jur. N. S. 172; 8 W. R. 114; 141 E. R. 1050.

Annotations:—**Distd.** Farquharson *v.* King (1901), 70 L. J. K. B. 985, C. A. **Consd.** Bevan *v.* National Bank, Bevan *v.* Capital & Counties Bank (1906), 23 T. L. R. 65. **Refd.** Drakeford *v.* Percy (1866), 7 B. & S. 515; Harper *v.* Marten (1895), 11 T. L. R. 368, C. A.

828. —— ——.]—Applts., timber merchants, warehoused with a dock co. the timber they imported & instructed the dock co. to accept all transfer or delivery orders signed by their clerk. The clerk had their authority to make sales limited as to price & quantity to their known customers. The clerk under an assumed name fraudulently sold applts.' timber to resps., who knew nothing of applts. or of the clerk under his real name & who bought & paid the clerk for the timber in good faith. The clerk carried out the sales by giving the dock co. orders for the transfer of the timber into his assumed name, & then in that name giving delivery orders to resps.:—*Held:* (1) applts., not having held out the clerk to resps. as their agent to sell to resps., were not estopped from denying the clerk's authority to sell; (2) the clerk having no title or apparent authority himself, could not give resps. any title; (3) applts. were entitled to recover from resps. the value of the timber.—FARQUHARSON BROTHERS & Co. *v.* KING & Co., [1902] A. C. 325; 71 L. J. K. B. 667; 86 L. T. 810; 51 W. R. 94; 18 T. L. R. 665; 46 Sol. Jo. 584, H. L.

Annotations:—**Refd.** Weiner *v.* Gill, Weiner *v.* Smith, [1906] 2 K. B. 574, C. A.; Truman *v.* Attenborough (1910), 103 L. T. 218; Macmillan *v.* London Joint Stock Bank, [1917] 2 K. B. 439, C. A.

829. Dealer—Transaction in usual course of business—Secret limitation.]—Where goods are bought from a person who carries on a business in which there is in the customary course authority to sell, *e.g.*, the business of a picture dealer, the buyer, provided he acts in good faith & without notice of any limitation of authority of the person selling, obtains a good title to the goods under Factors Act, 1889 (c. 45), s. 2, notwithstanding the goods were in fact intrusted to the person selling on condition no offer should be accepted until the real owner was referred to or unless a particular price was obtained.—TURNER *v.* SAMPSON (1911), 27 T. L. R. 200.

830. —— **Transaction not in usual course of business.**]—BIGGS *v.* EVANS, No. 485, *ante*.

For full anns., *see* S. C. No. 485, *ante*.

831. Estate & house agent—Authority to let & state selling price.]—A. gave his agents authority to

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831 i. *Estate & house agent—Holding out.*]—An estate agent who has adjacent lots of land put into his hands for sale without any written authority is not held out to the public as having a general power to sell at such prices as may be reasonable, & if he deviates from his instructions cannot bind his principal to a sale.—LUDWIG *v.* SCHULTZE (1885), L. R. 4 S. C. 247.—N.Z.

831 ii. —— *Authority to state selling price.*]—A., on the written instructions of deft., informed pltf. that on payment of a certain sum in cash deft. would send pltf. the deeds of property which pltf. wished to purchase. Pltf. indorsed on the letter: "I hereby accept the above on the understanding that I pay no expenses." In an action for specific performance:—*Held:* deft. had merely requested A. to convey certain information to pltf. & report the result, & had not constituted A. an agent for sale with power to sign an agreement binding upon deft. *Hamer* v. *Sharp* (1874), L. R. 19 Eq. 108, refd.—RYAN *v.* SING (1884), 7 O. R. 266.—CAN.

831 iii. —— ——.]—A., pltf.'s agent, opened negotiations with deft. for the sale to him of land, & communicated

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let, & a qualified authority to state the selling price of property, but no authority to sell. The agents contracted in his name to let, with an option to the lessee to buy at a stated price. The lessor filed a bill to have the agreement delivered up to be cancelled, on the ground that the agents had exceeded their authority; & the lessee filed a bill for specific performance of the contract:—*Held:* A. entitled to have the contract set aside.

Where a principal seeks to set aside a contract for sale entered into by his agents in excess of their authority, but confirms a contract to let, which was within their authority, he has a right, before any bill is filed against him by the lessee & asserted purchaser for specific performance, to file a bill to have the agreement cancelled, offering to grant a lease if the lessee chooses, because, if he brought an ejectment, the contract to let would be an answer to his action; & if he brought an action for rent, he might be considered as acquiescing in the whole agreement, the contract to let & the contract to sell being in the same instrument.—WIRE *v.* PEMBERTON, PEMBERTON *v.* WIRE (1854), 23 L. T. O. S. 345.

832. —— Authority to receive applications to view.]—In an action against defts. as vendors for not completing the sale of an estate, it appeared they issued an advertisement which stated that "to treat & view the property" applications were to be made to certain persons, one of whom (who was part owner) made a contract of sale with pltf., & it was contended that he had authority so to do by virtue of this advertisement:—*Held:* the advertisement gave authority to negotiate & to make & receive proposals, but not to conclude a sale.—GODWIN *v.* BRIND (1868), L. R. 5 C. P. 299, n.; 39 L. J. C. P. 122, n.; 17 W. R. 29; *sub nom.* GOODWIN *v.* BRIND, 20 L. T. 849.

Annotation:—**Refd.** Rosenbaum *v.* Belson, [1900] 2 Ch. 267.

833. —— Instructions to procure purchaser.]—An estate or house agent to whom instructions are given to procure a purchaser for property has not, though the price is named in the instructions, authority to enter into a binding contract with a purchaser to sell such property.—HAMER *v.* SHARP (1874), L. R. 19 Eq. 108; 44 L. J. Ch. 53; 31 L. T. 643; 23 W. R. 158.

Annotations:—**Distd.** Saunders *v.* Dence (1885), 52 L. T. 644. **Consd. & Expld.** Prior *v.* Moore (1887), 3 T. L. R. 624. **Consd.** Chadburn *v.* Moore (1892), 61 L. J. Ch. 674. **Consd. & Expld.** Rosenbaum *v.* Belson [1900], 2 Ch. 267.

with pltf. regarding price. Upon hearing the price from him he closed with deft., giving him a receipt for his cheque:—*Held:* pltf.'s reply to A.'s inquiry as to price did not imply that pltf. would sell at that price & did not authorise A. to make a contract binding on pltf. *Harvey* v. *Facey*, [1893] A. C. 552; *Chadburn* v. *Moore* (1892), 61 L. J. Ch. 674, cited.—CANADA SETTLERS LOAN & TRUST CO. *v.* PURVIS (1903), 7 Terr. L. R. 38.—**CAN.**

833 i. —— *Instructions to procure purchaser.*]—A general authority to an agent to sell land does not authorise him to enter into an open contract. Where land is intrusted to an agent to sell without instructions as to conditions & he enters into an open contract: *qu.:* whether as between vendor & purchaser that contract is absolutely void. *Hamer* v. *Sharp* (1874), L. R. 19 Eq. 108, folld.—ROSS *v.* VICTORIAN PROPERTY INVESTMENT BUILDING SOCIETY (1882), 8 V. L. R. 254.—**AUS.**

833 ii. —— ——.]—An agent instructed generally to sell land is not at liberty to enter into an open contract without any conditions; it is his duty to provide reasonable conditions of sale.—DONALDSON *v.* NOBLE (1888), 14 V. L. R. 1021.—**AUS.**

833 iii. —— ——.]—An estate agent cannot bind his principal by a contract unless he was employed not merely to negotiate a sale but with definite instructions to sell, & in determining the extent of his authority a fair interpretation must be placed on his instructions as a whole. *Hyde* v. *Wrench* (1840), 3 Beav. 334, apld.—BAKER *v.* TAYLOR (1906), 6 S. R. N. S. W. 500; 23 N. S. W. W. N. 173.—**AUS.**

833 iv. —— ——.]—An owner of land wrote to an agent requesting him to find "a purchaser" for it at $600 cash, or $800 on a specified credit. Two years later the owner wrote that the property had risen greatly in value, & asking what "he (the owner) should take for the lot altogether," whereupon the agent, without further communication with the owner, contracted in writing to sell the property for $600, "to be paid on the execution of a good & full warranty deed, clear of all incumbrances":—*Held:* assuming, without deciding, that the first letter gave power to sell, the agent had no authority for agreeing to give a deed such as that stipulated for.—ANDERSON *v.* MCBEAN (1866), 12 Gr. 463.—**CAN.**

833 v. —— ——.]—Where an estate or land agent or broker was given a power "to sell":—*Held:* in the absence of anything to indicate that he was given authority to complete the sale the power would merely authorise him to find a purchaser.—BOYLE *v.* GRASSICK (1905) 6 Terr. L. R. 232; 2 W. L. R. 99, 284.—**CAN.**

833 vi. —— ——.]—GILMOUR *v.* SIMON (1906), 26 C. L. T. 456; 15 Man. L. R. 205; 1 W. L. R. 417; 37 S. C. R. 422.—**CAN.**

833 vii. —— ——.]—An unconditional authority to sell at a named price carries with it the power to bind the principal by an open contract of sale, & as such contract often subjects the principal to obligations which he would not, on consideration, be willing to assume, it should not be lightly inferred, but the evidence should show beyond any reasonable doubt that it was conferred.

A., a real estate broker with whom deft. had listed certain properties, submitted an offer on behalf of pltf., & deft. replied naming a price which he would accept, whereupon A. closed a bargain with pltf., who signed an agreement which was sent to deft. In an action for specific performance:—*Held:* A.'s authority was to find a purchaser, but not to enter into a contract for sale. *Rosenbaum* v. *Belson*, [1900] 2 Ch. 267; *Harvey* v. *Facey*, [1893] A. C. 552, cited.—JULL *v.* RASBACH (1908), 7 W. L. R. 404; 13 B. C. R. 398.—**CAN.**

833 viii. —— ——.]—A., who had been authorised by defts. to find a purchaser for certain property, submitted an offer & was instructed to close the deal, but the negotiations fell through. Later on A. informed deft. that he had found him another purchaser, who had paid a deposit, & inclosed a transfer:—*Held:* A.'s authority to close referred to a particular transaction, & when those negotiations failed, that authority expired, leaving A. with his original instructions, which were merely to find a purchaser, & not to enter into a binding contract for sale.—HAYNER *v.* WEYL (1912), 21 W. L. R. 800; 3 W. W. R. 748; 5 D. L. R. 141.—**CAN.**

833 ix. *S. P.* DOYLE *v.* MARTIN (1910), 14 W. L. R. 666.

833 x. *S. P.* WILLIAMS *v.* HAMILTON (1908), 14 B. C. R. 47.

833 xi. —— ——.]—When an owner of property employs an estate agent to procure a purchaser or tenant at a specified price, the agent has no implied authority to conclude a contract for sale; his duty is simply to find a purchaser or tenant, & to communicate his offer to the owner.

An estate agent, employed by pltf. to obtain a purchaser for a house at a certain price, purported to conclude a contract for sale with defts. without notice that pltf. had previously concluded a contract with another purchaser:—*Held:* the estate agent had no implied authority to conclude a contract for sale; &, upon the facts, no express authority had been given.—WILDE *v.* WATSON (1873), 1 L. R. Ir. 402.—**IR.**

833 xii. —— —— *"Listing" agreement.*]—M. listed a property with G. & signed a document giving him the right to sell the X. property at the prices mentioned for four months from date & agreeing to pay him a commission. G. arranged a sale to pltf., who signed an agreement & paid G. part of the purchase-money during M.'s absence:—*Held:* the agreement only gave G. the right to find a purchaser, not to conclude a contract. *Rosenbaum* v. *Belson*, [1900] 2 Ch. 267, not folld.; *Hamer* v. *Sharpe* (1874), L. R. 19 Eq. 108, apld.; *Prior* v. *Moore* (1887), 3 T. L. R. 624; *Chadburn* v. *Moore* (1892), 61 L. J. Ch. 674, consd.—SCHAEFER *v.* MILLER (1913), 23 W. L. R. 913, Sask.; 11 D. L. R. 417; 4 W. W. R. 490; *affd.* S. C. of Canada (not reported).—**CAN.**

833 xiii. —— *Instructions to procure purchaser on stated terms.*]—W., a real estate agent in H., corresponded with deft., resident at T., with reference to the sale of her property & received a letter from her agreeing to sell for $5,000, half in cash & balance on mtge. at 6 per cent. W. later submitted an offer of $4,500 cash, which deft. refused, pointing out the revenue she derived from the property; & on same day W. wired "Have sold the property for $5,000 cash":—*Held:* the contract was not within W.'s authority, & the vendor could not claim specific performance. *Bromet* v. *Neville* (1908), 53 Sol. Jo. 321, consd.—LEVITT *v.* WEBSTER (1813), 24 O. W. R. 191; 1 O. W. N. 746; 10 D. L. R. 813.—**CAN.**

833 xiv. —— *Principal answering agent's inquiry as to price.*]—R., a land agent, received a letter from pltf. as

834. —— ——.]—Instructions to a house & estate agent to procure a purchaser & to negotiate a sale do not amount to authority to the agent to bind his principal by a contract for sale of real or leasehold property.

Deft. employed house & estate agents, with instructions to find a purchaser for leasehold property. Pltf. made an offer in writing to the agents, which was submitted by the agents to deft., who further instructed them to withdraw part of the property, & named the lowest price he was prepared to take for the remainder. Acting under this authority, the agents purported to enter into an open contract for sale of the remainder of the property to pltf. at the price named by deft. In an action for specific performance:—*Held:* (1) the agents had no authority to enter into a contract for sale on behalf of deft.; (2) the action must be dismissed.—CHADBURN *v.* MOORE (1892), 61 L. J. Ch. 674; 67 L. T. 257; 41 W. R. 39; 36 Sol. Jo. 666.

Annotation:—**Refd.** Rosenbaum *v.* Belson, [1900] 2 Ch. 267.

835. —— **Instructions to put property on books.**]—An estate agent who is instructed to place property on his books as for sale has no implied authority to sign on behalf of his principal a contract for sale of the property or to enter into any such contract.—PRIOR *v.* MOORE (1887), 3 T. L. R. 624.

Annotations:—**Folld.** Chadburn *v.* Moore (1892), 61 L. J. Ch. 674. **Distd.** Rosenbaum *v.* Belson, [1900] 2 Ch. 267.

836. —— **Authority to sell.**]—Instructions given by an owner of real estate to an agent to sell the property for him, & an agreement to pay a commission on the purchase price accepted, are authority to the agent to make a binding contract, including authority to sign an agreement for sale.—ROSENBAUM *v.* BELSON, No. 165, *ante*.

837. Factor—General authority—Sale on credit.]—A factor may, under his general authority, sell goods on credit, & he may agree with the buyer by way of payment to set off a debt of his own due to the buyer.—SCOTT *v.* SURMAN (1742), Willes, 400; 125 E. R. 1235.

Annotations:—**Expld.** Houghton *v.* Matthews (1803), 3 Bos. & P. 485. **Apld.** Gladstone *v.* Hadwen (1813), 1 M. & S. 517. **Expld.** Thompson *v.* Giles (1824), 2 B. & C. 422. **Expld. & Apld.** *Re* Trye & Lightfoot, *Ex p.* Pauli (1838), 3 Deac. 169. **Consd.** D'Arnay *v.* Chesneau (1845), 13 M. & W. 796. **Expld.** Boddington *v.* Castelli (1853), 1 E. & B. 879, Ex. Ch. **Apld.** Morgan *v.* Taylor (1859), 5 C. B. N. S. 653. **Expld.** De Mattos *v.* Saunders (1872), L. R. 7 C. P. 570. **Consd. & Expld.** *Re* West of England & South Wales District Bank, *Ex p.* Daie (1879), 11 Ch. D. 772. **Refd.** Ryall *v.* Rowles (1749-50), 1 Ves. Sen. 348; Taylor *v.* Plumer (1815), 3 M. & S. 562; Carvalho *v.* Burn (1833), 4 B. & Ad. 382; Parnham *v.* Hurst (1841), 8 M. & W. 743; *Re* Hallett's Estate, Knatchbull *v.* Hallett (1880), 13 Ch. D. 696, C. A.; Patten *v.* Bond (1889), 60 L. T. 583; St. Thomas' Hospital *v.* Richardson (1909), 101 L. T. 771, C. A.

838. *S. P.* HOUGHTON *v.* MATTHEWS, No. 121, *ante*.

Annotations:—**Refd.** Morris *v.* Cleasby (1813), 1 M. & S. 576; Hudson *v.* Granger (1821), 5 B. & Ald. 27; Bramwell *v.* Spiller (1870), 21 L. T. 672.

839. —— —— **Transfer of bill of lading of goods at sea.**]—A *bonâ fide* sale of goods at sea by a factor without notice is binding on the owner; & the buyer holds them by virtue of the bill of lading. The owner cannot dispute the buyer's title, because the goods were sold *bonâ fide* & by the owner's authority; but it is otherwise in the case of a buyer with notice (LORD MANSFIELD).—WRIGHT & RATHBONE *v.* CAMPBELL & HAYES (1767), 4 Burr. 2046; 1 Wm. Bl. 628; 98 E. R. 66.

Annotations:—**Apld.** Caldwell *v.* Ball (1786), 1 Term Rep. 205. **Consd.** Lickbarrow *v.* Mason (1787), 2 Term Rep. 63. **Apld.** Salomons *v.* Nissen (1788), 2 Term Rep. 674. **Expld.** Mason *v.* Lickbarrow (1790), 1 Hy. Bl. 357. **Apld.** Kinloch *v.* Craig (1790), 3 Term Rep. 783. **Distd.** Newsom *v.* Thornton (1805), 6 East, 17. **Consd.** Burdick *v.* Sewell (1884), 13 Q. B. D. 159, C. A. **Refd.** Glyn Mills *v.* East & West India Dock Co. (1882), 7 App. Cas. 591; Sewell *v.* Burdick (1884), 10 App. Cas. 74. **Mentd.** Pickering *v.* Busk (1812), 15 East, 38.

840. —— **Making advances.**]—A factor to whom goods have been consigned generally for sale, & who has made advances to his principal on credit of the goods, has no right to sell them, contrary to the orders of his principal, on the latter neglecting, on request, to repay the advances, although such sale would be a sound exercise of discretion on his part; his authority to sell not becoming, by reason of the unpaid advances, irrevocable, as an authority coupled with an interest.—SMART *v.* SANDERS (1846), 3 C. B. 380; 16 L. J. C. P. 39; 7 L. T. O. S. 339; 10 Jur. 841; 136 E. R. 152.

Annotations:—**Expld.** Siebel *v.* Springfield (1863), 3 New Rep. 36. **Refd.** Campanari *v.* Woodburn (1854), 15 C. B. 400; Donald *v.* Suckling (1866), 7 B. & S. 783.

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follows: "I hereby offer to M. of Winnipeg the sum of $2,100 cash for park lot No. 6 second range in the town of O." Thereupon R. telegraphed deft. as follows: "Will $2,100 cash take park lot? Answer." Deft. replied: "Accept offer." Deft. refused to complete the sale:—*Held:* (1) R. was not the agent of either party for the purpose of making a contract except in so far as he might have been deft.'s agent by the latter's telegram; (2) the telegram could not refer to pltf.'s offer, which had not been communicated to deft., nor could it be regarded as a direction to R.; it was no more than an answer to his inquiry whether he would sell at the price named, & contemplated that a contract would be entered into. *Harvey* v. *Facey*, [1893] A. C. 552, refd.—WHITE *v.* MALCOLM (1902), 1 O. W. R. 302.—**CAN.**

833 xv. —— *Authority to sell unmovable property—Sale of hotel licence.*]—DUFRESNE *v.* HUDON (1913), 19 R. de J. 344.—**CAN.**

835 i. —— *Instructions to put property on books—"Listing" agreement.*]—HERRON *v.* COMO (1913), 49 S. C. R. 1.—**CAN.**

840 i. *Factor—Making advances.*]—Pltf. agreed to lend deft. a certain sum of money on the understanding that he was to have the sole right of sale at a *del credere* commission of all the goods manufactured by deft. The goods were to be supplied as ordered, invoiced at a price which would enable pltf. "to sell the goods to the best advantage," & pltf. was to advance in cash 75 per cent. of the wholesale prices. As the loans proved insufficient for the contemplated purposes, pltf. demanded repayment of the advances. Deft. did not comply with the request, & pltf. sold the goods by auction:—*Held:* (1) pltf. was a factor, & had an irrevocable authority to sell; (2) if it became necessary for pltf. to protect himself & if he could not within a reasonable time sell privately, he was entitled to sell by public auction; (3) a sale by auction, fairly conducted, was binding, as the price obtained could not but be deemed the market value. *Halliday* v. *Holgate* (1868), L. R. 3 Exch. 299; *Donald* v. *Suckling* (1866), L. R. 1 Q. B. 585; *Smart* v. *Sandars* (1848), 5 C. B. 895; *Graham* v. *Dyster* (1817), 6 M. & S. 1; *Daniel* v. *Adams* (1764), Amb. 495; *Re Loft* (1844), 8 Jur. 206; *Aldborough (Earl)* v. *Trye* (1840), 7 Cl. & Fin. 436; *Pigot* v. *Cubley* (1864), 15 C. B. N. S. 701, cited.—MITCHELL *v.* SYKES (1884), 4 O. R. 501.—**CAN.**

840 ii. —— ——.]—Where goods are consigned to a foreign merchant as security for an advance, or to a factor intrusted with the sale of goods on commission, & where by reason of the fall in the market or other causes his security is declining in value, & becoming insufficient, such foreign merchant is invested with a power of sale over the goods after due notice to his principal, although the latter may place a limit on their sale, & desire to hold them on, if the principal do not put his factor in funds to make up the deficit so caused.—JAFFERBHOY LUDHABHOY CHATTOO *v.* CHARLESWORTH (1893), I. L. R. 17 Mad. 520.—**IND.**

840 iii. —— ——.]—In Feb., A. consigned to B. as factor a cargo of wheat, on which B. advanced 41s. per quarter. At the time of consignment A. wrote: "We understand this cargo will not be sold under 42s., London terms, without our consent." The markets fell, & ultimately, in Aug., B. demanded from A. a remittance to cover depreciation, storage, etc., adding: "Unless this is done within seven days from this date we must sell it at best obtainable price & claim on you for amount of loss." A. refused consent, & B. accordingly sold:—*Held:* the words "without our consent" could not cover more than a reasonable time, & B. was not bound to continue to hold so long as A. chose, but after due notice might sell.—ADAMS & CO. *v.* ATHYA & CO. (1873), 16 Sc. L. R. 20.—**SCOT.**

p. *Manager of cattle station—Authority as such—Previous similar acts—Holding out.*]—M., manager of deft.'s cattle station, on several occasions sold

Sect. 3.—*Implied authority: Sub-sects.* 15 *&* 16.]

841. ——— ———.]—Mere advances made by a factor, whether at the time of his employment as such, or subsequently, cannot have the effect of altering the revocable nature of an authority to sell, unless the advances are accompanied by an agreement that the authority shall not be revocable. Whether such an agreement has been made, or might be properly inferred, is a question upon the evidence for the jury.

In an action for damages for an alleged improper sale by deft. of certain sugars placed in his hands by pltfs. the judge directed the jury that, by the mere relationship of factor, the factor did not by making advances acquire any right in derogation of the right of his principal to give directions as to the time & manner of sale, & that any such right on the part of the factor must be made out of an agreement which might be inferred from the evidence or might be implied by proof of usage :—*Held:* no misdirection. — DE COMAS *v.* PROST & KOHLER (1865), 3 Moo. P. C. C. N. S. 158 ; 12 L. T. 682 ; 11 Jur. N. S. 417 ; 13 W. R. 295 ; 16 E. R. 59, P. C.

842. Foreman—General authority as such.]—A. was owner of a sawmill, & B. his foreman. B., as agent of A., but without any express authority, entered into a contract in writing to supply C. with a quantity of Scotch fir staves :—*Held:* this contract was binding on A., inasmuch as B. must be presumed to have had a general authority to enter into such contracts as the one in question.—RICHARDSON *v.* CARTWRIGHT (1844), 1 Car. & Kir. 328.

Master of ship—Necessity—Sale of ship or cargo.]—*See* SHIPPING & NAVIGATION.

843. Other agents—Holding out.]—Where A., a married man, sells, with her concurrence, goods belonging to B., a woman whom he has bigamously married, B. cannot afterwards, on discovering that her marriage was void, dispute the sale, as against a *bonâ fide* purchaser, inasmuch as she had constituted A. her agent to sell.—WALLER *v.* DRAKEFORD (1853), 1 E. & B. 749 ; 22 L. J. Q. B. 274 ; 17 J. P. 663 ; 17 Jur. 853 ; 118 E. R. 616 ; *sub nom.* DRAKEFORD *v.* WALLER, Saund. & M. 114 ; 21 L. T. O. S. 87.

Annotation :—**Refd.** Richards *v.* Johnson (1859), 5 Jur. N. S. 520.

844. ——— ———.]—A., living in the same house with B., was the owner of certain goods therein, which goods she, A., for a fraudulent purpose permitted B. to raise & receive money upon by way of bill of sale in his own name to C., who believed them to be B.'s goods. The goods being seized upon a *fi. fa.* against A. within 21 days of the date of the bill & before its registration :—*Held:* the sale to C. was valid, B. being in effect the agent of A. in the transaction.—LOW *v.* MCGILL, No. 212, *ante*.

SUB-SECT. 16.—AUTHORITY TO WARRANT.

845. Agent—Authority to sell.]—If A. constitutes B. his agent for sale of a certain article, B. is thereby invested with authority to do all that is usual in the trade on sale of the article ; he may have authority to warrant the goodness of the article so as to bind A., though A. never gave him any express authority to that effect.—DINGLE *v.* HARE (1859), 7 C. B. N. S. 145 ; 29 L. J. C. P. 143 ; 1 L. T. 38 ; 6 Jur. N. S. 679 ; 141 E. R. 770.

Annotation :—**Refd.** Mullett *v.* Mason (1866), Har. & Ruth. 779.

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cattle without deft.'s knowledge or authority. Subsequently M. sold cattle to pltf., who was unaware of previous sales, & only knew M. as manager. On deft. refusing delivery :—*Held:* selling cattle was not within ordinary scope of employment of a manager, & deft. not knowing of the previous sales, such sales could not be relied on by pltf. to show an implied authority in M. to bind deft.

To prove holding out, the third party must show that he contracted with the agent on the strength of the course of dealing from which the implied authority is to be inferred.—ROBINSON *v.* TYSON (1888), 9 N. S. W. 297.—**AUS.**

q. *Station-master—Authority as such.*] —Cattle were killed on defts.' railway through negligence, & afterwards sold by a station-master :—*Held:* the sale was not within the ordinary duty of a station-master. — O'RORKE *v.* GREAT WESTERN RY. CO. (1864), 23 U. C. R. 427.—**CAN.**

PART V. SECT. 3, SUB-SECT. 16.

845 i. *Agent—Authority to sell.*]—Pltf. purchased a piano from deft.'s salesman, who warranted the instrument to be sound & in good order. In an action for breach of warranty :—*Held:* a warranty given by a salesman intrusted with the management of a shop or warerooom in which articles were publicly exposed for sale was covered by the doctrine in *Howard* v. *Sheward* (1866), L. R. 2 C. P. 148, where the rule to be deduced from the earlier case of *Brady* v. *Todd* (1861), 9 C. B. N. S. 592, was explained.—MCMULLEN *v.* WILLIAMS (1880), 5 A. R. 518.—**CAN.**

845 ii. ——— ———.]—The sales agent for deft. co., which manufactured metal roofing, warranted that the roofing material was reasonably suitable for the purpose for which it was sold :—*Held:* it was within scope of the authority of a selling agent of a trading co. to give such warranties on its behalf as were ordinarily given to promote the sale of goods of the class in which it dealt.—LARAMIE *v.* GALT ART METAL CO. (1908), 12 O. W. R. 860.—**CAN.**

845 iii. ——— ———.]—An agent who sells a cow in a fair has an implied authority to give a warranty in open market on behalf of the owner ; the facts that the purchaser knows that the actual vendor is only an agent for another, & that neither of the parties is in the cattle trade, do not affect this principle. —ROONEY *v.* FIELDEN (1899), 33 I. L. T. 100.—**IR.**

845 iv. ——— ——— *Evidence of authority to warrant.*]—An agent to sell a vessel telegraphed to pltf., "Will you buy ketch *A.* ? Carries 22,000 ft." Pltf. examined the ketch & agreed to buy it. A bill of sale was executed by the owners, containing no mention of its carrying capacity. Pltf. found that it would not carry more than 16,000 ft. Defts. insisted on the truth of the representation made by their agent as to the carrying capacity of the vessel :—*Held:* an agent employed to sell was not thereby authorised to warrant, & the fact that defts. insisted on the truth of the statements made by their agent was not conclusive evidence of authority to warrant.—LATTER *v.* BROGDEN, O. B. & F. 116, C. A.—**N.Z.**

a. *Agent warranting horse—Authority to sell machinery.*]—An incorporated co. is not bound by an unauthorised warranty of one of its horses, made by machinery, although the agent sold the an agent employed by the co. to sell farm horse for the co. & had previously sold two or three horses for it.—GALLANT *v.* LOUNSBERRY CO., LTD. (1917), 44 N. B. R. 225.—**CAN.**

b. *Horse dealer—Authority to sell & receive price—Warranty of fitness for breeding purposes—Measure of damages.*] —Pltf. gave a stallion to M., a horse dealer, & told M. to sell the horse to the best advantage. He gave M. no authority to warrant, but left the selling & price entirely in his hands. The horse was Canadian-bred, but from imported Clydesdale stock. M. sold the horse to defts. for $750, taking in his own name two promissory notes of $375 each. The horse was sold for breeding purposes & warranted to be an imported Clydesdale. Defts. knew nothing of pltf., & dealt with M. as the owner. M. afterwards indorsed these notes to pltf. To an action on one of the notes, defts. set up a counterclaim for breach of warranty :—*Held:* (1) pltf., by his conduct, clothed M. with the apparent ownership of the horse, &, by so acting, authorised M. to make all such warranties as are usual in the ordinary course of the business of selling horses ; (2) from the circumstance of the horse being sold for breeding purposes, there was an implied warranty of fitness for breeding ; (3) defts. were entitled to damages for breach of warranty that the horse was an imported Clydesdale, & the measure of damages was the difference in value between an imported horse & a Canadian-bred one. *Brady* v. *Todd* (1861), 9 C. B. N. S. 592, distd.—TAYLOR *v.* GARDINER (1892), 8 M. R. 310.—**CAN.**

c. *Special agent—Authority to sell.*] —A chartered bank employed an agent to sell agricultural machinery : he warranted the machinery to work well & satisfactorily in the threshing of grain :—*Held:* a special agent could not bin his principal without express authority to warrant. — COMMERCIAL BANK OF MANITOBA *v.* BISSETT (1901), 7 M. R. 586 (6).—**CAN.**

846. Company officials warranting genuineness of share certificates.]—Pltf., having purchased for value shares in deft. co., discovered, upon application for registration, that his vendor's name was not registered for the shares, & that the transfer & certificate had both been forged by the co.'s secretary. It was part of the co.'s duty to receive & examine transfers & certificates, to have transfers registered, to procure the preparation, execution, & signature of certificates with all requisite & prescribed formalities, & thereupon to issue them to the persons entitled to receive them. One of the prescribed formalities was the signature of a director as well as that of the secretary:—*Held:* the co. had authorised its secretary to warrant the genuineness of certificates, & was estopped from disputing its liability upon a certificate issued by him, notwithstanding his forgery of the document.—SHAW *v.* PORT PHILIP COLONIAL GOLD MINING CO., LTD. (1884), 13 Q. B. D. 103; 53 L. J. Q. B. 369; 50 L. T. 685; 32 W. R. 771, D. C.

Annotations:—**Distd.** R. *v.* Charnwood Forest Ry. Co. (1884), 1 T. L. R. 161; Staple of England Merchants *v.* Bank of England (1887), 21 Q. B. D. 160, C. A. **Folld.** Ruben *v.* Great Fingall Consolidated, [1904] 1 K. B. 650. **Expld. & Distd.** Ruben *v.* Great Fingall Consolidated, [1904] 2 K. B. 712, C. A. **Dbtd. & N.F.** Ruben *v.* Great Fingall Consolidated, [1906] A. C. 439. I agree with Stirling, L.J., in regarding that decision as one that may possibly be upheld upon the supposition that the secretary there was in fact held out as having authority to warrant the genuineness of a certificate; if that be not so, then in my opinion the decision cannot be sustained (LORD LOREBURN, C.). **Refd.** British Mutual Banking Co. *v.* Charnwood Forest Ry. Co. (1886), 55 L. J. Q. B. 399; Bishop *v.* Balkis Consolidated Co. (1890), 25 Q. B. D. 512, C. A.

See, further, COMPANIES.

847. Servant warranting horse—Authority of servant to sell.]—If a servant sells a horse with warranty, it is the sale & contract of the master, but it is the warranty of the servant, unless the master gives him authority to warrant it, for a warranty is void which is not made & annexed to the contract; but there it is the warranty of the servant & the contract of the master.—SEIGNIOR & WOLMER'S CASE (1623), Godb. 360; 78 E. R. 212.

848. —— ——.]—MILLER *v.* LAWTON, No. 903, *post.*

849. —— —— **Instructions not to warrant.**]—If a horse-dealer send his servant to sell & the servant, contrary to his instructions, warrant the horse, the horse-dealer may be bound; but another person, not a horse-dealer, will not be bound by the unauthorised warranty of either the horse-dealer or his servant, or his own servant, since he has only given a particular authority (LORD ELDON, C.).—BANK OF SCOTLAND *v.* WATSON (1813), 1 Dow. 40; 3 E. R. 615.

Annotations:—**Mentd.** Trueman *v.* Loder (1840), 3 Per. & Dav. 267; Furze *v.* Sherwood (1841), 2 Q. B. 388; Yorkshire Banking Co. *v.* Beatson (1880), 5 C. P. D. 109, C. A.

850. —— ——.]—The servant of a private owner instructed to sell & deliver a horse on one particular occasion is not by law authorised to bind his master by a warranty, & the buyer takes it at the risk of being able to prove that the servant had in fact his master's authority for giving it. It is otherwise in the case of the servant of a horse-dealer or livery-stable keeper whose business is to deal in horses.—BRADY *v.* TODD, No. 105, *ante.*

Annotations:—**Apld.** Udell *v.* Atherton (1861), 7 H. & N. 172. **Distd.** Miller *v.* Lawton (1864), 15 C. B. N. S. 834. **Consd.** Howard *v.* Sheward (1866), L. R. 2 C. P. 148. The rule to be deduced from the case of *Brady* v. *Todd* seems to me to be this—if the servant or agent of a private individual intrusted on one occasion to sell a horse without authority from his master takes upon himself to warrant the soundness of the animal the master is not bound, but if the servant of a horse dealer, or even one who only occasionally assists him in his business, being employed to sell gives a warranty, the principal is bound even though the agent or servant was expressly forbidden to warrant (BYLES, J.). **Distd.** Brooks *v.* Hassall (1883), 49 L. T. 569. **Consd.** Baldry *v.* Bates (1885), 52 L. T. 620. **Refd.** Weir *v.* Barnett & Bell (1878), 38 L. T. 929, C. A.; Payne *v.* Leconfield (1882), 51 L. J. Q. B. 642; Armstrong *v.* Jackson, [1917] 2 K. B. 822.

851. —— **Authority to sell & receive price.**]—A servant employed to sell a horse & receive the price has an implied authority to warrant the horse to be sound; & in an action upon the warranty it is enough to prove it was given by the servant without calling him, or showing he had any special authority for that purpose.—ALEXANDER *v.* GIBSON (1811), 2 Camp. 555.

Annotations:—**Distd.** Brady *v.* Todd (1861), 9 C. B. N. S. 592. **Folld.** Baldry *v.* Bates (1885), 52 L. T. 620. **Refd.** Udell *v.* Atherton (1861), 7 H. & N. 172; Mackay *v.* Commercial Bank of New Brunswick (1874), L. R. 5 P. C. 394. **Mentd.** Ewer *v.* Ambrose (1825), 5 Dow. & Ry. K. B. 629; Bradley *v.* Ricardo (1831), 8 Bing. 57; Wright *v.* Beckett (1834), 1 Mood. & R. 414.

852. —— **Intrusted with sale at fair.**]—A servant intrusted by his master with the sale of a horse at a fair may have an implied authority to give a warranty to purchaser.—BROOKS *v.* HASSALL (1883), 49 L. T. 569.

853. —— **Sent to give receipt—Altering terms of warranty.**]—Where, on purchase of a horse, the vendor had given a warranty of soundness generally, & the servant sent with the receipt to the agent of the other party inserted, at his request, but without a special or general authority from his master, "warranted sound to the regiment":—*Held:* the master was not bound by this alteration of warranty, notwithstanding the money afterwards came to his hands.—STRODE *v.* DYSON (1804), 1 Smith, K. B. 400.

854. —— **Statements of principal to servant.**]—Pltf. purchased a mare of deft. through A., who, as he swore, had warranted her quiet to ride. Deft. admitted he had told A. he had received such a warranty when he had bought her a short time before, & A. admitted he had told pltf. that he believed the mare to be quiet to ride, but he denied that he had warranted her to pltf. to be so:—*Held:* the jury had, in the circumstances, been justified in finding that A. had been authorised by deft. to give a warranty, & had done so.—WATERS *v.* MADELEY (1885), 2 T. L. R. 2.

855. Servant of horse-dealer warranting horse—Authority as such—Instructions not to warrant.]—The agent or servant of a horse-dealer has an implied authority to bind his principal or master by a warranty, even though (unknown to the buyer) he has express orders not to warrant. Evidence of a general practice amongst horse-dealers not to warrant where the horse has been examined by a veterinary surgeon, & certified by him to be sound, is not admissible to rebut inference of authority to warrant.—HOWARD (HOWARTH) *v.* SHEWARD (1866), L. R. 2 C. P. 148; 36 L. J. C. P. 42; 15 L. T. 183; 12 Jur. N. S. 1015; 15 W. R. 45.

Annotation:—**Consd. & Folld.** Baldry *v.* Bates (1885), 52 L. T. 620.

856. —— **Authority to deliver—Warranty given after sale.**]—An authority to sell implies an authority to warrant; but where an agent is employed merely to deliver, it is necessary to show an express authority to warrant in order to bind the principal.

Where the servant of a horse-dealer, on delivering a horse to deft., made certain statements, & signed a receipt, including a warranty; & it appeared the contract of sale had been made before delivery:—*Held:* the master was not bound by the statements or receipt of the servant, as no express authority to give a warranty was proved.—

Sect. 3.—Implied authority: Sub-sects. 16 & 17.]

WOODIN *v.* BURFORD (1834), 2 Cr. & M. 391; 4 Tyr. 264; 3 L. J. Ex. 75.

Annotation :—**Apld.** Baldry *v.* Bates (1885), 52 L. T. 620.

857. —— Authority to deliver for approval & negotiate sale—Warranty given relating to incidental matter.]—BALDRY *v.* BATES, No. 864, *post.*

858. —— Authority to sell—Instructions not to warrant.]—If the servant of a horse-dealer with express directions not to warrant do warrant, the master is bound, because the servant, having a general authority to sell, is in a condition to warrant, & the master has not notified to the world that the general authority is circumscribed (BAYLEY, J.).—PICKERING *v.* BUSK, No. 315, *ante.*

Annotations :—**Distd.** Coleman *v.* Riches (1855), 16 C. B. 104. **Apprvd.** Collen *v.* Gardner (1856), 21 Beav. 540. For full anns., *see* S. C. No. 315, *ante.*

859. —— —— ——.]—BANK OF SCOTLAND *v.* WATSON, No. 849, *ante.*

For full anns., *see* S. C. No. 849, *ante.*

860. —— ——.]—BRADY *v.* TODD, No. 105, *ante.*

For full anns., *see* S. C. No. 105, *ante.*

861. —— Authority to sell at market.]—If a horse-dealer send his servant to market to sell a horse & the servant, contrary to his authority, warrant the horse, the dealer will be bound by it.—SLACK *v.* CREWE (1860), 2 F. & F. 59.

862. Servant of livery-stable keeper warranting horse—Authority to sell—Instructions not to warrant.]—If a livery-stable keeper, having a horse to sell, directed his servant not to warrant it, & the servant did nevertheless warrant it, the master would be liable on the warranty, because the servant was acting within the general scope of his authority, & the public cannot be expected to be cognisant of any private conversation between master & servant (ASHHURST, J.).—FENN *v.* HARRISON, No. 351, *ante.*

Annotations :—**Consd.** Coleman *v.* Riches (1855), 16 C. B. 104; Collen *v.* Gardner (1856), 21 Beav. 540; Baldry *v.* Bates (1885), 52 L. T. 620. **Refd.** Brady *v.* Todd (1861), 9 C. B. N. S. 592. For full anns., *see* S. C. No. 351, *ante.*

863. —— ——.]—BRADY *v.* TODD, No. 105, *ante.*

For full anns., *see* S. C. No. 105, *ante.*

864. Servant of owner of riding-school warranting horse—Instructions to deliver for approval & negotiate sale.]—The servant of the owner of a riding-school was instructed to deliver for approval & negotiate for sale of a horse to pltf. The servant warranted that the horse could be safely put in a stable along with pltf.'s horses. The horse was in fact suffering from mange, which the servant well knew :—*Held :* (1) in absence of a finding of the jury that deft. was a horse-dealer, deft. was not bound by any warranty as to soundness given by his servant in respect of a horse offered for sale; (2) even if deft. had been a horse-dealer he would not have been bound, as the warranty given did not relate to soundness, but to an incidental matter, & was not within the implied authority of the servant.—BALDRY *v.* BATES (1885), 1 T. L. R. 558, D. C.

865. Ship-broker warranting convoy of ship—General authority as such.]—If a ship is put up at Lloyd's coffee-house by the ship's broker as a general ship warranted to sail with convoy, & handbills are put about to the same effect, this is such a representation as shall bind the principal. —RUNQUIST *v.* DITCHELL (1799), 3 Esp. 64.

Annotation :—**Folld.** Sanderson *v.* Basher (1814), 4 Camp. 54 n.

SUB-SECT. 17.—MISCELLANEOUS CASES INVOLVING QUESTIONS OF AUTHORITY.

866. Agent agreeing to payment of gross sum—Authority to settle accounts & compromise claims.] —Disputes existing between A. & his solr., receiver, & confidential agent B., which involved long & intricate matters of account, authority was given by A. to a third person to settle any accounts in which he, A., had an interest, & to compromise any claims which he might have :—*Held :* such authority did not empower that third person to make an agreement, without production or examination of any account, that a gross sum should be paid to B. in lieu of all his demands on A.—JENKINS *v.* GOULD, No. 252, *ante.*

For full anns., *see* S. C. No. 252, *ante.*

867. Agent consenting to exchange of land—General authority for purposes of inclosure—Secret limitations.]—Where one of the parties to an ex-

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PART V. SECT. 3, SUB-SECT. 17.

d. *Agent giving directions as to delivery—Authority to buy for use on principal's property.*]—An agent authorised to purchase goods, for a principal, for use upon the principal's premises, has no implied authority to direct their delivery elsewhere. — MITCHELL *v.* WATSON (1880), 6 V. L. R. L. 493.—**AUS.**

e. *Agent giving receipt—Authority to receive payment.*]—An agent appointed to receive money for another must, in the ordinary course of business, be his agent also to give a receipt for it.—BEDSON *v.* SMITH (1863), 10 Gr. 292.—**CAN.**

f. *Agent making gift—Authority to sell.*]—An agent authorised to sell land at a price which he might think reasonable conveyed part of it by deed of gift to defts., for the opening of a street, which the agent considered would increase the value of the property :—*Held :* the conveyance was an excess of authority.—HAZEN *v.* PORTLAND TOWN (1884), 24 N. B. R. 332.—**CAN.**

g. *Factor agreeing with buyer that principal should store goods sold—Authority to sell.*]—A factor, or person intrusted with goods with power to sell & deliver them, has no authority to stipulate for his principal with the buyer for storage of the goods by the principal on behalf of the buyer.—BREBNER *v.* BIRKETT (1862), I. W. & W. L. 205.—**AUS.**

h. *Factor shipping goods abroad—Authority to sell.*]—A manufacturer in Bengal employed factors at Calcutta to sell goods on commission, which were occasionally consigned to England in the principal's name. The Calcutta market being depressed, the factors consigned them to England in their own names :—*Held :* there being no custom of trade qualifying the general mercantile law, such consignment was within the factors' general authority.—MUKTUNJOY CHUCKERBUTTY *v.* COCKRANE (1865), 10 Moo. Ind. App. 229; 19 E. R. 959.—**IND.**

k. *Gomashta committing act of bankruptcy—Authority as such.*]—A principal employing a gomashta to carry on a trade within the local limits of the High Ct.'s jurisdiction may be adjudged to have committed an act of insolvency within the meaning of 11 & 12 Vict., s. 9, clause 21, in consequence of the gomashta's act without the principal's having specifically authorised it or having had cognisance of it; & this might be applied upon a gomashta's having departed from the usual place of business with intent to defeat or delay the firm's creditors.—KASTUR CHAND *v.* DHANPORT SUNGH (1895), I. L. R. 23 Calc. 26; L. R. 22 I. A. 162. —**IND.**

l. *Manager retaining solicitor—Authority to do acts requiring legal advice.*]—Bye-laws of deft. co. authorised the general manager to compromise claims & do other acts, which would occasionally require legal advice : —*Held :* he had implied authority to retain a solr. *Stahlschmidt v. Lett* (1861), 9 W. R. 830; *Re Lett* (1861), 10 W. R. 6; *Re Marseilles Extension Ry. & Land Co.* (1870), L. R. 11 Eq. 151; *R. v. Cumberland JJ.* (1848), 5 D. & L. 431; *Crook v. Wright* (1825), Ry. & M. 278; *Re Snell* (1876), 6 Ch. D. 815; *Lee v. Jones* (1810), 2 Camp. 496; *Lushley v. Hogg* (1805) 11 Ves. 602; *Gillespie v. Alexander* (1827), 3 Russ. 130; *Pellatt's Case* (1867), 2 Ch. App. 527; *Elkington's Case* (1867), 2 Ch. App. 511; *Mudford's Claim* (1880), 14 Ch. D. 634; *Sutton v. Mashiter* (1829), 2 Sim. 513; *Ebbw Vale Co.'s Claim* (1869), L. R. 8 Eq. 14; *Ex p. Appleyard* (1881), 18 Ch. D. 587; *Whittaker v. Wright* (1843), 2 Hare, 310, cited.—CLARKE *v.* UNION FIRE INSURANCE CO., CASTON'S CASE (1884), 10 P. R. 339.—**CAN.**

change of land was represented by an agent, such agent being authorised generally to conduct the business of the inclosure, attend meetings, etc., but not to sign the necessary instruments which the proprietors had themselves to sign, & the agent received particular instructions as to one part of his business but did not communicate them to the comr. or to the other party :—*Held :* the agent being a general agent for the purposes of the inclosure, acts done by him inconsistently with his instructions were nevertheless binding upon his principal.—BEAUFORT (DUKE) *v.* NEELD (1845), 12 Cl. & Fin. 248 ; 9 Jur. 813 ; 8 E. R. 1399, H. L.

Annotations :—**Distd.** Wheatley *v.* Baston (1855), 7 De G. M. & G. 261. **Consd.** Collen *v.* Gardner (1856), 21 Beav. 540. **Refd.** Wing *v.* Harvey (1854), 5 De G. M. & G. 265 ; Towle *v.* National Guardian Assce. Soc. (1861), 30 L. J. Ch. 900 ; *Re* Scottish Universal Finance Bank, Ship's Case (1865), 12 L. T. 256, C. A. **Mentd.** Squire *v.* Whitton (1848), 1 H. L. Cas. 333 ; Mangles *v.* Dixon (1849), 1 H. & Tw. 542 ; Wood *v.* Scarth (1855), 2 K. & J. 33 ; Messageries *v.* Baines (1863), 11 W. R. 322 ; Shardlow *v.* Cotterill (1881), 50 L. J. Ch. 613 ; Barrow *v.* Isaacs, [1891] 1 Q. B. 417, C. A.

868. Agent giving cheque as security—Employed to raise money thereon.]—B. employed C. to raise money, giving him as security a cheque payable to C. or bearer, & C. procured the money from A., to whom he handed the cheque. In debt by A. against B. on the cheque : *Held :* C. was clearly deft.'s agent ; delivery by C. supported the averment in the declaration of a delivery by B. to A.—SAMUEL & GREEN (1847), 10 Q. B. 262 ; 16 L. J. Q. B. 239 ; 8 L. T. O. S. 449 ; 11 Jur. 607 ; 116 E. R. 102.

869. Agent giving security for charges—Employed to get possession of goods.]—Pltf. discharged the cargo of a stranded vessel at request of the captain, for the purpose of saving the cargo merely, & not with a view of completing the voyage. After the cargo had been discharged, & while it was in possession of pltf., it was sold to deft. Pltf. gave it up to deft.'s agent on receiving a promise from him that his charges should be paid. This promise was made without special authority from deft. :—*Held :* (1) the agent's employment to obtain possession of the goods gave him authority to give security for any charges for which there was a lien on the goods ; (2) an action could be sustained by pltf. against deft. on the promise made by deft.'s agent.—KINGSTON (HINGSTON) *v.* WENDT (1876), 34 L. T. 181 ; 24 W. R. 664.

870. Agent promising to pay—Authority to pay.]—An agent who has authority to pay a debt of his principal has authority to promise to pay it ; & where an agent acting within scope of his authority makes a payment on account of a debt of his principal, & nothing more is said or done, a promise to pay the balance of the debt will be inferred so as to take the case out of Stat. Limitations.—*Re* HALE, LILLEY *v.* FOAD, [1899] 2 Ch. 107 ; 68 L. J. Ch. 517 ; 80 L. T. 827 ; 47 W. R. 579 ; 15 T. L. R. 389 ; 43 Sol. Jo. 528, C. A.

871. Agent of grantee of bill of sale extending time for payment—Authority as such.]—A bill of sale empowered the grantee to take possession of the goods & sell them (*inter alia*) in case of default in payment. Before certain payments under the bill of sale became due, the grantor applied to an agent of the grantee for further time, which was granted. Before this time elapsed the agent took possession of the goods, & informed the grantor that on payment of £40 by the following Saturday the bill of sale would be given up. The grantor tendered £40 the following Saturday to a clerk at the grantee's office, but he said he had no authority to receive it, & told the grantor to come again on Monday. The money was again tendered on the Monday, but the goods had meanwhile been removed from the grantor's house & were sold :—*Held :* (1) the agent had authority from the grantee to extend time for payment ; (2) there was no default within the meaning of the bill of sale ; (3) the grantor was entitled to recover the value of the goods.—ALBERT *v.* GROSVENOR INVESTMENT CO., LTD. (1867), L. R. 3 Q. B. 123 ; 8 B. & S. 664 ; 37 L. J. Q. B. 24.

Annotation :—**Dbtd.** Williams *v.* Stern (1879), 5 Q. B. D. 409, C. A. In my opinion the decision in *Albert* v. *Grosvenor Investment Co.* did alter the meaning of the words used by the contracting parties ; I cannot agree with that decision (BRETT, L.J.).

872. Bank manager advising customer as to investment—Authority as such.]—Where a bank has granted an overdraft to a customer, whether secured by mtge. or not, the fact that it is for the benefit of the bank that money should be procured by the customer so as to enable the bank debt to be reduced & its security to be improved does not show that the manager of a branch of the bank has implied authority to assist the customer, & for that purpose to make representations to an intending lender. Where the branch manager of a bank, which did not & could not advise on investments, advised a customer to invest money in a loan on mtge. to another customer to whom the bank had granted an overdraft :—*Held :* the branch manager had no authority to advise pltf. so as to render the bank liable.—BANBURY *v.* BANK OF MONTREAL, [1917] 1 K. B. 409 ; 86 L. J. K. B. 380 ; 33 T. L. R. 104 ; 61 Sol. Jo. 129, C. A.

873. Bank manager giving guarantee.]—It is not within the ordinary scope of a bank manager's authority to guarantee the payment of a draft, & unless such guarantee is specially authorised it cannot be enforced.—*Re* SOUTHPORT & WEST LANCASHIRE BANKING CO., FISHER'S CASE, SHERRINGTON'S CASE (1885), 1 T. L. R. 204, C. A.

See, further, BANKERS & BANKING.

874. Book-keeper promising to make compensation for loss of parcel—Authority as such.]—A promise made by a carrier's book-keeper at the office to make compensation for loss of a parcel is not binding upon the carrier, unless the book-keeper be shown to be his general agent.—OLIVE *v.* EAMES (1817), 2 Stark. 181.

875. Cashier engaging workmen.]—A cashier is not authorised by virtue of his employment as such to make contracts with workmen.—MINNS *v.* SMITH (1858), 1 F. & F. 318 ; 32 L. T. O. S. 89.

876. Clerk demanding goods so as to take them out of reputed ownership—Authority to transact principal's business.]—A clerk who transacts his principal's business, though he does not accept bills or sell goods for him, has sufficient authority to demand the return of goods belonging to his principal so as to take them out of the reputed ownership of bkpt.—SMITH *v.* TOPPING (1833), 5 B. & Ad. 674 ; 2 New. & M. K. B. 421 ; 3 L. J. K. B. 47 ; 110 E. R. 939.

Annotations :—**Folld.** Fawcett *v.* Fearne (1844), 6 Q. B. 20. **Expld.** Price *v.* Groom (1848), 2 Exch. 542. **Consd.** *Re* Rawbone's Trust (1857), 3 K. & J. 476. **Apld.** *Re* Couston, *Ex p.* Ward (1872), L. R. 8 Ch. 144, C. A. **Consd.** Rutter *v.* Everett, [1895] 2 Ch. 872. **Refd.** *Re* Atkinson (1851), Foubl. 271. **Mentd.** Reynolds *v.* Hall (1859), 28 L. J. Ex. 257 ; Sacker *v.* Chidley (1865), 11 Jur. N. S. 654.

877. Factor bartering goods.]—A factor has an authority to sell for money, but not to barter.

Where a factor bartered his principal's goods :—*Held :* (1) no property passed ; (2) the principal might maintain trover against the party with whom the goods were bartered, although the latter was ignorant he had been dealing with the factor only.—GUERREIRO *v.* PEILE (1820), 3 B. & Ald. 616 ; 106 E. R. 786.

Annotation :—**Refd.** Wilson *v.* Moore (1834), 1 My. & K. 337.

Sect. 3.—Implied authority: Sub-sect. 17. *Sects.* 4 *to* 7.]

878. General agent giving indemnity—Authority as such.]—A., tenant to B., notwithstanding notice from C., a mtgee. of B.'s term, that the interest was in arrear, & that he was not to pay B. the rent then due, paid the rent to B. & was afterwards compelled by distress to pay the amount over again to C. In an action by A. against B. upon an indemnity given by D., B.'s general attorney:—*Held:* the indemnity was not binding upon B. in absence of proof of D.'s authority to make such contract for his client. —HIGGS *v.* SCOTT (1849), 7 C. B. 63; 137 E. R. 26.

879. House agent assessing damages—Authority as such.]—Deft. hired a furnished house from pltf. on the terms that he was to make good any articles broken or damaged, & any damage to the house through carelessness, "such loss to be assessed in the usual manner." W., the house agent through whom the house had been let to deft., made the usual inventory at commencement of the tenancy, & on its termination again checked it, assessing the damage done during the term at a trifling sum. Pltf. claimed a large sum of damages, alleging W. had no authority to assess the damages:—*Held:* (1) W. was acting within his authority in making the assessment; (2) the assessment was binding on pltf.—AITKEN *v.* PLOWDEN (1888), 4 T. L. R. 197.

880. Land agent giving acknowledgment of title—Authority as such.]—A land agent has no implied authority to give, on behalf of his principal, a written acknowledgment of title within Real Property Limitation Act, 1833 (c. 27), s. 14.—LEY *v.* PETER, No. 80, *ante*.

881. Land agent making agreement for valuation—Authority as such.]—An agent who has general management of an estate has authority, without the express authority of the landlord, to make an agreement with the tenant of a farm, who is desirous of cultivating the farm as a market garden, that he will allow the tenant a market garden valuation on his quitting the farm, & such agreement is binding on the landlord.—*Re* PEARSON & I'ANSON, [1899] 2 Q. B. 618; 68 L. J. Q. B. 878; 81 L. T. 289; 63 J. P. 677; 48 W. R. 154; 15 T. L. R. 452.

882. Manager of mine making contract with commissioners—Authority to manage mine & communicate with commissioners.]—The agent employed by a miner in the management of his mines, & in his communications with comrs. for setting out the metes & bounds & fixing the rents & duties in respect thereof, is not the agent of the miner for the purpose of making a contract with the comrs. not within the powers conferred upon them in that character.—A.-G. *v.* JACKSON (1846), 5 Hare, 355; 67 E. R. 950.

883. Postman receiving letters for post—Authority as such.]—Although it is settled law that an offer is to be deemed accepted when the letter containing the acceptance is posted, yet a town postman is not an agent of the post-office to receive letters; & delivery to him of a letter of acceptance of an application for allotment of shares will not, for the purpose of fixing the time of acceptance, be regarded by the ct. as a posting of the letter.—*Re* LONDON & NORTHERN BANK, *Ex p.* JONES, [1900] 1 Ch. 220; 69 L. J. Ch. 24; 81 L. T. 512; 7 Mans. 60.

See, further, CONTRACT; POST OFFICE.

884. Servant giving conditional bond—Authority as such.]—Where, on a suit being instituted in an inferior ct. against a barge-master, the bailiff, by process from the ct., attaches one of deft.'s barges while his servant is navigating it, & the servant, to release the barge & its cargo, gives the bailiff a bond conditioned for his master's appearance at the next ct., it is a legal bond, & cannot be avoided by a plea that the bailiff had no right to take it, or that it was taken by duress.—SUMNER *v.* FERRYMAN (1709), 11 Mod. Rep. 201; 88 E. R. 989.

885. Surveyor agreeing to amount of compensation—Authority as such.]—Notice to treat for part of a shop was served by a local authority upon pltf., who sent in a claim for compensation, which was not accepted. The surveyors for both parties met, & a sum for compensation was agreed upon between them. The solrs. prepared a formal agreement on the lines of this arrangement, but could not agree as to certain clauses. Subsequently pltf.'s solrs. served upon the local authority a counter-notice stating that pltf. declined to sell part only of the premises comprised in the notice to treat, & that he was willing & able to sell the whole of his interest in the premises & required the authority to purchase all his interest therein. Pltf. moved for an injunction to restrain further proceedings under the notice to treat:—*Held:* (1) the arrangement made by the surveyors did not amount to an agreement, & would not bind the principals until they accepted it; (2) pltf. was not estopped from claiming his rights under Lands Clauses Consolidation Act, 1845 (c. 18), s. 92.—POLLARD *v.* MIDDLESEX COUNTY COUNCIL (1906), 95 L. T. 870; 71 J. P. 85; 5 L. G. R. 3k.

SECT. 4.—AUTHORITY OF PARTICULAR CLASSES OF AGENTS.

Brokers.]—*See* Nos. 306, 333, 399, 400, 495, 503, 510—512, 530—534, 584—588, 722—726, 762—764, 774—777, 817—825, *ante*.

Estate, Land & House Agents.]—*See* Nos. 426—431, 731, 831—836, 879—881, *ante*.

Factors.]—*See* Nos. 355, 497—499, 513—518, 521—523, 529, 537—548, 592, 784, 837—841, 877, *ante*.

Managers of Businesses, Banks, etc.]—*See* Nos. 305, 308, 337—340, 349, 357—359, 386—390, 464, 549, 593—604, 618, 619, 623, 872, 873, 882, *ante*.

Travellers.]—*See* Nos. 341, 488, 615, 744, *ante*.

SECT. 5.—AUTHORITY TO ACT PRESUMED FROM HOLDING OUT, ESTOPPEL, OR FROM THE CONDUCT OF PRINCIPAL ON PREVIOUS OCCASIONS.

See Nos. 333, 341, 343—348, 353, 354, 395, 451, 453, 527, 582, 591, 594, 598, 604, 617, 637, 638, 715, 726, 733, 764, 805, 825—828, 843, 844, *ante*.

SECT. 6.—EFFECT OF SECRET LIMITATIONS OF AGENT'S OSTENSIBLE AUTHORITY.

See Nos. 335, 339, 349, 351, 365, 370, 379—381, 397, 428, 573, 574, 599, 809—816, 819, 820, 823, 829, 849, 855, 858, 862, 867, *ante*.

SECT. 7.—EXERCISE OF AUTHORITY.

886. Agent appointed by power of attorney—To deliver lease—Delivery on land leased without

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PART V. SECT. 7.

m. *Agent—To enter dwelling-house—Production of authority.*] A bill of sale gave a power of entry on a dwelling-house to two grantees or their agents on the happening of a certain event. The event happened, & grantees' agent came to the house, &, admittance having been refused, effected an entrance by opening a window:—*Held:* the entry was illegal & not justified by the power in the bill of sale, the agent not having disclosed his authority or stated the purpose for which he demanded admittance.—AICKINS *v.* BRUNTON (1866), 15 L. T. 84.—IR.

n. ——*To indorse negotiable instruments—Form of indorsement.*]—There are in mercantile transactions two forms of indorsement by an agent: one, simply "*p.*," "*pro*," "for," which

first claiming land to use of principal.]—If a corpn. appoints an attorney to deliver a lease which it has executed, it is not necessary that the attorney should enter upon the land & claim it to the use of the corpn. before making delivery. Proof that delivery was made upon the land is sufficient.—WILLIS *v.* JERMIN (1590), Cro. Eliz. 167; 78 E. R. 424.

For full anns., *see* DEEDS & OTHER INSTRUMENTS.

887. —— **To deliver seisin—Agent making delivery on day subsequent to deed of appointment.**]—A deed contained a power of attorney to A. to deliver seisin of the premises according to the form & effect of the deed:—*Held:* it was not necessary for the attorney to make delivery on the day of the date of the deed, but his power was well executed afterwards.—ROE d. HEALE *v.* RASHLEIGH (1819), 3 B. & Ald. 156; 106 E. R. 620.

888. —— **To execute deed—Signature must be in principal's name.**]—Where a warrant of attorney is given to execute a deed, the deed must be executed in the principal's name.—FRONTIN *v.* SMALL (1726), 2 Ld. Raym. 1418; 2 Stra. 705; 92 E. R. 423.

For full anns., *see* DEEDS & OTHER INSTRUMENTS.

889. —— —— ——.]—A person executing a deed for his principal under a power of attorney should sign in his principal's name.—WHITE *v.* CUYLER, No. 140, *ante*.

Annotation:—**Refd.** Hogan *v.* Hand (1861), 14 Moo. P. C. C. 310.
For full anns., *see* S. C. No. 140, *ante*.

890. —— —— ——.]—One who executes a deed for another under a power of attorney must execute it in his principal's name. If that is done it is immaterial in what form of words such execution is denoted by signature of the names; the deed is equally valid whether the signature is "A. by B. his attorney" or "B. for A.," since in either case the act of sealing & delivering is done in the principal's name & by his authority.—WILKS *v.* BACK (1802), 2 East, 142; 102 E. R. 323.

Annotations:—**Refd.** Berkeley *v.* Hardy (1826), 5 B. & C. 355; Hogan *v.* Hand (1861), 14 Moo. P. C. C. 310. **Mentd.** *Re* Bumsel & Wootton, *Ex p.* Bumsel & Wootton (1867), 15 W. R. 935.

891. —— —— ——.]—To bind the principal, a deed executed under a power of attorney must be in the principal's name.—BERKELEY *v.* HARDY, No. 129, *ante*

Annotations:—**Consd.** Hunter *v.* Parker (1840), 7 M. & W. 322. **Foll.** *Re* Milsted, *Ex p.* Jorey (1868), 18 L. T. 158.
For full anns., *see* S. C. No. 129, *ante*.

892. —— —— ——.]—The execution of a deed by attorney must be in the principal's name. If a deed be executed under power of attorney, the power of attorney should be produced. No subsequent acknowledgment is sufficient.—*Re* MILSTED, *Ex p.* JOREY, No. 130, *ante*.

893. —— **Agents to execute policies jointly or severally—Execution by some instead of all.**]—A power of attorney was given to fifteen persons, jointly or severally therein named, to execute such policies as they or any of them should jointly or severally think proper:—*Held:* an execution of such power by four of the persons named was sufficient.—GUTHRIE *v.* ARMSTRONG (1822), 5 B. & Ald. 628; 1 Dow. & Ry. K. B. 248; 106 E. R. 1320.

894. —— **Agent to surrender copyholds—Must act in principal's name.**]—Where any one has authority to do an act, he must do it in the name of him who gives authority, not in his own name nor as his own proper act.

An attorney appointed to surrender copyhold lands ought to pursue the manner & form of the surrender in all points, according to custom, as the copyholder himself ought to have done.

Where two by letter of attorney were constituted attorneys to make a surrender & they first showed their letter of attorney, & then by the authority given to them thereby surrendered, etc.:—*Held:* their authority well pursued.—COMBES' CASE, No. 42, *ante*.

Annotations:—**Expld.** Parker *v.* Kett (1701), Holt, K. B. 221. **Refd.** Hunter *v.* Parker (1840), 7 M. & W. 322.
For full anns., *see* S. C. No. 42, *ante*.

895. —— —— **Not proving that principal alive when agent admitted.**]—BAILEY *v.* COLLETT, No. 300, *ante*.

896. —— **To sign memorandum of association—Agent signing principal's name without denoting that it was signed by attorney—Agent appointed verbally.**]—C. verbally authorised O. to sign on his behalf the memorandum of assocn. of a co. O. accordingly signed the name of C. to the memorandum without his own name appearing. The co. being in course of winding-up, C. was put on the list, & applied to have his name removed, on the ground that he had never signed the memorandum nor agreed to take shares:—*Held:* (1) signature by an agent was sufficient; (2) the memorandum was not a deed, & it was not necessary that the authority to sign it should be given by deed; (3) though it was irregular for O. to sign C.'s name without denoting that it was signed by O. as his attorney, the signature was not on that ground invalid; (4) C. was not entitled to have his name removed from the list.—*Re* WHITLEY PARTNERS, No. 133, *ante*.

Annotations:—**Consd.** Dennison *v.* Jeffs, [1896] 1 Ch. 611; Bevan *v.* Webb, [1901] 2 Ch. 59, C. A. **Refd.** Jackson *v.* Napper, *Re* Schmidt's Trade Mk. (1886), 35 Ch. D. 162.

897. Production of authority.]—Where a party executes a deed under a power of attorney, the power ought to be produced.—JOHNSON *v.* MASON (1794), 1 Esp. 88.

For full anns., *see* ESTOPPEL.

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expresses an authority generally; the other "*per pro.*" or "*p. p.*" which expresses an authority created by procuration of power of attorney.—ULSTER BANK *v.* SYNNOTT (1871), I. R. 5 Eq. 595.—IR.

o. —— *To sell within limited time—Memorandum signed afterwards.*]—On Nov. 3 applt. appointed a limited co. his agents for the sale of his wool, with instructions to hold for one week. The co. sold the wool on same day, & on Nov. 10 sent a letter to resp. embodying the terms of the contract. Applt. then wrote to the co. claiming to have a new stipulation inserted, & ultimately declined to carry out the contract:—*Held:* the co. had authority, notwithstanding Nov. 9 had passed, to sign a memorandum of the sale.—FOREMAN *v.* MCLEAN (1915), 34 N. Z. 730.—N.Z.

p. —— *To sign notice to quit—Signature in agent's name.*]—A notice to quit may be signed in an agent's own name, without reference to the landlord, provided the agent's authority is general; but where the authority of the agent is special, such special authority must appear on the face of the notice itself.—MAGUIRE *v.* ROGERS (1893), 27 I. L. T. 19.—IR.

q. —— *To take legal proceedings—Suit in agent's name.*]—Four persons acting as the finance committee of the Consistory of the Dutch Reformed Church at L., & as the duly authorised agents of the Consistory, issued a summons in their own names. A resolution of the Consistory authorised the finance committee to take legal proceedings in name of the Consistory & not in name of the finance committee:—*Held:* persons appointed agents had no right to sue in their own names.—OELSCHING *v.* FINANCE COMMITTEE DUTCH REFORMED CHURCH, LADY GREY, S. A. L. R. (1916), C. P. D. 172.—S.AF.

r. —— *To transfer mineral claim by bill of sale—Signature in agent's name.*]—The interest of a principal in a mineral claim may be transferred by his agent by a bill of sale though executed by the agent in his own name.—WILSON *v.* WHITTEN, 1 M. M. C. 38.—CAN.

886 i. *Agent appointed by power of attorney—To execute deed—Execution before filing power.*]—If a deed be executed by an attorney under power before the filing of the power under No. 204, s. 98, the deed is not (unless confirmed) of any validity either before or after the filing of the power.——PRATT *v.* WILLIAMS (1869), 6 W. W. & a'B. L. 22.—AUS.

897 i. *Production of authority.*]—To prove the authority of an agent who underwrites a policy of insurance, it is not necessary, in order to charge his principal, that the instrument appointing such agent should be produced, if it is shown that he has been in the habit

Sect. 7.—Exercise of authority. Sect. 8. Part VI. Sect. 1.]

898. —— Subsequent acknowledgment not sufficient.]—If a deed is executed under power of attorney, the power should be produced: no subsequent acknowledgment is sufficient.—*Re* MILSTED, *Ex p.* JOREY, No. 130, *ante*.

899. ——.]—Where the authority of an agent depends, & is known by those who deal with him to depend, upon a written document, it may be necessary to produce the document or account for its non-production, in order to prove what was the scope of his authority.—NATIONAL BOLIVIAN NAVIGATION CO. *v.* WILSON (1880), 5 App. Cas. 176; 43 L. T. 60, H. L.

For full anns., *see* Part IX., Sect. 6, Sub-sect. 2, A.

900. —— No presumption from lapse of time.]—Where a deed, more than 30 years old, purports to be an appointment under a special power, & to be executed by the attorney of the donee of the power, although, by reason of the antiquity of the deed, the execution of it by the attorney as such ought to be presumed, yet there is no rule of law which requires or justifies the presumption by the ct. that the attorney was duly authorised to execute the power.

Where, in support of such a deed, no power of attorney was produced, nor evidence forthcoming as to the purport or contents of any such power:—*Held:* the title of the appointees claiming under the deed was not made out.—*Re* AIREY, AIREY *v.* STAPLETON, [1897] 1 Ch. 164; 66 L. J. Ch. 152; 76 L. T. 151; 45 W. R. 286; 41 Sol. Jo. 128.

Verification of power.]—*See* DEEDS & OTHER INSTRUMENTS.

SECT. 8.—PROOF OF AUTHORITY.

901. Letters—From principal to agent.]—Where a contract is to be collected from correspondence with an agent, & the last act of the agent in the matter which concludes the contract is to inclose in his own letter one from his principal agreeing to the proposed stipulations, the defence that the agent was not duly authorised is impossible (STUART, V.-C.). — CAYLEY *v.* WALPOLE (1870), 39 L. J. Ch. 609; 22 L. T. 900; 18 W. R. 782.

902. —— —— Proof of scope of authority.]—The consignor of goods, before hearing of the bkpcy. of the consignee, had sent three letters to the manager of a bank in L., inclosing bills drawn by himself upon certain parties, & referred therein to defts. as persons who would settle any irregularity that might occur respecting the acceptances. These letters were communicated to defts., & assented to by them. Another letter to the manager inclosed a bill drawn upon the consignee for the price of the goods in question:—*Held:* the letters were admissible in evidence, & were some evidence to show an authority in defts. to stop the cargo *in transitu*.—WHITEHEAD *v.* ANDERSON, No. 1117, *post*.

Annotations:—**Apld.** Wentworth *v.* Outhwaite (1842), 10 M. & W. 436; Coventry *v.* Gladstone (1868), L. R. 6 Eq. 44. **Consd.** *Re* Whitworth, *Ex p.* Gibbes (1875), 1 Ch. D. 101. **Expld.** *Re* Kiell, *Ex p.* Falk (1880), 14 Ch. D. 446, C. A. **Apld.** Bethell *v.* Clark (1887), 19 Q. B. D. 553; Reddall *v.* Union Castle Mail S.S. Co. (1914), 84 L. J. K. B. 360. **Expld.** Booth S.S. Co. *v.* Cargo Fleet Iron Co., [1916] 2 K. B. 570, C. A. **Refd.** Bolton *v.* L. & Y. Ry. Co. (1866), L. R. 1 C. P. 431.
For full anns., *see* S. C. No. 1117, *post*.

of underwriting policies for his principal, & that the latter has been in the habit of paying losses upon policies so subscribed.—MULCHAND CHUTUMAL *v.* SUNDARJI NARANJI (1870), 7 Bom. O. C. 39.—**IND.**

897 ii. ——.]—The land agent of a landlord, under his directions, served a notice to quit, on which ejectment was brought. The tenant, at the trial, produced a lease signed by the agent, & under which he had been registered as a freeholder, & the certificate of his registry thereunder was kept in the office of the agent of the landlord:—*Held:* the tenant was bound to prove that the agent had a power of attorney to execute leases from the landlord, & such alleged adoption by the landlord of the lease did not dispense with the necessity of such proof.—GOSFORD (LORD) *v.* ROBB (1845), 8 I. L. R. 217, Q. B.—**IR.**

897 iii. ——.]—Where a pltf. is absent the authority of his agent to maintain an action in the resident magistrate's ct. should, if questioned, be shown, & the power of attorney, if any, produced. —BROGDEN *v.* CROWSON, 1 J. R. 177.—**N.Z.**

PART V. SECT. 8.

s. Acceptance of bill drawn by agent —Admission of agent's authority to draw same.]—Where a bill is drawn by a person signing as agent of a co., acceptance admits the signature & authority of the agent to draw.—BANK OF MONTREAL *v.* DELATRE (1849), 5 U. C. R. 362.—**CAN.**

t. Adoption of agent's transactions.]—Adoption by a person of engagements purporting to be entered into on his behalf with a third party is evidence of authority in the agent to bind him with respect to subsequent transactions arising out of them.—LEIFNER *v.* MCLEAN (1909), 8 C. L. R. 306; 15 A. L. R. 470.—**AUS.**

u. Appearance by counsel at hearing of appeal—Proof of agent's authority of sign notice of appeal.]—Appearance by counsel at the hearing of an appeal does not prove the authority of an agent to sign a notice of appeal to a land appeal ct.—THOMPSON *v.* TIMMINS (1902), 2 S. R. N. S. W. 1; 19 N. S. W. W. N. 44.—**AUS.**

v. Authority to do specified act at specified time—Presumption of authority so to act at other times.]—SMITH *v.* ROE, 1 C. L. T. 154.—**CAN.**

w. Authority to sell in writing — Onus of proof on party questioning same.] —MCDONALD *v.* LEADLEY (1914), 27 W. L. R. 721.—**CAN.**

x. Holding out—Evidence of.]—Agents for the sale of applts.' goods acted under a written authority which provided that all contracts were to be made in applts.' name, & were to be submitted to them for approval. In an action by resps. against applts. on a contract made by agents for the sale to resps. of applts.' goods:—*Held:* (1) the limitation contained in the document being unknown to resps., they were entitled to give evidence that applts. held out the agents as having authority to enter into contracts without reference to applts.; (2) documents relating to prior transactions, & tending to show that the principals knew that the agents were holding themselves out as having authority to make contracts similar to that sued upon, were not rendered inadmissible by the mere fact that what was done by the principals in furtherance of such transactions was done after the date of the contract sued upon.—INTERNATIONAL PAPER CO. *v.* SPICER (1906), 4 C. L. R. 739.—**AUS.**

902 i. *Letters—From principal to agent—Proof of scope of authority.*]—C., a Govt. engineer, wrote to the Minister of the department for leave to obtain the opinion of A., an independent engineer, & received a reply that the Minister did not object to his so doing. Subsequently the Minister wrote to the Treasurer requesting him to provide for the payment of A., but this was not done:—*Held:* the letters did not show any authority in C. to employ A., so as to render the Govt. liable to pay for his report.—ADAMS *v.* R. (1871), 2 V. R. L. 145.—**AUS.**

y. Previous authority & subsequent ratification.]—Although a general agent may not have power to borrow money for his principal, yet the authority to borrow in a particular case may be shown by a previous authority either express or implied, or by subsequent ratification.—BUNWAREELAL SAHOO *v.* MOHESHUR SINGH (1863), Marsh. 544; 2 Hay, 644.—**IND.**

z. Retention of contract notes by principal—Proof of scope of authority.]—The retention by the parties of the contract note signed by the broker is evidence of his authority to bind them in the manner therein stated.—LUSK *v.* HOPE (1873), 17 L. C. J. 19.—**CAN.**

a. Statements — Of agent — How far proof of authority.]—Where an agent gives his clerk a number of blank notices to quit signed by him with instructions to take them to the lands, fill them up, & have them served, the statements of the clerk are admissible to prove the agent's authority to serve the notices.—POLLOK *v.* KELLY (1856), 6 Ir. Com. Law Rep. 367; 1 Ir. Jur. N. S. 360.—**IR.**

b. —— —— ——.]—Answer of deft. read against co-defts., whose agent he was, to prove the execution of an agreement by the agent, but not to prove his authority. — FAGAN *v.* HOWARD (1769), Wallis, 33.—**IR.**

c. Affidavit by agent.]—In an action for goods sold, the question was the authority of M. to bind defts., as their agent:—*Held:* an affidavit made by M. describing the nature of his agency, & filed by defts. on motion for new trial in another suit brought by pltf. against them, was clearly admissible against defts.—THAYER *v.* STREET, 23 U. C. R. 189.—**CAN.**

903. ——— ——— ———.]—In an action for the breach of a warranty on the sale of a horse by the servant of a private owner at a fair:—*Held:* a letter from pltf.'s attorney to deft., referring to the alleged warranty & averring a breach of it, & an answer from deft., simply denying there had been any breach of warranty, afforded evidence whence the jury was justified in finding that the servant had authority in fact to warrant.—MILLER *v.* LAWTON (1864), 15 C. B. N. S. 834; 3 New Rep. 430; 143 E. R. 1013.

904. ——— ——— **Forgeries — Not evidence.**]—Where the question was whether a clerk had authority to indorse bills on behalf of his principal, letters forged by the clerk & purporting to contain an authority to indorse upon a different occasion are irrelevant, & inadmissible to show that he had no authority to make the indorsement in question.—PRESCOTT *v.* FLINN, No. 354, *ante*.

For full anns., *see* S. C. No. 354, *ante*.

905. ——— **From agent to principal—Admitted as such by principal—How far proof of authority.**]—An admission of letters as written by A., "the agent of deft.", is an admission of agency. But a letter so admitted is only evidence of agency *quoad hoc* & is not necessarily evidence of a general agency, or of an agency to make the particular contract. That depends on the nature & terms of the letter.—HUNT *v.* WISE (1859), 1 F. & F. 445.

Part VI.—Delegation.

SECT. 1.—IN GENERAL.

906. Agent cannot delegate.]—The maxim *Delegatus non potest delegare* merely imports that an agent cannot, without authority from his principal, devolve upon another obligations to the principal which he has undertaken to fulfil personally, & as confidence in the particular person employed is at the root of the contract of agency, such authority cannot be implied as an ordinary incident in the contract. Where the exigencies of business render necessary the carrying out of the principal's instructions by a person other than the agent originally instructed, the rule must be relaxed so as to enable the agent to appoint a sub-agent & substitute, & to constitute, in the interests & for protection of the principal, a direct privity of contract between him & such substitute.—DE BUSSCHE *v.* ALT, No. 3, *ante*.

Annotations:—**Apld.** The Fanny, The Mathilda (1883), 48 L. T. 771, C. A. **Distd.** Harris *v.* Fiat Motors (1906), 22 T. L. R. 556.

For full anns., *see* S. C. No. 3, *ante*.

907. ———.]—When a person has been intrusted by a principal to do a thing, that person may not delegate his trust & authority & appoint another person to do the thing for him. Nothing requires greater trust than the collection of money, & where a principal authorises money to be sent direct to him or through his agent, that agent has no authority to trust any one else.—DUNLOP & SONS *v.* DE MURRIETA & CO. (1886), 3 T. L. R. 166, C. A.

908. ——— **Under-steward of corporation.**]—By charter, Gravesend corpn. was to have a capital seneschal, or high steward, and a sub-seneschal, or under-steward, by the latter of whom the judicial & ministerial functions of a recorder were to be performed, but no authority was given him to appoint a deputy, although a bye-law of the corpn. required that the under-steward, or his sufficient deputy, should be attendant at every ct. to discharge the duties of his office:—*Held:* the under-steward could not appoint a deputy generally to discharge all his ministerial duties. *Semble:* he might appoint a deputy to do some particular ministerial act with assent of the corpn.—R. *v.* GRAVESEND CORPN. (1824), 2 B. & C. 602; 4 Dow. & Ry. K. B. 117; 2 L. J. O. S. K. B. 94; 107 E. R. 507.

909. ——— **Broker.**]—A principal employs a broker from the opinion he entertains of his personal skill & integrity; & a broker has no right without notice to turn his principal over to another of whom he knows nothing (LORD ELLENBOROUGH, C.J.).—COCKRAN *v.* IRLAM, No. 951, *post*.

910. ——— **Master of ship.**]—Action for not accounting for goods delivered in this country to deft., the master of a ship, to be sold by him abroad:—*Held:* there being a special confidence reposed in deft. with respect to sale of the goods, he had no right to hand them over to another person & to give them a new destination in search of a market.—CATLIN *v.* BELL (1815), 4 Camp. 183.

911. ———.]—A master is not the agent for his owners to hold out a person as authorised to charter his ship, so as to bind the owners.—THE FANNY, THE MATHILDA, No. 1041, *post*.

912. ——— **Ship's husband.**]—A ship's husband is entitled to do all things usual in management of the vessel, to appoint an agent when in the ordinary sense the authority of an agent is required, but not to appoint a ship's husband to act in his place; he has no right without express sanction to intrust the performance of his duty to his firm or to any third person.—DOEG *v.* TRIST (1897), 13 T. L. R. 320; 2 Com. Cas. 153.

913. ——— **Attorney.**]—An attorney cannot, by power of attorney or otherwise, delegate to another

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PART VI. SECT. 1.

906 i. *Agent cannot delegate—Fire insurance agent.*]—W., a general agent of an insurance co. with authority to grant interim receipts, employed S. to solicit applications. S. was in the habit of issuing interim receipts, although he had no authority from the co. to do so. In an action to recover the amount of insurance under an interim receipt issued by S. to pltfs.:—*Held:* as the agency of W. involved the exercise by him of judgment & discretion in the matter of accepting or rejecting risks, he could not delegate his authority to S.—SUMMERS *v.* COMMERCIAL UNION INSURANCE CO., p. 399, m, *post*.

906 ii. ——— ———.]—Pltfs. claimed under an interim receipt given by H. on behalf of S., the agent of defts., an insurance co., with authority to effect interim insurances binding on the co. on receiving himself the premium in cash. H. had taken a promissory note for the premium at the time of the delivery of the interim receipt payable in three months, which was duly paid:—*Held:* (1) S. could not act through the medium of a sub-agent, since the authority of the original agent involved trust & confidence & was in the nature of *delectus personæ*, & the mandatory could not legally discharge his duties by handing them over to another not selected by the mandator; (2) the powers of a sub-agent could not exceed those of the agent, & H. could only have effected an interim insurance binding on the co. on receiving the premium in cash. *London & Lancashire Life Assce. Co.* v. *Fleming*, [1897] A. C. 499; *Acey* v. *Fernie*, 7 M. & W. 151, folld.—CANADIAN FIRE INSURANCE CO. *v.* JAMES ROBINSON (1901), 31 S. C. R. 488.—**CAN.**

912 i. ——— *Ship's husband.*]—A ship's husband has no right to delegate his powers, & more especially where the owners are on the spot, & immediately object to a transfer made by the ship's husband.—FORBES *v.* MILNE & CO. (1822), 2 Sh. (Ct. of Sess.) 87.—**SCOT.**

913 i. ——— *Attorney.*]—An attorney cannot delegate to another attorney a power to receive money directed to be paid to pltf. or his attorney.—MASECAR *v.* CHAMBERS (1847), 4 U. C. R. 171.—**CAN.**

913 ii. ——— ———.]—A writ of *ca. sa.* was issued against a person resident at

Sect. 1.—*In general.* *Sect.* 2: *Sub-sects.* 1, 2 & 3.]

the right vested in himself as such attorney. An attachment for non-payment of costs cannot be supported by a demand of costs by a third person, authorised by the attorney to receive them.—CLARK *v.* DIGNUM (1838), 3 M. & W. 319; 1 Horn. & H. 86; 7 L. J. Ex. 64; 2 Jur. 67.

914. *S. P. Ex p.* SMITH (1837), Will. Woll. & Dav. 588.

915. —— **Under-sheriff.**]—An under-sheriff cannot appoint a deputy to try causes sent down by a writ of trial to the sheriff.—JONES *v.* WILLIAMS (1843), 2 Dowl. N. S. 938; 12 L. J. Q. B. 295; 1 L. T. O. S. 171; 7 Jur. 581.

916. —— **Agent to insure.**]—*Qu.:* whether an agent employed by his principal to effect an insurance is guilty of a breach of duty as agent if he employs another person to get the policy effected by a policy broker.—CAHILL *v.* DAWSON (1857), 3 C. B. N. S. 106; 26 L. J. C. P. 253; 3 Jur. N. S. 1128; 140 E. R. 679.

917. —— **Unless expressly authorised.**] —A naked authority may be delegated by express authority for that purpose. Where pltf. gives authority to his attorney to make a demand, or to authorise any other person to do so, the attorney may, by letter of attorney, authorise another to make the demand.—PALLISER *v.* ORD (1724), Bunb. 166; 145 E. R. 634.

918. —— ——.]—Deft. authorised pltfs. "or their agent" to levy a distress. Pltfs. substituted in the distress warrant the name of W. for their own names. W. levied the distress, & on its proving unlawful recovered damages from pltfs. Pltfs. claimed to be indemnified by deft.:—*Held:* (1) from the terms of the distress warrant pltfs. were empowered to depute their authority; (2) they were entitled to the indemnity claimed.—TOPLIS *v.* GRANE (1839), 5 Bing. N. C. 636; 2 Arn. 110; 7 Scott, 620; 9 L. J. C. P. 180; 132 E. R. 1245.

Annotations:—**Apld.** Ibbett *v.* De la Salle (1860), 6 H. & N. 233. **Mentd.** Dugdale *v.* Lovering (1875), L. R. 10 C. P. 196; Sheffield Corpn. *v.* Barclay, [1903] 1 K. B. 1; [1905] A. C. 392, H. L.; Cory *v.* Lambton & Hetton Collieries (1916), 115 L. T. 738, C. A.

919. —— ——.]—*Semble:* where a power of attorney expressly authorises the appointment of an attorney by an attorney, the maxim *Delegatus non potest delegare* does not apply.—*In the goods of* ABDUL HAMID BEY (1898), 67 L. J. P. 59; 78 L. T. 202.

920. Delegation may be ratified.]—Where the deputy steward of a manor commanded H., his servant, to keep a court & grant land by copy, which he did, & the lord of the manor subsequently subsigned & confirmed it:—*Held:* the grant was good.—DACRES' (LORD) CASE (1584), 1 Leon. 288; 74 E. R. 263.

Annotations:—**Refd.** Parker *v.* Kett (1701), 1 Ld. Raym. 658. **Mentd.** Doe d. Leach *v.* Whitaker (1833), 5 B. & Ad. 409; Doe d. Roberts *v.* Whitaker (1834), 3 Nev. & M. K. B. 225.

921. ——.]—D., the managing owner of a ship, through pltfs., his agents at C., sold her to the Turkish Govt., & received a bill upon the Oriental Bank in London for the amount of the purchase-money, which bill was duly paid. D. had no express authority at the time from defts., the owners of 23-64ths of the ship, to sell her, but they knew that a sale was contemplated, &, after the sale, executed a power of attorney reciting that they had agreed to sell the vessel to the Turkish Govt., & had actually received the purchase-money, & empowering pltfs. to transfer their respective shares & to hand over the vessel to purchasers. Defts. afterwards received from D., or settled in account with him, the value of their respective shares:—*Held:* (1) the jury were warranted in finding that defts. had authorised the sale or had by their subsequent ratification so adopted his act as to render them jointly liable to pltfs. for the commission due on the sale; (2) the position of defts. was not so altered by the fact of pltfs. having drawn upon D. a bill at three months' date for the amount of the commission as to release them from liability upon dishonour of the bill.—KEAY *v.* FENWICK, No. 1103, *post.*

Annotation:—**Consd. & Folld.** Mould *v.* Andrews (1876), 35 L. T. 813.

Delegation by directors of companies, *see* COMPANIES.

Delegation by solicitors to their town or country agents or to their clerks, *see* SOLICITORS.

Delegation by stockbrokers to their town or country correspondents, *see* STOCK EXCHANGE.

Delegation by bankers to their town or country or foreign correspondents, *see* BANKERS & BANKING.

Delegation by auctioneers to their clerks, *see* AUCTION & AUCTIONEERS.

Delegation of right to sign memorandum so as to satisfy the Statute of Frauds, *see* Nos. 156-170, *ante.*

Delegation by committees & sub-committees of local authorities, *see* LOCAL GOVERNMENT, & particular titles *passim.*

SECT. 2.—IMPLIED AUTHORITY TO DELEGATE.

SUB-SECT. 1.—IN GENERAL.

922. General rule.]—An authority to delegate is to be implied where, from the conduct of the parties to the original contract of agency, the usage of trade, or the nature of the particular business which is the subject of agency, it may reasonably be presumed that the parties to the contract of agency originally intended such authority should exist, or where, in the course of the employment, unforeseen emergencies arise which impose upon the agent the necessity of employing a substitute.—DE BUSSCHE *v.* ALT, No. 3, *ante.*

Annotations:—**Consd.** The Fanny, The Mathilda (1883), 48 L. T. 771, C. A.; Meyerstein *v.* Eastern Agency Co. (1885), 1 T. L. R. 595. **Apld.** Powell & Thomas *v.* Jones, [1905] 1 K. B. 11, C. A. **Distd.** *Re* Joicey, Joicey

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Limerick, & was handed by the attorney to another attorney, for execution there. He delivered the writ, had deft. arrested, & afterwards applied to the sheriff to let deft. go at large to vote at an election then pending. An action for an escape was brought against the sheriff, & a verdict found for pltf. A motion was made to set aside the verdict, on the ground that the second attorney, as employed by the first, was to be considered as pltf.'s attorney:—*Held:* the second attorney was employed by the first as an agent merely to deliver the writ to the sheriff, & the maxim *Delegatus non potest delegare* applied.—ACHESON *v.* MASSEY (1827), 1 L. Rec. O. S. 185, K. B.—IR.

917 i. —— *Unless expressly authorised.*]—A naked authority may be delegated to another where the party having such authority is expressly authorised so to do by the instrument appointing him.—MOORE *v.* KIRWAN (1853), 2 Ir. Jur. 188.—IR.

h. *Acts not amounting to delegation.*] —Two joint owners of land gave H., the third joint owner, a power of attorney authorising him to make agreements for sale of the land. H. gave an estate agency co. authority to sell the land, & the co. sold certain lots to pltf.:—*Held:* H. did not delegate to the co. the power of sale conferred upon him by his co-owners, but merely authorised the co. to find purchasers & to carry out the sales, the terms of which were fixed by him.—ROGERS *v.* HEWER (1912), 19 W. L. R. 868; 1 W. W. R. 481; 1 D. L. R. 747; *revsd.* on other grounds, 22 W. L. R. 807; 8 D. L. R. 288.—CAN.

v. Elliot, [1915] 2 Ch. 115, C. A. **Refd.** Harris *v.* Flat Motors (1906), 22 T. L. R. 556.
For full anns., *see* S. C. No. 3, *ante*.

923. Whether power to delegate a question of fact.]—To a declaration alleging that deft. made his promissory note payable to the order of S., who indorsed to pltf., there was a plea denying the indorsement by S. It was proved that S.'s wife had authority from her husband to indorse bills & notes; that she told her daughter to indorse S.'s name on the note, which was done in the mother's presence, who handed the note to pltf.:—*Held:* (1) the extent of the authority given to S.'s wife was a question of fact to be determined by the jury; (2) there was evidence for the jury of an authority to indorse by the hand of another.—LORD *v.* HALL (1849), 8 C. B. 627; 2 Car. & Kir. 698; 19 L. J. C. P. 47; 14 L. T. O. S. 253; 137 E. R. 653.

Annotation:—**Refd.** Hemming *v.* Hale (1859), 7 C. B. N. S. 487.

SUB-SECT. 2.—POWER TO DELEGATE INFERRED FROM INHERENT NATURE OF OBJECT OF POWER.

924. In general.]—When the power given by one party to another by an instrument in writing is of such a nature as to require its execution by a deputy the party originally authorised as the agent may appoint a deputy.—QUEBEC & RICHMOND RAILROAD CO. *v.* QUINN (1858), 12 Moo. P. C. C. 232; 33 L. T. O. S. 68; 14 E. R. 899, P. C.

Annotation:—**Expld. & Distd.** *In the goods of* Abdul Hamid Bey (1898), 78 L. T. 202.

925. Life insurance agent.]—A proposal for a life policy was accepted on behalf of a London assurance co. by their agent in A., who acted in the transaction through the medium of a sub-agent, & the premium was paid:—*Held:* binding on the co., although the agent had no authority to appoint a sub-agent, & there were some informalities, but of form only.—ROSSITER *v.* TRAFALGAR LIFE ASSURANCE ASSOCN. (1859), 27 Beav. 377; 54 E. R. 148.

926. Shipowner's foreign agent.]—Where a shipowner employs an agent for the purpose of effecting the sale of a ship at any port at which the ship may from time to time in the course of her employment under charter happen to be, the appointment of substitutes at ports other than those where the agent himself carries on business is a necessity, & must reasonably be presumed to be in the contemplation of the parties.—DE BUSSCHE *v.* ALT, No. 3, *ante*.

For full anns., *see* S. C. No. 3, *ante*.

SUB-SECT. 3.—POWER TO DELEGATE PERFORMANCE OF MINISTERIAL OR INCIDENTAL ACTS.

927. Deputy steward of manor.]—The deputy steward of a manor may appoint a sub-deputy to act for him for a particular occasion.—KNOWLES *v.* LUCE (1580), Moore, K. B. 109; 72 E. R. 473.

Annotations:—**Consd.** Parker *v.* Kett (1701), 1 Ld. Raym. 658; R. *v.* Bedford Level Corpn. (1805), 6 East, 356. **Mentd.** R. *v.* Larwood (1694), 1 Ld. Raym. 29.

928. ——.]—The deputy steward of a manor may appoint an under-deputy to take a surrender out of ct.

A deputy may do whatever his principal might have done, except make a deputy, & cannot be appointed with less power; but a deputation to do a particular act will make a man servant *pro hac vice*. A deputy may act in his own name.—PARKER *v.* KETT (1701), Holt, K. B. 221; 1 Ld. Raym. 658; 12 Mod. Rep. 466; 1 Salk. 95; 90 E. R. 1021.

Annotations:—**Refd.** R. *v.* Lisle (1738), Andr. 163; R. *v.* Bedford Level Corpn. (1805), 6 East, 356; Bridges *v.* Garrett (1869), L. R. 4 C. P. 580; Ellis *v.* Ellis (1905), 53 W. R. 617. **Mentd.** Andrews *v.* Emmot (1787-8), 2 Bro. C. C. 297; Mountford *v.* Gibson (1804), 4 East, 441; Langley *v.* Sneyd (1822), 7 Moore, C. P. 165; Woolley *v.* Clark (1822), 1 Dow. & Ry. K. B. 409; Doe d. Nowell *v.* Roake (1825), 2 Bing. 497; Doe d. Hornby *v.* Glenn (1834), 3 Nev. & M. K. B. 837; Thomson *v.* Harding (1853), 2 E. & B. 630.

929. Under-steward of corporation.]—R. *v.* GRAVESEND CORPN., No. 908, *ante*.

930. Drawing bills of exchange.]—An authority given to A. to draw bills in the name of B. may be exercised by the clerks of A.—*Re* MARSHALL, *Ex p.* SUTTON (1788), 2 Cox, Eq. Cas. 84; 30 E. R. 39.

Annotations:—**Distd.** *Re* Robinson & Farrand, *Ex p.* Holdsworth (1841), 1 Mont. D. & De G. 475. **Consd.** *Re* Acraman, *Ex p.* Bushell (1844), 3 Mont. D. & De G. 615. **Apld.** Lord *v.* Hall (1849), 8 C. B. 627.

931. Signature—Policy of insurance.]—*Semble:* where under a power of attorney B. is authorised by A. "to underwrite any policy of insurance not exceeding £100 & subscribe same in his (A.'s) name & to settle & adjust losses," etc., although B. cannot delegate his whole authority to another, yet,

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PART VI. SECT. 2, SUB-SECT. 3.

k. *Agent to sell timber limits—Delegation of authority to broker.*]— Deft. was agent to sell timber limits on behalf of M. & Co. & himself jointly, either for cash or credit, & out of the proceeds to pay all charges, wages, etc., & all drafts & renewals, & retain for himself all advances & commission; balance, if any, to M. & Co. M. & Co. failed, & pltf., their assignee, made a new agreement with deft., by which he was to receive the purchase-money on trust to pay himself half the total price. Deft. placed timber in the hands of K. for sale as broker. K. failed to pay a sum of $4,300, proceeds of sale of timber:—*Held:* the employment of K. was reasonable & proper, & the loss from his failure to pay over must fall on the estate & not on deft. personally. *Speight* v. *Gaunt*, 22 Ch. D. 727; *Parkinson* v. *Hanbury*, L. R. 2 H. L. 1, apld.; *Goutard* v. *Carr*, 13 Q. B. D. 598 n.; *Wheeler* v. *United Telephone Co.*, 13 Q. B. D. 597; *Savage* v. *Paine, Re Stamford (Lord)*, 33 W. R. 909; *Berdan* v. *Greenwood*, 3 Ex. D. 251; *Lafone* v. *Smith*, 4 H. & N. 158; *Jones* v. *Markie*, L. R. 3 Exch. 1; *Spurr* v. *Hall*, 2 Q. B. D. 615; *Hawkesley* v. *Bradshaw*, 5 Q. B. D. 302; *Emden* v. *Carte*, 19 Ch. D. 311, cited.—BELL *v.* FRASER (1885), 12 A. R. 1.—**CAN.**

l. *Bailiff.*]—A cty. ct. bailiff can lawfully employ an assistant to make a lawful seizure under an execution issued to the bailiff, or to execute a civil process which includes making such seizure.—R. *v.* POLSKY (1916), 1 W. W. R. 451; 27 M. R. 271.—**CAN.**

931 i. *Signature—Bill of lading.*]—A number of cases of wine were delivered to S. & Co., defts.' agents, at the port of A., to be forwarded to pltf. at H. The bill of lading was signed by S. & Co., *p.p.* K., & described the goods as shipped in good order & condition. On examination of the goods previous to delivery, it was found that several of the cases had been tampered with, & a number of bottles of wine emptied of their contents. K., by whom the signature of S. & Co. was affixed to the bill of lading at A., had no written authority so to do, but was the chief clerk & proxy of the firm, & acted in the usual course of business:—*Held:* the appointment of S. & Co. as defts.' agents authorised them to perform all things usual in the line of business in which they were employed, & involved power to do particular acts by others within scope of their business, & K. as their chief clerk was competent to sign the name of the firm to bills of lading in the ordinary course of business, without any written authority so to do.—RONNE *v.* MONTREAL S.S. CO. (1886), 7 R. & G. 312; 7 C. L. T. 375.—**CAN.**

931 ii. —— *Notice to quit.*]—The copy of a notice to quit served upon a tenant by the landlord's agent, under a power of attorney authorising the agent to serve such notices in his own name, was signed by a clerk in the agent's name & with the agent's authority:—*Held:* the signature was sufficient.—M'MULLEN *v.* TUTE (1877), 11 I. L. T. 64.—**IR.**

931 iii. —— *Memorandum to satisfy Statute of Frauds.*]—An agent "thereunto lawfully authorised" within the above Act cannot delegate his authority.—STEVENSON *v.* SMITH (1907), 13 B. C. R. 213; 7 W. L. R. 161.—**CAN.**

Sect. 2.—*Implied authority to delegate: Sub-sects.* 3 & 4. *Sect.* 3: *Sub-sect.* 1.]

having signed a slip for a policy of insurance, the signature of his clerk, in his absence, to a policy made in pursuance thereof, is a good execution of the power, that being only a ministerial act, which he might authorise another to do for him; but he must himself execute the power in all matters in which his judgment & discretion are requisite.—MASON *v.* JOSEPH, No. 1069, *post.*

932. —— Notice.]—By the Clifton Suspension Bridge Act, 11 Geo. 4 (c. lxix.), s. 109, it was provided that in all cases where it might be necessary for the trustees to give notices they should be in writing, & signed by the trustees or their clerks by their order:—*Held:* where the clerks were attorneys in partnership, notices signed in their names by persons in their employment, who had authority generally to sign documents in the style of the firm, were insufficient.—MILES *v.* BOUGH (1842), 3 Q. B. 845; 3 Gal. & Dav. 119; 12 L. J. Q. B. 74; 7 Jur. 81; 114 E. R. 732.

Annotations:—**Apprvd.** R. *v.* Kent JJ. (1873), 42 L. J. M. C. 112. **Refd.** Miles *v.* Coote (1844), 3 L. T. O. S. 281; Cundell *v.* Dawson (1847), 4 C. B. 376. **Mentd.** Inglis *v.* G. N. Ry. Co. (1852), 19 L. T. O. S. 149.

933. —— —— Of claim to vote.]—Applt. gave his agent a written authority to make & sign on applt.'s behalf a claim to vote in one of the parliamentary divisions of a county, or in the administrative county, or both, as he might seem to be qualified. A notice of claim was thereupon prepared, & signed with applt.'s name by a clerk of the agent under his direction:—*Held:* the affixing of the signature to the notice of claim by the clerk instead of the agent did not establish that applt. had not given due notice of his claim within Parliamentary Voters Registration Act, 1843 (c. 18), s. 38.—BROWN *v.* TOMBS, [1891] 1 Q. B. 253; FOX & S. Reg. 196; 60 L. J. Q. B. 38; 64 L. T. 114; 55 J. P. 359; 7 T. L. R. 49.

934. Deputy registrar—Effect of death of registrar.]—15 Car. 2, c. 17, creating the corpn. of the Bedford Level, directed that they should appoint a registrar, etc., & other officers at their pleasure, the duty of which registrar was to register titles to land within the Level, & he took an oath of office. The corpn. having at the request of the registrar elected a deputy registrar:—*Held:* (1) the latter must be considered as much a deputy of the principal registrar as if nominated by him; (2) however such deputy were properly or not constituted in the first instance, yet his authority necessarily expired on the death of his principal; (3) however the acts of a legal deputy to a ministerial officer may be good after the death of his principal before notice thereof to those who are interested in his acts, as being done under a colour of authority, yet the titles of landowners within the Level registered by the deputy after the death of his principal was known were invalid.—R. *v.* BEDFORD LEVEL CORPN. (1805), 6 East, 356; 2 Smith K. B. 535; 102 E. R. 1323.

For full anns., *see* REAL PROPERTY & CHATTELS REAL.

935. Sale of ship.]—Where, in consequence of damage to a ship during the voyage, it becomes impossible to prosecute the adventure, the master has authority to sell her for the benefit of all parties interested; & a person employed by him to superintend the sale may lawfully pay over the proceeds to him, or to his order.—IRELAND *v.* THOMSON (1847), 4 C. B. 149; 17 L. J. C. P. 241; 136 E. R. 460.

Annotation:—**Distd.** Walshe *v.* Provan (1853), 8 Exch. 843.

936. Receipt of money.]—An attorney must necessarily in the ordinary course of business authorise his clerks to receive moneys & to do many other acts for him, in his name, & such acts are binding on the attorney & his client.—HEMMING *v.* HALE (1859), 7 C. B. N. S. 487; 29 L. J. C. P. 137; 6 Jur. N. S. 554; 8 W. R. 46; 141 E. R. 905.

See, further, SOLICITORS.

937. Sexton.]—The sexton of a parish may delegate the performance of his duties to a deputy.—ST. MARGARET'S, ROCHESTER, BURIAL BOARD *v.* THOMPSON (1871), L. R. 6 C. P. 445; 40 L. J. C. P. 213; 24 L. T. 673; 36 J. P. 6; 19 W. R. 892.

938. Renewal of lease.]—The owner of premises placed them in the hands of F., his country solr., for the purpose of renewing pltf.'s tenancy in certain premises in London which was about to expire. F. communicated with C., his London agent, who instructed B., a land agent in London, to enter into a contract with pltf.—*Held:* F. entitled to delegate his authority to B.—DEW *v.* METROPOLITAN RY. CO. (1885), 1 T. L. R. 358, C. A.

SUB-SECT. 4.—POWER TO DELEGATE IN CASES OF SUPERVENING NECESSITY.

939. Illness of agent.]—An order having been made for payment of a sum of money out of ct. to a lady who was appointed attorney for certain parties in America, who were *cestuis que trust* of the fund, it appeared the lady was too ill to attend personally to receive the money; & the solr. in the case was allowed to receive it on her account, her receipt being given for it, & her signature thereto verified by affidavit.—HOLLAND *v.* HARPER (1853), 20 L. T. O. S. 216.

940. Exigencies of business.]—DE BUSSCHE *v.* ALT, No. 3, *ante.*

For full anns., *see* S. C. No. 3, *ante.*

941. Drunkenness of driver.]—An omnibus belonging to defts. was being driven along a public highway by H., their servant. A police inspector honestly thinking that H. was drunk, told him he was not to drive any further, & the omnibus must be driven home. V., a passer-by who had formerly been in defts.' employment as conductor only & not as driver, volunteered to drive & did drive the omnibus home, a distance of about a quarter of a mile, the conductor & H. acquiescing in his doing so. V. drove negligently or unskilfully & by reason thereof ran over & injured pltf.:—*Held:* (1) as defts. might have been communicated with, there was no necessity for their servants to delegate to V. the duty of driving the omnibus home; (2) defts. were not liable for the negligence of V. *Qu.:* whether if there had been any such necessity defts. would have been liable.

"It is not *primâ facie* within the scope of a coachman's employment to delegate the duty of driving to other persons" (A. L. SMITH, L.J.).—GWILLIAM *v.* TWIST, [1895] 2 Q. B. 84; 64 L. J. Q. B. 474; 72 L. T. 579; 59 J. P. 484; 43 W. R. 566; 11 T. L. R. 415; 14 R. 461, C. A.

Annotations:—**Consd.** Beard *v.* London General Omnibus Co., [1900] 2 Q. B. 530, C. A. **Apld.** Harris *v.* Fiat Motors (1906), 22 T. L. R. 556. **Distd.** Ricketts *v.* Tilling, [1915] 1 K. B. 644, C. A.

942. Driver handing over driving while investigating machinery of car.]—A motor car having been repaired by defts., was sent back to the owner under charge of a driver in defts.' employment. He received instructions from defts. not to give up the driving to any one. At one stage of the journey a man not in defts.' employment accompanied the driver, who, hearing a noise at the back of the car, intrusted the driving to his companion while he went to the back of the car to see the cause. His companion negligently drove the car against pltf.'s van. In an action to recover damages in the cty. ct. the jury found a verdict for pltf. The Div. Ct. held, as there was no necessity for keeping the car

going while the driver examined the machinery, nor for intrusting the driving to his companion, defts. were not liable for negligence of the latter. Upon appeal:—*Held:* as the question of the necessity to intrust the driving to a third person was not raised in the cty. ct. nor by notice of appeal to the Div. Ct., it could not be raised afterwards, & the verdict & judgment for pltf. must stand.—HARRIS *v.* FIAT MOTORS, LTD. (1907), 23 T. L. R. 504, C. A.

For full anns., *see* MASTER & SERVANT.

SECT. 3.—POSITION OF SUB-AGENT.

SUB-SECT. 1.—PRINCIPAL'S RIGHTS AGAINST SUB-AGENT.

943. In general.]—Where an agent is appointed, who must appoint a sub-agent, the act of the sub-agent is not necessarily the act of the agent. If, however, negligence of the sub-agent can be treated as negligence of his immediate principal, the sub-agent may be treated as a mere servant of the agent, & there would be no privity of contract between him & the principal. The clerk of a banker receives money for the banker, & if he embezzles the money it is the loss of the banker, not of the customer (CROMPTON & BLACKBURN, JJ.).—COLLINS *v.* BROOK (1860), 5 H. & N. 700; 29 L. J. Ex. 255; 6 Jur. 999, Ex. Ch.

944. ——.]—Where the relationship of principal & agent has been created between a principal & a sub-agent employed by his agent & the principal has been no party to any termination of the sub-agent's agency, the agent cannot without authority from the principal change the sub-agent's position in the transaction from that of an agent to, for example, that of a purchaser from the principal (THESIGER, L.J.).—DE BUSSCHE *v.* ALT, No. 3, *ante*.

Annotations:—**Refd.** The Fanny, The Mathilda (1883), 48 L. T. 771, C. A.; Meyerstein *v.* Eastern Agency Co. (1885), 1 T. L. R. 595.
For full anns., *see* S. C. No. 3, *ante*.

945. ——.]—MAINWARING *v.* BRANDON (1818), 8 Taunt. 202.

946. Deputy appointed by bailiff.]—Where a bailiff employed another person as deputy to act for him, the deputy to account weekly to the bailiff:—*Held:* an action of account did not lie at the instance of the principal against the deputy, for the deputy was to receive to his master's use, & the immediate bailiff had account against his deputy.—MALMESBERRY (ABBOT) *v.* LE GODE (A.) (1330), Y. B. 4 Edw. 3, 17, pl. 8.

947. Agent appointed by trustee.]—A trustee *al auter use* made a letter of attorney to S. to manage & receive rents & profits of lands. S., having done so, & accounted to the trustee, on being sued by the *cestui que trust* insisted that the trustee, not he, was to account, & he, having already accounted to the trustee, might be quiet as to pltf. The trustee was dead:—*Held:* S. must account to pltf. whether the trustee was alive or dead. — POLLARD *v.* DOWNES (1682), 2 Cas. in Ch. 121; 22 E. R. 876.

948. ——.]—A mere agent of the trustee may not be accountable to the *cestui que trust;* but otherwise with respect to a substituted trustee.—MYLER *v.* FITZPATRICK (1822), 6 Madd. 360; 56 E. R. 1128.

Annotations:—**Apld.** Morgan *v.* Stephens (1861), 3 Giff. 226; *Re* Barney, Barney *v.* Barney, [1892] 2 Ch. 265. **Refd.** Wilson *v.* Bury (1880), 5 Q. B. D. 518, C. A.

949. Insurance agent engaged by factor.]—The rule of equity is, that if an order is sent by a principal to a factor to make an insurance, & he charges his principal as if it was made, if he never, in fact, has made that insurance he is considered as the insurer himself. In a transaction between merchants in different countries one sends to the other to insure, who pretends to do it, & charges his correspondent as if done, he shall, after a loss happens, be charged as the insurer; that is a right principle; but if such factor employs an agent, that equity will not extend over that agent (LORD HARDWICKE, C.).—TICKEL *v.* SHORT (1750-1), 2 Ves. Sen. 239; 28 E. R. 154.

950. Agent's son employed by agent.]—Bill for discovery & account. A son employed under, paid by, & accounting to deft., his father, may be a witness, but is not accountable to his father's principal.—CARTWRIGHT *v.* HATELEY (HATELY) (1791), 1 Ves. 292; 3 Bro. C. C. 238; 30 E. R. 349.

Annotation:—**Refd.** Ireland *v.* Thomson (1847), 4 C. B. 149.

951. Broker employed by del credere agent.]—C. consigned goods to M., his broker, upon a *del credere* commission for sale, & drew bills upon him in advance, which M. accepted, but never paid. Afterwards, without the knowledge of C., M. placed the goods with H., another broker, upon a *del credere* commission & upon an agreement to divide the

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PART VI. SECT. 3, SUB-SECT. 1.

943 i. *In general.*]—Where a mandatory has employed another person to perform the duty intrusted to him, no action accrues to the principal against the sub-agent, but he must sue the mandatory, who on his part must sue the sub-agent. This principle is not intended to apply to cases where in the ordinary course of business it becomes necessary for the agent to employ a sub-agent. If the custom is established & well known, it would be no violation of that principle to hold that a privity is thus created between the principal & the sub-agent.—KENNEDY *v.* LOYNES (1909), 26 S. C. 271; 19 C. T. R. 515.—S. AF.

943 ii. —— *Account.*]—Where a receiver was appointed in respect of properties about which there was litigation, in which pltf. was found to be the proprietor:—*Held:* a suit for account by pltf. did not lie against the *teshildars* employed under the receiver, as they were his sub-agents & not liable to render an account to pltf.—JATINDRA NARAIN ACHARYA CHOWDHURY *v.* MOHARAM AKAND (1908), 12 C. W. N. 1035.—**IND.**

m. *Agent employed by factor.*]—Persons employed by a factor or agent, who is their principal, are not personally responsible for transactions carried on in the name of their principal.—DIXON *v.* ETU (1884), 7 L. N. 213, Q. B. 1884.—**CAN.**

n. *Clerk of agent.*]—The general rule is that clerks of an agent are not agents of the principal.—HOPE *v.* DIXON (1875), 22 Gr. 439.—**CAN.**

o. *Sub-agent employed by agent to purchase — Buying for himself.*]—An agent to purchase land employed a sub-agent to complete the negotiations for sale. The latter bought for his own benefit & in his own name:—*Held:* though the right of the principal was founded indirectly on the sub-agent's agreement to act, the cause of action did not arise upon this agreement as creating a trust in the land, but upon a constructive trust raised by the ct., & not created or intended by the parties. *Bartlett* v. *Pickersgill* (1759), 4 East, 577 n., distd.—PORTER *v.* TE KORAMO, 4 J. R. N. S. S. C. 1.—**N.Z.**

p. *Sub-agent warranting proper execution of mortgage.*]—Pltf.'s solr., having in his hands for investment money of pltf., requested an agency co. to invest it, & the co. asked defts. to invest it. They invested it on a mtge., purporting to be made to B., the certified owner of certain property. The certificates had, in fact, been stolen by H., who came to defts., represented himself to be B., & forged the signatures necessary to obtain the loan. A member of deft. firm made the affidavit of execution in which he swore that the mtge. was made by B., who was personally known to him, & the money was advanced by pltf. B., the true owner, forced pltf. to remove the mtge. from the register, & pltf. sued for loss sustained:—*Held:* (1) there was privity between pltf. & defts., who had received a consideration, & defts. were liable to pltf. for his loss, they having in effect warranted that the person who executed the mtge. was B., the real owner; (2) even if defts. had not received any actual consideration they were guilty of negligence & liable on the principle that if a person undertakes to perform a voluntary act he is liable if he performs it improperly, but not if he neglects to perform it. *Coggs* v. *Bernard*, 2 Ld. Raym. 909; *Collen* v. *Wright*, 8 E. & B. 647; *Starkey* v. *Bank of England*, [1903] A. C. 114; *Bank of England* v. *Cutler*, [1908] 2 K. B. 208; *Bank of England* v. *Cutler & Bartrum*, 25 T. L. R. 509, follds.—PARKER *v.* M'ARA (1913), 23 W. L. R. 141; 10 D. L. R. 37.—**CAN.**

Sect. 3.—*Position of sub-agent: Sub-sects.* 1 & 2.]

commission with him, & obtained his acceptances for the amount. H. having sold the goods & become bkpt., his assignees received the proceeds of the sales, the acceptances of H. were proved under his commission & a dividend received upon them. In an action of money had & received by the assignee of C., who had also become bkpt., against the assignees of H.:—*Held:* (1) there was no privity between C. & H.; (2) the sale by H. was as against C. unauthorised; (3) the assignees of H. were liable to the assignee of C. for the proceeds of sale.—COCKRAN *v.* IRLAM (1814), 2 M. & S. 301; 105 E. R. 393.

952. Banker employed by agent.]—A. having received money as agent for B. & others, in specific proportions for each, paid it over to C. as a banker in his own name, & having drawn out part of it, directed C. not to pay away the remainder, except by his order:—*Held:* (1) C. was bound to hold the money for A.; (2) B. could not recover the remainder of his share from C., though he had given C. notice that A.'s agency was at an end.—PINTO *v.* SANTOS (1814), 1 Marsh. 132; 5 Taunt. 447; 128 E. R. 763.

Annotations:—**Consd. & Distd.** Ogle *v.* Atkinson (1814), 1 Marsh. 323. **Consd.** Ireland *v.* Thomson (1847), 4 C. B. 149; Walshe *v.* Provan (1853), 8 Exch. 843.

953. Agent appointed by managing owner of ship.]—A., B., & others, were owners of a ship in the service of the East India Co. B. was managing owner, & employed C. as his agent for general purposes, & amongst others to receive & pay moneys on account of the ship; & C. kept a separate account in his books with B. as managing owner. To obtain payment of a sum due from the East India Co. on account of the ship, it was necessary that the receipt should be signed by one or more of the owners, besides the managing owner, & upon a receipt signed by B. & one of the other owners C. received on account of the ship £2,000 from the East India Co., & placed it to B.'s credit in his books as managing owner. The part owners having brought money had & received to recover the balance of that account:—*Held:* (1) C. had received the money as agent of B., & was accountable to him for it; (2) there was no privity between the other part owners & C.; (3) the action was not maintainable.—SIMS *v.* BRITTAIN (1832), 4 B. & Ad. 375; 1 Nev. & M. K. B. 594; 110 E. R. 496.

Annotations:—**Distd.** Walshe *v.* Provan (1853), 8 Exch. 843. **Refd.** Sims *v.* Bond (1833), 2 Nev. & M. K. B. 608; Elston *v.* Braddick (1834), 2 Cr. & M. 435; Ireland *v.* Thomson (1847), 4 C. B. 149; Cooke *v.* Seeley (1848), 17 L. J. Ex. 286; Bodenham *v.* Hoskyns (1852), 2 De G. M. & G. 903; Coulthurst *v.* Sweet (1866), L. R. 1 C. P. 649. **Mentd.** *Re* Gross, *Ex p.* Adair (1871), 24 L. T. 198.

954. Agent appointed by ship-broker—Custom.]—Deft. was a shipowner, pltf. a ship-broker. Deft. had employed B., a ship-broker in London, to procure a freight. Pltf. was a correspondent of B., & the terms of business between them were to act as agents in their trade for one another on terms of sharing the profits of the job. Pltf., on B.'s instructions, procured a freight, but the bargain went off. B. would not claim any agency charges. Pltf. sued deft., who knew nothing of pltf., for his share:—*Held:* a misdirection to leave the case to the jury to say if, by usage, one ship-broker was thus authorised by his principal to employ another.—SMITH *v.* BOUTCHER (1845), 4 L. T. O. S. 116, 398.

955. Broker employed by agent for sale.]—Pltfs., landowners in N.Z., were in the habit of shipping wheat from N.Z. to England for sale on the London market, taking bills of lading which made the wheat deliverable to themselves in London, & indorsing these bills to M. & T., merchants & factors at Glasgow, with instructions to sell the wheat in London. M. & T. having no house or agency in London, were themselves in the habit of indorsing these bills of lading to defts., corn factors & brokers in London, for the purpose of their selling the wheat. Indorsement of the bills of lading by pltfs. to M. & T. & by M. & T. to defts. was in each case only for the purpose of selling the wheat & without intention of passing any property in it. Pltfs. knew the sales effected for them by M. & T. were made by brokers employed by M. & T., but were in no way parties to the particular contracts of sale, nor were their names disclosed upon them. Defts. effected sales of certain cargoes of wheat so consigned for sale by pltfs. in the above mode, & paid the proceeds into their own account with their bankers, & from time to time made remittances to M. & T. on account of them. Pltfs. brought an action against defts. for the net balance of the proceeds of the said cargoes of wheat after deducting the remittances made to M. & T. in respect thereof, but without giving credit due to them from M. & T. on other transactions:—*Held:* (1) there was no privity of contract between pltfs. & defts.; (2) whatever right pltfs. might have had as owners to claim the wheat before it had been sold, they had no right, after such sale, to the proceeds, without giving credit for the sum due to defts. from M. & T. on their general account.

M. & T. were not employed to make a contract of brokerage between pltfs. & defts. It may have been no breach in their agreement with pltfs. to employ a sub-agent, but they had no authority to make a contract between the two. The case differs from that of a manager employed by the owner of an estate to realise the produce with absolute discretion; it is part of the management to employ a broker or agent for the purpose of selling the things to be sold, & the manager has authority to create the relation of principal & agent between the owner of the estate & the person whom he employs to sell (BRAMWELL, B.).—NEW ZEALAND & AUSTRALIAN LAND CO. *v.* WATSON (1881), 7 Q. B. D. 374; 50 L. J. Q. B. 433; 44 L. T. 675; 29 W. R. 694, C. A.

Annotations:—**Distd.** Maspons *v.* Mildred (1882), 9 Q. B. D. 530, C. A. **Distd. & Expld.** Kaltenbach *v.* Lewis (1885), 10 App. Cas. 617; Anderson *v.* Sutherland (1897), 13 T. L. R. 163. **Mentd.** Henry *v.* Hammond, [1913] 2 K. B. 515.

956. Sub-agent appointed with principal's approval—Charter.]—A. & Co., employed by pltfs. to find a charter for their ship, communicated pltfs.' requirements, with their approval, to defts. Pltfs.' instructions were that a charterparty was to be effected only with a first-class firm. Defts. communicated with R. & Co., by whose agency a charter was effected with a firm in S. Pltfs. lost a considerable portion of the freight. In an action for negligence:—*Held:* (1) on the facts R. & Co. were agents of the charterers, & not pltfs.; (2) defts. were liable as the last brokers employed by pltfs.—ECOSSAISE S.S. CO., LTD. *v.* LLOYD, LOW & CO. (1890), 7 T. L. R. 76, C. A.

957. —— Loan.]—Agents, employed for commission to procure an advance of money for their principals, employed for that purpose, with assent of the principals, a sub-agent, on the footing that he should share the commission with them. The sub-agent was aware that the agents were acting for their principals. He succeeded in procuring the advance of the required amount by a co. Without knowledge of the agents or their principals the sub-agent received from the co. a commission for introducing the business to them:—*Held:* (1) on the facts there was evidence that the contractual relation of principal & agent had been established between the principals & sub-agent; (2) even if no privity of contract existed between them, the sub-agent stood in a fiduciary relation to the principals, & was accountable to them for the commission he

had received from the co.—POWELL & THOMAS *v.* JONES (EVANS) & Co., [1905] 1 K. B. 11; 74 L. J. K. B. 115; 92 L. T. 430; 53 W. R. 277; 21 T. L. R. 55; 10 Com. Cas. 36, C. A.

Annotation :—**Consd. & Distd.** Bath *v.* Standard Land Co., [1911] 1 Ch. 618, C. A.

958. Principal suing agent & sub-agent jointly.]—L. appointed A. his agent to manage his estates by a power of attorney containing an express power for A. to appoint a proper person to act as agent under him. A. retained B. as his solr., & employed him to receive rents, & generally in management of the estates. In B.'s books items were entered & charged as against L. A banking account was opened in the joint names of A. & B. into which rents, etc., were paid. A long correspondence took place between L.'s solr. & B. relative to the accounts which had been furnished, in the course of which B. (who was treated rather as agent of L. than of A.) said, if there were errors in them, they should be corrected. L. filed his bill against A. & B., alleging various acts of misconduct & mismanagement, & prayed an account against both A. & B. :—*Held :* (1) as there was no case of fraud made out against A. & B., a bill for an account could not be sustained against both an agent & a sub-agent; (2) B. not being legally liable to account to L., his submission to correct any errors in the accounts did not make him a proper party to a bill by L. for an account; (3) the bill must be dismissed against both A. & B. —LOCKWOOD *v.* ABDY (1845), 14 Sim. 437; 5 L. T. O. S. 122; 9 Jur. 267; 60 E. R. 428.

For full anns., *see* CONTRACT.

959. ——.]—The trustee of a charity managed its affairs by an agent who received the income & had the title deeds in his possession. The agent was made a party to an information for an account & a scheme. On demurrer :—*Held :* he was not a proper party.—A.-G. *v.* CHESTERFIELD (EARL) (1854), 18 Beav. 596; 23 L. T. O. S. 153; 18 Jur. 686; 2 W. R. 499; 52 E. R. 234.

Annotations :—**Apld.** Maw *v.* Pearson (1860), 28 Beav. 196. **Refd.** Brown *v.* Wales (1872), 27 L. T. 410.

960. ——.]—To a bill against a trustee & his solr. alleging that trust moneys had been improperly paid to the solr. for costs, a demurrer of the solr. was allowed, he being a mere agent, & the matter complained of being one merely of account as between the trustee & *cestui que trust.*—MAW *v.* PEARSON (1860), 28 Beav. 196; 54 E. R. 340.

Annotations :—**Distd.** Hardy *v.* Caley (1864), 33 Beav. 365. **Expld.** Cowper *v.* Stoneham (1893), 68 L. T. 18. **Refd.** *Re* Spencer, Spencer *v.* Hart (1881), 51 L. J. Ch. 271, C. A.

961. Sub-agent liable on bill drawn by him payable to principal.]—A. employed B. to sell goods for him; C., as B.'s broker, procured a purchaser & drew a bill for the amount, payable to A., which was accepted by the purchaser, but dishonoured :—*Held :* C. was liable to A. as drawer of the bill.—LE FEVRE *v.* LLOYD (1814), 5 Taunt. 749; 1 Marsh. 318; 128 E. R. 886.

Annotations :—**Apld.** Higgins *v.* Senior (1841), 11 L. J. Ex. 99. **Distd.** Castrique *v.* Buttigieg (1855), 10 Moo. P. C. C. 94.

962. Effect of payment by sub-agent to agent as apparent principal.]—A person employed by ship-owners, as their agent, effected a policy of insurance, & represented himself as principal to the brokers who caused such insurance to be effected : —*Held :* if the brokers received the amount of the loss from the underwriters & paid it over to the agent, they were not liable to the owners, in an action for money had & received, although part of the money was paid to the agent after they were informed of his having acted in that capacity.—BELL *v.* JUTTING (1817), 1 Moore, C. P. 155.

SUB-SECT. 2.—SUB-AGENT'S RIGHTS AGAINST PRINCIPAL.

963. Charges for labour & material.]—M. being called abroad, requested G. to act for him in relation to the building of a house at W. Under this authority G., by an instrument under hand, appointed V. surveyor of the intended buildings with power to make contracts for work and materials. V. in pursuance of this power on behalf of M. contracted with workmen for the mason work, & on this work these workmen duly entered :—*Held :* the contract was binding on M.—MARLBOROUGH (DUKE) *v.* STRONG (1721), 1 Bro. Parl. Cas. 175; 1 E. R. 496.

For full anns., *see* BUILDING CONTRACTS, ENGINEERS & ARCHITECTS.

964. Remuneration.]—A. being commissioned by deft. to purchase & ship wheat for him, employed pltf. to bring it down to the coast & to pay shipping charges, etc., but failed to pay him. Pltf. claimed the amount from deft., who had not at that time paid to A. any part of the sum due :—*Held :* pltf. must sue the person who actually employed him, not deft.—CULL *v.* BACKHOUSE (1793), 6 Taunt. 149; 128 E. R. 990.

PART VI. SECT. 3, SUB-SECT. 2.

964 i. *Remuneration—Commission.*]—In an action by pltfs. claiming commission on a sale of defts.' property effected by pltfs., & in respect of which sale they alleged they had been employed as agents by defts. :—*Held :* there was no evidence fit to be submitted to a jury of such employment, the evidence showing only the employment of pltfs. by another agent of defts. on the terms that pltfs. were to receive from that other agent one-half the commission which he received from defts.—YOUNG *v.* TIBBITS (1912), 14 C. L. R. 114.—**AUS.**

964 ii. —— ——.]—Pltfs., estate agents, brought about a sale of deft.'s land, having introduced the purchaser to deft.'s brother, who had "listed" deft.'s land with pltfs., & who was authorised by deft. as his agent for sale of the land :—*Held :* pltfs. not entitled to commission or remuneration, as the brother had no authority to employ an agent, & deft. had not ratified his brother's act. *Semble :* pltfs. should have sued the brother.—WESTAWAY *v.* CLOSE (1912), 21 W. L. R. 582.—**CAN.**

964 iii. —— ——.]—An insurance co. was in course of organisation, & O., signing as general manager, engaged pltf. to solicit subscriptions, for which service he was to receive a salary & commission. There was no evidence that O. had any authority, & the act was not ratified, no co. of the name ever becoming incorporated. Afterwards there was an amalgamation under another name, & at a meeting of the provisional directors O. was authorised to make arrangements with agents "out of his own compensation." O., signing as general manager, made another arrangement with pltf. for services, & from correspondence it was clear that pltf. looked to O. for payment. In an action against the co. for remuneration & commission :—*Held :* pltf. had failed to establish any liability against the co., as any agreement he made for remuneration was made with O. alone, who was not authorised to make the agreements upon which pltf. relied.—BROWN *v.* SECURITY LIFE INSURANCE CO. OF CANADA (1911), 20 O. W. R. 68; 3 O. W. N. 85.—**CAN.**

964 iv. —— —— *Principal not bound by agreement between agent & sub-agent.*] —Defts. arranged with their solr. the price & terms on which they were willing to sell their land. A purchaser was found by pltf., who was never employed by defts., & their solr. had no authority to appoint another person as agent. The solr. promised to prepare a contract & send it to defts., but did not mention that pltf. was intervening, & nothing was said about commission. Defts. admitted that they were willing to pay a commission to the solr. Defts. knew nothing of pltf. & had no reason to believe that he had anything to do with the transaction. The solr. prepared the offer & acceptance in a form in which were inserted the name of pltf. as defts.' agent & the promise to pay commission. The form was signed by the intending purchaser & defts. Defts., when signing it, did not read the document & had no knowledge of the introduction of pltf.'s name in it :—*Held :* defts. not liable. *Carlisle*

Sect. 3.—Position of sub-agent: Sub-sects. 2 & 3. Sect. 4.]

965. ——.]—Attorneys to absent proprietors of estates in Jamaica being entitled to only 6 per cent. commission as remuneration for performance of all duties of their office, including that of factorage, persons appointed by them to be factors cannot recover either the amount of the supplies furnished to the estates, or of their commission upon them, from the proprietors, but must look to the attorneys for payment.—PENNANT *v.* SIMPSON (1831), 1 Knapp, 399 ; 12 E. R. 371.

Annotation :—**Consd.** Steele *v.* Murphy (1841), 3 Moo. P. C. C. 445.

966. ——.]—If A. employs B. to procure him a loan on the usual terms, & B. employs C., who obtains it on other & different terms, A. will not be liable to C. either for commission or for remuneration unless he ratifies these terms & recognises C.'s employment.—MASON *v.* CLIFTON (BART.) (1863), 3 F. & F. 899.

967. Charges.]—A. employed B. to convey goods to the Continent. B., without A.'s knowledge, employed C. to transact the business, & the goods were shipped by C. & landed on the Continent by C.'s agents :—*Held :* (1) there was no privity between A. & C. ; (2) C. was not entitled to recover his charges or those of his agents from A. though A. had not paid the amount to B.—SCHMALING *v.* TOMLINSON (1815), 1 Marsh. 500 ; 6 Taunt. 147 ; 128 E. R. 989.

Annotation :—**Refd.** Meyerstein *v.* Eastern Agency Co. (1885), 1 T. L. R. 595.

968. Indemnity.]—A merchant consigned counterfeit jewels of the value of £168 15*s.* to his factor to sell ; the factor procured an agent to dispose of them, representing them to be good & of the value of £810, & received from him the proceeds of sale. The purchaser, afterwards discovering that the jewels were counterfeit, arrested the agent, & recovered back the purchase-money :—*Held :* an action would not lie by the agent against the merchant, although the agent was ignorant of the fraud when he made the sale, especially if the jury did not find that the merchant directed the factor to employ the agent, or ordered him to conceal the fact of the jewels being counterfeit.

The factor was authorised by deft. to sell the jewels, & he cannot authorise another ; that which pltf. did was without warrant from deft. (MONTAGUE, J.).—SOUTHERN *v.* How (1616-18), J. Bridg. 125 ; Cro. Jac. 468 ; Poph. 143 ; 123 E. R. 1248.

Annotations :—**Expld.** Hall *v.* Barrows (1863), 8 L. T. 227. **Refd.** Blanchard *v.* Hill (1742), 2 Atk. 484 ; Grylls *v.* Davies (1831), 2 B. & Ad. 114 ; Crawshay *v.* Thompson (1842), 5 Scott, N. R. 562 ; Burgess *v.* Burgess (1853), 3 De G. M. & G. 896 ; Hirst *v.* Denham (1872), L. R. 14 Eq. 542.

969. ——.]—Deft., a merchant at H., was for several years in the habit of instructing his bankers there to procure their London bankers to accept bills drawn upon them by foreign correspondents of deft., & the London bankers were in the habit of accepting the bills as advised. At the time of the acceptance the bankers at H. debited deft. & credited their London bankers with the amount. For this business deft. paid his bankers at H. one-quarter per cent. commission on the amount. They paid their London bankers a fixed sum of £600 per annum for their general London business, & were charged nothing extra in respect of these acceptances. Deft., except on one occasion, when he wrote to the London bankers, requesting them, in event of a draft being presented for acceptance, to hold it over for a day or two till they received instructions from the bankers at H., never communicated with them except as above. Interest was charged to deft. by the bankers at H. from the day when the bills became due. The London bankers marked all the bills directed to them under the circumstances above as "on account" of deft. The bankers at H. having become bkpt., the London bankers paid the amount of several bills accepted as above which became due subsequent to the bkpcy. In an action by the assignees of the bankers at H. upon a special case :—*Held :* (1) the assignees entitled to recover the amount so paid against deft., as the credit was given to him by the bankers at H. & not by the London bankers ; (2) there was no evidence of any privity between deft. & the London bankers.—BARKWORTH *v.* ELLERMAN (1861), 6 H. & N. 605 ; 7 Jur. N. S. 829 ; 9 W. R. 377 ; 158 E. R. 250, Ex. Ch.

970. —— **For freight & expenses.**]—Where pltfs. consigned goods to their factors, who, not having funds to pay the freight & duties, agreed with defts. that they should take charge of the consignment, pay the freight & duties & sell the goods, & have half the usual commission on such sale, & defts. paid the freight & duties, & received the goods, after which the factors became bkpt., having before informed defts. that the goods were pltfs.', but defts. notwithstanding sold the goods :—*Held :* on trover by pltfs., defts. had not a right to retain for the freight & duties after deducting the balance due from factors to pltfs. at the time of bkpcy.—SOLLY *v.* RATHBONE (1814), 2 M. & S. 298 ; 105 E. R. 392.

Annotation :—**Distd.** Bailey *v.* Culverwell (1828), 8 B. & C. 448.

971. —— **Lost by breach of duty.**]—Deft. instructed H., who in turn instructed pltf., to buy 2,000 tons pig iron at one month. There being no market for "month" iron, pltf. made a price for month iron & covered himself by buying "cash" iron :—*Held :* (1) deft.'s mandate had not been performed ; (2) he was entitled to refuse acceptance.—SERVICE *v.* BAIN (1892), 9 T. L. R. 95, C. A.

Lien.]—*See* Part VIII., Sect. 3, Sub-sect. 4, *post*.

Right to set off against principal sums due from agent.]—*See* Part IX., Sect. 3, Sub-sect. 2, E, *post*.

SUB-SECT. 3.—AS REGARDS THIRD PARTIES.

972. Notice to quit—Given by sub-agent.]—A notice to quit given by an agent of an agent is not sufficient without a recognition by the principal.—DOE d. RHODES *v.* ROBINSON, No. 1078, *post*.

Annotation :—**Distd.** Doe d. Lyster *v.* Goldwin (1841), 1 Gal. & Dav. 463.

& Cumberland Banking Co. v. *Bragg*, [1911] 1 K. B. 489 ; *Lewis* v. *Clay* (1897), 67 L. J. Q. B. 224, follds.—ROSE *v.* MAHONEY (1915), 34 O. L. R. 238 ; 8 O. W. N. 547 ; 24 D. L. R. 326. —**CAN.**

q. *On dismissal.*]—Defts., a corpn., by the directors appointed under their corporate seal an attorney with general powers to do everything necessary as fully as they might do if present. The attorney appointed pltf. as a sub-agent for a year, & this was renewed from time to time, but eventually pltf. was summarily dismissed & brought an action for wrongful dismissal :—*Held :* (1) it was within the authority of the directors' attorney to appoint pltf. for a year, & pltf. was entitled to rely on such authority when he entered into the engagement ; (2) pltf. was entitled to judgment.—HOWARTH *v.* SINGER MANUFACTURING CO. (1883), 8 A. R. 264.—**CAN.**

r. *Sub-agent appointed with principal's approval—Set-off between agent & sub-agent.*]—An agent appointed to sell goods, with knowledge of his principal, appointed a sub-agent, who accounted to him :—*Held :* no privity of contract was established between the principal & the sub-agent, & the latter was entitled, in his account with the agent, to set off against sales of the principal's goods sums due to him from the agent. *New Zealand & Australian Land Co.* v. *Watson* (1881), 7 Q. B. D. 374, follds.—FOWLER *v.* WILKIN (1885), L. R. 4 C. A. 10.—**N.Z.**

PART VI. SECT. 3, SUB-SECT. 3.

s. *Sub-agent appointed with principal's approval—Tort committed by sub-agent.*]—A sub-agent may render the principal liable if the circumstances

973. Notice of act of bankruptcy—Notice to sub-agent.]—Notice to a solr.'s managing clerk of an act of bkpcy. is not notice to the solr.'s client.

M. retained a solr. to purchase for him the business of a debtor who had committed an act of bkpcy., but against whom at the time no receiving order had been made. The solr.'s managing clerk, who partially negotiated the purchase, had at the time notice of the act:—*Held:* (1) even if the clerk had such notice, in the circumstances, it was not notice to the lay client; (2) the purchase was not invalid.—*Re* ASHTON, *Ex p.* MCGOWAN (1891), 64 L. T. 28; 39 W. R. 320; 7 T. L. R. 207; 8 Morr. 72.

974. Notice to sub-agent where agent absent.]—In the absence of evidence to the contrary, the ct. will infer that a clerk in the registered office of a co. is, during business hours, & whilst the secretary is absent, so far in charge of the office that he has authority to receive a notice so as to make it a communication to the co.—*Re* BREWERY ASSETS CORPN, TRUMAN'S CASE, [1894] 3 Ch. 272; 63 L. J. Ch. 635; 71 L. T. 328; 43 W. R. 73; 35 Sol. Jo. 682; 1 Mans. 359; 8 R. 508.

975. Agent's liability for negligence of employees.]—No action lies against a steward, manager, or agent, for damage done by the negligence of those employed by him in the service of his principal, but the principal or those actually employed are alone liable.—STONE *v.* CARTWRIGHT (1795), 6 Term Rep. 411; 101 E. R. 622.

Annotations:—**Apld.** Bush *v.* Steinman (1799), 1 Bos. & P. 404. **Consd. & Distd.** Wilson *v.* Peto (1821), 6 Moore, C. P. 47. **Consd.** Laugher *v.* Pointer (1826), 5 B. & C. 547. **Refd.** Bennett *v.* Bayes (1860), 5 H. & N. 391; Weir *v.* Bennett (1877), 3 Ex. D. 32; Weir *v.* Barnett & Bell (1878), 38 L. T. 929, C. A.

SECT. 4.—EFFECT OF DELEGATION ON RELATION BETWEEN PRINCIPAL AND AGENT.

976. Responsibility of agent—Funds received by sub-agent.]—Where a person employed to receive money for another employs a third person to receive it for him, proof of the money having come to the hands of such third person is sufficient to charge the person who employed him with the receipt.—MATTHEWS *v.* HAYDON (1796), 2 Esp. 509.

977. —— ——.]—M. employed R. & Co., bankers in Edinburgh, to obtain for him payment of a bill drawn on a person resident in Calcutta. R. & Co. accepted the employment & wrote promising to credit him with the money when received. R. & Co. transmitted the bill in the usual course of business to C. & Co., of London, & by them it was forwarded to India, where it was duly paid. R. & Co. wrote to M. announcing the fact of its payment, but never credited him in their books with the amount. The house in India failed:—*Held:* (1) R. & Co. were M.'s agents to obtain payment of the bill, & payment having been actually made, became *ipso facto* liable to him for the amount received; (2) he could not be called on to suffer any loss occasioned by the conduct of their sub-agents, as between whom & himself no privity existed.—MACKERSY *v.* RAMSAYS, BONARS & Co. (1843), 9 Cl. & Fin. 818; 8 E. R. 628.

Annotations:—**Consd.** Prince *v.* Oriental Bank Corpn. (1878), 3 App. Cas. 325, P. C. **Refd.** Beatie *v.* Carmichael (1857), 29 L. T. O. S. 223; Meyerstein *v.* Eastern Agency Co. (1885), 1 T. L. R. 595. **Mentd.** West Ham Union Grdns. *v.* St. Matthew, Bethnal Green, Churchwardens & Overseers, [1896] A. C. 477.

978. —— ——.]—A. having recovered in an action judgment against B. for £45 5*s.*, B. was taken in execution on a *ca. sa.*, & paid the £45 5*s.* to the sheriff, who let him out of custody. The attorney employed to issue execution authorised F., his clerk, to receive the money so paid to the sheriff; the sheriff paid F. £20 of the £45 5*s.* on F. promising to bring the attorney's receipt for the money, whereupon F. was to receive the remaining £25 5*s.* F. disappeared with the £20. A. brought an action against the sheriff for the escape; the sheriff paid £25 5*s.* into ct.; & A. replied, damages *ultra*:—*Held:* on this issue deft. was entitled to the verdict.

The attorney is responsible; & it must in most cases be a matter of utter indifference whether the

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of the case are such that the principal & the agent must be deemed to have intended & agreed that the latter should, or might, appoint a substitute for the purpose of discharging in his stead, & on behalf of the former, duties including or involving the making of representations for the purpose of carrying out the business of the principal.

A principal having intrusted an agent with the conduct of his business is responsible for whatever wrong the agent commits in the course of the employment. *Barwick* v. *English Joint Stock Bank*, L. R. 2 Exch. 265; *Lloyd* v. *Grace*, [1912] A. C. 716; *De Bussche* v. *Alt*, 8 Ch. D. 310; *Powell* v. *Jones*, [1905] 1 K. B. 11, cited.—KILDONAN *v.* THOMPSON (1915), 30 W. L. R. 626; 21 D. L. R. 181; 7 W. W. R. 1299.—**CAN.**

PART VI. SECT. 4.

976 i. *Responsibility of agent—Appointment of sub-agent approved by principal.*]—Where the intention of the parties, as shown by the terms of an agreement made between principal & agent, was that all the pecuniary liabilities originally imposed upon the agent were to be transferred to a sub-agent, & such sub-agent, with the knowledge & consent of the principal & in the terms of the agreement approved by him, accepted financial responsibility:—*Held:* the liability of the agent to account to the principal came to an end.—S. A. JOSEPH & RICHARD, LTD. *v.* LINDLEY (1905), 3 C. L. R. 280.—**AUS.**

976 ii. —— *Fraud of sub-agent.*]—A., collector of customs, gave a bond to account for & pay over all moneys which should come into his hands, etc. He received written instructions that all entries were to be made by him, all permits were to be granted & signed only by him, & payment of all duties to be made to him, except in certain circumstances:—*Held:* having permitted the deputy collector to assume & perform duties intrusted to him alone, he was responsible under his bond for defalcations of the deputy.—R. *v.* STANTON (1852), 2 C. P. 18.—**CAN.**

976 iii. —— *Failure of broker.*]—H. employed G. & Co. to dispose of his flour, & G. & Co. employed brokers who received the proceeds of sales of H.'s flour. The brokers having failed:—*Held:* although G. & Co. were not factors with a *del credere* commission, they were liable for a loss occasioned by such failure.—GOODERHAM *v.* HYDE (1857), 6 C. P. 341.—**CAN.**

976 iv. —— *Negligence of notary.*]—Upon a contract with a co. to carry & present promissory notes for payment, where the co. delivered them to a notary, who failed to notify the indorser of non-payment:—*Held:* the co. were not liable.—MCQUARRIE *v.* FARGO (1871), 21 C. P. 478.—**CAN.**

976 v. —— *Bankruptcy of sub-agent.*]—On counter-appeals from the judgment of the ct. below, condemning deft. to account under an agreement by which pltf. advanced money to build a ship to be reimbursed out of the proceeds of the sale of the ship, which he, pltf., was authorised to send to his friends in Liverpool or London, & for this purpose to appoint & substitute attorneys & agents:—*Held:* deft. was not liable by reason of the bkpcy. of the substitutes for moneys due from them, & the principal should bear the loss, inasmuch as, in the circumstances, the substitutes were his own attorneys & agents, there being no evidence that the agent was not justified in appointing the sub-agent.—SYMES *v.* LAMPSON (1854), 5 L. C. R. 17, Q. B. —**CAN.**

976 vi. —— *Where no necessity for delegation.*]—Pltf. purchased a farm from B. for £2,000 & employed deft., who occasionally acted as country agent, to do what was necessary to obtain transfer. The terms of the sale were that instalments of £1,000 & £600 should be paid before transfer, & deft., in the performance of his agency, transmitted to the seller's agent the amounts of the instalments thus payable. Subsequently deft. employed his Cape Town attorneys to obtain certain papers required to pass transfer, but owing to absence of a clerk there was some months' delay. In the meantime the seller surrendered his estate & pltf. lost the greater part of the money he had paid:—*Held:* there was an unreasonable delay in passing transfer, & as there was no necessity for employing the Cape Town attorneys to obtain the papers, or proof of custom to justify deft. in not doing the work himself, he was liable for the loss sustained by pltf. by reason of the delay.—KENNEDY *v.* LOYNES, No. 943 i., *ante*.—**S.AF.**

Sect. 4.—Effect of delegation on relation between principal & agent. Part VII. Sects. 1 & 2.]

thing is done by his own hand or by that of a clerk (ERLE, C.J.).—HEMMING *v.* HALE, No. 936, *ante*.

979. —— ——.]—An agent is liable to his principal for money received by the sub-agent though the employment of the sub-agent is known to the principal.—SKINNER & Co. *v.* WEGUELIN, EDDOWES & Co. (1882), Cab. & El. 12.

980. —— ——.]—Where the secretary of an unincorporated building society was sought to be made liable for money misappropriated by his private clerk, & it appeared that the directors had at different times in the presence of the secretary handed cheques to the private clerk with the concurrence of the secretary:—*Held:* the knowledge of & to some extent the implied direction on the part of the secretary had the same effect as if the cheques had been handed directly to him, & he was liable to make good the money misappropriated.—*Re* MUTUAL AID PERMANENT BENEFIT BUILDING SOCIETY, *Ex p.* JAMES (1883), 49 L. T. 530; 48 J. P. 54.

981. —— **Trover.**]—A. intrusted B. with goods to sell in India, agreeing to take back from B. what he should not be able to sell, & allowing him what he should obtain beyond a certain price, with liberty to sell them for what he could get if he could not obtain that price; B. not being able to sell the goods in India himself, left them with an agent to be disposed of by him, directing the agent to remit the money to himself in England:—*Held:* A. could not maintain trover against B. for the goods.—BROMLEY *v.* COXWELL (1801), 2 Bos. & P. 438; 126 E. R. 1372.

982. —— **Conversion by sub-agent.**]—A., a London merchant, employed B. & Co., an agency co. in London, to transmit on A.'s behalf the usual shipping documents in connection with a consignment of certain goods by A. shipped at H. for conveyance to S., with instructions to B. & Co. to forward them to their S. correspondent, there to be sold at the best possible price, & the proceeds to be remitted to pltf. B. & Co. sent the documents to C. at S., with orders to sell, etc. B. & Co. did not inform A. who C. was. C. converted the goods to his own use, & A. sued B. & Co. for the price of the goods:—*Held:* (1) B. & Co. employed C. as their sub-agent; (2) there was no privity of contract between A. & C. to make C. liable to A.; (3) B. & Co. were liable to A. by reason of C.'s default.—MEYERSTEIN *v.* EASTERN AGENCY CO., LTD. (1885), 1 T. L. R. 595.

983. —— **Negligence in supervising acts of sub-agent.**]—A. was appointed by the ct. paid manager of an estate. It was part of his duty to pay moneys received by him as such manager in a certain manner; & from time to time he remitted to his solrs. one moiety of the surplus moneys not required for the purpose of carrying on the business that it might be paid into ct. The solrs. misappropriated the moneys:—*Held:* (1) A. was justified in employing solrs. for the purpose of the payment into ct., the exigencies of the business justifying him in employing skilled sub-agents; (2) negligence on his part being established, A. was liable.—*Re* MITCHELL, MITCHELL *v.* MITCHELL (1884), 54 L. J. Ch. 342; 52 L. T. 178; 1 T. L. R. 153.

984. Unauthorised delegation involving loss of remuneration.]—BEABLE *v.* DICKERSON (1885), 1 T. L. R. 654.

Part VII.—Ratification.

SECT. 1.—IN GENERAL.

Effect of ratification, *see* pp. 418-423, *post*.

Ratification by companies of acts *ultra vires*, *see* COMPANIES.

Ratification by companies of acts of company promoters, *see* COMPANIES.

Ratification of assault, wrongful imprisonment, etc., by employees of railways, tramways, etc., *see* MASTER & SERVANT.

SECT. 2.—ACTS CAPABLE OF RATIFICATION.

985. In general.]—The very idea of ratification implies the absence of original authority.—RICHARDSON *v.* OXFORD, No. 1125, *post*.

986. —— **Whole transaction must be ratified.**]—A contract cannot be ratified in part & repudiated in part. If ratified, the whole contract must be ratified, & the agency accepted *cum onere* (LORD ELLENBOROUGH, C.J.).—HOVIL *v.* PACK (1805), 7 East, 164; 3 Smith, K. B. 164; 103 E. R. 62.

987. —— ——.]—A party to a cause for whose benefit, in common with others, the cause has been prosecuted, cannot avail himself of the benefit resulting from the suit discharged of the expenses of it, although he might have been made a party without his authority.—HALL *v.* LAVER (1842), 1 Hare, 571; 66 E. R. 1158.

Annotations:—**Apld.** Burge *v.* Brutton (1843), 2 Hare, 373. **Refd.** Norton *v.* Cooper, *Re* Manby, *Ex p.* Bittleston (1856), 3 Sm. & G. 375. **Mentd.** M'Gregor *v.* Derbyshire, Staffordshire & Worcestershire Junction Ry. Co. (1849), 13 L. T. O. S. 445.

988. —— ——.]—WILSON *v.* POULTER, No. 1097, *post*.

For full anns., *see* S. C. No. 1097, *post*.

989. —— ——.]—Where a contract has been entered into by one man as agent for another, the person on whose behalf it has been made cannot take the benefit of it without bearing its burdens.

Where the master of a ship entered into a charterparty whereby he was himself to receive the freight, & in consideration thereof to convey troops for the Govt., & to fit the vessel for that purpose, & he advanced money out of pocket, & drew bills on the owner for the rest of the expenses, to enable the ship to earn the freight, which contract the owner adopted:—*Held:* the master, if sued by the owner for the freight as money had & received, would have had a right at law to deduct the money so advanced without pleading a set-off & he had a right in equity to be reimbursed out of the freight

PART VII. SECT. 2.

986 i. *In general—Whole transaction must be ratified.*]—Pltf. went to B.C. nine years before the action, leaving his wife behind, to whom he wrote & occasionally sent money. She procured deft. to indorse a note made by her for the price of furniture to carry on a boarding-house (which she subsequently carried on with pltf.'s knowledge), & executed to deft. a chattel mtge. under seal in her own name on the furniture. The rent of the house being in arrear, & part of the mtge. money overdue, the landlord distrained, & deft. enforced his mtge., & pltf.'s wife not dissenting but rather assenting, the goods were sold, & the balance, after the payment of rent & mtge., was handed over to her. Pltf. thereupon sued deft. in trespass & trover:—*Held:* as by the action pltf. ratified the conduct of his wife in purchasing the furniture, he should not be allowed to repudiate the mtge., which formed part of the whole arrangement.—HALFPENNY *v.* PENNOCK (1873), 33 U. C. R. 229.—CAN.

so earned, such a case not falling within the rule that the master has not in ordinary circumstances a lien on the freight for wages & disbursements.—BRISTOWE *v.* WHITMORE (1861), 9 H. L. Cas. 391; 31 L. J. Ch. 467; 4 L. T. 622; 8 Jur. N. S. 291; 9 W. R. 621; 1 Mar. L. C. 95; 11 E. R. 781, H. L.

Annotations:—**Consd. & Apld.** The Red Rose (1865), L. R. 2 A. & E. 80. **Foll.** The Feronia (1868), L. R. 2 A. & E. 65. **Apld.** Tooth *v.* Hallett (1869), 4 Ch. App. 242, L. JJ. **Consd. & Distd.** The Two Ellens (1871), L. R. 3 A. & E. 345. **Refd.** The Orienta, [1894] P. 271; The El Argentino (1909), 101 L. T. 80. **Mentd.** The Sara (1889), 14 App. Cas. 209, H. L.

990. Criminal act—Forgery.]—BARBER *v.* GINGELL, No. 346, *ante*.

For full anns., *see* S. C. No. 346, *ante*.

991. —— ——.]—F. forged a power of attorney under which stock standing in the names of certain trustees, including himself, was sold out & transferred to the buyers. The sum produced by the sale was carried to a fund belonging jointly to F. & his partners. His partners knew of the money thus produced being carried to their partnership fund, but did not know it was produced by forgery. F. was afterwards convicted & executed for another forgery. No laches or connivance was attributable to the other trustees:—*Held:* (1) the trustees might adopt the transfer, though as against them it would not have been binding, & though it originated in a forgery; (2) the partners of F. were liable for the proceeds of the sale.—STONE *v.* MARSH, STRACEY & GRAHAM (1827), 6 B. & C. 551; 9 Dow. & Ry. K. B. 643; Ry. & M. 364; 5 L. J. O. S. K. B. 201; 108 E. R. 554.

Annotations:—**Consd.** *Re* Marsh, *Ex p.* Bolland (1828), Mont. & M. 315; *Re* Jones, *Ex p.* Jones (1835), 3 Deac. & Ch. 525; *Re* Elliott, *Ex p.* Jermyn (1837), 6 L. J. Bcy. 41; *Re* Jermyn, *Ex p.* Elliott (1837), 2 Deac. 179. **Distd.** Bishop *v.* Jersey, (1854), 22 L. T. O. S. 326; Dudley & West Bromwich Banking Co. *v.* Spittle (1860), 8 W. R. 351; Chowne *v.* Baylis (1862), 31 Beav. 351. **Refd.** Lee *v.* Bayes (1856), 18 C. B. 599; **Admity. Comrs.** *v.* S.S. Amerika, [1917] A. C. 38, H. L. **Mentd.** The Princess Royal (1870), L. R. 3 A. & E. 41 Midland Insce. Co. *v.* Smith (1881), 6 Q. B. D. 561.

992. —— ——.]—On the same facts:—*Held:* the adoption of the sale & transfer & receipt of the money did not amount to ratification of the felonious act of F.—*Re* MARSH, *Ex p.* BOLLAND (1828), Mont. & M. 315.

Annotations:—**Consd. & Apld.** *Re* Elliott, *Ex p.* Jermyn (1837), 6 L. J. Bcy. 41. **Consd.** *Re* Jermyn, *Ex p.* Elliott (1837), 2 Deac. 179.

993. —— ——.]—W. accepted certain bills of exchange in the name, but without the authority, of his brother J., which bills were dishonoured when at maturity. W. was taken up upon another charge of forgery, & while in custody the holders of the above bills of exchange applied to J. for payment of them:—*Held:* the written acknowledgment by J. (after the bills had been dishonoured) that he was responsible for them, & also that he engaged to pay them in case his brother should fail to do so, was not sufficient to make him liable upon the bills, no antecedent authority having been given to W. to accept them, & the subsequent acknowledgment of liability being made to screen his brother from a charge of forgery.—*Re* LATHAM, *Ex p.* EDWARDS (1841), 2 Mont. D. & De G. 241; 10 L. J. Bcy. 62; 5 Jur. 706.

994. —— ——.]—A forged instrument cannot be ratified by the person whose name is forged, & he cannot adopt it so as to make himself liable thereon.

J. owed pltf. £20, & sent to him a promissory note for that amount, which purported to bear, & was believed by pltf. to bear, the signatures of J. & deft., J.'s brother-in-law. Before the note became due, pltf. met deft. & mentioned the note to him. He denied the signature to be his, & pltf. said it must be a forgery of J.'s, & he would consult a lawyer with the view of taking criminal proceedings against him. Deft. begged pltf. not to do so, & said he would rather pay the money. Pltf. said he must have it in writing; & if deft. would sign a memorandum, he would take it. Deft. signed a document admitting himself to be responsible to pltf. for the amount of the note:—*Held* (MARTIN, B., *diss.*): (1) the foregoing document was no ratification of the forged promissory note, but an agreement on the part of deft. to treat the note as his own & to become liable upon it, in consideration that pltf. would forbear to prosecute J.; (2) this agreement was against public policy & void, as founded upon an illegal consideration; (3) although a voidable act might be ratified by matter subsequent, it was otherwise when an act was originally & in its inception void; (4) the foregoing document was of no effect as a ratification, as the act done—that is, the forged signature to the note—was illegal & void.—BROOK *v.* HOOK (1871), L. R. 6 Exch. 89; 40 L. J. Ex. 50; 24 L. T. 34; 19 W. R. 508.

Annotations:—**Refd.** Bolton Partners *v.* Lambert (1889), 41 Ch. D. 295, C. A.; Jones *v.* Mercioneth Permanent Benefit Bldg. Soc., [1891] 2 Ch. 587; Marsh *v.* Joseph (1896), 66 L. J. Ch. 128, C. A.; Brodie *v.* Brodie, [1917] P. 271.

995. —— ——.]—A person who knows that a bank is relying upon his forged signature to a bill cannot lie by & not divulge the fact until he sees

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990 i. *Criminal act—Forgery.*]—MERCHANTS' BANK OF CANADA *v.* LUCAS (1890), 18 S. C. R. 704.—**CAN.**

990 ii. —— *Fraud.*]—Principals are not allowed to benefit by adopting the fraud of their agents.—KOYLASH CHUNDER BANERJEE *v.* KALEE PROSONNO CHOWDHRY (1871), 16 W. R. 80.—**IND.**

990 iii. —— ——.]—Applt. having deposited $100 in resp. bank, intrusted the deposit receipt for safe custody to R., his agent, who subsequently signed applt.'s name to it without his authority, & deposited the receipt with resps. as security for an advance by resps. to himself. The advance not being repaid, resps. charged the amount against the deposit. Later R. confessed to resps. that he had so used the receipt, & begging applt. not to prosecute him, gave applt. a mtge. on some property in which he had an interest. Two years later applt. notified the bank of R.'s fraud & demanded payment:—*Held:* although R. had falsely represented that he had an authority which he did not possess, his dealing with the receipt had been ratified by applt., & the fact that R. had committed a criminal offence did not render his act incapable of ratification, there having been no undertaking on the part of either applt. or resp. to forbear to prosecute. *McKenzie* v. *British Linen Co.*, 6 App. Cas. 99; *Brook* v. *Hook*, L. R. 6 Exch. 89, cited.—SCOTT *v.* BANK OF NEW BRUNSWICK (1894), 23 S. C. R. 277.—**CAN.**

a. *Bill accepted in agent's own name.*]—Pltf. contracted with F. to do the plumbing of a house which F. had contracted to build for W. M. F. having failed to complete his contract, pltf. sought to recover the amount due to him from W. M., whose wife, M. M., was joined as co-deft., alleging that, before he undertook the work, he saw M. M., who was acting for W. M. in his absence, & that she agreed to pay him the $200 & keep it out of the contract. After the work which pltf. contracted to do had been completed, F. drew an order on M. M. for the amount to which pltf. was entitled, which M. M. accepted in these terms: "Accepted by M. M.":—*Held:* the acceptance, being one which purported to be binding only upon M. M., was incapable of ratification by W. M., & the doctrine of ratification was inapplicable.—CRAIG *v.* MATHESON (1900), 32 N. S. R. 452.—**CAN.**

b. *Demand for payment.*]—A demand of payment of the amount due under Melbourne & Geelong Corpns. Amendment Act (No. 178) made on behalf of the council by an unauthorised person is sufficient when ratified by proceedings by the council based on such demand.—WRIGHT *v.* GEELONG TOWN COUNCIL (1877), 3 V. L. R. L. 313.—**AUS.**

c. *Distress by agent in own name.*]—A distress made by an agent for the benefit of his principal in his own name instead of his principal's may be ratified by the principal.—GRANT *v.* MCMILLAN (1861), 10 C. P. 536.—**CAN.**

Sect. 2.—*Acts capable of ratification.* *Sect.* 3.]

that the position of the bank is altered for the worse. But there is no principle on which his mere silence for two weeks from the time when he first knew of the forgery, during which the position of the bank was in no way altered or prejudiced, can be held to be an admission or adoption of liability or an estoppel.

The names of A. & B. appeared on a bill as drawers & indorsers to B. L. Co. The B. L. Co.'s Inverness bank discounted it for C., who signed it as acceptor. They had no previous dealings with A. or B. The bill being dishonoured when due, notice to that effect was sent to A. & B., & received late on a Saturday, but they did not communicate with the bank. On the following Monday, Apr. 14, C. brought to the B. L. Co. a blank bill with A. & B.'s names as drawers & indorsers, apparently in the same handwriting as the previous bill. It was agreed to accept it as a renewal of the previous bill, but for a less amount, the difference being paid in cash by C. Three days before it was due notice was sent to A. & B., & again when it was dishonoured, & then through the B. L. Co.'s law agent. A fortnight after the first notice the B. L. Co. were informed for the first time that A. & B.'s signatures were forgeries, & they declined to pay the amount of the bill. A. alleged that he called on C. on Apr. 14 about the first bill, & C. admitted that he had forged his name, handed him the bill, & solemnly assured him that it had been taken up by cash; &, so assured, he did not think it necessary to communicate with the bank. He admitted that on that day he drank with C. & borrowed £4 of him. He denied any knowledge of the second bill until he received the bank notices. C. was convicted of the forgery. The B. L. Co. charged A. with payment of the bill on the ground that he had either authorised the use of his name or subsequently adopted & accredited the bill, & was estopped from denying liability:—*Held:* on the facts proved A. had neither authorised nor assented to the use of his name, & the circumstances did not raise any estoppel against him.—M'KENZIE *v.* BRITISH LINEN CO. (1881), 6 App. Cas. 82; 44 L. T. 431; 29 W. R. 477, H. L.

Annotations:—**Refd.** Colonial Bank *v.* Cady, London Chartered Bank of Australia *v.* Cady (1890), 63 L. T. 27, H. L.; Ewing *v.* Dominion Bank, [1904] A. C. 806, P. C. **Mentd.** Mackie *v.* Hebertson (1884), 9 App. Cas. 303, H. L.; Ogilvie *v.* West Australian Mortgage Agency Corpn., [1896] A. C. 257, P. C.

996. —— **Receipt of stolen goods.**]—Prisoners, husband & wife, were jointly indicted for receiving goods knowing them to have been stolen. The jury found both prisoners guilty, & that the wife received the goods without the control or knowledge of, & apart from, her husband, & that he afterwards adopted his wife's receipt:—*Held:* the conviction against the husband could not be sustained.—R. *v.* DRING (1857), Dears. & B. 329; 30 L. T. O. S. 158; 21 J. P. 742; 3 Jur. N. S. 1132; 6 W. R. 41; 7 Cox, C. C. 382, C. C. R.

Annotations:—**Distd.** R. *v.* Woodward (1862), 9 Cox, C. C. 95, C. C. R. **Folld.** R. *v.* Pritchard & Pritchard (1913), 9 Cr. App. Rep. 210, C. C. A.

997. —— ——.]—A wife, in the absence of her husband, & without his knowledge, received stolen goods, & paid money on account of them. The thief & the husband afterwards met. The latter then learnt that the goods were stolen, & he agreed on the price which he was to pay for them, & paid the balance to the thief:—*Held:* on these facts the husband might be convicted of receiving the goods knowing them to be stolen.—R. *v.* WOODWARD (1862), Le. & Ca. 122; 31 L. J. M. C. 91; 5 L. T. 686; 26 J. P. 116; 8 Jur. N. S. 104; 10 W. R. 298; 9 Cox, C. C. 95, C. C. R.

Annotation:—**Refd.** Brook *v.* Hook (1871), L. R. 6 Exch. 89.

998. Insurance without orders by bailee of goods.]—Pltf., a wharfinger, effected a policy of insurance against fire on "goods in trust or on commission," intending thereby to cover the goods of customers. No charge for insurance was made to customers, nor were they informed of the existence of the policy. On a fire happening:—*Held:* pltf. was entitled to recover the entire value of the goods of customers which had been destroyed, & not merely the value of his own lien on them.

A person intrusted with goods can insure them without orders from the owner, & even without informing him that there was such a policy. An assurance made without orders may be ratified by the owners of the property, & then the assurers become trustees for them (LORD CAMPBELL, C.J.).—WATERS & STEEL *v.* MONARCH FIRE & LIFE ASSURANCE CO. (1856), 5 E. & B. 870; 25 L. J. Q. B. 102; 26 L. T. O. S. 217; 2 Jur. N. S. 375; 4 W. R. 245; 119 E. R. 705.

Annotations:—**Folld.** L. & N. W. Ry. Co. *v.* Glyn (1859), 1 E. & E. 652. **Distd.** Seagrave *v.* Union Marine Insce. (1866), L. R. 1 C. P. 305; North British Insce. *v.* Moffatt (1871), L. R. 7 C. P. 25; Martineau *v.* Kitching (1872), 41 L. J. Q. B. 227. **Consd.** Ebsworth *v.* Alliance Marine Insce. (1873), L. R. 8 C. P. 596. **Mentd.** South Australian Insce. *v.* Randell (1869), 6 Moo. P. C. C. N. S. 341.

999. Invalid transaction.]—There can be no ratification of an invalid transaction where the person performing the supposed act of ratification has been kept, by the conduct of the party in whose favour it is made, unaware of the invalidity of the first transaction, & has not, at the time of the supposed ratification, the means of forming an independent judgment.—SAVERY *v.* KING (1856), 5 H. L. Cas. 627; 25 L. J. Ch. 482; 27 L. T. O. S. 145; 2 Jur. N. S. 503; 4 W. R. 571; 10 E. R. 1046, H. L.

Annotations:—**Expld.** Hobbyn *v.* Hobbyn (1889), 60 L. T. 499. **Refd.** Allcard *v.* Skinner (1887), 36 Ch. D. 145, C. A. **Mentd.** Barnard *v.* Hunter (1856), 28 L. T. O. S. 152, C. A.; Turner *v.* Collins (1871), 7 Ch. App. 334, n.; Pisani *v.* A.-G. for Gibraltar (1874), L. R. 5 P. C. 516; De Witte *v.* Addison (1899), 80 L. T. 207, C. A.; Moody *v.* Cox & Hatt (1917), 116 L. T. 740, C. A.

999 i. *Invalid transaction.*]—In certain leases the lessor was described as the surviving trustee of a will. In that capacity he, as owner, & not as agent for another, demised lands, in which he had not at the time of the respective demises any equitable or legal estate whatever, nor any power enabling him to grant leases; but he was, as agent, in receipt of the rents of the demised lands for the persons who were beneficially interested under the will:—*Held:* these leases, *qua* contracts, could not be sustained on the ground of a subsequent ratification of them by those persons.—BYRNE *v.* ROBKE (1869), L. R. 3 Eq. 642.—IR.

999 ii. ——.]—Though a subsequent ratification may supply the want of authority in an agent at the time of his acceptance of an offer, it must be shown in such case that there was a contract purporting to be made by & with the agent, which, if the agent had authority, would be a valid binding contract.

At a meeting of a dispensary committee, an agreement in writing for the purchase by them, as agents for the board of guardians, from deft. for £60, of a plot of land for a doctor's residence & dispensary, was signed by deft. & by the chairman on behalf of the committee. The committee had at the time no authority from the board of guardians to contract for the purchase of land. Deft. subsequently withdrew his offer, & refused to carry out the agreement. After such withdrawal & refusal the agreement came before the board of guardians, & was approved by them. Neither the agreement nor the approval was under seal. In a suit by the guardians for specific performance:—*Held:* (1) there being nothing under the seal of the guardians to give effect to the agreement in the only way in which they could bind themselves, there was not any contract which could be ratified by them, so as to make their approval relate back to the date of the agreement, & thus render the withdrawal by deft. inoperative; (2) the guardians were not entitled to enforce the agreement. *Kidderminster Corpn.* v. *Hardwick* (1873), L. R. 9 Exch. 13; *Oxford Corpn.* v. *Crow*, [1893] 3 Ch. 535, folld.; *Bolton Partners* v. *Lambert* (1889), 41 Ch. D. 295; *Re Portuguese Consolidated Copper Mines* (1890)

1000. Notice of abandonment.]—A mere pledgee of a policy on a ship has no implied authority to give notice of abandonment on behalf of the assured to the underwriters, & a notice, given by the pledgee without express authority, does not become valid on its subsequent ratification by the assured.—JARDINE *v.* LEATHLEY (1863), 3 B. & S. 700; 1 New Rep. 394; 32 L. J. Q. B. 132; 7 L. T. 783; 9 Jur. N. S. 1035; 11 W. R. 432; 1 Mar. L. C. 288; 122 E. R. 262.

Annotation :—**Distd.** Williams *v.* North China Insce. (1876), 35 L. T. 884, C. A. In *Jardine* v. *Leathley* the ratification was of acts & not of contracts (MELLISH, L.J.).

1001. Act done with fraudulent intention of deriving personal benefit therefrom.]—Where an agent makes a contract purporting to sell goods in the name of a principal, but with the fraudulent intention of selling them on his own account & for his own benefit, it is competent for the principal to ratify & take the benefit of the contract as against the buyers.

V. was agent of T. for purposes of entering into & rescinding contracts of sale. V. on T.'s behalf sold certain goods to M. & H. Subsequently, not purporting to act as T.'s agent, he repurchased the goods sold, & resold them purporting to act as T.'s agent, but really intending to sell them for his own benefit. The buyers, on discovering or suspecting he was selling on his own behalf, repudiated the contract of sale. After the repudiation T. ratified & adopted it :—*Held :* he could so do, notwithstanding V.'s fraud & the buyers' repudiation.—*Re* TIEDEMANN & LEDERMANN FRÈRES, [1899] 2 Q. B. 66; 68 L. J. Q. B. 852; 81 L. T. 191.

Annotation :—**Distd.** Hambro *v.* Burnand, [1903] 2 K. B. 399.

SECT. 3.—WHO CAN RATIFY.

1002. Person on whose behalf act done.]—The general rule of common law, borrowed from civil law, is that the person in whose name the act was done may, if he thinks fit, afterwards ratify & adopt it (WILLES, J.).—PHILLIPS *v.* EYRE (1870), L. R. 6 Q. B. 1; 40 L. J. Q. B. 28; 22 L. T. 869, Ex. Ch.

Annotations :—**Mentd.** Harris *v.* Quine (1869), L. R. 4 Q. B. 653; Ellis *v.* M'Henry (1871), L. R. 6 C. P. 228; A.-G. for Colony of Hong Kong *v.* Kwok-a-Sing (1873), L. R. 5 P. C. 179; Rouquette *v.* Overmann (1875), 33 L. T. 420; The M. Moxham (1875), 1 P. D. 43; Musgrave *v.* Pulido (1879), 41 L. T. 629, P. C.; Batthyany *v.* Walford (1886), 33 Ch. D. 624; Bath Union *v.* Berwick-on-Tweed Union, [1892] 1 Q. B. 731; Companhia de Moçambique *v.* British South Africa Co., De Sousa *v.* British South Africa Co., [1892] 2 Q. B. 358, C. A.; British South Africa Co. *v.* Companhia de Moçambique, [1893] A. C. 602, H. L.; Fielding *v.* Thomas, [1896] A. C. 600, P. C.; Machado *v.* Fontes, [1897] 2 Q. B. 231, C. A.; Fracis, Times *v.* Carr (1900), 82 L. T. 698, C. A.; Carr *v.* Fracis, Times, [1902] A. C. 176; R. *v.* Crewe, *Ex p.* Sekgome, [1910] 2 K. B. 576, C. A.; Rayment *v.* Rayment & Stuart, Chapman *v.* Chapman & Buist, [1910] P. 271; Batt *v.* Metropolitan Water Board, [1911] 1 K. B. 845.

1003. ——.]—To rebut a plea of tender by a subsequent demand & refusal, the subsequent demand must be made by a person authorised to receive payment. Ratification by the creditor of an unauthorised demand is not sufficient.—COLES *v.* BELL (1808), 1 Camp. 478, n.

1004. *S. P.* COORE *v.* CALLAWAY (1794), 1 Esp. 115.

For full anns., *see* CONTRACT.

1005. ——.]—A person may ratify an action brought in his name but without his knowledge or authority by another professing to act as his agent and on his behalf.—ANCONA *v.* MARKS, No. 1160, *post.*

For full anns., *see* S. C. No. 1160, *post.*

1006. —— Act must be done on principal's behalf.]—The rule as to ratification applies only to the acts of one who professes to act as agent of a person who afterwards ratifies (PARKE, J.).—VERE *v.* ASHBY, ROWLAND & SHAW (1829), 10 B. & C. 288; 109 E. R. 457.

Annotations :—**Apprvd.** Keighley, Maxsted *v.* Durant, [1901] A. C. 240. **Mentd.** Battley *v.* Lewis (1840), 1 Man. & G. 155; Forester *v.* Bell (1847), 9 L. T. O. S. 133; Yorkshire Banking Co. *v.* Beatson, Leeds County Banking Co. *v.* Beatson (1879), 4 C. P. D. 204.

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45 Ch. D. 16, distd.—ATHY GUARDIANS *v.* MURPHY, [1896] 1 I. R. 65.—**IR.**

999 iii. ——.]—A contract entered into by an officer of the Crown empowered by stat. to make the contract in a prescribed way, although defective in not conforming to such statutory requirements, may be ratified by the Crown.—WOODBURN *v.* R. (1898), 6 Ex. C. R. 12; *revsd.* on another point, 29 S. C. R. 112.—**CAN.**

d. *Maker altering note without indorser's consent.*]—A., after making a promissory note, altered it as to the time of payment without the knowledge or consent of the indorser, who promised to pay it :—*Held :* the alteration having been made without authority rendered the note void, & no subsequent promise by the indorser to pay could have the effect of ratifying it.—WESTLOH *v.* BROWN (1878), 43 U. C. R. 402.—**CAN.**

e. *Notice to quit—Subsequent ratification ineffectual.*] — CAIRNEY *v.* FOX, Q. C. R. 486.—**IR.**

f. *Purchase of goods at sheriff's sale.*]—A sheriff or his bailiff may sign for the purchaser the memorandum in writing in same manner as an auctioneer or his clerk. The entry of deft.'s agent as purchaser is sufficient, if deft. afterwards acknowledge the agent's authority.—FLINTOFT *v.* ELMORE (1868), 18 C. P. 274.—**CAN.**

g. *Tortious act.*]—MAUDUOIT *v.* ROSS, No. 1006 *v.*, *post.*

h. *Unsigned contract for sale of land.*]—The subsequent recognition of an unsigned contract, in writing, for the sale of lands, by the signature of his lawfully authorised agent to a notice specifying & adopting the contract, is sufficient to bind the party contracting to be charged therewith.—NORRIS *v.* COOKE (1857), 7 I. C. L. R. 37 (E.); S. C. 2 Ir. Jur. N. S. 443 (E.).—**IR.**

k. *Voidable transaction—Deed of gift to trustee.*]—A deed of gift to an agent & trustee, voidable in its origin & unsustainable, may be validated & made binding on the grantor by his subsequent deliberate acts done with the assistance of his legal adviser.—DE MONTMORENCY *v.* DEVEREUX (1840), 2 Dr. & Wal. 410; 7 Cl. & Fin. 188; West, 64.—**IR.**

PART VII. SECT. 3.

l. *Ratification by one agent of invalid act of another agent.*]—A lease was granted without authority by an agent to deft.; —*Held :* even supposing the original transaction liable to be set aside, ratification by another person with authority of the owner to ratify would render the lease valid.—ANNUND CHUNDER BOSE *v.* BROUGHTON (1872), 17 W. R. 301; *sub nom.* ADMINISTRATOR-GENERAL OF BENGAL *v.* ANUNDO CHUNDER BOSE, 21 W. R. 425.—**IND.**

m. *Joint agents cannot ratify each other's acts.*]—A. & B., general agents of deft. co., jointly appointed W. as general agent of the co. at L. with authority to grant interim receipts. W. employed S. to solicit applications, but S. had no authority from the co. to issue interim receipts. S. subsequently had a conversation with A. in which he told the latter that he was in the habit of issuing interim receipts, & A. agreed to his doing so & said S. was to be considered as W.'s agent. S. signed an interim receipt to cover an insurance of pltf.'s property which was subsequently destroyed by fire. In an action to recover the amount of the insurance under the terms of this receipt :—*Held :* there was no evidence of ratification by the co., as, even if authority to act as agent independently of W. had been given by A., such authority would not have been valid because not given by A. & B. jointly, they being joint agents of the co.—SUMMERS *v.* COMMERCIAL UNION INSURANCE CO. (1881), 6 S. C. R. 18.—**CAN.**

1002 i. *Person on whose behalf act done.*]—A principal cannot ratify a contract made by an agent without his authority, unless the agent, at the time of entering into the contract, professed to act on behalf of a principal.—CROWDER *v.* MCALISTER (1909), S. R. Q. 203.—**AUS.**

1006 i. —— *Act must be done on principal's behalf.*]—A. & B. were partners, & A. without the knowledge of B. purchased goods in his own name, such goods being subsequently taken into stock & disposed of for the benefit of the firm :—*Held :* B. could not be made liable on the contract by ratification, as he was no party to the contract & was not contemplated by A. as his principal at the time of the contract. *Watson* v. *Swann* (1862), 11 C. B. N. S. 771; *Vere* v. *Ashby* (1829), 10 B. & C. 288, follds.; *Durant* v. *Roberts*, [1900] 1 Q. B. 629, distd.—FRASER *v.* SWEET (1900), 20 C. L. T. 283; 13 Man. L. R. 147.—**CAN.**

1006 ii. *S. P.* BANK OF NEW ZEALAND *v.* FLEMING 1898), 18 L. R. N. Z.—**N.Z.**

1006 iii. —— ——.]—Deft. received from M. through C. a deposit on a purchase of property, & gave a receipt stipulating for completion in ten days.

Sect. 3.—*Who can ratify. Sect.* 4.]

1007. —— ——.]—The question of liability by ratification depends upon whether the act was originally intended to be done to the use or for the benefit of the person who is afterwards said to have ratified it.—EASTERN COUNTIES RY. CO. *v.* BROOM (1851), 6 Exch. 314; 6 Ry. & Can. Cas. 743; 16 L. T. O. S. 465, 509; 15 Jur. 297; 20 L. J. Ex. 196, Ex. Ch.

Annotations:—**Consd. & Dbtd.** Goff *v.* G. N. Ry. Co. (1861), 3 E. & E. 672. **Expld.** Woollen *v.* Wright (1862), 1 H. & C. 554, Ex. Ch.; Bank of New South Wales *v.* Owston (1879), 4 App. Cas. 270. **Refd.** Whitfield *v.* S. E. Ry. Co. (1858), E. B. & E. 115; Williams *v.* Smith (1863), 14 C. B. N. S. 596; Walker *v.* S. E. Ry. Co., Smith *v.* S. E. Ry. Co. (1870), L. R. 5 C. P. 640. **Mentd.** Mersey Docks & Harbour Board *v.* Penhallow (1861), 8 Jur. N. S. 486, Ex. Ch.

1008. —— ——.]—MARSH *v.* JOSEPH, No. 1122, *post.*

For full anns., *see* S. C. No. 1122, *post.*

1009. —— ——.]—A contract made by a person intending to contract on behalf of a third party, but without his authority, cannot be ratified by the third party so as to render him able to sue or liable to be sued on the contract where the person who made the contract did not profess at the time of making it to be acting on behalf of a principal.—KEIGHLEY, MAXSTED & Co. *v.* DURANT, [1901] A. C. 240; 70 L. J. K. B. 662; 84 L. T. 777; 17 T. L. R. 527; 45 Sol. Jo. 536, H. L.

Annotations:—**Apld.** Eastern Construction Co. *v.* National Trust Co., [1914] A. C. 197, P. C. **Refd.** Hambro *v.* Burnand, [1903] 2 K. B. 399; *Re* Rowe, *Ex p.* Derenburg, [1904] 2 K. B. 483, C. A.; Boston Fruit Co. *v.* British & Foreign Marine Insce., [1906] A. C. 336; Reliance Marine Insce. *v.* Duder, [1913] 1 K. B. 265, C. A.

1010. —— ——.]—Where a stranger pays a debt without authority, no ratification is possible unless the payment professes to be made on behalf of the debtor (STIRLING, L.J.).—*Re* ROWE, *Ex p.* DERENBURG & Co., [1904] 2 K. B. 483; 73 L. J. K. B. 594; 91 L. T. 220; 52 W. R. 628; 48 Sol. Jo. 475; 11 Mans. 130, C. A.

Annotation:—**Refd.** *Re* Keet, [1905] 2 K. B. 666, C. A.

1011. —— **Distress by equitable owner—Ratification by legal owner.**]—A distress for rent upon a warrant signed by one who has only an equitable interest in the land cannot be rendered valid by a ratification subsequently given by the legal owner. By a subsequent ratification, the distrainor has an authority in him at the time, but only where the authority is put forward at the time, & the act is manifestly done under it, for the ratification can only operate on the act as it is; it adopts the act as actually done by or for the benefit of him for whom it is alleged at the time it is so done. If it does more, it changes the nature of the act, which he alleges to be done in his own right & for his own benefit, & turns it into an act alleged to be done in the right of another, since adopted.—COLLIER *v.* CLARKE (1845), 5 L. T. O. S. 475.

1012. —— **Distress ordered by landlord—Ratification by executrix.**]—Where a distress was made by command & in the name of a landlord, but he died before the distress was actually made:—*Held:* the bailiff might make recognisance as bailiff of his extrix., who ratified the distress, although before probate.—WHITEHEAD *v.* TAYLOR (1839), 10 Ad. & El. 210; 2 Per. & Dav. 367; 9 L. J. Q. B. 65; 4 Jur. 247; 113 E. R. 81.

Annotation:—**Distd.** Fishmongers' Co. *v.* Robertson (1843), 5 Man. & G. 131.

1013. —— **Insurance on behalf of owner—Ratification by charterers.**]—Applts. were charterers of the ship *B.* The charterparty, which amounted to a demise of the ship, was made between C. & Sons, "as agents for the owners," & applts., & provided that the owners should pay for insurance on the ship. A policy of insurance was effected by insurance brokers on the instructions of C. & Sons, agents of the owners, "as well in their own name as for & in the name & names of all & every other person or persons to whom the subject-matter of this policy does or may or shall appertain in part or in all." The name of applts. was not mentioned in the policy, which was a valued policy, & contained a collision clause. During the continuance of the policy the *B.* came into collision with another ship. Legal proceedings being taken in the cts. of the United States of America, the collision was found to have been caused by negligence of the master & crew of the *B.*, & applts. were compelled to pay damages to the owners of the other ship:—*Held:* applts. were not entitled to recover from the underwriters the damages so paid by them as being a loss covered by the policy, there being no evidence that it was effected on their behalf, or that they were within the contemplation of the parties at the time it was made.—BOSTON FRUIT Co. *v.* BRITISH & FOREIGN MARINE INSURANCE Co., [1906] A. C. 336; 75 L. J. K. B. 537; 94 L. T. 806; 54 W. R. 557; 22 T. L. R. 571; 10 Asp. M. L. C. 260; 11 Com. Cas. 196, H. L.

For full anns., *see* INSURANCE.

1014. —— **Insurance repudiated by intended assured—Ratification by different assured.**]—An insurance broker at Lloyd's, having an order from his principal to effect a reinsurance on goods for a voyage at a certain premium, obtained a slip from deft., an underwriter, at a premium in excess of that authorised. Deft. was not told who the principal was. The broker issued a provisional cover note, but the principal repudiated the insurance. The broker, without informing deft., issued a fresh cover note, containing deft.'s name as underwriter, to pltf., who desired to reinsure an interest in the same goods. Deft. signed a policy in the ordinary Lloyd's form, bearing the same

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At the time both deft. & C. believed that M. was purchasing for himself, or on behalf of himself & others. Pltf. consented to allow her name to be used as purchaser, & this was handed to C. a few days after the receipt of the deposit. The transaction was not completed within the ten days, but the negotiations were carried on after that period:—*Held:* C., who was merely a dummy, could not enforce the contract & had no interest in it. At the date of the receipt by deft. to C., C. was unaware of the existence of pltf., & could not be acting on her behalf, & pltf. could not ratify or take advantage of the contract. *Keighley, Maxsted* v. *Durant*, [1901] A. C. 240, folld.—ECROYD *v.* RODGERS (1913), 24 W. L. R. 318; 11 D. L. R. 626; 23 Man. L. R. 633.—**CAN.**

1006 iv. —— ——.]—Pltf. sued deft. on mtges. executed to pltf. by the adoptive mothers of deft. (who were also defts.) subsequent to his adoption. Pltf. contended that the mtges. had become effectual as against deft. by reason of his subsequent conduct. Evidence was given that he had promised his adoptive mothers to redeem the mtges., & that he had stood by & allowed pltf. to carry out the provisions of the mtge. deeds to his own detriment by paying maintenance to deft.'s adoptive mothers, & by paying off certain mtges. which had been created by them previous to the adoption of deft.:—*Held:* the promise to redeem could not have the effect of ratification, for the ratification of the unauthorised contract of an agent can only be effectual when the contract has been made by the agent avowedly for or on account of the principal, & not when it has been made on account of the agent himself.—SHIDDESHVAR *v.* RAMCHANDRARAV (1882), I. L. R. 6 Bom. 463.—**IND.**

1006 v. —— —— *Tort.*]—A wrongful act, in order to be capable of being ratified so as to make the ratifier liable for the wrong, must be done professedly for the use or benefit or by the authority of the party who is afterwards said to have ratified it.—MAUDUIT *v.* ROSS (1884), 10 V. L. R. L. 264.—**AUS.**

1006 vi. —— *Contract unauthorised by testator—Ratification by executor.*]—Where a contract is made for a testator by an agent in his lifetime without authority, which contract testator might have ratified but has not so ratified, his exors. cannot in law ratify such contract so as to make it binding on the estate of testator.—BUNDOORA PARK ESTATE Co., LTD. *v.* FISHER (1894), 20 V. L. R.—**AUS.**

date as the slip :—*Held :* (1) as pltf. was not the principal of the broker at the time when the broker obtained the slip from deft., pltf. could not ratify the contract made by the broker; (2) an action against deft. on the policy could not be maintained by pltf.—BYAS *v.* MILLER (1897), 3 Com. Cas. 39.

1015. Person unascertained at date of act—Administrator.]—Goods were sold after the death of an intestate, & before grant of letters of administration, by one who had been deceased's agent; they were sold avowedly on account of the estate of intestate. In an action for the price of the goods brought by the administrator :—*Held :* the fact of the intended principal being unknown at the time to the person who intended to be the agent was immaterial, & pltf. could recover.—FOSTER *v.* BATES, No. 1134, *post.*

Annotations :—**Folld.** Bodyer *v.* Arch (1854), 10 Exch. 333. **Apld.** Thorne *v.* Tilbury (1858), 27 L. J. Ex. 407; Hill *v.* Curtis (1865), L. R. 1 Eq. 90; Baker *v.* Blaker (1886), 55 L. T. 723. **Consd.** Durant *v.* Roberts & Keighley, Maxsted, [1900] 1 Q. B. 629, C. A.; *Re* Pryse, [1904] P. 301. C. A. **Refd.** Holland *v.* King (1848), 6 C. B. 727; Crossfield *v.* Such (1853), 1 C. L. R. 668; Morgan *v.* Thomas (1853), 22 L. J. Ex. 152; Pemberton *v.* Chapman (1858), E. B. & E. 1056, Ex. Ch.; Ellis *v.* Ellis, [1905] 1 Ch. 613.
For full anns., *see* S. C. No. 1134, *post.*

1016. ——— ———.]—In order to make the estate of a deceased person liable for services rendered whilst there is no personal representative, it must be shown, not only that the services are for the benefit of the estate, but that they are rendered under a contract with someone who subsequently, by obtaining letters of administration, becomes authorised to bind the estate, & ratifies the contract.—*Re* WATSON, *Ex p.* PHILLIPS (1887), 19 Q. B. D. 234; 56 L. J. Q. B. 619; 57 L. T. 215; 35 W. R. 709; 3 T. L. R. 668, C. A.

1017. ——— **Heir.**]—During the life of D., owner in fee of land which was let to tenants from year to year & week to week, the property was managed by deft. as her agent, deft. receiving the rents & paying them into a separate earmarked account at his own bank. D. having died intestate in 1867, deft. continued to receive the rents & pay them into the bank exactly as before, not informing the tenants of D.'s death, but stating to several persons that he was acting as agent & receiver for the heir, whoever he might be. Deft. thus acted till 1880, when, more than 12 years after D.'s death, he claimed the property on his own account. The assignee of D.'s heir having in 1881 brought an action against deft. to recover possession of the land & for an account of the rents & profits :—*Held :* (1) deft.'s acts in receiving the rents as agent for the heir, though unauthorised, might be ratified by the true owner, & were ratified by pltf. bringing his action within a reasonable time after the heir was ascertained; (2) pltf. was entitled to judgment for recovery of possession of the land & to an account of the rents & profits since D.'s death.—LYELL *v.* KENNEDY, KENNEDY *v.* LYELL (1889), 14 App. Cas. 437; 59 L. J. Q. B. 268; 62 L. T. 77; 38 W. R. 353, H. L.

Annotations :—**Distd.** Trevor *v.* Hutchins (1897), 76 L. T. 183. **Consd.** Reid-Newfoundland Co. *v.* Anglo-American Telegraph Co., [1912] A. C. 555, P. C. **Refd.** Keighley, Maxsted *v.* Durant, [1901] A. C. 240; Henry *v.* Hammond, [1913] 2 K. B. 515.

1018. Person must be reasonably designated.]—A contract can only be ratified by the principal contemplated at the time when it was made. He need not be named, but there must be such a description of him as shall amount to a reasonable designation of the person intended to be bound by his contract.—WATSON *v.* SWANN (1862), 11 C. B. N. S. 756; 31 L. J. C. P. 210; 142 E. R. 993.

Annotations :—**Folld.** Byas *v.* Miller (1897), 3 Com. Cas. 39. **Consd.** Durant *v.* Roberts & Keighley, Maxsted, [1900] 1 Q. B. 629, C. A. **Apprvd.** Keighley, Maxsted *v.* Durant, [1901] A. C. 240. **Refd.** Browning *v.* Provincial Insce. Co. for Canada (1873), L. R. 5 P. C. 263; Ebsworth *v.* Alliance Marine Insce. (1873), L. R. 8 C. P. 596; McCaul *v.* Strauss (1883), Cab. & El. 106.

1019. Person must actually exist or be in contemplation of law.]—Ratification can only be by a person ascertained at the time of the act done & a person in existence either actually or in contemplation of law, as in the case of assignees of bkpts. & administrators, whose title for the protection of the estate vests by relation. Where a contract is signed by one who professes to be signing "as agent" but who has no principal existing at the time, & the contract would be altogether inoperative unless binding upon the person who signed it, he is bound thereby; & a stranger cannot by a subsequent ratification relieve him from that responsibility.—KELNER (KELMER) *v.* BAXTER (1866), L. R. 2 C. P. 174; 36 L. J. C. P. 94; 15 L. T. 213; 12 Jur. N. S. 1016; 15 W. R. 278.

Annotations :—**Applied.** Scott *v.* Ebury (1867), L. R. 2 C. P. 255; Cullen *v.* O'Meara (1867), 1 S. W. R. 1174; Melhado *v.* Porto Alegre Ry. Co. (1874), L. R. 9 C. P. 503. **Distd.** Spiller *v.* Paris Skating Rink Co. (1878), 7 Ch. D. 368. **Expld. & Distd.** Hollman *v.* Pullin (1884), Cab. & El. 254; *Re* Northumberland Avenue Hotel Co. (1886), 33 Ch. D. 16, C. A.; Hume *v.* Record Reign Jubilee Syndicate (1889), 80 L. T. 404; Blyth *v.* Fladgate, Morgan *v.* Blyth, Smith *v.* Blyth, [1891] 1 Ch. 337. **Refd.** McCaul *v.* Strauss (1883), Cab. & El. 106; *Re* Patent Ivor Manufacturing Co., Howard *v.* The Co. (1888), 38 Ch. D. 156; Nichols *v.* Regent's Canal Co. (1894), 71 L. T. 249; Thompson *v.* L. C. C., [1899] 1 Q. B. 840, C. A.; Keighley, Maxsted *v.* Durant, [1901] A. C. 240; Natal Land & Colonisation Co. *v.* Pauline Colliery & Development Syndicate, [1904] A. C. 120, P. C.; Hickman *v.* Kent or Romney Marsh Sheep Breeders' Assocn., [1915] 1 Ch. 881. **Mentd.** Hugill *v.* Masker (1889). 58 L. J. Q. B. 171 C. A.

See, further, COMPANIES.

1020. Members & officers of unincorporated body.]—A contract made professedly on behalf of a volunteer corps cannot be ratified by individual members or officers of the corps.—JONES *v.* HOPE (1880), 3 T. L. R. 247, C. A.

Annotations :—**Consd.** Overton *v.* Hewett (1886), 3 T. L. R. 246. **Distd.** Samuel *v.* Whetherby (1907), 98 L. T. 169, C. A.

SECT. 4.—TIME FOR RATIFICATION.

1021. Acceptance—Contract—Before date fixed for beginning of performance.]—A contract must be ratified within a reasonable time after acceptance by an unauthorised person, & such a contract cannot be ratified after the date fixed for performance to commence.—METROPOLITAN ASYLUMS BOARD MANAGERS *v.* KINGHAM & SON (1896), 6 T. L. R. 217.

1022. ——— **Offer to buy—After withdrawal of offer.**]—An offer of purchase was made by deft. to S., pltfs.' agent, who was not authorised to make any contract for sale. The offer was accepted by S. on behalf of pltfs. Deft. withdrew his offer, & after his withdrawal pltfs. ratified the acceptance of the offer by S. In an action by pltfs. for specific performance of the contract :—*Held :* (1) the ratification by pltfs. related back to the acceptance by S., & the withdrawal by deft. was inoperative; (2) pltfs. were entitled to specific performance.—BOLTON PARTNERS *v.* LAMBERT

PART VII. SECT. 4.

n. *Compromise — Repudiation competent before order passed determining suit.*]—Any party to a suit has the right to repudiate the action of an agent compromising it without his knowledge & consent, before an order is passed accepting the compromise as the final determination of the suit.—MONMOHINI GUHA *v.* BANGA CHANDRA DAS (1904), I. L. R. 31 Calc. 357.—IND.

Sect. 4.—Time for ratification.]

(1889), 41 Ch. D. 295; 58 L. J. Ch. 425; 60 L. T. 687; 37 W. R. 434; 5 T. L. R. 357, C. A.

Annotations:—**Folld.** *Re* Portuguese Consolidated Copper Mines, *Ex p.* Badman, *Ex p.* Bosanquet (1890), 45 Ch. D. 16, C. A. **Distd.** Metropolitan Asylums Board Managers *v.* Kingham (1890), 6 T. L. R. 217; Dibbins *v.* Dibbins, [1896] 2 Ch. 348. **Apld.** *Re* Tiedmann & Ledermann, [1899] 2 Q. B. 66. **Consd. & Dbtd.** Fleming *v.* Bank of New Zealand, [1900] A. C. 577, P. C. The decision referred to (*Bolton Partners v. Lambert*) presents difficulties; & their Lordships reserve their liberty to reconsider it if on some future occasion it should become necessary to do so (LORD LINDLEY). **Expld. & Distd.** *Re* Gloucester Municipal Pet., 1900; Ford *v.* Newth, [1901] 1 K. B. 683. **Refd.** *Re* Hemp Yarn & Cordage Co., Hindley's Case (1896), 74 L. T. 627, C. A.; Cook *v.* Williams (1897), 13 T. L. R. 481. **Mentd.** Bristol, Cardiff & Swansea Aerated Bread Co. *v.* Maggs (1890), 44 Ch. D. 616.

1023. Contract—Not after breach of.]—Pltfs. sued deft. for breach of contract to take a lease of a market. The contract was not under the corporate seal, nor was it signed by an agent of pltfs. appointed for that purpose under the corporate seal; but subsequent to the date of the breach a resolution recording the letting to deft. was duly entered in pltfs.' books & sealed with the corporate seal:—*Held:* the resolution, being after the breach, was too late to operate as a ratification.—KIDDERMINSTER CORPN. *v.* HARDWICK (1873), L. R. 9 Exch. 13; 43 L. J. Ex. 9; 29 L. T. 611; 22 W. R. 160.

Annotations:—**Distd.** Melbourne Banking Corpn. *v.* Brougham (1878), 4 App. Cas. 156, P. C. **Folld.** Oxford Corpn. *v.* Crow, [1893] 3 Ch. 535.

1024. —— After repudiation.]—*Re* PORTUGESE CONSOLIDATED COPPER MINES, No. 1148, *post.*

For full anns., *see* S. C. No. 1148, *post.*

1025. Entry of stranger to avoid fine—Within five years.]—If the disseisor levy a fine with proclamations according to 4 Hen. 7, c. 24, & a stranger within 5 years after the proclamations enter in the right of the disseisee, without the privity or consent of the disseisee:—*Held:* (1) this shall not avoid the bar of the fine, unless he assent to it within the 5 years, for the words of the Act are, "so that they pursue their title, claim or interest by way of action, or lawful entry within 5 years," etc.; (2) that which is done by another without his assent is not a pursuing by him according to the intent of the Act, for otherwise by such means against the will of the disseisee every stranger may avoid such a fine, which was not the intent of the Act.—POLLARD *v.* LUTTRELL, AUDLEY *v.* POLLARD (1597), Poph. 108; 79 E. R. 1216; *sub nom.* AUDLEY *v.* POLLARD, Cro. Eliz. 561.

Annotations:—**Apld.** Bird *v.* Brown (1850), 4 Exch. 786. **Distd.** Lyell *v.* Kennedy, Kennedy *v.* Lyell (1889), 14 App. Cas. 437. **Refd.** Lyell *v.* Kennedy (1887), 18 Q. B. D. 796, C. A.; *Re* Portuguese Consolidated Copper Mines, Badman's & Bosanquet's Cases (1890), 39 W. R. 25, C. A.; Dibbins *v.* Dibbins, [1896] 2 Ch. 348.

1026. Exercise of option—Before option expires.]—Acceptance by an agent acting without authority of an option of purchase, which has to be exercised within a limited time, is not made effective by the principal's ratification after the time has expired.

Articles of partnership between two persons provided that, in the event of one of the partners dying, the surviving partner should be at liberty to purchase the share of the deceased partner upon his giving notice to that effect within 3 months after the death. Upon the death of one of the partners, notice was given on behalf of the surviving partner who was of unsound mind, by his solr., within the 3 months, but without any authority so to do. Afterwards an order was made under Lunacy Act, 1890 (c. 5), authorising a notice being given on behalf of the surviving partner, & notice was given, but after expiration of the 3 months:—*Held:* the subsequent notice did not ratify the first notice so as to make it valid from its date, & the notice was invalid.—DIBBINS *v.* DIBBINS, [1896] 2 Ch. 348; 65 L. J. Ch. 724; 75 L. T. 137; 44 W. R. 595; 40 Sol. Jo. 599.

Insurance—After loss.]—*See* INSURANCE.

1027. Notice to quit.]—A notice to quit given by an agent without authority is sufficient if subsequently ratified by his principal.—GOODTITLE d. KING *v.* WOODWARD (1820), 3 B. & Ald. 689; 106 E. R. 813.

Annotations:—**Dbtd. & Distd.** Doe *d.* Mann *v.* Walters (1830), 10 B. & C. 626. **Dbtd.** Cope *v.* Mooney (1863), 10 L. T. 854. **Refd.** Doe *d.* Lyster *v.* Goldwin (1841), 1 Gal. & Dav. 463.

1028. —— Before expiry of period of notice.]—A notice to quit given by an agent without authority must be ratified before the day on which it begins to operate as a notice to quit. A ratification after the period named in the notice has begun to run is too late.—DOE d. MANN *v.* WALTERS, No. 436, *ante.*

For full anns., *see* S. C. No. 436, *ante.*

1029. —— ——.]—RIGHT d. FISHER, NASH & HYRONS *v.* CUTHELL, No. 1079, *post.*

For full anns., *see* S. C. No. 1079, *post.*

1030. —— ——.]—A notice to quit must be such that the tenant may safely act on it at the time of receiving it, & a notice by an unauthorised agent cannot be made good by an adoption of it by the principal after the proper time for giving it.—DOE d. LYSTER *v.* GOLDWIN (1841), 2 Q. B. 143; 1 Gal. & Dav. 463; 10 L. J. Q. B. 275; 114 E. R. 57.

Annotations:—**Consd.** Doe d. Parsley *v.* Day (1842), 2 Q. B. 147. **Expld.** Jones *v.* Phipps (1868), 9 B. & S. 761. **Apld.** Dibbins *v.* Dibbins, [1896] 2 Ch. 348. **Refd.** Doe d. Pulker *v.* Walker (1845), 14 L. J. Q. B. 181.

1031. Payment—Before money returned by creditor.]—Where a creditor accepts payment of a debt from a stranger without debtor's authority, it is competent to creditor, on discovering want of authority & before any ratification of payment by debtor, to undo the payment by returning the money to the stranger; & debtor cannot in such case ratify the payment by placing a plea of payment on the record in an action brought against him for the amount by creditor.

Deft. being indebted to pltf., S., who had acted as his attorney in the matter of pltf.'s claim (the amount of which was disputed), but whose authority had been countermanded, paid to pltf. £60 in discharge of the disputed claim. Pltf. afterwards at the request of S., & before any ratification by deft., repaid to S. the £60, & sued deft. for the debt. Deft. pleaded as to £60 payment, & relied upon the payment made by S.:—*Held:* (1) it was competent to pltf. & S., before ratification by deft., to cancel what they had done; (2) the plea of pay-

1023 i. *Contract—Not after breach of.*]—B. informed a manager of a bank that A. requested him to lodge cash to A.'s credit to meet cheques A. had drawn, &, with the consent of the manager, he deposited a store warrant instead; A.'s cheques were dishonoured. B. then explained what he had done to A., who was satisfied, & sued the bank:—*Held:* A. could not ratify B.'s contract after breach of the contract & dishonour of the cheques.—BANK OF NEW ZEALAND *v.* FLEMING (1898), 18 L. R. 1. —N.Z.

1027 i. *Notice to quit—Before ejectment.*]—*Qu.:* whether a subsequent recognition by the landlord of the authority of an agent to serve a notice to quit be in any case sufficient to make the notice good. Such subsequent recognition must at all events be by some act done before ejectment. *Semble:* it should be six months before the period limited for giving up possession.—KEATING *v.* CLEARY (1843), 6 I. L. R. 221.—IR.

ment was not proved.—WALTER *v.* JAMES (1871), L. R. 6 Exch. 124 ; 40 L. J. Ex. 104 ; 24 L. T. 188 ; 19 W. R. 472.

Annotations :—**Distd.** Bolton Partners *v.* Lambert (1889), 41 Ch. D. 295, C. A. That the acceptance by the assumed agent cannot be treated as going for nothing is apparent from the case of *Walter* v. *James* (LINDLEY, L.J.). **Refd.** *Re* Rowe, *Ex p.* Derenburg, [1904] 2 K. B. 483, C. A.

1032. —— To person pleading set-off—At time of trial.]—It is a good answer to a plea of set-off that the amount has been paid by a person professing to act as agent for & on account of pltf., though without his authority, & that the latter ratified the act at the time of the trial.

The treasurer of a corpn. paid their clerk, deft., the amount of his year's salary, both parties believing at the time that the treasurer had the authority of the corpn. to make such payment ; but the treasurer had no such authority, & the corpn. afterwards repudiated the payment & dismissed deft. from their service. In an action against deft. for recovery of certain moneys paid to him on account of the corpn. :—*Held :* the corpn. was entitled at the trial to ratify the act of their treasurer, & deft. could not set off the amount of his salary as due to him from the corpn.—SIMPSON *v.* EGGINGTON (1855), 10 Exch. 845 ; 24 L. J. Ex. 312 ; 19 J. P. 776.

For full anns., *see* CONTRACT.

1033. Prosecution for nuisance—After issue but before hearing of summons.]—A committee appointed by a metropolitan vestry under Metropolis Management Act, 1855 (c. 170), s. 58, for the purpose, *inter alia*, of executing the Metropolis Management Acts, so far as they related to the public health of the parish, being informed by the sanitary inspector that a nuisance existed upon certain premises endangering the health of the inhabitants, directed the inspector to serve notice upon the owner of the premises under the Acts requiring him to abate the nuisance, & in default to take proceedings. The inspector, in pursuance of such direction, served the required notice, &, upon the owner failing to comply with it, laid an information against him for penalties under the Acts, & a summons was issued. After the issue of the summons & before the hearing of the information, the vestry by resolution approved the acts of the committee in causing the notice to be served & the information to be laid :—*Held :* the approval of the vestry, although given after the service of the notice, & the issue of the summons, was sufficient, & the owner was liable to be convicted.—FIRTH *v.* STAINES, [1897] 2 Q. B. 70 ; 66 L. J. Q. B. 510 ; 76 L. T. 496 ; 61 J. P. 452 ; 45 W. R. 575 ; 13 T. L. R. 394 ; 41 Sol. Jo. 494.

1034. Removal of master—After termination of voyage.]—A., professing to act as agent of B., the owner of a vessel, under a power of attorney removed C., the master, from command during the voyage for alleged misconduct. At termination of the voyage, the master, who had been permitted to remain on board, sued the owner for wages. *Qu.:* whether the act of A. in removing C. from command of the vessel could be ratified by B. after the voyage was over.—BERWICK *v.* HORSFALL, No. 298, *ante*.

1035. Stoppage in transitu—Before expiry of transit.]—I., a merchant in America, shipped certain cargoes of goods to the account of C. & T., merchants in England, against whom a fiat in bkpcy. issued on May 8. Immediately on the arrival of the cargoes on May 5, 7, & 9, defts., during the continuance of the transit, gave notice to the masters & assignees of a claim to stop the goods in transit on behalf of I. Defts. were not agents of I., nor had they received any authority from I. to make the stoppage. On May 11 pltfs., the official assignees of C. & T., demanded from the masters & consignees the cargoes then on board the vessels in port & undelivered, but delivery of them was refused. On the same day the masters handed over the cargoes to defts., who on May 12 refused to deliver them to pltfs., the assignees of C. & T., on demand. On the 13th, H., having received from I. a power of attorney, executed on Apr. 28, to stop the goods in transit, on the same day adopted & confirmed the previous stoppage of defts., & I. before commencement of the action adopted & ratified the acts of defts. & H.:—*Held :* (1) there could be no valid stoppage in transit after demand of the goods by pltfs. on May 11 ; (2) the ratification by I., after the transit was ended, was too late & had not the effect of altering retrospectively the property in the goods, which at that time, notwithstanding the act of defts., had become vested in pltfs.—BIRD *v.* BROWN (1850), 4 Exch. 786 ; 19 L. J. Ex. 154 ; 14 Jur. 132 ; 154 E. R. 1433.

Annotations :—**Distd.** Hutchings *v.* Nunes (1863), 1 Moo. P. C. C. N. S. 243, P. C. ; Williams *v.* North China Insce. (1876), 35 L. T. 884, C. A. ; McCaul *v.* Strauss (1883), Cab. & El. 106 ; Bolton Partners *v.* Lambert (1889), 41 Ch. D. 295, C. A. ; Lyell *v.* Kennedy, Kennedy *v.* Lyell (1889), 14 App. Cas. 437, H. L. **Apld.** Dibbins *v.* Dibbins, [1896] 2 Ch. 348. **Distd.** Durant *v.* Roberts & Keighley, Maxsted, [1900] 1 Q. B. 629, C. A. **Consd.** Keighley, Maxsted *v.* Durant, [1901] A. C. 240, H. L. **Refd.** Simpson *v.* Eggington (1855), 10 Exch. 845 ; Berwick *v.* Horsfall (1858), 4 C. B. N. S. 450 ; Jardine *v.* Leathley, (1863), 3 B. & S. 700 ; Ainsworth *v.* Creeke (1868), 1 Hop. & Colt. 141 ; Smart *v.* Pessol (1874), 30 L. T. 632 ; *Re* Portuguese Consolidated Copper Mines, *Ex p.* Badman, *Ex p.* Bosanquet (1890), 45 Ch. D. 16, C. A. Ford *v.* Newth (1901), 70 L. J. K. B. 459 ; *Re* Gloucester Municipal Petn., [1901] 1 K. B. 683. **Mentd.** Brook *v.* Hook (1871), L. R. 6 Exch. 89.

1036. —— Power received after stoppage.]—R., a merchant resident in Jamaica, on Feb. 29, 1860, ordered from P. & G., merchants at B., in America, goods to be shipped to him at K., in Jamaica, at his risk & expense. The goods were shipped & sent on Mar. 28 following. On Mar. 31, while the goods were on their voyage, a fiat of insolvency was issued against R., & H. was appointed official assignee. Previously, however, on Mar. 28, P. & G. were advised of the failure of R. by a letter from a firm in Jamaica, & on Mar. 29 by a letter from R. himself, who, at the same time, informed them that he had handed the goods to N. (one of resp. firm) as agent for P. & G., for whose firm N. had previously acted as agent & transacted business. The letters of Mar. 28 & 29 reached P. & G. on Apr. 16, & on that day they executed & sent a letter & a power of attorney to N. to do & transact on their behalf whatever was necessary for their interests in the consignment of the goods to R. The power of attorney was not received by N. until May 5. The vessel containing the assignment arrived at K. on Apr. 21, & on that day N. demanded on behalf of P. & G. & obtained possession of the goods, which he afterwards disposed of. An action of trover having been brought by H., applt., the official assignee of R., against resp. firm of R. & N. for the value of the goods, the jury found for pltf. for the amount the goods had sold for ; but leave was reserved to defts. to set aside the verdict & enter a nonsuit, which was afterwards directed, on the ground that, as R. had signified to N. his refusal to receive the goods before his insolvency, the property in them had reverted to P. & G., & had never passed to pltfs., the official assignees :—*Held :* (1) resp. N., being sufficiently proved to have been the agent of P. & G., before R.'s insolvency, the possession taken by him of the cargo on Apr. 21 was an effectual stoppage *in transitu* on behalf of P. & G. ; (2) the letter & power of attorney sent by P. & G., though not received until after the

Sect. 4.—Time for ratification. Sects. 5 & 6: Subsects. 1 & 2.]

stoppage of the goods, ratified & confirmed the act of N. as P. & G.'s agent.—HUTCHINGS *v.* NUNES & NUNES (1863), 1 Moo. P. C. C. N. S. 243; 9 L. T. 125; 10 Jur. N. S. 109; 15 E. R. 692, P. C.

SECT. 5.—RATIFICATION MUST TAKE PLACE AFTER FULL KNOWLEDGE.

1037. No ratification without knowledge.]—A. agreed with B. that he would endeavour to sell a picture belonging to B. & that if he did so B. should pay him £100. B. died before the picture was sold. In an action against B.'s administratrix:—*Held:* the fact that the administratrix, in ignorance of the agreement, confirmed the sale of the picture was not an adoption by her of the agreement so as to make her liable to pay £100.—CAMPANARI (CAMPANASI) *v.* WOODBURN (1854), 15 C. B. 400; 3 C. L. R. 140; 24 L. J. C. P. 13; 24 L. T. O. S. 95; 1 Jur. N. S. 17; 3 W. R. 59; 139 E. R. 480.

1038. ——.]—Pltfs., through D. & Co., brokers, sold 682 bags of linseed, at a certain price per quarter, to H., & H. afterwards, through same brokers, sold the linseed at an increased price to deft. The time for deft.'s payment of the purchase-money was to arrive before the time fixed for H.'s payment. Deft. being in want of the linseed to complete a contract he had made, sent one of his clerks to D. & Co. for the delivery order with instructions to follow up the matter & get the order. The clerk was taken by D. & Co. to pltfs., from whom he obtained the order only on his promising that deft. would pay pltfs. for the seed, as pltfs. required to be paid before they parted with the order. On the following day deft. sent a cheque to D. & Co. for £900 on account of the linseed, which had not been measured at that time, so that the precise quantity of it was not then known. Upon its being measured it was found that pltfs. were entitled under their contract with H. to receive £971 15*s.* 6*d.* In an action by them against deft. to recover the difference between this amount & £900, the amount of the cheque:—*Held:* there was no evidence to warrant a jury in finding a ratification by deft. of the contract the clerk had made, it not being proved that the clerk had communicated to deft. what had passed between him & pltfs. when he obtained the order.—FITZGERALD & GREENHILL *v.* DRESSLER (1859), 7 C. B. N. S. 374; 29 L. J. C. P. 113; 33 L. T. O. S. 43; 5 Jur. N. S. 598; 141 E. R. 861.

Annotations:—**Mentd.** Reader *v.* Kingham (1862), 13 C. B. N. S. 344; Sutton *v.* Grey, [1894] 1 Q. B. 285, C. A.; Harburg India Rubber Comb Co. *v.* Marten, [1902] 1 K. B. 778, C. A.; Davys *v.* Buswell, [1913] 2 K. B. 47, C. A.

1039. ——.]—In an action for money advanced & goods supplied for the use of a ship, on an alleged contract to repay such money & pay for such supplies, it was contended that though the captain was not entitled to borrow money & pledge the owners' credit, yet he having done so, defts. had ratified his acts:—*Held:* they could so ratify them, but to prove such ratification it was necessary to show that they acted with knowledge of the circumstances.—GUNN *v.* ROBERTS (1874), L. R. 9 C. P. 331.

Annotations:—**Refd.** The Orienta, [1894] P. 271. **Mentd.** Adair *v.* Young (1879), 12 Ch. D. 13, C. A.; The Pontida (1884), 9 P. D. 177, C. A.

1040. ——.]—It is competent, no doubt, to a principal to ratify or adopt the act of his agent in purchasing that which such agent has been employed to sell, & to give up the right, which he would otherwise be entitled to exercise, of either setting aside the transaction or recovering from the agent the profits derived by him from it, & the non-repudiation for a considerable length of time of what has been done would at least be evidence of ratification or adoptions, or might possibly, by analogy to Stat. Limitation, constitute a defence; but before the principal can properly be said to have ratified or adopted the act of his agent or waived his right of complaint in respect of such act it should be shown that he has had full knowledge of its nature & circumstances, in other words, that he had presented to his mind proper materials upon which to exercise his power of election; & it by no means follows that, because in a case like the present he does not repudiate the whole transaction after it has been completed he has lost a right (actually vested in him) to the profits derived by his agent from it (THESIGER, L.J.).—DE BUSSCHE *v.* ALT, No. 3, *ante*.

Annotations:—**Refd.** *Re* Pepperell, Pepperell *v.* Chamberlain (1879), 27 W. R. 410; Blake *v.* Gabe (1885), 31 Ch. D. 196; Allcard *v.* Skinner (1887), 36 Ch. D. 145; Northumberland *v.* Bowman (1887), 56 L. T. 773. For full anns., *see* S. C. No. 3, *ante*.

1041. ——.]—G., a shipbroker at G. G., chartered the *F.* & the *M.* before their arrival at G. G. & without communication with the owners. G. had on

PART VII. SECT. 5

1037 i. *No ratification without knowledge.*]—A. & B., tenants of land residing abroad, executed powers of attorney authorising the sale of their interests for such sums of money as their respective agents should think reasonable. Defts., wishing to open a street through the land, applied to the agents, who conveyed to them by deed of gift the piece of land required, believing that the opening of the street would increase the value of the adjoining land of their principals. After this partition was made between A. & B. by mutual deed of release, & the land through which the proposed street was to be laid out became the sole property of A., & in the deed thereof executed by B. to A., & on a plan annexed thereto, the land released to A. was described as bounded by the proposed street. A similar plan was annexed to the deed given by A. to B. Defts. afterwards entered on the land & opened the street, for which A. brought trespass:—*Held:* A.'s agent had exceeded his authority in conveying the land to defts., & A. had not ratified the deed by accepting the conveyance from B. describing the land as bounded by the street, because it did not appear that when A. accepted the deed from B. she knew that her agent had exceeded his authority in conveying the land to defts.—HAZEN *v.* PORTLAND TOWN (1884), 24 N. B. R. 332.—**CAN.**

1037 ii. ——.]—CAMERON *v.* TATE (1888), 15 S. C. R. 622.—**CAN.**

1037 iii. ——.]—DUNBAR *v.* TREDENNICK (1813), 2 Ball & B. 304.—**IR.**

1037 iv. ——.]—Acceptance of & payment for work done under a contract are not an adoption of the contract where the principal has not been made aware of the terms of the contract.—HEDICAN *v.* CROW'S NEST PASS LUMBER CO. (1914), 19 B. C. R. 416; 17 D. L. R. 164; 28 W. L. R. 37.—**CAN.**

1037 v. ——.]—Before the principal can be held bound by ratification he must be proved to have had full knowledge or, at any rate, means of knowledge of all the essential facts of the transaction into which his agent had entered on his behalf.—KATYAYANI BEBI *v.* PORT CANNING & LAND IMPROVEMENT CO. (1914), 19 C. W. N. 56.—**IND.**

1037 vi. —— *Effect of error.*]—T., land commissioner of the deft. ry. co., acting beyond the scope of his authority, agreed for a sale to pltf. of land without reservation of minerals. The co. subsequently ratified the contract so made, but under an erroneous impression as to its legal effect. In an action by pltf. for specific performance, the co. pleaded that, owing to the mistake, there was no contract, for want of *consensus ad idem*:—*Held:* on the evidence, the co. through their officer ratified the transaction between T. & pltf., & pltf. was entitled to specific performance without reservation of minerals, & the mistake did not prevent the formation of a contract capable of ratification. *Kennedy* v. *Panama Mail Co.*, L. R. 2 Q. B. 580; *Gomperts* v. *Bartlett*, 2 E. & B. 849; *Gurney* v. *Womersley*, 4 E. & B. 133; *Stewart* v. *Kennedy*, 15 App. Cas. 75, 108; *Tamplin* v. *Jones*, 15 Ch. D. 215, consd. —HOBBS *v.* ESQUIMAULT & NANAIMO RY. CO. (1898), 29 S. C. R. 450.—**CAN.**

several previous occasions chartered the *F.* & the *M.* in similar circumstances, & all of these charter-parties had been carried into effect. After the arrival of the *F.* & the *M.* at G. G. their masters were shown the charter-parties. A fortnight afterwards the masters refused to take up the charter-parties, freights having risen during the meantime:—*Held:* on the evidence it was impossible to say that the masters had knowingly ratified the charter-parties in such a way as to make the act a complete ratification. — THE FANNY, THE MATHILDA (1883), 48 L. T. 771; 5 Asp. M. L. C. 75, C. A.

1042. —— .]—Acquiescence & ratification must be founded on a full knowledge of the facts, & further, it must be in relation to a transaction to which effect may be given thereby.—BANQUE JACQUES-CARTIER *v.* BANQUE D'EPARGNE DE MONTREAL (1887), 13 App. Cas. 111; 57 L. J. P. C. 42, P. C.

1043. ——.]—To constitute a binding adoption or ratification of acts done without previous authority (1) the acts must have been done for, & in the name of, the supposed principal; (2) full knowledge of them & unequivocal adoption after knowledge must be proved; or else the circumstances must warrant the clear inference that the principal was adopting the acts of his supposed agent whatever their nature or culpability.—MARSH *v.* JOSEPH, No. 1122, *post.*

Annotations:—**Expld. & Distd.** *Re* Williams' Settled Estates, [1910] 2 Ch. 481. **Refd.** Hambro *v.* Burnand (1903), 8 Com. Cas. 252.

SECT. 6.—WHAT AMOUNTS TO RATIFICATION.

SUB-SECT. 1.—GENERAL RULE.

1044. In general.]—Ratification may take place in two ways, either by a specific ratification of the particular act or by a general ratification of everything done by the agent on behalf of his principal (LORD CHELMSFORD).—FITZMAURICE *v.* BAYLEY (1860), 9 H. L. Cas. 78; 3 L. T. 69; 6 Jur. N. S. 1215; 8 W. R. 750; 11 E. R. 657, H. L.

For full anns., *see* CONTRACT.

1045. When ratification must be under seal.]—An instrument under seal executed on behalf of a principal by an agent without authority must be ratified under seal, & a parol ratification is insufficient; but where the seal is not essential to the validity of the instrument, a parol ratification, though it does not make the instrument binding as the deed of the principal, gives it the effect of a written contract by him.

Where a ship, on being sold, was transferred by an instrument executed under seal by the auctioneer, without authority, & the owner subsequently ratified the sale by conduct:—*Held:* (1) 3 & 4 Will. 4, c. 55, s. 31, did not require the transfer to be under seal; (2) the ratification gave to the instrument the effect of a written transfer according to the Act.—HUNTER *v.* PARKER (1840), 7 M. & W. 322; 10 L. J. Ex. 281; 9 L. T. 53; 151 E. R. 789.

Annotations:—**Refd.** Ridgway *v.* Roberts (1844), 4 Hare, 106; Chapman *v.* Benson (1847), 5 C. B. 330; Hobson *v.* Holt (1850), 16 L. T. O. S. 263, Ex. Ch.; The Eliza Cornish (1853), 1 Ecc. & Ad. 36; Low *v.* Macgill (1864), 4 New Rep. 145; Naylor *v.* Mortimore (1864), 13 W. R. 47.

1046. ——.]—Where a contract sought to be enforced by a corpn. was one which clearly required to be made under their seal, but was not under the seal of the corpn. or signed on their behalf by a person authorised under seal to do so, nor ratified under seal or part performed or acted upon:—*Held:* such contract could not be enforced by the corpn.—OXFORD CORPN. *v.* CROW, [1893] 3 Ch. 535; 69 L. T. 228; 42 W. R. 200; 8 R. 279.

Annotation:—**Folld.** Hoare *v.* Lewisham Corpn. (1901), 85 L. T. 281.

SUB-SECT. 2.—PARTICULAR INSTANCES.

1047. Acceptance of allotment of shares—Letter of authority given after act done.]—R. having applied

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PART VII. SECT. 6, SUB-SECT. 1.

1044 i. *In general.*]—If a person knows that others have for his benefit put themselves in a position of disadvantage from which if he speaks or acts at once they can extricate themselves, but from which after a lapse of time they can no longer escape, his mere inaction in such circumstances may be convincing evidence of ratification & adoption of acts done in his name, but without his authority.—CITY BANK OF SYDNEY *v.* MCLAUGHLIN (1909), 9 C. L. R. 615.—**AUS.**

1044 ii. ——.]—All facts denoting approbation & even silence on the part of the mandator, knowing the acts of the mandatory, involve ratification, & are equivalent to express ratification.—BUCHANAN *v.* MCMILLAN (1874), 20 L. C. J. 105.—**CAN.**

1044 iii. ——.]—A ratification of an act or transaction will be implied wherever the conduct of the party on whose behalf it is done or entered into is such as to indicate an intention to adopt it in whole or in part.—TAYLOR *v.* HEGLESON (1910), 15 W. L. R. 273.—**CAN.**

1044 iv. ——.]—T. had for thirty-one years acted as agent to D. T.'s agreements had uniformly been ratified by D. To an ejectment on the title, brought by the lessor of pltf., to whom D. had made a lease, deft. took defence, & offered the written agreement of T. in evidence. He proved also that he had paid a great advance in rent, which had been duly received by D. Pltf. insisted it was necessary to show a written authority from D. to T.:—*Held:* there was no evidence or grounds for leaving it to the jury to presume any authority, either written or parol, from D. to T.—JACK *v.* ALEXANDER, Rowe, 496, K. B.—**IR.**

1044 v. —— *Letters to third party—Res inter alios acta.*]—To establish a valid ratification of an agent's acts it is necessary to prove an intention by the principal to confirm & adopt the unauthorised acts done on his behalf, & that intent must be expressed with full knowledge of all the material circumstances or with the object of confirming the agent's acts in all events. Where pltf. founded an allegation of express ratification by deft. on the terms of a letter addressed by deft. to another person & not to the agent or pltf., nor intended to be communicated to them:—*Held:* the letter, being *res inter alios acta*, did not establish a ratification.—REID *v.* WARNER (1907), T. S. 961.—**S. AF.**

1044 vi. —— *Fraudulent transaction.*]—BELLEVUE LAND CO. *v.* ROY (1916), 23 R. L. N. S. 217 (Que.).—**CAN.**

1045 i. *When ratification must be under seal.*]—An agreement under seal for sale to pltf. of deft.'s land was signed by pltf. & by a person purporting to sign as agent for deft., but who had not, at the time he signed the agreement, authority from deft. to close a sale. The agreement when it came to deft.'s knowledge was ratified & confirmed by her by a letter (not under seal) to pltf.'s solrs.:—*Held:* in order to bind deft. it was not necessary that the instrument should be under seal, & the ratification was sufficient. *Hunter* v. *Parker* (1840), 7 M. & W. 322, follds.—COBBLEDICK *v.* BERSCH (1913), 24 W. L. R. 259; 11 D. L. R. 235.—**CAN.**

PART VII. SECT. 6, SUB-SECT. 2.

o. *Agreement to pay—Subsequent vote in council without reference to contract.*]—The Provincial Secretary of Q., without the authority of an Order in Council, issued a letter to D. in which he stated that the Govt. would provide in the next budget for $6,000 on account of printing work undertaken by D., & that such sum would be payable to anyone to whom D. indorsed the letter. D. indorsed the letter to applts., who sought to recover upon it:—*Held:* a subsequent Act of the legislature appropriating a certain sum for work of the class which D. had performed was not a ratification of the promise contained in the letter, since it merely gave the Executive power to pay the amount without forcing them to do so.—JACQUES-CARTIER BANK *v.* THE QUEEN (1895), 25 S. C. R. 84.—**CAN.**

Sect. 6.—What amounts to ratification: Sub-sect. 2.]

for shares in a co. wrote to the co. requesting that the letter of allotment might be handed to H., one of its promoters. The shares were allotted to R., & on H.'s applying for the allotment a bundle containing numerous letters of allotment was handed to him. It was disputed whether the allotment to R. was amongst these, but it was proved that when H. received the bundle, R.'s letter to the co. had not been posted, but was afterwards sent by R. to H. & by him produced to the co. R. never paid anything in respect of the shares, but, his name having been inserted by the liquidator in the list of contributories:—*Held:* (1) the letter, though not in H.'s hands when he received the allotment, was a ratification of what he did; (2) the evidence showing that the allotment letter of R.'s shares was in the bundle handed to H., R. had notice of the allotment, & must be settled on the list.—*Re* LAFFITTE & CO., LTD., DE ROSAZ'S CASE (1869), 21 L. T. 10, C. A.

1048. Admission to copyhold—Delay in dissent.]—Though the admittance may be invalid, by reason of its having been made by the steward out of the manor, yet the jury, after the lapse of 35 years, during which the property has been enjoyed, & more than once transmitted on assumption of validity of the entry under the admittance, are warranted in finding that the admittance has been ratified by the lord.—DOE d. GUTTERIDGE *v.* SOWERBY (1860), 7 C. B. N. S. 599; 29 L. J. C. P. 291; 2 L. T. 150; 6 Jur. N. S. 870; 8 W. R. 393; 141 E. R. 950.

1049. Approval of building specifications—Work proceeded with.]—A. bought certain land from a ry. co. subject to a condition that he was to erect no building or make any specifications except according to specifications approved by the co.'s principal engineer. Specifications were sent by A. to the resident engineer for transmission to the principal engineer for approval. The resident engineer did not send them to the principal engineer, but told A. he might proceed. The plans were not seen by the principal engineer until the work had been proceeding for 2 months, when he at once refused to approve them:—*Held:* (1) the approval of the resident engineer was not binding on the co.; (2) the fact that A. had been allowed to continue the work for 2 months was not, in the circumstances, such an acquiescence on the part of the co. as to exempt A. from being restrained from further prosecuting the works.—A.-G. *v.* BRIGGS, A.-G. *v.* BIRMINGHAM & OXFORD JUNCTION RY. CO. (1855), 1 Jur. N. S. 1084.

1050. Borrowing—Deposit of security—Correspondence as to value of security.]—A. accepted bills for the accommodation of B., who deposited title-deeds of A. with C., the holder of the bills, as security for their payment; A. wrote to C. referring to the existence of the debt, saying "the security you hold is a great deal more than I really owe by half. I should be very sorry to take what I owe you for the property":—*Held:* the letter was a sufficient memorandum to entitle C. to hold the premises to the full amount of the bills, though B. had no direct authority at the time of deposit to deposit the deeds with C.—*Re* BELL, *Ex p.* SKINNER (1832), 1 Deac. & Ch. 403, C. of R.

1051. —— Mortgage.]—Deft. M., previous to his departure for India, executed a power of attorney constituting his wife, his partner, & another person his attorneys in a great variety of matters specified in the power. He was the owner of real estates in Essex, the title-deeds of which were left in the custody of his wife. During his absence, the attorneys, believing they had authority to do so, purported to mtge. the real estates to pltf. co. Mrs. M. deposited the title-deeds with the co. & covenanted that M. should execute a legal mtge. On M. learning this proceeding he was dissatisfied & blamed his wife for having consented to part with his title-deeds. The mtge. deeds sent to him for execution did not reach him, & were never executed. On his return to England he negotiated with pltf. co. for a further loan & wrote a letter to the co. containing the words "I propose to borrow from your co. a sum of £6,000 to be secured on my Essex property which you now hold in addition to the sum of £12,000 already advanced by your co. & secured thereon," but the negotiation was ineffectual. Deft. repudiated the former mtge. On an application by pltf. co. for a receiver:—*Held:* (1) the question whether the letter was written with full knowledge of all the circumstances of the case could not be determined until the cause was in a more advanced state; (2) on the record as it then stood it did not appear sufficiently that deft. had ratified the transaction.—HOPE INSURANCE CO. *v.* MUNNINGS (1822), 1 L. J. O. S. Ch. 49.

1052. —— —— Admission of charge in negotiations for further loan.]—A merchant, being abroad, empowered certain persons in England to receive moneys, adjust claims & do other acts. Money being wanted by his firm in England, of which firm he was a partner, his attorneys deposited certain deeds with the H. Co. to secure £12,000, & covenanted that he should execute the mtge. The power of attorney was not sufficient authority, but the merchant, on his return to England, having written a letter to the H. Co., requesting the loan of £6,000 "to be secured on my Essex property which you now hold, in addition to the sum of £12,000 already advanced," & professing his readiness to

1049 i. *Approval of building specifications—Work proceeded with.]*—A wife, proprietor of a piece of land upon which a house has been built on a contract made with her husband in his own name & the builders, is responsible for the price of the house, because she consented to the construction & her husband acted as her agent without declaring it; &, even if her husband might not be considered as her agent, she would still be held responsible, but only as to the extent of the extra value given to her property by the construction.—BÉLANGER *v.* PAGUETTE (1884), 11 Q. L. R. 67.—**CAN.**

p. *Bill of exchange—Acceptance per procuration—Statement of principal.]*—In an action on a bill of exchange expressed to be accepted "*per procuration*" by deft.'s clerk, evidence was given of a conversation with deft. in which he stated that A. (the drawer) had drawn a bill on him which pltf. held, & that A. ought to pay it, because it was drawn for his benefit:—*Held:* there was sufficient proof to leave to the jury of a recognition of the clerk's authority to accept.—MORRISON *v.* SPURR (1856), 3 All. 288.—**CAN.**

1050 i. *Borrowing—Entries in principal's books.]*—Account-books are admissible in evidence, in order to show an adoption by a principal of the acts of his agent.—KING *v.* KER (1849), 12 I. L. R. 472, C. P.—**IR.**

1051 i. —— *Mortgage bond—Presence at execution.]*—Two of certain co-sharers in a patni talukh executed a bond to pay off rent due on the estate. In an action in which all the co-sharers were defts.:—*Held:* liability under the bond only extended to the co-sharers who actually signed the bond, & to such other co-sharers as, by their presence at the time of execution, might be considered to have acquiesced in it.—MOHESH CHUNDER BANERJEE *v.* RAM PROSONNO CHOWDHRY (1878), I. L. R. 4 Calc. 539.—**IND.**

q. *Building contract—Making payments on account.]*—The managing director of a ry. co. entered into contracts for & on behalf of the co. for the construction of the road, erection of station-houses, & maintenance of way, at certain prices set forth in the schedules, under which the contractor entered upon the execution of the works, constructed the road & some of the station-houses, & during the progress of the work had been paid large amounts on account of his work according to the scheduled prices, after which the co. refused to allow him to complete the contracts, alleging that the prices agreed to be paid were exorbitant, & that the agent had not been authorised to enter into them:—*Held:* the co. bound by the contracts, on the ground of ratification & acquiescence therein.—BUFFALO & LAKE HURON R. W. CO. *v.* WHITEHEAD (1860), 8 Gr. 157.—**CAN.**

execute the mtge. deed:—*Held:* this was a confirmation of the security.—MUNNINGS *v.* BURY (1829), Taml. 147; 48 E. R. 59.

1053. —— Pledge of goods—Mere delay without alteration in situation of parties.]—Where a principal, whose goods had been pledged by a factor without authority, omitted for some time to make any demand, or to make any communication to the pledgee:—*Held:* such omission could not be considered as an affirmance of the act of the factor, unless it appeared the delay had caused an alteration in the situation of the parties—in that of the principal for the better, or of the pledgee for the worse.—ROBERTSON *v.* KENSINGTON, No. 511, *ante*.

1054. Charterparty—Loading of cabin—Acceptance of goods so loaded & charging freight therefor.]—Deft., a merchant in London, chartered a vessel of pltf.'s to bring from B. a full & complete cargo at £3 5*s.* per ton. Deft.'s agents at B. filled the carrying part of the vessel, & also the cabin, with their own goods, & consigned them to deft., as their factor, for sale. There was contradictory evidence as to the terms upon which the cabin was filled. The bill of lading was annexed to a bill of exchange drawn by the agents upon deft., which bill of exchange was sold to a third party. On the ship's arrival in London pltf. claimed freight for the cabin at the then current rate of £7 per ton. Deft. insisted that he was entitled to the use of the cabin as well as the other part of the ship at the rate of £3 5*s.* per ton, but he charged his agents for freight at the rate of £7 per ton, & allowed them commission at that rate. The goods were stopped, the bill of exchange not having arrived at maturity, when this action was brought to recover the above rate of freight for the use of the cabin. Deft., after action brought, paid the bill, & obtained possession of the goods:—*Held:* (1) deft. was not, under the terms of the charterparty, entitled to load the cabin; (2) the judge properly directed the jury that, although deft.'s agents at B. had no authority from deft. to put goods in the cabin, yet, as deft. adopted their act by accepting the goods & charging his agents freight in respect of them, he was bound to pay pltf. the current rate of freight at the time of loading; (3) the action was not brought too soon since the taking of the goods for the purpose of obtaining freight rendered deft. liable irrespectively of his actual possession after action brought.—MITCHESON (MICHESON) *v.* NICOL (1852), 7 Exch. 929; 21 L. J. Ex. 323; 19 L. T. O. S. 229.

1055. Distress—Acceptance of service of process.]—Pltf.'s goods were illegally seized under a warrant of distress handed by defts. to a bailiff. Pltf. wrote to defts. seeking reparation. Defts. replied stating that their solrs. would accept service of process:—*Held:* (1) the reply of defts. indicated that they stood by the act of the bailiff; (2) there was evidence of ratification by defts. of the illegal distress which entitled pltf. to damages.—CARTER *v.* ST. MARY ABBOTTS, KENSINGTON VESTRY (1900), 64 J. P. 548, C. A.

1056. —— Leaving matter in agent's hands.]—A landlord is not liable for the tortious act of a broker in seizing what his warrant does not authorise him to seize, unless he ratifies the broker's act, with knowledge of what he has done; but he is responsible for any irregularity by the broker in dealing with the distress he was authorised to make—as for selling the goods without notice of the distress, & without appraisement.

A., who received the rents & generally managed the property of B., signed in B.'s name, but without B.'s authority, a warrant to distrain the goods of C., a tenant, for rent in arrear, & after the goods had been distrained informed B. thereof, who said she should leave the matter in his hands:—*Held:* there was sufficient evidence that the distress was authorised or ratified & adopted by B.—HASELER *v.* LEMOYNE (1858), 5 C. B. N. S. 530; 28 L. J. C. P. 103; 22 J. P. 788; 4 Jur. N. S. 1279; 7 W. R. 14; 141 E. R. 214.

1057. —— Receipt of proceeds of sale.]—A landlord authorised bailiffs to distrain for rent due to him from his tenant of a farm, directing them not to take anything except on the demised premises. The bailiffs distrained sheep of another person, supposing them to be the tenant's, beyond the boundary of the farm; the sheep were sold, & the landlord received the proceeds:—*Held:* the landlord was not liable in trover for the value of the sheep, unless it were found by the jury that he ratified the act of the bailiffs with knowledge of the irregularity, or that he chose, without inquiry, to take the risk upon himself & to adopt the whole of their acts.—LEWIS *v.* READ (REED) (1845), 13 M. & W. 834; 14 L. J. Ex. 295; 4 L. T. O. S. 116, 419; 153 E. R. 350.

Annotations:—**Consd. & Expld.** Freeman *v.* Rosher (1849), 13 Q. B. 780. **Consd.** Haseler *v.* Lemoyne (1858), 28 L. J. C. P. 103. **Foll.** Carter *v.* St. Mary Abbotts Vestry (1899), 63 J. P. 487. **Reid.** Lowe *v.* Dowling, [1906] 2 K. B. 772, C. A.

1058. —— ——.]—A principal is not liable in trespass for the wrongful act of his agent unless he authorises it beforehand or subsequently assents to it with knowledge of what has been done; it is not sufficient that he receives benefit from it, unless at the time of the receipt he has notice of the illegality.

Where a broker, under a warrant from the landlord authorising him to distrain goods & chattels of the tenant, seized a fixture, which was afterwards

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1054 i. *Charterparty — Acceptance of benefit.*]—Defts. instructed their agents to charter a ship to carry certain goods from N.Y. to S. The agents chartered pltfs.' ship, & the voyage was carried out & the goods duly delivered & received by defts. On the way to S. the vessel called at H., where one of defts., who had previously received the charterparty, visited her. He was also present at S. when the goods were delivered. On neither occasion did he make any objection to the freight payable under the charter, but subsequently refused to pay it on the ground that the rate was too high, & that his agents had exceeded their authority in entering into the charterparty at that rate:—*Held:* not having made any objection either at H. or S., though fully acquainted with the rate of freight agreed to be paid, & having received the full benefit of the contract, he had thereby ratified it, & must fulfil his obligations thereunder.—LOOMER *v.* STARR (1874), 3 N. S. D. 439.—**CAN.**

1054 ii. —— *Acts attributable to position of master.*]—In an action on a charterparty entered into by an agent professing to act for both master & owner, but who in fact had no authority from the master:—*Held:* subsequent conduct of the master being referable to his character & duty as such did not amount to ratification of the charterparty.—HASONBLOY VISRAM *v.* CLAPHAM (1882), I. L. R. 7 Bom. 15.—**IND.**

r. Composition with debtor—Receipt of dividend—Delay in dissent.]—During pltf.'s absence his bookkeeper & principal clerk signed on his behalf an agreement of composition with a debtor, &, in pursuance thereof, collected from the assignee the dividend realised from the estate. Pltf. was informed by his clerk by letter of what he had done & did not object at the time, but on his return in the following month he claimed the whole debt from debtor, crediting the dividend as a payment on account:—*Held:* in the circumstances there was a ratification of the clerk's act.—NEIL *v.* VINEBERG (1882), 5 L. N. 118.—**CAN.**

s. Compromise — Delay in dissent.]—Where a creditor receives an offer of compromise from his debtor & refers to his agent about it, & the latter, unknown to the creditor, accepts it & gives discharge therefor, the creditor after twelve months cannot repudiate the settlement; his quiescence is equivalent to ratification.—OGILVIE FLOUR MILLS CO. *v.* PINARD (1915), Q. R. 49 S. C. 282.—**CAN.**

t. Contract for delivery—Acceptance of freight.]—A shipper denied the right of his agent, to whom freight was paid, to make a special bargain for delivery, & of the agent's clerk to sign the bill of lading:—*Held:* he could not deny the agent's authority so to do, having accepted the freight paid, & it was too late to object to the clerk signing, the master having accepted the cargo.—BEARD *v.* STEELE (1873), 34 U. C. R. 43.—**CAN.**

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sold, & the proceeds paid to the landlord:—*Held:* the receipt of the proceeds did not make the landlord a trespasser, it not being shown that he was aware of the illegal seizure.—FREEMAN *v.* ROSHER (1849), 13 Q. B. 780; 18 L. J. Q. B. 340; 13 Jur. 881; 116 E. R. 1462.

Annotations:—**Apld.** Pidgeon *v.* Legge (1857), 21 J. P. 743; Collett *v.* Foster (1857), 2 H. & N. 356. **Foll.** Carter *v.* St. Mary Abbotts Vestry (1899), 63 J. P. 487. **Refd.** Newnham *v.* Stevenson (1850), 16 L. T. O. S. 469.

1059. —— ——.]—In an action for rent, deft. by his counterclaim alleged an illegal distress by breaking an outer door. At the trial it was shown that pltf. gave no authority to the broker to break open the door, &, although he received the proceeds of the distress, he did not then know of the illegal act of the broker:—*Held:* pltf. not liable for the act of the broker.—GREEN *v.* WROE, [1877] W. N. 130.

1060. Execution—Creditor becoming party to interpleader issue.]—An execution creditor does not, by becoming a party to an interpleader issue, ratify or adopt the act of the sheriff, so as to render himself liable in trespass for the seizure of the goods which are the subject of the interpleader issue.—WILSON *v.* TUMMAN, No. 1129, *post.*

For full anns., *see* S. C. No. 1129, *post.*

1061. *S. P.* WOOLLEN *v.* WRIGHT (1862), 1 H. & C. 554; 31 L. J. Ex. 513; 10 W. R. 715; 158 E. R. 1005; *sub nom.* WRIGHT *v.* WOOLLEN, 7 L. T. 73, Ex. Ch.

1062. *S. P.* WALKER *v.* OLDING (1862), 1 Hol. 621; 158 E. R. 1033.

Annotations:—**Distd.** Blaker *v.* Seager (1897), 76 L. T. 392. **Refd.** Durant *v.* Roberts, Keighley, Maxsted, [1900] 1 Q. B. 629, C. A.

1063. —— **Failure to interfere.**]—Where a debtor is taken in execution by the orders of an attorney's clerk, in circumstances imposing no liability on the attorney, a subsequent refusal by the attorney to interfere for debtor's release is not a ratification so as to render him liable for trespass.—KINNING *v.* BUCHANAN (1850), 15 L. T. O. S. 305.

1064. Expenses incurred—Letter expressing approval.]—A relative of a deceased lady ordered pltf., an undertaker, to perform a funeral which was suitable to her rank; & her son, many months before he took out administration to the deceased's effects, wrote a letter to the relative who ordered the funeral in which he expressed his approbation of all that had been done. In an action against deceased's son, charging him as administrator for funeral expenses:—*Held:* the action was maintainable.—LUCY (LACEY) *v.* WALROND (1837), 3 Bing. N. C. 841; 3 Hodg. 215; 5 Scott, 49; 6 L. J. C. P. 290; 132 E. R. 634.

Annotation:—**Refd.** Corner *v.* Shew (1838), 3 M. & W. 350.

1065. False imprisonment—Failure to deny authority.]—Judgment having been entered up against pltf., on a warrant of attorney, for £60 given to deft. to secure payment of a debt by instalments of which less than £20 were due, deft.'s attorney caused pltf. to be arrested under a *ca. sa.*, indorsed to levy £21 10*s.* Deft., having been informed that pltf. had been arrested by a person who had joined in the warrant of attorney, wrote a letter in answer not denying that such arrest had taken place by her authority. The writ was afterwards set aside by order of a judge. In an action for false imprisonment:—*Held:* (1) deft. was liable in trespass for the act of her attorney in improperly causing pltf. to be arrested; (2) there was evidence to go to the jury that deft. had authorised the arrest.—COLLETT *v.* FOSTER (1857), 2 H. & N. 356; 26 L. J. Ex. 412; 29 L. T. O. S. 229; 5 W. R. 790.

Annotations:—**Consd.** Smith *v.* Keal (1882), 9 Q. B. D. 340, C. A. I agree with the view taken by Bramwell, B., in *Collett* v. *Foster*, viz., that we should be very cautious how far we extend the doctrine of an implied authority given to agents (POLLOCK, B.).

1066. —— **Failure to interfere.**]—Deft.'s son, a youth about 17 or 18, in his employ, caused a servant whom he suspected of obtaining money from him by false pretences to be apprehended & taken before a magistrate, who remanded him, but ultimately discharged him. After the remand, the son told his father what he had done; the latter did not prohibit his son from proceeding in the matter, but said, as he (the son) had begun it, he would not interfere:—*Held:* there was no evidence for a jury of either previous authority or subsequent ratification by the father.

If the son had knocked pltf. down & the father had said, "I think it served him right," that would not be a ratification of the son's act so as to make the father a trespasser (ERLE, C.J.).—MOON *v.* TOWERS (1860), 8 C. B. N. S. 611; 141 E. R. 1306.

1067. Hiring—Acting as chairman when lease agreed to.]—Where, during the negotiations for the hire of a hall for a fête, W. was abroad & her son who was acting for her occupied the chair at a meeting which passed a resolution accepting an offer to organise the fête & guaranteeing £200 towards the expenses, but neither he nor his mother knew the terms of the hiring agreement before the fête was held, & the hiring agreement only professed to bind the members of the T. league of which the son was not a member:—*Held:* (1) no ratification by the son on his own behalf could possibly be inferred; (2) W. could not be held liable on the ground that she had ratified the agreement.—ROYAL ALBERT HALL CORPN. *v.* WINCHILSEA (LADY) (1891), 7 T. L. R. 362.

1064 i. *Expenses incurred—Taking benefit of judgment.*]—A creditor who gives his account for collection to a collector with instructions not to sue & not to incur expenses, but who, when he has discovered that the agent has sued & obtained judgment in his favour against the debtor for the amount of his claim, takes the benefit of the judgment, ratifies thereby the act of his agent.—BERNARD *v.* LALONDE (1889), 12 L. N. 275.—**CAN.**

1064 ii. —— *Acceptance of benefit.*]—A contractor not having completed the erection of a school ordered by pltfs., deft. as secretary, treasurer, & another trustee, without the authority of a formal writing of trustees, completed the building out of moneys of pltfs., who took it over, & used it:—*Held:* sufficient ratification of the act of deft., who was entitled to credit as treasurer for moneys so paid as above. *French* v. *Blackhouse* (1771), 5 Burr. 2728; *Sentance* v. *Hawley* (1863), 13 C. B. N. S. 458; *Bristow* v. *Whitmore* (1861), 3 L. J. Ch. 467, foll.—VASSAR SCHOOL DISTRICT *v.* SPICER (1911), 21 M. R. 777; 18 W. L. R. 147.—**CAN.**

1064 iii. —— *Delay & failure to dissent.*]—A telegraphic repairer whilst engaged in the business of the co. accidentally received a severe gunshot wound, & was sent for medical treatment to a physician by the operator under whom he was working. The operator had no authority to contract debts on behalf of the co., except to a trifling amount. The occurrence was communicated to the co. No proof was given that the co. had notified the physician that they would not be liable until after the expenditure had been incurred:—*Held:* where a principal, having received information by letter from his agent of his acts touching the business of his principal, does not within a reasonable time express his dissent to the agent, he is deemed to approve his acts, & his silence amounts to a ratification of them.—GALLOP *v.* NEW YORK, NEWFOUNDLAND, & LONDON TEL. CO. (1867), 5 Nfld. L. R. 195.—**NFLD.**

1067 i. *Hiring—Acceptance of services.*]—Acceptance of the services of a solr. by directors is evidence of ratification of the original hiring by their managing director, even though the managing director acted without authority.—ALBERT RY. CO. *v.* PECK (1885), 26 N. B. R. 191.—**CAN.**

w. *Increase of salary to servant—Opportunity to see entries in books.*]—During applt.'s absence from the colony applt.'s wife raised the wages of respt., applt.'s agent in regard to his business:—*Held:* the facts that applt. had an opportunity of seeing an account in his ledger in which wages at the increased amount were entered as due, though the increase was not drawn, & that if he did examine the account he did not object to it, were no evidence of ratification by applt.—JONES *v.* TAYLOR (1902), 22 N. Z. L. R. 514.—**N.Z.**

1068. Insurance—Covering ship—Agent's books open to principal—No dissent.]—H., managing owner of a ship, directed an insurance broker to effect an insurance on the entire ship, upon an adventure in which all the part-owners were jointly interested; the amount of the entire premium was carried to the ship's account in H.'s books, which were open to the inspection of all the part-owners, who saw the account & never objected to it; it did not appear that the insurance broker knew the names of all the part-owners, or whether or not they had given authority to H. to insure:—*Held:* (1) the jury were warranted in inferring a joint authority to insure; (2) all the part-owners were jointly liable for the premium to the insurance broker, notwithstanding he had debited H. alone, & divided with him the profits of commission upon effecting the insurance.—ROBINSON *v.* GLEADOW (1835), 2 Bing. N. C. 156; 1 Hodg. 245; 2 Scott, 250; 132 E. R. 62.

1069. —— Execution of policy—Offer to settle.]—A policy of insurance, executed in the name of the principal by the clerk of an agent who had authority to underwrite policies in the principal's name, was after execution shown to the principal, who offered terms of settlement:—*Held:* the principal had ratified the act of the clerk.—MASON *v.* JOSEPH (1804), 1 Smith, K. B. 406.

1070. Investment—Receipt of interest on same.]—Pltf. deposited £300 in the hands of P., deft.'s testator, who let same at interest upon a mtge. of houses & took the mtge. in pltf.'s name. The mtge. afterwards proved defective. It did not appear that pltf. ever assented to this mtge., or that he gave deft. a general authority to dispose of it at interest as he thought fit, or that he laid any restraint upon deft. that he should not dispose of it without his approbation; but it did appear that pltf. had received interest for several years, & in the receipts had taken notice of the principal being in mtge. upon the security:—*Held:* this amounted to an approbation of the security.—CLARKE *v.* PERRIER (1679), 2 Freem. Ch. 48; 22 E. R. 1050.

1071. Legal proceedings—Compromise of—Acquiescence.]—Pltf.'s solr. made a compromise of the suit, as pltf. alleged, without his knowledge or consent, but it having been proved pltf. had been subsequently made acquainted with the arrangement, & had to some extent acted upon it & acquiesced in it for several months:—*Held:* he was bound by the arrangement from his own acquiescence.—CLIFFORD *v.* TURNELL (1848), 11 L. T. O. S. 197.

1072. —— —— Delay in dissent.]—An action for breach of promise of marriage having been compromised in June, 1887, pltf. brought a second action in Feb., 1888, alleging that the compromise of the former action had been made by her counsel without her consent:—*Held:* in so far as the compromise fell within scope of counsel's authority, the delay on pltf.'s part precluded her from objecting to it.—ELLENDER *v.* WOOD (1888), 4 T. L. R. 680; 32 Sol. Jo. 628, C. A.

1073. —— Institution of—Delay in dissent.]—A shipowner applied to the ct. to set aside an order condemning him in costs of unsuccessful legal proceedings taken in his behalf by the managing owner, on the ground that the proceedings had been instituted without his knowledge, consent, or ratification, & the first intimation he had of the proceeding was a notice received by him about a month previous to the present application condemning him in costs of such proceeding:—*Held:* the application must be refused as it did not appear that the applicant, though he had no knowledge of the institution, was not aware of the pendency, of the proceedings, & because he had not at once applied to the ct. on becoming aware of the proceedings, instead of delaying to take any steps for over a month.—THE BELLCAIRN (1886), 54 L. T. 544.

1074. Letting—Allowing tenant to take possession.]—A.'s agent contracted to grant a lease to B. for 7 or 14 years, & B. was put into possession. On B. claiming a lease determinable at his (B.'s) option, A. contended that the lease must be determinable at his (A.'s) option, & denied the agent's authority to agree to a lease determinable at B.'s option:—*Held:* (1) by putting B. into possession under the agreement, A. was precluded from denying the agent's authority; (2) it was immaterial that A. had mistaken the legal effect of the agreement.—POWELL *v.* SMITH (1872), L. R. 14 Eq. 85; 41 L. J. Ch. 734; 26 L. T. 754; 20 W. R. 602.

Annotations:—**Expld.** Wilding *v.* Sanderson, [1897] 2 Ch. 534, C. A. **Refd.** M'Kenzie *v.* Hesketh (1877), 38 L. T. 171; Eastes *v.* Russ, [1914] 1 Ch. 468, C. A.

1075. —— Bringing action on lease.]—Pltf. in a case for an injury to his reversionary interest in copyholds was trustee for a person who had demised the premises:—*Held:* an allegation that pltf. was possessed of the reversion was not a variance, as the bringing of the action by pltf. as reversioner was an adoption of the letting by the *cestui que trust*, who was his agent.—VALLANCE *v.* SAVAGE (1831), 7 Bing. 595; 5 Moo. & P. 576; 9 L. J. O. S. C. P. 181; 131 E. R. 230.

Annotations:—**Distd.** Jolly *v.* Arbuthnot (1859), 4 De G. & J. 224; Howe *v.* Scarrott, Sharp *v.* Scarrott (1859), 4 H. & N. 723. **Refd.** Higham *v.* Rabett (1839), 7 Scott, 827.

1076. —— Receipt of rent.]—Where an agreement for the letting of land was given in evidence in an action by A., his wife, & B. against the alleged tenant for breach of same, which agreement purported to be made by an agent for A.'s wife & B. only, but A. had received rent from deft.:—*Held:* there had been no ratification by A. of the agreement *ab initio*, the agent at the time of entering into the agreement not having professed to have authority to act for the husband & the subsequent receipt by A. of the rent not making him in the

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1068 i. *Insurance—Acceptance of same.*]—In an action against a wife on a contract of insurance signed for her by her husband she pleaded want of authority in her husband to sign:—*Held:* her acceptance was sufficient proof of such authority.—MUTUAL INSURANCE CO. *v.* DESROUSSELLES (1882), 5 L. N. 179.—**CAN.**

1074 i. *Letting—Allowing tenant to take possession.*]—Pltf.'s agent, without authority under seal, by deed leased to deft. certain land belonging to pltf. The evidence showed that the lease when signed was delivered to pltf., & that he several times requested the agent to go & see whether deft. had performed his covenants under it; that he had never objected to the lease, but had been on the lot, & had had it surveyed after deft. took possession of it. The jury found that pltf. had adopted the lease & re-delivered it as his deed:—*Held:* their finding was right, & the lease was binding upon pltf.—PETTIGREW *v.* DOYLE (1886), 17 C. P. 34.—**CAN.**

1074 ii. —— *Bringing action for account against agent.*]—E., to whom deceased had promised to leave his estate, not being aware that there was an heir, granted a binding lease. On the heir establishing his right he sued E. for an account of the rents, but refused to recognise the lease. In an action by lessee to bind the heir with the lease:—*Held:* the heir was not bound, & his suit against E. was not a ratification of E.'s acts.—MOFFATT *v.* NICHOLL (1862), 9 Gr. 446.—**CAN.**

1074 iii. —— *Failure to deny authority.*] — Where the authority of an attorney under power is restricted in the power, & he enters into a contract in excess of such authority, but the principal, on becoming aware of it, does not repudiate it, the other party may enforce his remedy for breach of such contract.—BROWN *v.* HARDY (1868), 5 W. W. & a'B. L. 245.—**AUS.**

1074 iv. —— *Failure to repudiate.*]—Where the granting of a lease has been brought to the knowledge of the principal it is his duty to repudiate same if the agent had not authority to execute it. To act otherwise is an adoption & ratification of the act of the agent.—WADDEN *v.* WADDEN (1893), 7 Nfld. L. R. 795.—**NFLD.**

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circumstances a joint contractor *ab initio* with the persons for whom the agent had authority to act.—SAUNDERSON *v.* GRIFFITHS (1826), 5 B. & C. 909; 8 Dow. & Ry. K. B. 643; 4 L. J. O. S. K. B. 318; 108 E. R. 338.

Annotations:—**Distd.** Durant *v.* Roberts & Keighley, Maxsted, [1900] 1 Q. B. 629, C. A. Holroyd, J. when dealing with ratification distinctly says that the argument as to ratification would have had weight if the agent had *professed* to act for A. at the time when he made the contract; in my judgment a man keeping an intention locked up in his own mind is not "professing" to act for another when he makes the contract (A. L. SMITH, L.J.). **Apprvd.** Keighley, Maxsted *v.* Durant, [1901] A. C. 240. **Refd.** Bobbett *v.* Pinkett (1876), 1 Ex. D. 368.

1077. Licence—Delay in dissent.]—Where pltfs.' agent granted a licence to carry on for two years mining works on ground not opened, & watched the working until the adventure proved successful & pltfs. objected that, according to the custom of the district, the agent had no right to grant a licence for more than one year:—*Held:* pltfs. were precluded from then objecting by reason of their having stood by without interfering with defts.' works.—HARRISON *v.* AMES (1850), 15 L. T. O. S. 321.

1078. Notice to quit—Bringing action on notice.]—A notice to quit given by an agent of the landlord to receive rents is not sufficient, without a recognition by the landlord; the bringing of an action founded on the notice is not of itself a recognition.—DOE d. RHODES *v.* ROBINSON (1837), 3 Bing. N. C. 677; 3 Hodg. 84; 4 Scott, 39 6; 6 L. J. C. P. 235; 1 Jur. 356; 132 E. R. 571.

Annotation:—**Refd.** Doe d. Lyster *v.* Goldwin (1841), 1 Gal. & Dav. 463.

1079. —— ——.]—Where a lease for 21 years contained a proviso that in case either landlord or tenant, or their respective heirs & exors. wished to determine it at the end of 14 years, & should give six months' notice in writing under his or their respective hands, the term should cease:—*Held:* (1) a notice to quit, signed by two only of three exors. of the original lessor, to whom he had bequeathed the freehold as joint tenants, expressing the notice to be given on behalf of themselves & the third exor., was not good under the proviso, which required it to be given under the hands of all three; (2) the notice to quit being such as the tenant was to act upon at the time, no subsequent recognition of the third exor. would make it good by relation; nor was his joining in the ejectment evidence of his original assent to bind the tenant by the notice.—RIGHT d. FISHER, NASH & HYRONS *v.* CUTHELL (1804), 5 East, 491; 2 Smith, K. B. 33; 102 E. R. 1158.

Annotations:—**Distd.** Goodtitle d. King *v.* Woodward (1820), 3 B. & Ald. 689; Doe d. Elliott *v.* Hulme (1828), 6 L. J. O. S. K. B. 345; Doe d. Aslin *v.* Summersett (1830), 1 B. & Ad. 135. **Consd.** Doe d. Mann *v.* Walters (1830), 10 B. & C. 626. **Refd.** Dodd *v.* Acklom (1843), 6 Man. & G. 672; Charrington *v.* Johnson (1845), 4 L. T. O. S. 398; *Re* Viola's Indenture of Lease, Humphrey *v.* Stenbury, [1909] 1 Ch. 244.

1080. Payment—Acceptance of balance of rent.]—Land was mtged. &, in 1859, a payment of interest on the mtge. was made. In 1878 a tenant of part of the property, on the direction of mtgee., but without mtgor.'s knowledge, paid rent to mtgee. He afterwards paid rent to mtgor. less the rent paid to mtgee., & there was no evidence that mtgor. required him to pay her the balance. In 1880 mtgee. brought a foreclosure action. Mtgor. set up Real Property Limitation Act, 1837 (c. 28):—*Held:* a payment to take the case out of the statute must be a payment by a person liable,—in the present case, by a person bound to pay the principal or interest of the mtge. money; the tenant's payment here was not on behalf of the mtgor., but was simply a payment which the tenant as tenant was bound to make; in the circumstances, there could be no ratification, the character of the payment not being variable by anything done subsequently between mtgor. & mtgee.—HARLOCK *v.* ASHBERRY (1882), 19 Ch. D. 539; 51 L. J. Ch. 394; 46 L. T. 356; 30 W. R. 327, C. A.

Annotations:—**Consd.** Bradshaw *v.* Widdrington, [1902] 2 Ch. 430, C. A. **Refd.** Lewin *v.* Wilson (1886), 11 App. Cas. 639, P. C.; *Re* Clifden, Annaly *v.* Agar-Ellis, [1900] 1 Ch. 774; Taylor *v.* Hollard, [1902] 1 K. B. 676; *Re* Lacey, Howard *v.* Lightfoot, [1907] 1 Ch. 330, C. A. **Mentd.** *Re* Cross, Harston *v.* Timson (1882), 20 Ch. D. 109, C. A.; Newbould *v.* Smith (1885), 29 Ch. D. 882; Badeley *v.* Consolidated Bank (1886), 34 Ch. D. 536; Topham *v.* Booth (1887), 56 L. J. Ch. 812; Hugill *v.* Wilkinson (1888), 38 Ch. D. 480; *Re* Owen, [1894] 3 Ch. 220; Kibble *v.* Fairthorne, [1895] 1 Ch. 219; Hall *v.* Snowdon, Hubbard (1899), 68 L. J. Q. B. 363, C. A.; London & Midland Bank *v.* Mitchell, [1899] 2 Ch. 161.

1081. —— Agreement to indemnify & instructions not to make further payments.]—Pltf. had maintained the natural son of deft.'s brother for a space of 15 months, during which time he had expended £120, & had lent H. in cash £50. Pltf. had applied to deft. by letter for payment of £70; & deft. had sent £35. In his letter to pltf. deft. said he could pay over to pltf.'s bankers £35, the remainder of the money owing to pltf. by H., & continued—"but I beg in future you will not lend any money in my name, as I will not be answerable for it":—*Held:* not sufficient for the jury to draw the inference that H. had acted as agent of deft., & that deft. had afterwards sanctioned the agency so as to make him liable.—ELLABY *v.* SAUNDERS (1847), 8 L. T. O. S. 367.

1082. —— Delay in dissent.]—If the attorney of a party authorise A. to pay money for his client, & A. pay it, & the attorney mention the matter to his client, who does not disclaim the transaction till several months after, this is evidence to go to the jury that the authority to pay was authorised by the client.—PARKER *v.* DUBOIS, No. 217, *ante*.

1083. —— Knowledge of custom & silence.]—Pltf., a broker, on instructions of deft. bought three lots of sugar for him, numbered 67, 68, & 69. By the conditions of sale the goods were to remain at the wharf, at seller's risk, till the warrants were delivered to the buyer. On May 25 deft. requested pltf. to obtain a warrant for lot 67 & clear it at the Custom House, which he did. At the same time pltf. paid & obtained warrants for the other lots, which was the ordinary course of proceeding among brokers, they getting discount allowed by the seller. It was proved that deft. knew of this practice, & that it had been done in this instance. On June 22 deft. instructed pltf. to clear lot 68.

1078 i. *Notice to quit—Bringing action on notice.*]—A notice to quit was signed by a person as agent & receiver for C. Ejectment was afterwards brought upon such notice:—*Held:* the bringing of the ejectment was a sufficient recognition by C. of the act of the agent, without further proof of the agency.—CONNER *v.* M'CARTHY (1826), Batt. 643.—**IR.**

1078 ii. —— ——.]—On an ejectment by a landlord founded on a notice to quit signed by his agent:—*Held:* the subsequent bringing of the ejectment was not in itself a sufficient proof or recognition of the agent's authority to serve notice to quit.—FREWEN *v.* AHERNE (1841), 4 Ir. Law. Rep. 181 (E.).—**IR.**

1080 i. *Payment—To agent by promissory note—Acceptance of subsequent payments.*]—Deft. was indebted to pltfs. for rent, & to pltfs.' agent for goods supplied. He gave the agent his promissory note, payable to the agent, for the sum of two debts. The agent discounted the note, & appropriated the whole amount. After the due date of the note pltfs. received from deft. two quarters' rent accrued after the date of the above transaction:—*Held:* pltfs. had acquiesced in the transaction, & must be treated as paid.—NORTHERN LOAN & LAND CO. *v.* LICHTSCHEINAL (1888), 6 L. R. N. Z. 643.—**N.Z.**

1080 ii. —— *Of sum loaned to person unauthorised by borrower to receive same—Payment of interest charges.*]—KNOX *v.* BORVIN (1893), Q. R. 4 S. C. 311.—**CAN**

According to the ordinary practice, if the warrants had not been obtained previously, they would have been obtained on the Saturday, & the duty would have been paid on the following Monday. The warrants, however, had been previously obtained. A fire broke out after business hours on Saturday, & lot 68 was destroyed:—*Held:* (1) the conduct of deft. amounted to a ratification or adoption of the previous payment; (2) the sugar was then standing at the buyer's risk; (3) pltf. could recover the money paid for it as money paid for deft.'s use.

Knowledge on the part of the principal that it was the ordinary course of business for the broker to make prepayment, & acquiescence by silence, amounts to a specific permission to the broker to do so (ERLE, C.J.).—SENTANCE *v.* HAWLEY (1863), 13 C. B. N. S. 458; 1 New Rep. 323; 7 L. T. 745; 143 E. R. 182; *sub nom.* HAWLEY *v.* SENTANCE, 11 W. R. 311.

1084. —— **Partial indemnity.**]—Where a broker, according to usual practice, pays the deposit for the buyer, who afterwards recognises the payment by part payment to the broker, this is not an admission to dispense with production of the bought & sold notes, there having been no acceptance of part of the goods sold.

In an action for the loss upon a resale of goods sold under a contract, with conditions stated at length in the declaration, the bought & sold notes not being produced at the trial, it appeared that the conditions were those usual in tea-sales; that deft. was in the trade & acquainted with the conditions; that the brokers had paid the deposit required by the conditions, & deft. had recognised the amount so paid as a debt from him to the brokers, & included it in a composition which he paid to them as his creditors:—*Held:* the payment was not an admission of liability upon the contract.—DANIEL *v.* PIDDING (1845), 6 L. T. O. S. 192.

1085. Proclamation by colonial governor—Failure of Crown to interfere.]—*Semble:* the non-objection on the part of the Crown to a notification or proclamation issued by a Governor of one of its ceded colonies does not imply that the Governor had authority in the subject of the proclamation, nor will its non-interference render the proclamation valid on the ground of acquiescence.—CAMERON *v.* KYTE (1835), 3 Knapp, 332; 3 State Tr. N. S. 607; 12 E. R. 678.

For full anns., *see* DEPENDENCIES, COLONIES & BRITISH POSSESSIONS.

1086. Purchase—Acceptance of goods bought.]—Pltf., a factor abroad, having exceeded the price limited for purchase of hemp, deft., who objected to the contract, but afterwards reshipped & disposed of some of it on a new risk, was ordered to account for the whole at cost price.—CORNWAL *v.* WILSON (1750), 1 Ves. Sen. 509; 27 E. R. 1173.

Annotation:—**Expld. & Distd.** Devaux *v.* Connolly (1849), 8 C. B. 640.

1087. —— ——.]—Orders for goods were given respectively by the secretary, chairman of the board of directors, & deputy chairman of a joint-stock co. The goods were delivered at the premises of the co., accompanied with invoices made out to the co., & were used in the business of the co.:—*Held:* (1) as the goods comprised in the orders were delivered to, & accepted by, persons authorised to accept them, & used in the business of the co., such orders, although not formally ratified by the directors sitting as a board, must be considered to have been adopted by the directors; (2) the co. was liable upon them.—SMITH *v.* HULL GLASS CO. (1852), 11 C. B. 897; 7 Ry. & Can. Cas. 287; 21 L. J. C. P. 106; 16 Jur. 595; 138 E. R. 729.

Annotations:—**Consd.** *Re* Sea Fire & Life Assoc., Greenwood's Case (1854), 3 De G. M. & G. 459; Forbes *v.* Marshall (1855), 11 Exch. 166. **Consd. & Expld.** Ernest *v.* Nicholls (1857), 6 H. L. Cas. 401, H. L. **Consd. & Distd.** Sea, Fire, Life Assce. Soc. *v.* Port of London Ship Owners' Loan & Assce. Soc. (1857), 6 W. R. 24, H.L. **Consd.** Prince of Wales Assce. *v.* Harding (1858), E. B. & E. 183; Allard *v.* Bourne (1863), 15 C. B. N. S. 468. **Apld.** *Re* County Palatine Loan & Discount Co., Cartmell's Case (1874), 9 Ch. App. 691. **Consd.** Biggerstaff *v.* Rowatt's Wharf, [1896] 2 Ch. 104. **Reid.** Royal British Bank *v.* Turquand (1855), 5 E. & B. 248; Reuter *v.* Electric Telegraph Co. (1856), 6 E. & B. 341; Peddyl *v.* Gwyn, Gordon *v.* Sea, Fire & Life Assce. Soc. (1857), 3 Jur. N. S. 188; *Re* Athenæum Life Assce., *Ex p.* Eagle Insce. (1858), 27 L. J. Ch. 829. **Mentd.** British Empire Mutual Life Assce. *v.* Browne (1852), 12 C. B. 723; South of Ireland Colliery Co. *v.* Waddle (1868), 37 L. J. C. P. 211.

1088. —— ——.]—The agent of an incorporated ry. co. agreed by parol with pltf. to purchase of him a quantity of sleepers upon certain terms. The sleepers were received & used by the co.:—*Held:* there was evidence from which the jury might find a contract by the co.—PAULING *v.* LONDON & NORTH-WESTERN RY. CO. (1853), 8 Exch. 867; 7 Ry. & Can. Cas. 816; 23 L. J. Ex. 105; 21 L. T. O. S. 157; 1 C. L. R. 997.

1089. —— ——.]—An agent to receive rents & manage property agreed without actual authority that his principal should take the stock, etc., of an outgoing tenant at a valuation: this included the eatage of fields, in which the principal's cattle were afterwards placed by his servants with his knowledge:—*Held:* this was a ratification of the whole valuation.—RODMELL *v.* EDEN (1859), 1 F. & F. 542.

1090. —— **Acknowledgment of liability.**]—In an action against two persons, not partners, but having a joint power & authority (as trustees under a deed of assignment in trust for creditors), for work done or goods supplied, on the order of one of them, any acknowledgment of liability on the part of the other, although accompanied by some qualification, or apparently made under some mistake of law or fact, may be left to the jury, as evidence of a ratification or of a precedent authority.—HINTON *v.* FORESTER (1858), 1 F. & F. 150.

1091. —— **Action against agent for negligence in purchase.**]—A. purchased from B. through C.'s agency an annuity, after C.'s bkpcy. A. sued C. for negligence as the agent in the purchase of the annuity, but the action was compromised on C. paying costs & engaging to assist A. in a proof under the bkpcy. A. claimed to prove for the consideration money on the ground that the grant of the annuity was a colourable transaction contrived for the purpose of obtaining A.'s money in payment of a debt due from B. to C., but the ct. rejected the proof on the ground that the transaction was a substantial one:—*Semble:* even if the transaction had been colourable, the conduct of A., after bkpcy. & with full knowledge of all the circumstances, in bringing an action against C. for negligence as the agent in the purchase of the annuity was, as against the creditors, an election to adopt the annuity & would defeat the proof under the bkpcy.—*Re* HOWARD & GIBBS, *Ex p.* SHAW (1826), 2 Gl. & J. 106.

1092. —— **Assignment of right purchased.**]—In 1863, a ry. co. under the powers of a special Act, which incorporated Lands Clauses Consolidation Act, 1845 (c. 18), & Railways Clauses Consolidation Act, 1845 (c. 20), acquired land, without the underlying minerals, & constructed their ry. across it, within the 4 years for that purpose limited by the special Act. In 1904 the co.'s solrs., acting without authority, to prevent injury to the ry. by subsidence entered into an informal agreement on behalf of the co. to purchase the minerals from A., the owner. Subsequently by a contract under seal, the co. assigned the benefit of the agreement to B., who, claiming the minerals adversely to A., disputed its validity:—*Held:* the co. by assigning the

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agreement to B. had ratified it.—THOMPSON *v.* HICKMAN, [1907] 1 Ch. 550; 76 L. J. Ch. 254; 96 L. T. 454; 23 T. L. R. 311.

For full anns., *see* MINES, MINERALS & QUARRIES.

1093. —— Claiming goods purchased.]—In an action for the price of house furniture ordered by deft.'s son in deft.'s name it appeared that deft., some months afterwards, came to reside in the house &, on the goods being taken under a writ of execution against the son, claimed them as his:—*Held:* there was evidence from which a jury might infer his adoption of the order.—BROOKS *v.* MERRYWEATHER (1862), 3 F. & F. 144.

1094. —— Correspondence as to delivery.]—Where a contract for the sale of iron made by a broker is not binding on the parties owing to a material variance between the bought & sold notes, the fact that the buyer without referring to the terms of either the bought or the sold note, & in the belief that the contract is binding, authorises the broker to propose terms to the seller as to delivery of the iron & payment of the purchase-money is not a ratification of the contract contained in either the bought or the sold note.—SIEVEWRIGHT (SIVEWRIGHT) *v.* ARCHIBALD (1851), 17 Q. B. 103; 20 L. J. Q. B. 529; 17 L. T. O. S. 264; 15 Jur. 947; 117 E. R. 1221.

Annotations:—Apld. Fisenden *v.* Levy (1863), 11 W. R. 259. Distd. Parton *v.* Crofts (1864), 16 C. B. N. S. 11. Dbtd. Heyworth *v.* Knight (1864), 4 New Rep. 288. Mentd. Coddington *v.* Goddard (1860), 82 Mass. Rep. 436; Lucas *v.* Dixon (1889), 22 Q. B. D. 357, C. A.; *Re* Hoyle, Hoyle *v.* Hoyle, [1893] 1 Ch. 84, C. A.

1095. —— Delay in dissent.]—A. shipped goods to India, & in his letter of instructions to his agent B. directed him to invest the proceeds in certain specified articles of merchandise, or in bills at the exchange of the day, & remit them to England. B., instead of complying with his orders, invested the proceeds in a commodity not specified in his letter of instructions, & transmitted a bill of lading for same, which reached A. on May 29, who notified an agent of B., on Aug. 7, his dissent from what had been done, the goods having in the meantime been lost at sea.—*Held:* the laches of A. in delaying his notice of abandonment so long discharged B.'s liability.—PRINCE *v.* CLARK (1823), 1 B. & C. 186; 2 Dow. & Ry. K. B. 266; 1 L. J. O. S. K. B. 69; 107 E. R. 70.

Annotation:—Apld. Peru Republic *v.* Peruvian Guano Co. (1887), 36 Ch. D. 489.

1096. —— Failure to return goods to vendor.]—Although a husband is not cohabiting with his wife, yet if she improvidently takes up goods of a tradesman for which he would not otherwise be liable, he assents to the contract if, having any control over the goods, he does not cause them to be returned to the vendor.—WAITHMAN *v.* WAKEFIELD (1807), 1 Camp. 120.

Annotation:—Refd. Freestone *v.* Butcher (1840), 9 C. & P. 643.

1097. —— Seizure of part of property purchased.]—A., knowing of B.'s bkpcy., at the request of B.'s

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1093 i. *Purchase—Taking possession of property bought.*]—S., acting as agent for deft. co., purchased a piece of land from pltf., paying $100 on account & giving a mtge. note for the balance. The co. were notified of the transaction within a week after the giving of the note & took no steps to repudiate it. They entered into possession of the land, dealt with it as their own, & received the rents & profits:—*Held:* assuming that S. was not legally authorised to give the note at the time he did, the co. had ratified his act.—RYAN *v.* TERMINAL CITY CO., LTD. (1893), 25 N. S. R. 131.—**CAN.**

1093 ii. —— *Instructing agent to get out of contract.*]—PRINCE *v.* LEWIS (1870), 21 C. P. 63; 31 U. C. R. 244.—**CAN.**

1093 iii. —— *Disapproval followed by orders to insure purchased property.*]—The managing director of an English co. without authority contracted for the purchase of real estate for use of the co. at O., in Canada, & went into possession & used the property for purposes of the co. The purchase was immediately communicated by him to the English directors, & they disapproved thereof, but did no act repudiating the purchase; on the contrary, they directed the buildings to be insured:—*Held:* this conduct was an adoption of the contract by the directors.—CONANT *v.* MIALL (1870), 17 Gr. 574.—**CAN.**

1093 iv. —— *Negotiations for return of chattel.*]—B. sold a racehorse to H., a minor, upon a representation by H. that his mother would pay. H. on former occasions had, to the knowledge of B., purchased horses for which the mother afterwards paid. The mother allowed the son to keep a pack of hounds at her residence, & paid for his equipment as master. The mother entered into negotiations with B. for the return of the horse—a course which B. agreed to accept upon two alternative conditions, which the mother agreed to consider; & this incident was relied upon by B. as a ratification by the mother of the contract with the son:—*Held:* the negotiations were not of such character as to amount to ratification by the mother.—BARRETT *v.* IRVINE, [1907] 2 I. R. 462, 474.—**IR.**

1095 i. —— *Delay in dissent.*]—An agent was instructed to purchase a racehorse, a condition being that a veterinary surgeon's certificate that the horse was sound was first obtained. The agent obtained a qualified certificate, but paid the money. Pltf. kept the horse for several months, & made no offer to return it, but leased the horse to B. & tried to sell it:—*Held:* pltf. had not rescinded the contract. Ratification may be shown by mere acquiescence, or by not disavowing within a reasonable time, or by acts or omissions from which it can be inferred. If a party intends to rescind he must show it by clear unequivocal acts inconsistent with ratification.—COX *v.* ISLES, LOVE & CO. (1910), S. R. Q. 80.—**CAN.**

1095 ii. —— ——.]—A contract of sale was completed by delivery to resps. as vendors & to appits. as vendees of bought & sold notes. Appits. retained the bought note & made no objection either to the terms of the contract or to the authority of C. & M. as brokers to bind them. Subsequently disputes arose as to inspection & delivery of the goods, & resps. were obliged to sell the goods elsewhere at a loss. In an action for damages for breach of contract:—*Held:* appits. were bound by the contract entered into by C. & M., the evidence disclosing an implied authority to C. & M. to complete the contract on appits.' behalf, & as, even if there had not been any original authority to C. & M., there was such acquiescence by appits. as amounted to ratification, appits. only having disputed C. & M.'s authority after the dispute as to inspection & delivery arose.—TRENT VALLEY WOOLLEN CO. *v.* OELRICHS (1894), 23 S. C. R. 682.—**CAN.**

1096 i. —— *Failure to return goods to vendor.*]—In an action brought by pltf. against deft. co. for the price of articles alleged to have been sold by him to the co. for use in connection with the construction of their line of railway, it appeared that the articles were sold to H., manager of defts., & were used by him in connection with the building of the road; that pltf. was employed by H. to do certain work on the road; & that this act of H. was ratified by defts., who paid pltf. for the services rendered by him:—*Held:* the sale of the articles sued for was made to defts. & not to H. individually.—MCDONALD *v.* BROAD COVE COAL CO. (1900), 32 N. S. R. 486.—**CAN.**

y. —— *Under hire-purchase agreement—Retaining copy of agreement & receipts for instalments.*]—Deft., an illiterate woman, permitted her daughter to sign a hire-purchase agreement for a piano, whereunder pltfs. retained property in the piano until full payment. Pltfs. sued to recover the piano; & deft. alleged ignorance of the clause in the agreement entitling them to resume possession. A copy of the agreement signed by the daughter had remained in deft.'s house three years, & she kept the receipts for payment. The jury having found no ratification by deft:—*Held:* the verdict was perverse & there must be a new trial.—HEINTZMAN *v.* GRAHAM (1888), 15 O. R. 137.—**CAN.**

z. *Receipt of bailed goods by bailor's manager—Delay in dissent.*]—Pltf. bailed a horse to deft. to be returned to him at a certain time. Before the time elapsed deft., not requiring the horse any longer, returned it to H., who was in pltf.'s employment both at the time of bailment & return, & who told deft. that pltf. had sent him for the horse. H. was known to deft. & to others generally as being in the employment of pltf. as a general manager of his business. About two months after the return of the horse deft. met pltf. & told him that he had delivered it to H. Pltf. neither approved nor disapproved of this. Three years afterwards an action was brought:—*Held:* pltf. was estopped by his conduct from complaining of the delivery to H.—BOUCHETTE *v.* ANDERSON (1876), Temp. Wood, 64.—**CAN.**

wife & with B.'s money bought 30 South Sea bonds, & gave them to her. B.'s assignee seized 22 as part of bkpt.'s estate:—*Held:* he could not maintain trover against A. for the money with which he purchased the other 8; as the seizing part of the bonds was an affirmance of deft.'s act & pltf. could not avow the act as to part & disavow it for the rest.—WILSON *v.* POULTER (1730), 2 Stra. 859; 1 Barn. K. B. 118, 284; 93 E. R. 898.

Annotation:—Refd. Peru Republic *v.* Peruvian Guano Co. (1887), 36 Ch. D. 489.

1098. Receipt of money—Correspondence between principal & third party.]—A., a solr., employed by a mtgor. & a mtgee., received the interest on the mtge. debt regularly. After a time he fraudulently obtained from mtgor. a portion of the principal. At first mtgee. received his interest regularly from A. at his office; but ultimately A. allowed the interest to fall into arrear till a large sum became due on the mtge. During this time mtgee. made no application to mtgor. in consequence of the irregularity in payment. In Sept., 1853, mtgor. paid mtgee. £43 13*s.* 9*d.*, as a half-year's interest on the principal remaining due; that led to an explanation & discovery of the fraudulent receipt of the principal by A. Mtgee. did not repudiate the payment at the time. On Feb. 24 mtgor. wrote to inquire in what way he should pay the half-year's interest just due, expressing his fear that A. would not be able to make good his defalcations to mtgee. On the 26th mtgee. wrote requesting payment by cheque, & on Mar. 4 mtgee. again wrote, saying he believed A. was hopelessly involved, & suggesting the loss should be divided between them:—*Held:* (1) A. was agent of mtgee. to receive the interest but not the principal; (2) in order to bind mtgee. by the acts of A. in receiving the principal it was necessary to show either that what he did was with intention of adopting the acts of A. or that the position of mtgor. was altered; (3) in the circumstances mtgee. was not bound.—KENT *v.* THOMAS (1856), 1 H. & N. 473.

1099. —— Treating sum as debt from agent.]—W. lent a sum of money to defts. on the security of the rates. W.'s brother, authorised to receive the interest on his behalf, received & misappropriated the principal. W. afterwards treated the sum received as a debt from his brother, took a warrant of attorney from him to secure payment, & failed to inform defts. of his intention to repudiate the payment:—*Held:* W. had ratified the payment to his brother.—R. *v.* TENBURY GRDNS., No. 709, *ante*.

1100. Sale—Acceptance of purchase-money.]—*Semble:* the owner of a ship receiving the proceeds of a sale of the ship by the master abroad is estopped from disputing such sale, & so are parties deriving title under him with knowledge of the facts.—THE MARGARET MITCHELL (1858), Sw. 382; 4 Jur. N. S. 1193.

1101. —— —— Purchase-money earmarked.]—Confirmation by the owner of a sale abroad of a British ship by the master will not be inferred from vague expressions of approval, if the owner at the time was not aware of the true state of the facts relating to the sale. Acceptance of purchase-money generally operates as a ratification of the sale, but not so if the money was received without the intention of appropriating it, or if received in ignorance of the facts relating to the sale.

The owner of a ship, being ignorant of the true state of facts relating to the sale of his ship abroad by the master, received as proceeds of the sale bills of exchange at 60 days; before the bills became due he became aware of the true circumstances, & his ship having arrived, he arrested her; when the bills fell due he obtained payment of them, & paid the money into ct.:—*Held:* such receipt of the purchase-money by him did not amount to a ratification of the sale.—THE BONITA, THE CHARLOTTE (1861), 1 Lush. 252; 30 L. J. P. M. & A. 145; 5 L. T. 141; 1 Mar. L. C. 145.

1102. —— Action for price.]—The trustee of a bkpt.'s estate applied, under Bkpcy. Act, 1869 (c. 71), s. 72, to the Bkpcy. Ct. to declare a bill of sale, made by bkpt. previously to his bkpcy., fraudulent & void as against himself as trustee, &

1098 i. *Receipt of money—Correspondence.*]—W., a real estate agent, obtained from pltf. an offer to purchase the property of deft., his principal. He wrote deft. he had received an offer for fourteen days at $850, which meant $807.50 net to deft. Deft. wrote accepting, & transmitting documents of title. Pltf.'s attorney wrote a cheque to W. or order for $850 & W. gave him his receipt. Deft. sent his brother to W., who declined to hand over the cash to him, whereon deft. wrote him a letter authorising him to pay over to his brother. In acknowledging this W. refused to hand over the purchase-price until the transfers were registered. Pltf. & deft.'s brother, as his agent, then wrote a joint letter to W. instructing him to pay the money to the U. bank, but instead he converted it:—*Held:* deft. had ratified the unauthorised receipt of the purchase price by W., & pltf.'s payment was good & he was entitled to specific performance of the contract. *Phosphate, Lime Co.* v. *Green*, L. R. 7 C. P. 57; *Marsh* v. *Joseph*, [1897] 1 Ch. 247, applds.; *Hunter* v. *Parker* (1841), 7 M. & W. 322; *Simpson* v. *Eggington*, 10 Exch. 845; *Lyall* v. *Kennedy*, 14 App. Cas. 437, refd. HENDRY *v.* WISMER (1911), 18 O. W. R. 350; 2 O. W. N. 560.—CAN.

a. *Removal of goods — Acceptance of same at destination.*]—In an action on a replevin bond against principal & sureties, the breach assigned was the non-return of a portion of the timber replevied, for which defts. in replevin, the subsequent pltfs., obtained a judgment. It appeared that the timber, when replevied, was on the banks of a river some distance above the point where it was intended to be shipped, & by directions of F., pltf. in replevin, it was put in the possession of L., who was F.'s general agent for looking after his lands in that part of the country. L. authorised deft. in replevin to take it down to the shipping point, where it was again taken possession of for F., by a person appointed by L. to receive it there, & shipped for F. L. had been forbidden by F. to permit this removal to the shipping point, but defts. in replevin were not aware of it, & such removal was to the benefit of whoever might be the owner:—*Held:* the receipt of the timber at the shipping point by F. was a ratification on his part of the removal, though such removal was in violation of his orders. —PATTERSON *v.* FULLER (1872), 32 U. C. R. Q. B. 240.—CAN.

1100 i. *Sale—Acceptance of purchase-money.*]—R. delivered cattle to J. to consign to G. D., who had previously acted as agent for R., on receipt of a telegram from J., assuming to act as agent for R., took possession of & sold the cattle & remitted the proceeds to R., less commission. In an action brought by R. against D. for negligently selling, R. stated that he had received the proceeds of sales, but that D. had no authority to sell the cattle on his account:—*Held:* the receipt of proceeds of sale by R. operated as a ratification of the authority of D. & made D. his agent.—RICKETSON *v.* DEAN & LAUGHTON (1870), 4 S. A. R. 78.—AUS.

1100 ii. —— ——.]—BUCOVETSKY *v.* COOK (1910), 16 O. W. R. 257; 1, O. W. N. 998.—CAN.

1100 iii. —— ——.]—Pltf. sued the owners of land & their agents in the alternative for specific performance of a contract for the sale to him & purchase by him of land entered into by the agents with him, or for other relief. The purchase-money was paid by pltf. to the agents, possession was taken by pltf. & improvements made, & possession retained for six years, but no conveyance or transfer was made to pltf.:—*Held:* (1) a ratification of an act or transaction will be implied wherever the conduct of the person on whose behalf it is done or entered into is such as to indicate an intention to adopt it in whole or in part; (2) the receipt of the purchase-money or part thereof operated as a ratification of an unauthorised sale; (3) in the case of an agent exceeding authority ratification might be implied from silence or acquiescence.—TAYLOR *v.* HEGLESON (1910), 15 W. L. R. 273.—CAN.

1101 i. —— —— *Purchase-money ear-marked.*]—In an action on a written agreement purporting to be made between pltfs. & deft. by M., his agent, for the sale by deft. of a plot of land, it appeared that M. had received $200 from pltfs., but had paid it over to deft. in a cheque which included other sums:—*Held:* as the money was not knowingly received as being part of the purchase-money, there was no such receipt of part of the purchase-money as amounted, according to *Hunter* v. *Parker* (1841), 7 M. & W. 322, & other cases, to ratification.—MARGOLIS *v.* BIRNIE (1912), 21 W. L. R. 462; 5 D. L. R. 534.—CAN.

1102 i. —— *Action for price.*]—D., a plumber, working on deft.'s house,

Sect. 6.—What amounts to ratification: Sub-sect. 2.]

to order the assignees under the bill of sale, who had previous to the bkpcy. sold the goods comprised therein, to pay over the proceeds of sale to himself as such trustee. The Bkpcy. Ct. having made the order prayed for, & the assignee having accordingly paid over the proceeds of sale:—*Held:* the trustee could not afterwards bring an action of trover against the assignees under the bill of sale to recover the difference between the value of the goods & the amount realised by the sale, inasmuch as by the proceedings in bkpcy. to recover the proceeds of sale he had affirmed such sale & waived the tort.—SMITH *v.* BAKER (1873), L. R. 8 C. P. 350; 42 L. J. C. P. 155; 28 L. T. 637; 37 J. P. 567.

Annotations:—**Apld.** Roe *v.* Mutual Loan Fund (1887), 19 Q. B. D. 347, C. A. **Expld.** Mercer *v.* Vans Colina (1897), 4 Mans. 363. **Consd.** Rice *v.* Reed, [1900] 1 Q. B. 54, C. A.; Comitti *v.* Maher (1905), 94 L. T. 158. **Refd.** *Re* Wilson, [1916] 1 K. B. 382. **Mentd.** Davis *v.* Petrie (1905), 93 L. T. 511.

1103. —— Authority to deliver given after sale.]—D., managing owner of a ship, through pltfs. his agents sold her to T., & received a bill upon the O. Bank for the amount of purchase-money, which was duly paid. D. had no express authority at the time from defts., owners of 23-64ths of the ship, to sell her, but the latter knew a sale was contemplated; & after the sale they executed a power of attorney reciting they had agreed to sell the vessel to T. & had actually received the purchase-money, & empowering pltfs. to transfer their respective shares & to hand over the vessel to purchaser. Defts. afterwards received from D., or settled in account with him, the value of their respective shares:—*Held:* (1) the jury were warranted in finding defts. had authorised the sale of the ship by D. or had by their subsequent ratification so adopted his act as to render them jointly liable to pltfs. for commission due to the latter on the sale; (2) the position of defts. was not so altered by the fact of pltfs. having drawn upon D. a bill at 3 months' date for the amount of the commission as to release the former from liability upon the dishonour of the bill.—KEAY *v.* FENWICK (1876), 1 C. P. D. 745, C. A.

Annotation:—**Folld.** Mould *v.* Andrews (1876), 35 L. T. 813.

1104. —— Delay in dissent.]—By an agreement dated Aug. 31, 1855, & made between A. & B. (father & son) of the one part, & pltf. of the other part, A. & B. agreed to sell certain lands to pltf. The agreement was signed by B. on behalf of himself & his father. Although there was not sufficient evidence of previous authority from the father to the son, it was clearly established that the father had full notice of the agreement a few days after it was signed. A. & B. afterwards desired to sell the property to another party. Pltf. filed a bill for specific performance:—*Held:* the father by his subsequent conduct had ratified the contract made by his son.—BIGG *v.* STRONG (1858), 32 L. T. O. S. 98; 4 Jur. N. S. 983; 6 W. R. 536, C. A.

1105. —— ——.]—Unnecessary delay on the part of the owner, dissatisfied with the sale of a ship by the master, may import acquiescence in the sale; & if there has been acquiescence by the owner, however unauthorised the sale may have been at the commencement, it amounts to ratification by the owner.—THE AUSTRALIA (1859), 13 Moo. P. C. C. 132; Sw. 480; 7 W. R. 718; 15 E. R. 50, P. C.

1106. —— ——.]—Pltf. entered into a contract by letter with C., general manager of a ry. & harbour co., for purchase of some land belonging to the co. In pursuance of the terms of contract a branch line of rails was laid down by the co., & possession was given to pltf., who placed machinery upon the land in such a manner that the knowledge of what was done must have come to the directors. Nine months after the date of contract the co. informed pltf. that C. had no authority to contract, & repudiated the contract:—*Held:* though C. had no authority to enter into the contract, what subsequently passed amounted to a ratification of it.—WILSON *v.* WEST HARTLEPOOL RY. & HARBOUR CO.

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addressed to him a memorandum stating that he would require to send to pltfs. in Boston for certain articles specified, which deft. gave to T., an express-man, who handed it to pltfs. Pltfs. treated it as an order from D., with whom they had dealings, & sent the goods & invoice to him by T. & D. refused to receive them. T. then delivered them to deft., who paid T. for them, & took his receipt. Pltfs. remaining ignorant of this transaction, demanded payment of D., which he refused:—*Held:* by bringing *assumpsit* for goods sold & delivered against deft. they waived the tort, ratified the sale by T., & treated him as their agent, & payment to him discharged deft.—DALTON *v.* HAMILTON (1869), 1 Han. 422.—**CAN.**

1104 i. —— *Delay in dissent.*]—Pltf. authorised M. to sell two horses. M., instead of selling, exchanged one of the horses with deft. for another horse & a sum of money. The money was paid over to pltf.'s wife, & there was evidence tending to show that she informed her husband of the facts. There was no denial on his part that he had knowledge. The exchange was made in Dec., & the horse taken in part payment remained on pltf.'s premises all the winter. Pltf. returned home in the latter part of Mar. & did not take steps to rescind the transaction until some time in June:—*Held:* there was acquiescence amounting to ratification.—MCDONALD *v.* MORRISON (1895), 27 N. S. R. 347.—**CAN.**

1104 ii. —— ——.]—T., pltf.'s agent to make sales of land, was authorised to appoint M. as selling agent, & a number of sales by M. were duly ratified by pltf. M. submitted deft.'s offer to T., who consented to a sale & notified pltf., but no reply was received until some months later, when pltf., who had in the meantime transferred his properties to another agent, repudiated the transaction. Pltf. was aware that deft. had commenced digging a cellar on the land, & it was not until deft. had erected a brewery & made improvements that he heard that the purchase was disputed:—*Held:* T. & M. had acted within their authority, & ratification, if necessary, was to be implied from pltf.'s conduct, for if he wished to repudiate, he should have done so within a reasonable time. *Leroux* v. *Brown* (1852), 12 C. B. 801; *Miles* v. *New Zealand Alford Estate Co.* (1885), 54 L. J. Ch. 1035, cited.—MCDOUGALL *v.* CAIRNS (1896), 2 Terr. L. R. 219.—**CAN.**

1104 iii. —— —— *Admissibility of evidence.*]—Agents for sale of applts.' goods acted under a written authority which provided that all contracts were to be made in applts.' name, & were to be submitted to them for approval:—*Held:* (1) the document was capable of the construction that the agents had authority to bind applts. by provisional contracts unless the latter gave notice that they would not perform them, & applts. not having given such notice within a reasonable time, the jury might infer that they had assented to this contract; (2) the document justified the inference that the agents had authority to inform parties whether their proposals had been accepted by applts., & a statement by agents that the contract was being performed by their principals was admissible as evidence of ratification of the contract.—INTERNATIONAL PAPER CO. *v.* SPICER (1906), 4 C. L. R. 739.—**AUS.**

1104 iv. —— *Taking benefit of contract.*]—MCDONALD *v.* LEADLAY (1914), 27 W. L. R. 721.—**CAN.**

1104 v. —— *Receipt of note in payment—Drawing on purchaser.*]—In an action for damages for breach of contract, defts. were precluded from denying their liability upon a contract for the sale by them of certain machinery, or that M. had been their agent in the making thereof, where they had received acceptances from pltfs. of the proposal to sell bearing on their face a statement that they were subject to confirmation by defts., & had held pltfs.' note payable to their order, & had twice drawn on pltfs. in respect thereof, & where the whole correspondence between the parties showed that pltfs. thought they were dealing with defts., & defts. had never repudiated the idea until the machinery sold proved worthless. *Keen* v. *Priest*, 1 F. & F. 314; *Wiedemann* v. *Walpole*, [1891] 2 Q. B. 534, refd.—MAPLE LEAF PORTLAND CEMENT CO., LTD. *v.* OWEN SOUND IRONWORKS CO., LTD. (1913), 24 O. W. R. 790.—**CAN.**

d. *Signature of composition deed — Delay & correspondence.*]—LAWRENCE *v.* ANDERSON (1890), 17 S. C. R. 319.—**CAN.**

(1865), 2 De G. J. & Sm. 475; 5 New Rep. 289; 34 L. J. Ch. 241; 11 L. T. 692; 11 Jur. N. S. 124; 13 W. R. 361; 46 E. R. 459.

Annotations:—**Consd.** Hunt *v.* Wimbledon L. B. (1878), 4 C. P. D. 48, C. A. **Apld.** *Re* Patent Ivory Manufacturing Co., Howard *v.* Patent Ivory Manufacturing Co. (1888), 38 Ch. D. 156. **Consd.** Hoare *v.* Kingsbury Urban Council, [1912] 2 Ch. 452. **Refd.** *Re* National Savings Bank Assocn., Brady's Case (1867), 15 W. R. 753; Melbourne Banking Corpn. *v.* Brougham (1879), 48 L. J. P. C. 12; *Re* Northumberland Avenue Hotel Co., Sully's Case (1885), 54 L. T. 76. **Mentd.** Bateman *v.* Mid Wales Ry. Co., National Discount Co. *v.* Mid Wales Ry. Co., Overend, Gurney *v.* Mid Wales Ry. Co. (1866), L. R. 1 C. P. 499; A.-G. *v.* Biphosphated Guano Co. (1879), 11 Ch. D. 327, C. A.; Hart *v.* Hart (1881), 18 Ch. D. 670; Teebay *v.* Manchester & Sheffield Ry. Co. (1883), 52 L. J. Ch. 613.

1107. —— ——.]—A. & B. being tenants in common, A., without any authority from B., contracted for the sale of the estate. B., on being informed of it, objected, & said the price was too low; a mtgee. threatening to sell the estate under his power unless the sale proceeded, B. allowed the matter to go on, & gave no notice to the purchaser that he dissented; an abstract was delivered, & negotiations as to the title went on for about 3 years:—*Semble:* it was too late for B. to object that the agreement was entered into without his authority.—PHILLIPS *v.* HOMFRAY, FOTHERGILL *v.* PHILLIPS (1871), 6 Ch. App. 770.

For full anns., *see* MINES, MINERALS & QUARRIES.

1108. —— **Letter requesting agent to return deposit.**]—Deft. having a house to sell, No. 17, H. Street, employed B. to act as his agent in selling it. Pltf. being in want of an investment, applied to B. for an order to see No. 7 in same street. B. gave him a card to view No. 7, & upon being satisfied with it he paid a deposit of £20 for purchase of the house. An agreement for sale of the house was subsequently drawn out for the signature of pltf. & deft., but in that agreement No. 17 was the house agreed to be sold, & not No. 7. Upon this being discovered, pltf. refused to sign the agreement, but upon B. representing to him that it was really the house he had seen, he eventually signed the agreement, & paid a further deposit. The agreement was then shown to deft., who, finding that a wrong term was inserted, namely, 68 years instead of 64½, refused to sign. Pltf. applied to B. to return him the deposit, which he declined to do without an order from deft. Pltf. went to deft., who gave him a letter to B., requesting him to return the money. B. having again refused, an action was brought to recover same from deft.:—*Held:* (1) the letter to B. was evidence to go to a jury of a ratification by deft. that B. was acting as his agent; (2) deft. was liable to repay to pltf. the money received by B. as such agent.—BENHAM *v.* BATTY (1865), 6 New Rep. 42; 12 L. T. 266; 13 W. R. 636.

1109. —— **Parol assent—Delivery of samples.**]—A. & B. being jointly interested in a quantity of oil, A. entered into a contract for the sale of it, without the authority or knowledge of B., who, upon receiving information of the circumstances, refused to be bound by it, but afterwards assented by parol, & samples were delivered to the vendees. In an action against vendees:—*Held:* (1) B.'s subsequent ratification of the contract rendered it binding; (2) it was to be considered as a contract in writing within Stat. Frauds.—SOAMES *v.* SPENCER (1822), 1 Dow. & Ry. K. B. 32.

Annotations:—**Consd.** Maclean *v.* Dunn (1828), 4 Bing. 722; Durant *v.* Roberts & Keighley Maxsted, [1900] 1 Q. B. 629, C. A.; Keighley, Maxsted *v.* Durant, [1901] A. C. 240, H. L. **Refd.** Riche *v.* Ashbury Ry. Carriage & Iron Co. (1874), L. R. 9 Exch. 224, Ex. Ch.

1110. —— **Sending invoice to & demanding payment from purchaser.**]—Defts. bought goods at the shop of A., after notice that A. had committed an act of bkpcy. by absconding, & claimed to set off against the price a debt due to them from A. A fiat having afterwards issued against A., his assignees sent in an invoice, & demanded payment for the goods so bought by defts.:—*Held:* the assignees did not thereby so affirm the sale as to disentitle them to maintain trover for the goods upon a subsequent demand & refusal.—VALPY *v.* SANDERS (SAUNDERS) (1848), 5 C. B. 886; 17 L. J. C. P. 249; 11 L. T. O. S. 201; 12 Jur. 483; 136 E. R. 1128.

Annotation:—**Refd.** Rice *v.* Reed, [1900] 1 Q. B. 54, C. A.

1111. Seizure of bankrupt's goods—Surrender by bankrupt's assignees of interest therein.]—The house of pltf., an uncertificated bkpt., was broken open, & effects acquired by him subsequent to his bkpcy. taken by defts., who had become his creditors since bkpcy. & did not know who his assignees were. The bkpt. having sued defts. in trespass, they obtained after a rule for a plea a surrender of the assignees' interest in the effects seized:—*Held:* (1) this was a ratification of the seizure; (2) pltf. could not recover.—HULL *v.* PICKERSGILL (1819), 1 Brod. & Bing. 282; 3 Moore, C. P. 612; 129 E. R. 731.

Annotations:—**Apld.** Foster *v.* Bates (1843), 12 M. & W. 226. **Consd.** Heslop *v.* Baker (1853), 8 Exch. 411; Durant *v.* Roberts & Keighley, Maxsted, [1900] 1 Q. B. 629, C. A. **Refd.** Muskett *v.* Drummond (1829), 10 B. & C. 153; Mills *v.* Oddy (1835), 5 Tyr. 571; Watson *v.* Swann (1862), 11 C. B. N. S. 756. **Mentd.** Bird *v.* Brown (1850), 4 Exch. 786.

1112. Signature of agreement—Acting on faith of same.]—In *assumpsit* for not receiving corn sold, it appeared that by the course of the corn market the seller's broker delivered a sample & order for delivery of the corn to the buyer, who had till next market day to refuse it if he found the bulk vary from the sample; & that the buyer sent his servant to examine the bulk &, having done so, refused the contract:—*Held:* although the broker's note was not of itself a sufficient memorandum of the contract signed by the buyer or his agent within Stat. Frauds, the broker being *primâ facie* the agent only of the seller & not of the buyer, yet, the buyer having acted upon the order by sending his servant to examine the bulk, was such an adoption of the broker's agency as made him agent for both parties, & his note was sufficient within Stat. Frauds (LORD ELLENBOROUGH, C.J.).—KINNITZ *v.* SURRY (1805), Paley on Agency, 171.

1113. —— **Correspondence & receipt of money.**]—Pltf. having purchased deft.'s lands at an auction, signed a memorandum of the contract, which the auctioneer's clerk also signed as a witness. At the same time the clerk received & signed a receipt for the deposit, which was paid over by the auctioneer to deft.'s attorney. Deft. being unable to make out the title, the attorney wrote to pltf. advising pltf. to relinquish the purchase:—*Held:* neither the receipt of the money nor the letter amounted to a ratification so as to constitute the clerk deft.'s agent to sign the memorandum.—GOSBELL *v.* ARCHER (1835), 2 Ad. & El. 500; 1 Har. & W. 31; 4 Nev. & M. K. B. 485; 4 L. J. K. B. 78; 111 E. R. 193.

For full anns., *see* CONTRACT.

1114. —— **Delay in dissent.**]—The several owners of lands in the parish of C. entered into an agreement that a particular common should be enjoyed as a cow pasture for 99 years; & this agreement was signed by the bailiff of one of the owners, so far as he had power. Though no particular authority could be shown, yet, after an acquiescence of over 30 years on the part of this owner:—*Held:* an authority should be presumed, & he should be bound by the act of his servant.—TUFTON *v.* WENT-

Sect. 6.—What amounts to ratification: Sub-sects. 2 & 3.]

WORTH (1720), 1 Bro. Parl. Cas. 165; 2 Eq. Ca. Abr. 207; 1 E. R. 489.

1115. —— Delay in obtaining information.]—H., a brewer, sent P. to bid at a sale by auction of property described as in the occupation of S. at £20 a year, & B. & S. at 2*s.* a week each. S., B., & S. were really under-tenants of C., another brewer, who had a lease for 9 years at £20 a year. At a sale the lease was read over & the property sold subject to it. It was knocked down to P., & he signed the contract, which contained no reference to the lease. An abstract was delivered omitting the lease. H. took no steps to repudiate the contract until after a copy of the lease had been applied for & furnished some weeks afterwards. The vendor filed a bill for specific performance of the contract for sale subject to the lease:—*Held:* the unauthorised act of P. had not been ratified by H.—CABALLERO *v.* HENTY, No. 572, *ante*.

Annotations:—**Distd.** L. & N. W. Ry. Co. *v.* Boulton (1890), 62 L. T. 392. **Refd.** Phillips *v.* Miller (1875), L. R. 10 C. P. 420.
For full anns., *see* S. C. No. 572, *ante*.

1116. —— Parol consent to execution of deed.]—In an action on a covenant which had been entered into by certain creditors of C., of which deft. was one, with pltfs., trustees for such creditors, there was an issue taken on a plea of *non est factum*. At the trial there was evidence that the deed had been signed for deft. by his son; & that on its being afterwards shown to deft. he was asked if the son had authority to execute it for him, when he stated his son had authority, & that he adopted it. It was also shown that deft. had confirmed the proceedings which had been taken by pltfs. as trustees under the deed:—*Held:* there was evidence of a delivery of the deed by deft., sufficient to sustain a verdict for pltfs., notwithstanding the absence of proof of the son having been authorised to execute the deed by an instrument under seal.—TUPPER *v.* FOULKES (1861), 9 C. B. N. S. 797; 2 F. & F. 166; 30 L. J. C. P. 214; 3. L. T. 741; 7 Jur. N. S. 709; 9 W. R. 349; 142 E. R. 314.

Annotation:—**Apprvd.** *Re* Seymour, Fielding *v.* Seymour, [1913] 1 Ch. 475, C. A.

1117. Stoppage in transitu—Letter assuming goods had been stopped.]—The consignor of a cargo wrote a letter to defts. in which he assumed that they had stopped the cargo in transit. This letter did not reach defts. until after stoppage:—*Qu.:* whether his letter gave them authority to stop the cargo at the time of stoppage, or amounted to a valid confirmation of that act.—WHITEHEAD *v.* ANDERSON (1842), 9 M. & W. 518; 11 L. J. Ex. 157; 152 E. R. 219.

Annotations:—**Apld.** Wentworth *v.* Outhwaite (1842), 10 M. & W. 436; Coventry *v.* Gladstone (1868), L. R. 6 Eq. 44. **Consd.** *Re* Whitworth, *Ex p.* Gibbes (1875), 1 Ch. D. 101. **Expld.** *Re* Kiell, *Ex p.* Falk (1880), 14 Ch. D. 446, C. A. **Apld.** Bethell *v.* Clark (1887), 19 Q. B. D. 553; Reddall *v.* Union Castle Mail S.S. Co. (1914), 84 L. J. K. B. 360. **Expld.** Booth S.S. Co. *v.* Cargo Fleet Iron Co., [1916] 2 K. B. 570, C. A. **Refd.** Bolton *v.* L. & Y. Ry. Co. (1866), L. R. 1 C. P. 431. **Mentd.** Tanner *v.* Scovell (1845), 14 M. & W. 28.

1118. Submission to arbitration—Acting on previous correspondence.]—Deft. co. served the owner of lands with a notice to treat under Lands Clauses Consolidation Act, 1845 (c. 18). Two years afterwards the co. entered into possession. In the course of a correspondence between the landowner & the co. the landowner received a letter purporting to have been written on behalf of the co., agreeing to a proposal that the value of the land should be submitted to arbn. under the above Act. This letter, which, with many others, was written by a clerk to a former solr. of the co., signing himself in this instance "for law clerk," was repudiated by the co. as unauthorised:—*Held:* the co. could repudiate the letter of the clerk giving its assent although it had acted upon his previous correspondence.—KEMP *v.* SOUTH EASTERN RY. CO. (1872), 26 L. T. 110; 20 W. R. 306, C. A.

For full anns., *see* COMPULSORY PURCHASE OF LAND & COMPENSATION.

1119. Tender—Pleading tender made.]—At an interview between pltf. & deft. at deft.'s house when deft. was willing to pay £10, A., who was present, offered to fetch that sum, but was prevented by pltf.'s saying he could not take it:—*Held:* (1) the offer was a good tender; (2) although deft. did not at the time take notice of what was done, yet his pleading it afterwards was a sufficient ratification of A.'s act.—HARDING *v.* DAVIES (1825), 2 C. & P. 77.

For full anns., *see* CONTRACT.

1120. —— Receipt of—Attempt to compromise claim for non-delivery.]—In an action to recover the difference in the market value of certain shares in a ry., sold but not delivered to pltf. by deft., pltf. alleged a readiness upon his part to comply with the conditions of the contract, & a tender of the money to the brokers from whom he had made the purchase. Deft. in a letter to pltf.'s attorneys, in answer to one from them informing him that a tender had been made by pltf. to the brokers, had not repudiated the brokers as his agents, or denied their authority to receive the money, but evinced a wish to come to certain terms:—*Held:* (1) such conduct amounted to a recognition by him that the brokers were authorised, & the tender was good & valid; (2) a verdict found for pltf. should not be disturbed.—JACKSON *v.* JACOB (1837), 3 Bing. N. C. 869; 3 Hodg. 219; 5 Scott, 79; 6 L. J. C. P. 315; 1 Jur. 262; 132 E. R. 645.

1118 i. *Submission to arbitration — Knowledge amounting to approval.*]—In a suit defended by an agent (ammokhtar) on behalf of deft., the agent applied for a reference to arbn., although he had no power so to do under the am-mokhtarnamah. After the submission of the award objection was made on behalf of deft. that the agent had no authority to apply for or consent to the reference:—*Held:* although the agent was not authorised to apply for or consent to a reference, deft., having been aware of the proceedings & tacitly ratified the action of his agent, could not be allowed to question the legality of the award.—SATURJIT PERTAB BAHADOOR SAHI *v.* DULHIN GULAB KOER (1897), I. L. R. 24 Calc. 459.—**IND.**

e. Substitution of notes — Treating substituted note as existing security.]—A note payable to D. or bearer for $348.40, with interest at 15 per cent., was made to D. & delivered to him as reeve of the township for money loaned by the latter, & was left with S., the treasurer, for pltfs. Subsequently deft. gave his own note for $278, payable to S. (but not to order), S., without authority from pltfs., giving up to him the former, the difference between the two notes being a loan to S. himself, though included in deft.'s note. S. having died, his accounts with pltfs. were adjusted by pltfs. with his surety, who was charged with the note sued on, which he arranged by giving the note for $278 & his own note for $70; & a balance of $183 was, as agreed to by pltfs., paid by him & a receipt therefor given to him in full of pltfs.' claim against S. After this settlement pltfs., by a resolution in council, recognised this note for $278 as amongst their existing securities, thus showing that they were aware of its having been received in substitution of the note sued on:—*Held:* taking the whole transaction together, there was such ratification of the acts of S. by pltfs. in the subsequent adjusting of his accounts with his surety that, coupled with the receipt of the note for $278 with other notes & money in full satisfaction of all claims on the note sued upon, it was evidence to go to the jury of the payment of this note under a plea of payment.—NORTH GWILLIMBERG TOWNSHIP *v.* MOORE (1865), 15 C. P. 445.—**CAN.**

f. Trespass—Receipt of boomage.]—The facts that a co. is entitled to boomage on all lumber coming within the boom & receives boomage are not an adoption of the act of the owners of lumber in fastening it to the land of a riparian proprietor.—DEVER *v.* SOUTH BAY BOOM CO. (1872), 1 Pug. 109.—**CAN.**

1121. Trover & conversion—Crediting debtor with additional sum over that realised.]—On Dec. 9, 1909, pltf. was removed to defts.' infirmary suffering from temporary insanity. On Dec. 17, 1909, the relieving officer of defts. seized & illegally sold goods of pltf., which she valued at £150, for £4. The guardians knew of the sale in Jan., 1910. On Apr. 1, 1910, defts. informed pltf.'s solr. that the relieving officer had acted without instructions & on his own responsibility, but they gave her credit for £2 12*s.* 6*d.* Pltf. having recovered, claimed damages for wrongful sale & conversion of goods. A jury having found the guardians had adopted the act of the relieving officer:—*Held:* pltf. entitled to judgment.—BARNS *v.* ST. MARY, ISLINGTON, GUARDIANS (1911), 76 J. P. 11; 10 L. G. R. 113.

Annotation:—**Apld.** Becker *v.* Riebold (1913), 30 T. L. R. 142.

1122. Withdrawal of fund in court—Bonâ fide receipt by principal of costs out of.]—Without the knowledge or authority of X., a solr., A., another solr., used X.'s name in proceedings wherein by acts of fraud & forgery A. obtained an order for the payment out of a fund in ct. & was thereby enabled to get the fund paid out by a cheque from the Paymaster-General, with which he opened a fictitious account at the bank. Two days later & after the account had been partially drawn upon, X. was told by A. that his name had been made use of for a formal party. X. reprimanded A. for this, but, without inquiring into the nature of the business, accompanied A. to the Paymaster-General's Office & received a cheque for £15 for costs; over £10 of this he paid to A. for out-of-pocket expenses, & the balance of £4 5*s.* 6*d.* he handed to his partner Y., who entered it to the credit of the firm in their books without knowing anything of the circumstances in which the money had been paid. A large portion of the fund formerly in ct. having been lost:—*Held:* (1) in the circumstances X. had not condoned or ratified the use of his name by A. & was not liable for the whole of the loss sustained, but only for the amount of the £15 cheque which he took; (2) Y. was liable only for the £4 5*s.* 6*d.* received by him for the partnership. Form of order for making good a loss occasioned to the Consolidated Fund under Ct. of Ch. (Funds) Act, 1872 (c. 44), s. 5, through payment of a fund out of ct. to the wrong person.—MARSH *v.* JOSEPH, [1897] 1 Ch. 213; 66 L. J. Ch. 128; 75 L. T. 558; 45 W. R. 209; 13 T. L. R. 136; 41 Sol. Jo. 171, C. A.

Annotations:—**Distd.** *Re* Williams' Settled Estates, [1910] 2 Ch. 481. **Refd.** Hambro *v.* Burnand (1903), 8 Com. Cas. 252.

1123. Work executed—Acceptance & sale of ship as repaired.]—Where pltfs. contracted with the agent of an absent shipowner to effect certain specified repairs (all confined to damage by stranding), &, instead of doing the work as stipulated, alleged that they had, on the agent's authority, done the equivalent thereto or better, & in the same contract stipulated that they should be paid for repairs due to deterioration at scheduled prices stated by them, & it appeared that the agent's authority to pltfs.' knowledge was limited to the specified repairs:—*Held:* the facts that the shipowner had taken the ship as repaired & sold it did not amount to a ratification of the contract.—FORMAN & CO. PROPRIETARY, LTD. *v.* THE LIDDESDALE, [1900] A. C. 190; 69 L. J. P. C. 44; 82 L. T. 331; 9 Asp. M. L. C. 45, P. C.

Annotation:—**Distd.** Dakin *v.* Lee (1914), 84 L. J. K. B. 894.

1124. —— Adoption by corporation of surveyor's acts.]—The city surveyor of Manchester having certified under Manchester Improvement Act, 1867 (c. xxxvi.), s. 38, that there was imminent danger from a building of which pltf. was the owner & occupier, the town clerk, assuming to act on behalf of the corpn., issued a direction to the surveyor "to cause the building mentioned in his certificate to be taken down or repaired in such manner as he should think requisite." The surveyor employed a builder to take down & rebuild certain parts of the building; the builder was paid by the corpn. for so doing, & the corpn. afterwards recovered the amount from pltf.:—*Held:* the acts of the surveyor, authenticated by the town clerk, were the acts of the corpn.; or, at all events, they were ratified & adopted by them so as to justify what was done under the certificates.—CHEETHAM *v.* MANCHESTER CORPN. (1875), L. R. 10 C. P. 249; 44 L. J. C. P. 139; 32 L. T. 28; 39 J. P. 343.

For full anns., *see* CORPORATIONS.

1125. —— Agreement to pay.]—In an action for work & materials it appeared that pltf. was employed in rebuilding certain stables, but finding it difficult to do so without rebuilding the adjoining stables, which were in a ruinous state, he applied at deft.'s house & received directions to do the work from one who, though he had done some jobs for deft., had no authority to order anything to be done for deft., who was at the time out of the country. Deft. did not know of the work being done until the bill for it was sent in, when after some delay he said, as the work had been done, rather than have litigation he would pay for it. The jury found for pltf. On motion for a new trial:—*Held:* (1) deft.'s delay in answering, followed by the promise to pay, was a sufficient ratification, though accompanied by a disclaimer of authority; (2) the ratification might be after action.—RICHARDSON *v.* OXFORD (COUNTESS) (1861), 2 F. & F. 449.

1126. —— Knowledge amounting to approval.]—A benefit building society is bound by orders for necessary repairs given by the secretary, though not previously sanctioned by the number of trustees required by the rules for transacting the ordinary business of the co. or entered in the minute-book, where the trustees knew at the time the repairs were being made.—ALLARD *v.* BOURNE (1863), 15 C. B. N. S. 468; 3 New Rep. 42; 143 E. R. 863.

SUB-SECT. 3.—BURDEN OF PROOF.

1127. On person alleging ratification.]—A. placed money in the hands of B., a solr., for investment. B. misappropriated the money, &, to cover the fraud, obtained from C., another client, upon a false representation, a transfer of C.'s equitable interest under a previously executed mtge. No money of A. was paid to C. In a suit to set aside the transfer it was contended that C. had ratified & confirmed the transaction:—*Held:* (1) the burden of proving a case of acquiescence lay on A., & could not be discharged except by proving (*a*) C. was aware of the time & manner in which A.'s money was deposited with B., (*b*) no part of it had been employed for C.'s use or benefit; (2) the transfer must be set aside.—WALL *v.* COCKERELL (1863), 10 H. L. Cas. 229; 1 New Rep. 486; 32 L. J. Ch. 276; 8 L. T. 1; 9 Jur. N. S. 447; 11 E. R. 1013, H. L.

Annotations:—**Consd.** Spaight *v.* Cowne, Edwards *v.* Spaight (1863), 1 Hem. & M. 359. **Distd.** London Freehold & Leasehold Property Co. *v.* Suffield (Lord) (1897), 46 W. R. 102, C. A. **Refd.** Mollett *v.* Robinson (1870), L. R. 5 C. P. 646.

SECT. 7.—EFFECT OF RATIFICATION.

SUB-SECT. 1.—IN GENERAL.

1128. General rule.]—A subsequent ratification by a principal of a contract by an agent is equivalent to a previous authority.—MACLEAN *v.* DUNN, No. 1158, *post.*

1129. ——.]—That an act done for another by a person not assuming to act for himself, but for such other person, though without any antecedent authority, becomes the act of the principal, if subsequently ratified by him, is the known & well-established rule of law. In that case the principal is bound by the act, whether it be for his detriment or advantage, whether it be founded on a tort or a contract, to the same extent as by & with all the consequences which follow from the same act done by his previous authority (TINDAL, C. J.).—WILSON *v.* TUMMAN (TUMMON) (1843), 6 Man. & G. 236 ; 6 Scott, N. R. 894 ; 1 Dow. & L. 513 ; 12 L. J. C. P. 306 ; 1 L. T. O. S. 256, 314 ; 134 E. R. 879.

Annotations:—**Apld.** Collier *v.* Clarke (1845), 5 L. T. O. S. 475 ; Ancona *v.* Marks (1862), 7 H. & N. 686. **Distd.** Brook *v.* Hook (1871), L. R. 6 Exch. 89, A void or illegal act, *e.g.*, a forgery, cannot be ratified. **Consd.** Durrant *v.* Roberts & Keighley, Maxsted, [1900] 1 Q. B. 629, C. A. ; Keighley, Maxsted *v.* Durant, [1901] A. C. 240. The principle does not apply when the person making the contract did not profess at the time of making it to be acting on behalf of a principal. **Mentd.** Walker *v.* Hunter (1845), 2 C. B. 324 ; Follett *v.* Hoppe (1847), 5 C. B. 226 ; Withers *v.* Parker (1859), 4 H. & N. 524 ; Woollen *v.* Wright (1862), 1 H. & C. 554, Ex. Ch. ; Walker *v.* S. E. Ry. Co., Smith *v.* S. E. Ry. Co. (1870), 23 L. T. 14 ; McCaul *v.* Strauss (1883), Cab. & El. 106 ; Morris *v.* Salberg (1889), 22 Q. B. D. 614, C. A.

1130. ——.]—If a principal acts on a contract entered into by his agent beyond his authority, he cannot afterwards dispute his agent's authority to enter into it.—STUART (LORD) *v.* LONDON & NORTH-WESTERN RY. CO. (1852), 15 Beav. 513 ; 7 Ry. & Can. Cas. 25 ; 51 E. R. 636 ; *varied* on another point, 1 De G. M. & G. 721, L.JJ.

1131. ——.]—If one man professes to make a contract on behalf of another, & that other adopts it, it is the same as if he had made it himself (MARTIN, B.).—PETO *v.* REYNOLDS (1854), 9 Exch. 410 ; 23 L. J. Ex. 98 ; 22 L. T. O. S. 246 ; 18 Jur. 472 ; 2 W. R. 196 ; 156 E. R. 175.

Annotations:—**Reld.** Armfield *v.* Allport (1857), 27 L. J. Ex. 42 ; Fielder *v.* Marshall (1861), 9 C. B. N. S. 606 ; M'Call *v.* Taylor (1865), 34 L. J. C. P. 365. **Mentd.** Forbes *v.* Marshall (1855), 3 C. L. R. 933 ; R. *v.* Harper (1881), 7 Q. B. D. 78, C. C. R.

1132. Ratification equivalent to prior command.]—If a servant sells a horse with warranty, it is the sale & contract of the master, but it is the warranty of the servant, unless the master gives him authority to warrant it, for a warranty is void which is not made & annexed to the contract ; but if the master do agree unto it after, it shall be said that he did agree to it *ab initio*. As where a servant does a disseisin to the use of his master, the master not knowing of it, & then the servant makes a lease for years, & then the master agrees, the master shall not avoid the lease for years ; for now he is in by reason of his agreement *ab initio*. When the servant promises for the master, that the master shall forbear to sue, etc., & shall by such a day deliver to deft. the obligation, etc., & deft. promises to pay the money at such a day, & the master having notice thereof agrees to it, it is now the promise of the master *ab initio*, for it is included in his authority that he should agree, compound, etc., & he has power to make a promise.—SEIGNIOR & WOLMER'S CASE, No. 847, *ante*.

1133. ——.]—An agent sold goods to be paid for by bills. The purchaser gave the bills, & directed the agent to hold the goods for him, unless he could sell them at a certain profit. While the goods thus remained, the acceptors of the bills stopped payment. The agent thereupon applied to purchaser for further security. Purchaser then gave the agent an order to sell the goods, & pay the bills. Subsequently & before any sale purchaser became bkpt. ; his assignees claimed & brought trover for the goods :—*Held :* (1) they were not entitled ; (2) the application by the agent for security must be considered as an application on behalf of the vendor, whose assent to the arrangement might be presumed, it being for his benefit, & whose subsequent assent would relate back to the transaction which required the assent.—BAILEY *v.* CULVERWELL (1828), 8 B. & C. 448 ; 2 Man. & Ry. K. B. 564 ; Dan. & Ll. 176 ; 7 L. J. O. S. K. B. 19 ; 108 E. R. 1109.

Annotations:—**Expld. & Folld.** *Re* Douglas, *Ex p.* Hankey (1838), 4 Deac. 1. **Apld.** Hutchinson *v.* Heyworth (1838), 9 Ad. & El. 375. **Mentd.** Dixon *v.* Yates (1833), 5 B. & Ad. 313 ; Godts *v.* Rose (1855), 17 C. B. 229 ; Meyerstein *v.* Barber (1866), 36 L. J. C. P. 48.

1134. ——.]—When one party means to act as agent for another, & acts accordingly, a subsequent

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PART VII. SECT. 7, SUB-SECT. 1.

1128 i. *General rule.*] — A contract made by an agent is complete before he has advised his principal of it, & before the latter has sent a ratification to the other party to the contract.—HIBBARD *v.* THOMPSON CO. (1903), 5 Que. P. R. 372.—**CAN.**

1128 ii. ——.]—Where the act of the agent has been communicated to & ratified by the principal, it becomes the act of the principal in point of law.—PESTONJEE NESSERWANJER *v.* GOOL MAHOMED SAHIB (1874), 7 Madras High Ct. Rep. 369.—**IND.**

g. *Ratification retroactive as regards place & time.*]—He who makes a purchase at his domicil from an agent enters into the contract there & cannot be considered as having made the sale at the place where it is ratified by the principal, such ratification being but a suspensive or resolutory condition according to the facts of each case, the fulfilment of which is retroactive to the date & place of the contract.—TRUDEL *v.* ASSAD (1912), 14 Que. P. R. 202.—**CAN.**

h. ——.] — In a sale by a commercial traveller the contract is perfected at the place where the order is taken. In supposing that the order be subject to ratification, such ratification will be retroactive to the day & place when & where the sale was effected.—GENDREAU *v.* LAVIGNE (1917), 18 Q. P. R. 324.—**CAN.**

1132 i. *Ratification equivalent to prior command.*]—The rule as to ratification by a principal of acts done by an assumed agent is that the ratification is thrown back to the date of the act done, & that the agent is put in the same position as if he had authority to do the act at the time the act was done by him.—PICKLES *v.* WESTERN ASSURANCE CO. (1902), 40 N. S. R. 327.—**CAN.**

1132 ii. —— *Release of agent's guarantor.*]—A motor car co. employed P. & Co. to ship a motor car & deliver it to their order. P. & Co. employed pltf. as their agent to carry out these instructions. When the car arrived the through bill of lading was not forthcoming. Pltf., as consignee of the car, thereupon communicated with M., who had acted as agent for the motor car co., & agreed to deliver the car to M. upon his undertaking to indemnify pltf. against all claims in consequence of the delivery of the car by pltf. without production of the shipping documents. Defts. indorsed upon the letter of guarantee a further guarantee for its due performance. Pltf. then wrote to P. & Co. fully acquainting them with all the circumstances, & with the delivery of the car to M., & inclosing a copy of the letter of guarantee & defts.' indorsement. Both P. & Co. & the motor car co., with full knowledge of all the facts, stated that they were satisfied to have delivery effected to M. upon his letter of guarantee so indorsed. M. having paid all the shipping charges, obtained possession of the car & sold it, but did not account to the satisfaction of his principals, the motor car co., for the proceeds of the sale. P. & Co. then, at the instigation of the motor car co., made a claim upon pltf., who sued defts. as guarantors under their indorsement of the letter of guarantee given by M. :—*Held :* the subsequent ratification by pltf.'s principals of the delivery of the car to M. was equivalent to original authority, & no enforceable claim in respect of such delivery could be made upon pltf., & pltf. had no cause for action upon the letter of guarantee against defts.—UNION BANK OF AUSTRALIA *v.* RUDDER (1911), 13 C. L. R. 152.—**AUS.**

ratification by the other is equivalent to a prior command (PARKE, B.).—FOSTER *v.* BATES (1843), 1 Dav. & L. 400; 12 M. & W. 226; 13 L. J. Ex. 88; 2 L. T. O. S. 150; 7 Jur. 1093; 152 E. R. 1180.

Annotations:—**Expld.** Holland *v.* King (1848), 6 C. B. 727; Morgan *v.* Thomas (1853), 22 L. J. Ex. 152; Hill *v.* Curtis (1865), L. R. 1 Eq. 90. **Consd.** Durant *v.* Roberts & Keighley, Maxsted, [1900] 1 Q. B. 629, C. A. **Reid.** Bodger *v.* Arch (1854), 10 Exch. 333. **Mentd.** Welchman *v.* Sturgis (1849), 13 Q. B. 552; Copner *v.* Copner (1852), 19 L. T. O. S. 67; Crossfield *v.* Such (1853), 1 C. L. R. 668; Thorne *v.* Tilbury (1858), 27 L. J. Ex. 407; Pemberton *v.* Chapman (1853), E. B. & E. 1056, Ex. Ch.; Baker *v.* Blaker (1886), 55 L. T. 723; *Re* Pryse, [1904] P. 301, C. A.; Ellis *v.* Ellis, [1905] 1 Ch. 613.

1135. ——]—The doctrine *Omnis ratihabitio retrotrahitur et mandato priori æquiparatur* means: (1) as applied to cases of contract, that if A., unauthorised by B., makes a contract on his behalf with C., which B. afterwards recognises & adopts, the contract is to be dealt with as having been originally made by his authority; (2) as applied to cases of tort, that where A., professing to act by the authority of B., does that which *primâ facie* amounts to a trespass, & B. afterwards assents to & adopts such acts, A. is treated as having from the beginning acted by his authority, & B. becomes a trespasser unless he can justify the act. In some cases also where an act, which if unauthorised would amount to a trespass, has been done in the name & on behalf of another, & without previous authority, a subsequent ratification may enable the party on whose behalf the act was done to take advantage of it, & treat it as having been done by his direction; but this doctrine must be taken with the qualification that the act of ratification must take place at a time & in circumstances when the ratifying party might have himself lawfully done the act which he ratifies.

The doctrine is one intelligible in principle, & easy in its application, when applied to cases of contract. If A B., unauthorised by me, makes a contract on my behalf with J. S., which I afterwards recognise & adopt, there is no difficulty in dealing with it as having been originally made by my authority. J. S. entered into the contract on the understanding that he was dealing with me, & when I afterwards agreed to admit that such was the case, J. S. is precisely in the condition in which he meant to be; or, if he did not believe A. B. to be acting for me, his condition is not altered by my adoption of the agency, for he may sue A. B. as principal, at his option, & has the same equities against me, if I sue, which he would have had against A. B. (ROLFE, B.).—BIRD *v.* BROWN, No. 1035, *ante*.

Annotation:—**Reid.** Simpson *v.* Eggington (1855) 10 Exch. 845.

For full anns., *see* S. C. No. 1035, *ante*.

1136. ——.]—If a person takes on himself to act as the agent of another, & as such enters into an agreement & communicates what he has done to the principal, & the act is afterwards adopted by him, it then becomes the agreement of the principal. The person is then *ex post facto* constituted an agent, that is to say, the principal has adopted & ratified the act (ROMILLY, M.R.).—COLLEN *v.* GARDNER, No. 428, *ante*.

1137. ——.]—Defts. made an offer to pltf. subject to the proviso that it should be withdrawn if not accepted within a month. On the last day of the month pltf. posted an acceptance, addressed to an unauthorised agent of defts., by whom it was not received until after the month had expired. Defts. by their subsequent conduct ratified the act of the agent in receiving the acceptance on their behalf:—*Held:* (1) as the agent must be regarded as being authorised to receive the acceptance, the acceptance dated from the time of posting; (2) the acceptance was in time.—MORRELL *v.* STUDD & MILLINGTON, [1913] 2 Ch. 648; 83 L. J. Ch. 114; 109 L. T. 628; 58 Sol. Jo. 12.

1138. —— **Act of public agent.**]—Deft., a naval commander, stationed on the coast of Africa, with instructions to suppress the slave trade, was requested by the Governor of Sierra Leone to obtain liberation of two British subjects detained as slaves at the Gallinas by the son of the king of that country, & in effecting that object to use force, if necessary. He proceeded to the Gallinas with an armed force, &, having landed at Dombocorro, took military possession of a barracoon belonging to pltf., a Spaniard carrying on the slave trade at the Gallinas. He communicated with the king of the country, & the two British subjects having been released, deft. concluded a treaty for the abolition of the slave trade in that country. In execution of this treaty, deft. fired the barracoon of pltf. & carried away his slaves to Sierra Leone, where they were liberated. Some of pltf.'s goods, used in the slave traffic, were claimed by the king as forfeited, & delivered up to him; other goods were destroyed. These proceedings having been communicated to the Lords of the Admlty., & the Secretaries of State for the foreign & colonial departments, they respectively, by letter, adopted & ratified the act of deft.:—*Held:* (1) pltf. might maintain trespass for seizure of his slaves; (2) ratification of deft.'s act by ministers of state was equivalent to a prior command, & rendered it an act of state, for which the Crown was alone responsible.—BURON *v.* DENMAN, No. 432, *ante*.

For full anns., *see* S. C. No. 432, *ante*.

1139. —— ——.]—An act done by an agent of the Govt., though in excess of his authority, being ratified & adopted by the Govt.:—*Held:* equivalent to previous authority.—SECRETARY OF STATE FOR INDIA *v.* KAMACHEE BOYE SAHABA (1859), 13 Moo. P. C. C. 22; 7 Moo. Ind. App. 476; 19 E. R. 388.

For full anns., *see* PUBLIC AUTHORITIES & PUBLIC OFFICERS.

1140. Ratification of one act not authority to commit further similar acts.]—The ratification by the shareholders of a co. of a particular act of the directors in excess of their authority does not authorise them to do similar acts in future.

One of the articles of assocn. of a registered co. provided that the directors' power of borrowing on the credit of the co. should be limited, so that "the total amount should not exceed in the aggregate, as an existing debt at the same time, one half of the then actually paid-up capital of the co." The articles contained no restriction on the borrowing powers of the co., & the directors' power of borrowing was capable of being extended by the votes of one half of all the shareholders at a general meeting. The directors obtained a letter of credit for an amount exceeding one half of the then paid-up capital of the co., which was ratified by a general meeting. The letter subsequently expired, & was renewed, & a second letter was obtained. These latter acts were never ratified:—*Held:* though the limitation above mentioned was merely a limitation of the powers of the directors, & not of the general powers of the co., so that the acts of the directors were capable of ratification, yet the ratification of the first letter of credit did not authorise its renewal nor the obtaining of the second letter.—IRVINE *v.* UNION BANK OF AUSTRALIA (1877), 2 App. Cas.

1140 i. *Ratification of one act authority to do act arising out of ratified act.*]—Adoption by a person of engagements purporting to be entered into on his behalf with a third party is evidence of authority in the agent to bind him with respect to those transactions, & also with respect to subsequent transactions arising out of them.—LEIPNER *v.* MCLEAN (1909), 8 C. L. R. 306.—**AUS.**

Sect. 7.—Effect of ratification: Sub-sects. 1 & 2.]

366; 46 L. J. P. C. 87; 37 L. T. 176; 25 W. R. 682, P. C.

Annotations:—**Expld.** Grant *v.* United Kingdom Switchback Ry. Co. (1888), 40 Ch. D. 135, C. A. **Consd.** *Re* London & New York Investment Corpn., [1895] 2 Ch. 860. **Distd.** Boschoek Proprietary Co. *v.* Fuke, [1906] 1 Ch. 148. **Mentd.** Melbourne Banking Corpn. *v.* Brougham (1878), 4 App. Cas. 156, P. C.

1141. Ratification limited to act ratified.]—Pltfs., tea merchants, were accustomed to send quantities of tea all over the kingdom. It was the practice for defts. & other railway cos. to send their carmen to call on pltfs. & ask if there was any tea for L. & N.W. Ry. Co. or whichever railway co. it might be. It was a business arrangement whereby the railway co.'s servants came in uniform & collected the tea on behalf of the railway co. Deft. co. had in their employment a carman, B., who was aware of this arrangement. On Dec. 14 B. went away sick, & was marked in defts.' books as being away sick until Jan. 6, when he was marked as left. On Dec. 21 he went to defts.' yard & took out a horse & van & put on the co.'s uniform & went to pltfs.' warehouse & obtained possession of three chests of tea, which he afterwards disposed of. Subsequently, on Feb. 24, 1917, defts. prosecuted to conviction B. & another man for stealing the tea, & in that prosecution defts. laid the property in the tea in themselves. In an action by pltfs. to recover the value of the tea:—*Held:* all that defts. necessarily ratified was a bare bailment. The operation of their ratification was exhausted when it was determined that B.'s possession was to be regarded in law as defts.' possession to the minimum extent required to satisfy the law of larceny. There was no ratification of the felonious taking away of the goods, & defts. were not liable for the loss thereof.—HARRISONS & CROSSFIELD, LTD. *v.* LONDON & NORTH WESTERN RY. CO., [1917] 2 K. B. 755; 86 L. J. K. B. 1461; 33 T. L. R. 517; 61 Sol. Jo. 647.

1142. Ratification relieves agent from liability—From breach of warranty of authority.]—Where A. entered into & signed an agreement as agent of B., & B. shortly afterwards signed it with the words "I hereby sanction this agreement, & approve of A.'s having signed it on my behalf":—*Held:* A. was not personally responsible.—SPITTLE *v.* LAVENDAR (1821), 2 Brod. & Bing. 452; 5 Moore, C. P. 270; 129 E. R. 1041.

Annotations:—**Apld.** Galy *v.* Driver (1828), 2 Y. & J. 549. **Distd.** Tanner *v.* Christian (1855), 4 E. & B. 591; Bramwell *v.* Spiller (1870), 21 L. T. 672; Paice *v.* Walker (1870), 22 L. T. 547.

1143. —— To principal.]—A., acting for B., a foreign principal, but in his own name, bought of C., in London, a cargo of wheat on board a vessel represented to be on its way from G., payment to be made in cash on delivery of the shipping documents. Having paid the price at the request of his principal, A. drew upon him for the amount, & the bill was duly paid. B. afterwards came to London, saw the contract, & ratified all that A. had done. It turned out that the cargo had been fraudulently disposed of by the captain before the date of the contract of sale by C. to A.:—*Held:* (1) B. could not maintain an action against A. to recover back the money paid as upon a failure of consideration; (2) his only remedy, whether in his own name or in that of A., was against C., the seller.—RISBOURG *v.* BRUCKNER (1858), 3 C. B. N. S. 812; 27 L. J. C. P. 90; 30 L. T. O. S. 258; 6 W. R. 215; 140 E. R. 962.

1144. *S. P.* SMITH *v.* COLOGAN, No. 1155, *post.*

1145. —— Unless personal liability created.]—The promoters of a ry. co. drew a cheque for £500 upon a bank, which advanced the sum in order to pay House fees for the passing of the Bill. The secretary promised to procure immediately a letter from the promoters as further security; he neglected to send it immediately, but about a fortnight after the Act received the Royal assent he wrote to the manager requesting him to allow the directors of the ry. "to draw to the extent of £1,000, to be repaid out of the calls on shares." This contract was ratified by the co. at the first meeting of directors. The amount was credited to the co. in the bank books, & the bank sued & obtained judgment & execution against the co. When no return was made to the elegit, an action was brought by the bank against the promoters on their personal contract. The ry. had never been worked, & no calls had been made:—*Held:* (1) the cheque & letter created a personal liability on the part of defts.; (2) the ratification by the co. did not destroy that liability; (3) the provision for payment in the latter did not make the issuing of calls a condition precedent to pltfs.' right of action; (4) the facts did not establish a substituted contract.—SCOTT *v.* EBURY (LORD) (1867), L. R. 2 C. P. 255; 36 L. J. C. P. 161; 15 L. T. 506; 15 W. R. 517.

Annotations:—**Distd.** Coutts *v.* Irish Exhibition in London (1890), 63 L. T. 489; Blyth *v.* Fladgate, Morgan *v.* Blyth, Smith *v.* Blyth, [1891] 1 Ch. 337.

SUB-SECT. 2.—OF SPECIFIC ACTS.

1146. Acceptance of offer to purchase.]—An offer of purchase was made by deft. to S., who was pltfs.' agent, but was not authorised to make any contract for sale. The offer was accepted by S. on behalf of pltfs. Deft. withdrew his offer, & after the withdrawal pltfs. ratified the acceptance of the offer by S. In an action by pltfs. for specific performance of the contract:—*Held:* (1) ratification by pltfs. related back to the acceptance by S.; (2) the withdrawal by deft. was inoperative; (3) pltfs. were entitled to specific performance.—BOLTON PARTNERS *v.* LAMBERT, No. 1022, *ante.*

Annotations:—**Consd.** *Re* Portuguese Consolidated Copper Mines, *Ex p.* Badman, *Ex p.* Bosanquet (1890), 45 Ch. D. 16, C. A.; Metropolitan Asylums Board Managers *v.* Kingham (1890), 6 T. L. R. 217; Dibbins *v.* Dibbins, [1896] 2 Ch. 348. **Expld.** *Re* Hemp, Yarn & Cordage Co., Hindley's Case (1896), 74 L. T. 627, C. A. **Dbtd.** Fleming *v.* Bank of New Zealand, [1900] A. C. 577, P. C. **Expld.** Ford *v.* Newth (1901), 70 L. J. K. B. 459. **Consd.** *Re*

j. *Ratification of part is ratification of whole.*]—When ratification is established as to a part it operates as confirmation of the whole of that particular transaction.—KATYAYAN DEBI *v.* PORT CANNING & LAND IMPROVEMENT CO. (1914), 19 C. W. N. 56.—**IND.**

k. *Ratification subject to condition—Non-observance of condition.*]—Pltf.'s brother, in pltf.'s absence & without authority, agreed to sell pltf.'s land to deft. for a named price, & upon specified terms. Pltf. was the registered owner of the land in fee, & deft. registered a caveat against the registration of any person as transferee or owner of the land, or of any instrument affecting the land, unless such instrument was expressed to be subject to deft.'s claim. Pltf. on his return repudiated the agreement, but afterwards treated with deft. in such way as to indicate ratification, but always on the assumption that deft. would make the terms of payment to suit pltf., which deft. did not agree to do:—*Held:* pltf. was entitled to have the registration of the caveat cancelled, & deft. was not entitled to specific performance of the agreement.—FERNIE *v.* KENNEDY (1910), 13 W. L. R. 437.—**CAN.**

l. *Ratification bars subsequent repudiation.*]—M., on behalf of defts., entered into a contract with pltfs. for purchase of goods:—*Held:* defts. having adopted & ratified the agreement, could not deny M.'s authority to act for them.—ALBERT CHEESE CO. *v.* LEEMING (1880), 31 C. P. 272.—**CAN.**

Gloucester Municipal Petn., 1900, Ford *v.* Newth, [1901] 1 K. B. 683. **Refd.** Bristol, Cardiff, & Swansea Aerated Bread Co. *v.* Maggs (1860), 44 Ch. D. 616; Cook *v.* Williams (1897), 13 T. L. R. 481; *Re* Tiedeman & Ledermann, [1899] 2 Q. B. 66.

1147. Act—In excess of authority.]—Although an agent exceed the scope of his authority, yet, if the principal waive or ratify the excess, the act of the agent is binding on the principal.

Action by an agent, in Malta, against his principal, to recover the amount of damage sustained by him, in a suit brought in Genoa upon a breach of contract which he had defended on behalf of his principal, upon appeal upheld, & damages decreed against the principal.—FRIXIONE *v.* TAGLIAFERRO & SONS (1856), 10 Moo. P. C. C. 175; 27 L. T. O. S. 21; 4 W. R. 373; 14 E. R. 459, P. C.

Annotation:—**Distd.** Halbronn *v.* International Horse Agency & Exchange, [1903] 1 K. B. 270.

1148. Allotment of shares.]—An allotment of shares in a co. purported to be made on Oct. 24, 1888. This allotment was held to be invalid, because notice of the board meeting had not been duly given to all the directors. Two applicants, to whom shares had been allotted on Oct. 24, claimed to have their names removed from the register. One of these applicants did not pay the money due on application, & wrote a letter in which he expressed a hope that the directors would not enforce the claim against him. The other paid the money due on application, & also the money due on allotment, but wrote to the bankers of the co. that the latter money was paid under protest, & he considered the conduct of the directors in allotting the shares unfair. On Dec. 24 the co. brought an action against the first applicant for the money due from him, & recovered judgment. On Jan. 7, 1889, at a meeting of the directors, at which two directors attended, it was resolved the certificates of the shares allotted should be sealed & issued. At a meeting of Jan. 16, at which four directors were present, the minutes of the meeting of Jan. 7 were signed by the chairman. On Mar. 7, at a duly constituted meeting of directors, a resolution was passed confirming the allotments of Oct. 24, 1888:—*Held:* (1) the allotments of Oct. 24, 1888, were capable of ratification by the co. & were ratified within a reasonable time; (2) the subsequent ratification related back & confirmed the allotments made by the two directors as unauthorised agents; (3) the applicants must retain their shares.—*Re* PORTUGUESE CONSOLIDATED COPPER MINES, LTD., BADMAN'S CASE, BOSANQUET'S CASE (1890), 45 Ch. D. 16; 63 L. T. 423; 39 W. R. 25; 2 Meg. 249, C. A.

Annotations:—**Apld.** Molineaux *v.* London, Birmingham & Manchester Insce., [1902] 2 K. B. 589, C. A. **Refd.** Dibbins *v.* Dibbins, [1896] 2 Ch. 348.

1149. Alteration in bank's account.]—Acquiescence & ratification must be founded on full knowledge of the facts, & must be in relation to a transaction to which effect may be given thereby.

Where the accounts of a bank in liquidation had been changed so as to represent the bank as debtor in respect of a sum which had been borrowed by its manager for his owh purposes:—*Held:* the doctrine of acquiescence & ratification by the liquidating authorities would not avail to render the bank liable to pay a debt which it never owed.—BANQUE JACQUES CARTIER *v.* BANQUE D'EPARGNE DE MONTREAL (1887), 13 App. Cas. 111; 57 L. J. P. C. 42, P. C.

1150. Appointment of naval officer.]—Where a commodore appointed a captain under him without having authority for that purpose:—*Held:* the subsequent ratification of such appointment, by the Lords of the Admlty. or the King in council, did not entitle the commodore to share as a flag officer in the distribution under His Majesty's proclamation of July 7, 1803, of prizes taken before the date of such ratification.—DONELLY *v.* POPHAM (1807), 1 Taunt. 1; 127 E. R. 729.

Annotations:—**Distd.** Wellard *v.* Moss (1823), 1 Bing. 134. **Refd.** Montague *v.* Janverin (1811), 3 Taunt. 442; The Calypso (1828), 2 Hag. & Adm. 209.

1151. Cancellation of contract—Interests of third parties affected.]—A petition was presented against a town councillor, alleging that his election was void on the ground that, at the date of his nomination, he had an interest in a contract with the council. It appeared that resp., in answer to an advertisement, had offered to supply to the council, for 12 months, certain goods at specified prices, & the offer was accepted. Afterwards he applied to a committee of the council to be released from his contract. The committee resolved that subject to approval by the council he be released from that date. He was then nominated. After his nomination the council approved the resolution of the committee releasing him:—*Held:* (1) the advertisement, tender, & acceptance constituted a contract in which resp. had an interest; (2) the ratification after resp.'s nomination of the resolution releasing him did not relate back to the date of resolution, because the interests of persons other than the parties to the contract might be affected; (3) resp. at the date of his nomination had an interest in a contract with the council, & was disqualified, & his election was void.—*Re* GLOUCESTER MUNICIPAL ELECTION PETITION, 1900, FORD *v.* NEWTH, [1901] 1 K. B. 683; 70 L. J. K. B. 459; 84 L. T. 354; 65 J. P. 391; 17 T. L. R. 325; 49 W. R. 345.

1152. Closing of Stock Exchange account.]—Deft employed pltf., a broker on the Stock Exchange, to purchase shares, which he did. Before settling-day pltf. became a defaulter through inability to meet his engagements, &, in accordance with the rules of the Stock Exchange, the accounts which he had opened were closed as between himself & the jobbers at the then current prices as fixed by the official assignee. The account in respect of the shares bought for deft. when closed, as above mentioned, showed a balance in favour of the jobbers as against pltf. According to the practice of the Stock Exchange such closing of the account did not affect the client if he, nevertheless, desired to have the contract completed, & was not in default to the defaulting broker; & the jobber in that case was bound to complete on the settling-day. Pltf., on the same day when he was declared a defaulter & his accounts closed, subsequently informed deft. that he could either have the contract completed, as above mentioned, or he might accept the official price. Deft. said he would do the latter:—*Held:* deft., having ratified the closing of the account before the settling-day, was liable to indemnify pltf. against the amount for which pltf. was liable to the jobbers on such closing.—HARTAS *v.* RIBBONS (1889), 22 Q. B. D. 254; 58 L. J. Q. B. 187; 37 W. R. 278; 5 T. L. R. 200, C. A.

Annotations:—**Refd.** Ellis *v.* Bond, [1898] 1 Q. B. 426, C. A.: Beckhusen & Gibbs *v.* Hamblet, [1900] 2 Q. B. 18.

1153. Contract.]—Where a broker made a contract in writing for the sale of goods, not being authorised by one of his principals at the time, which contract the latter afterwards assented to:—*Held:* the broker was an agent duly authorised to bind his principal under Stat. Frauds at the time the contract was entered into.—MACLEAN *v.* DUNN (1828), 4 Bing. 722; 1 Moo. & P. 761; 6 L. J. O. S. C. P. 184; 130 E. R. 947.

Annotation:—**Mentd.** Lemond *v.* Devalla (1847), 8 Q. B. 1030.

1154. —— Principal liable for agent's commission.]—KEAY *v.* FENWICK, No. 1103, *ante*.

For full anns., *see* S. C. No. 1103, *ante*.

Sect. 7.—Effect of ratification: Sub-sect. 2.]

1155. Delegation.]—Defts., being instructed by pltfs. to insure goods, & unable to procure an insurance in London, wrote to K. & Co., the shipowners at Newcastle, asking them to get the insurance done. After the loss defts. were unable to get the policy from K. & Co., & K. & Co. collected the loss. Pltfs. approved of what was done & endeavoured to recover the money from K. & Co. In an action against defts. for negligence:—*Held:* defts. not liable, as they had acted reasonably, the policy being a good one, & the loss being caused by misconduct of K. & Co.—SMITH *v.* COLOGAN (1788), 2 Term Rep. 188 n.; 100 E. R. 102 n.

1156. Distress.]—Trespass for seizing cattle. Plea that the beasts were seized for services due to the lord. Replication that at the time of seizure deft. was not bailiff. The lord had afterwards approved of the seizure:—*Held:* deft. was bailiff although not so before the seizure.—ANON. (1406), Y. B. 7 Hen. 4, fol. 34, pl. 1.

Annotations:—**Apld.** Ancona *v.* Marks (1862), 7 H. & N. 686. **Refd.** Durant *v.* Roberts, Keighley, Maxsted (1900), 48 W. R. 476, C. A.

1157. ——.]—One who distrains as a bailiff, when he is not, is not liable in trespass if the person who authorised him to distrain assents to the distraint, for the assent relates back to the time of the distraint.—ANON. (1586), Godb. 109; 78 E. R. 67.

Annotations:—**Apld.** Whitehead *v.* Taylor (1839), 10 Ad. & El. 210; Wilson *v.* Trumman (1843), 6 Man. & G. 236; Collier *v.* Clarke (1854), 5 L. T. O. S. 475. **Refd.** Durant *v.* Roberts & Keighley, Maxsted, [1900] 1 Q. B. 629, C. A. **Mentd.** Britton *v.* Cole (1697), 12 Mod. Rep. 175; Lucas *v.* Nockells (1833), 10 Bing. 157; Trent *v.* Hunt (1853), 1 W. R. 481.

1158. ——.]—HULL *v.* PICKERSGILL, No. 1111, *ante*.

For full anns., *see* S. C. No. 1111, *ante*.

1159. Executor.]—If an exor. ratifies orders given by another person for an extravagant funeral he may be sued by the undertaker individually & not as exor. for the whole expense.—BRICE *v.* WILSON (1834), 8 Ad. & El. 350 n.; 3 Nev. & M. K. B. 512; 3 L. J. K. B. 93; 112 E. R. 870.

Annotation:—**Refd.** Green *v.* Salmon (1838), 1 Will. Woll. & H. 461.

1160. Legal proceedings.]—Where the holder of a bill of exchange, without the knowledge or authority of pltf., indorsed & delivered it to an attorney for pltf., in order that an action might be brought upon it in his name, & pltf., after action brought, ratified the act:—*Held:* (1) the subsequent ratification was equivalent to a prior authority; (2) pltf. had a valid title to sue on the bill.—ANCONA *v.* MARKS (1862), 7 H. & N. 686; 31 L. J. Ex. 163; 5 L. T. 753; 8 Jur. N. S. 516; 10 W. R. 251; 158 E. R. 645.

Annotations:—**Apld.** Bolton Partners *v.* Lambert (1889), 41 Ch. D. 295. **Refd.** Durant *v.* Roberts, Keighley, Maxsted, [1900] 1 Q. B. 629, C. A.

1161. Purchase—Principal affected with notice to agent.]—A. having notice of an incumbrance, purchased in the name of B. & then agreed that B. should be purchaser, & he paid the purchase-money without notice of the incumbrance:—*Held:* though B. did not employ A., nor know anything of the purchase till after it was made, yet B., approving of it afterwards, made A. his agent *ab initio*, & was affected with the notice to A.—JENNINGS *v.* MOORE (1708), 2 Vern. 609; 23 E. R. 998.

Annotations:—**Consd.** Le Neve *v.* Le Neve (1747), Amb. 436. **Refd.** Dresser *v.* Norwood (1863), 14 C. B. N. S. 574; Ross *v.* Army & Navy Hotel Co. (1886), 34 Ch. D. 43, C. A.

1162. ——.]—Where an unauthorised purchase of bonds is ratified by an assignee in bkpcy. seizing part of the bonds purchased, he cannot bring trover against purchaser for the price of other bonds which while purchased at the same time had not been so seized.—WILSON *v.* POULTER, No. 1097, *ante*.

Annotation:—**Apld.** Peru Republic *v.* Peruvian Guano Co. (1887), 36 Ch. D. 489.

1163. —— **Principal bound for whole contract.**]—CORNWAL *v.* WILSON, No. 1086, *ante*.

For full anns., *see* S. C. No. 1086, *ante*.

1164. —— **Agent's right to indemnify.**]—A co. having been formed for the manufacture of glass, the directors entered into a contract to purchase a licence to use a patent for certain improvements in making glass, & constituted themselves trustees for the co. The purchase was subsequently sanctioned by a general meeting of shareholders, but the speculation proving unsuccessful, dissatisfaction arose, & the directors were dismissed:—*Held:* the co. having sanctioned the contract, was bound to indemnify the original directors against liabilities in respect of the purchase.—GLEADOW *v.* HULL GLASS CO. (1849), 19 L. J. Ch. 44; 13 Jur. 1020.

1165. —— **Of chattel which vendor had no right to sell.**]—If a principal ratifies the unauthorised purchase by his agent of a chattel which the vendor had no right to sell, he is guilty of a conversion, although he had no knowledge of the circumstances which made the sale unlawful.

Pltf.'s ship was stranded on the African coast, & being unlawfully seized & sold by W., was purchased by T., the agent of defts., Liverpool merchants, without their authority. T. informed defts. of the purchase on their behalf & of the price; & they, without knowing the circumstances which made the sale unlawful, replied, "We duly received your letter informing us of your having purchased the brig, but you do not say from whom you bought her, nor whether you have the register with her. You had better, for the present, make a hulk of her. From your description of her, she is not out of the way in price if she has not sustained much damage." In an action of trover by the owner of the ship:—*Held:* there was evidence of a conversion, for although defts. did not know the ship had been unlawfully sold, if they ratified the purchase, they were liable.—HILBERY *v.* HATTON (1864), 2 H. & C. 822; 3 New Rep. 671; 33 L. J. Ex. 190; 10 L. T. 39; 2 Mar. L. C. 31; 159 E. R. 341.

1166. Receipt of payment in unauthorised manner.]—If a factor sells the goods of his principal, & receives a draft from the vendee on his banker for the value of them, & accepts from the banker notes of hand in discharge of such draft, the principal can recover the value of the goods from vendee, although the banker fails before the notes become due; for the principal, by receiving the notes from the factor, took the banker for his debtor.—VERNON *v.* BOVERIE, COOKSEY *v.* BOVERIE (1683), 2 Show. 296; 89 E. R. 949.

Annotation:—**Apld.** Litchfield Union Grdns. *v.* Greene (1857), 1 H. & N. 884.

1167. Sale.]—The assignees of a bkpt. having once affirmed the acts of a person who wrongfully sold

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PART VII. SECT. 7, SUB-SECT. 2.

1161 i. *Purchase—Principal affected with notice to agent.*]—If a principal adopts the acts of an agent in respect of purchase of property, he must take the property subject to conditions with which the agent encumbered it, notwithstanding any secret arrangement between them not known to third parties.—ISHEN CHUNDER SINGH *v.* SHAMA CHURN (1864), W. R. 3.—**IND.**

1166 i. *Receipt of payment in unauthorised name.*]—SCOTT *v.* BANK OF NEW BRUNSWICK, No. 990 iii., *ante*.—**CAN.**

1161 ii. *S. P.* DALTON *v.* HAMILTON (1869), 1 Han. 422.—**CAN.**

1167 i. *Sale—Interests of third parties affected.*]—M., as agent of S., on July 18, 1910, made a sale of land to pltf. conditional on its being approved by S., who lived in Victoria, B.C. There was no evidence of such approval prior to Oct. 5, 1910, when S. conveyed the land to pltf.:—*Held:* although the making of the conveyance was a ratification of

bkpt.'s property, cannot afterwards treat him as a wrongdoer, & maintain trover.—BREWER & GREGORY *v.* SPARROW (1827), 7 B. & C. 310; 1 Man. & Ry. K. B. 2; 6 L. J. O. S. K. B. 1; 108 E. R. 739.

Annotations:—**Distd.** Burn *v.* Morris (1834), 4 Tyr. 485. **Consd.** Lindon *v.* Sharp (1843), 6 Man. & G. 895; Valpy *v.* Sanders (1848), 5 C. B. 886. **Expld.** Lythgoe *v.* Vernon (1860), 5 H. & N. 180.

1168. ——.]—Where, after the wrongful sale of goods, the owner claims the proceeds as money received to his use, & the wrongdoer thereupon pays, & the owner accepts, part of the proceeds as money received to his use, the tort is waived, & the owner's remedy for the residue of the amount of the sale is by an action for money had & received to his use.—LYTHGOE *v.* VERNON (1860), 5 H. & N. 180; 29 L. J. Ex. 164.

1169. ——.]—SMITH *v.* BAKER, No. 1102, *ante*.

For full anns., *see* S. C. No. 1102, *ante*.

1170. Trespass.]—A. placed money in the hands of his attorney to invest for him, giving the attorney an unlimited discretion to do what was best; the attorney advanced the money to N. on mtge., but discovering the security was bad, the attorney sued out a bailable writ in A.'s name against the borrower for the amount without A.'s knowledge: —*Held:* he could maintain no action against the attorney for arresting him without the authority of A. if the attorney acted *bonâ fide*, & A. afterwards approved of what he had done.—ANDERSON *v.* WATSON (1827), 3 C. & P. 214.

Annotation:—**Dbtd.** Davis *v.* Jenkins (1843), 12 L. J. Ex. 386.

1171. ——.]—The sheriff having seized goods in the house of A., under a *fi. fa.* against him at the suit of B., & a claim having been made by C. under a bill of sale, B. not choosing to contest the claim so made by C., his attorneys gave the sheriff a direction to withdraw, in the following terms:—"A. *v.* B. Withdraw under the *fi. fa.* herein, the goods having been claimed." The officer finding that the bill of sale under which C.'s claim was made did not convey the whole of the goods he had seized, retained possession of those to which the claim did not apply; & three days afterwards informed the attorneys for the execution-creditor what he had done. The attorneys, as well as the execution-creditor, expressed their approbation of the course the officer had adopted, the former observing that the direction to withdraw was only intended to apply to the goods that were the subject of the claim. In trespass for entering the house & seizing & converting the goods, the sheriff justified entering under the writ. Pltf. replied, admitting the writ & warrant, that, after the seizure, A. discharged & forbade defts. from further executing the writ, & new-assigned that he brought his action for the subsequent trespass & conversion. Defts., in their rejoinder, traversed the discharge to the sheriff:—*Held:* (1) construing the direction to the sheriff to withdraw with reference to the surrounding circumstances, it amounted to no more than a partial direction to retire from the possession of the goods to which C.'s claim applied; (2) the subsequent ratification by A. of the detention of the rest of the goods, being an act done for his benefit, was a sufficient justification to the sheriff; (3) the issue was not divisible, & A. would not be entitled to recover, even though it should appear that some of the goods subsequently detained were within the claim.—WALKER *v.* HUNTER (1845), 2 C. B. 324; 15 L. J. C. P. 12; 6 L. T. O. S. 154; 9 Jur. 1079; 135 E. R. 970.

Annotations:—**Expld.** *Re* A Debtor, *Ex p.* Smith, [1902] 2 K. B. 260, C. A. **Mentd.** Simpson *v.* Margitson (1847), 11 Q. B. 23; Bruner *v.* Moore, [1904] 1 Ch. 305.

1172. ——.]—If a stranger, acting without authority at the time, takes upon himself to trespass in the name & for the benefit of an absent person, such professed agent becomes liable for his unauthorised act, & a right of action is acquired by the person against whom the wrong was committed; but the person in whose name the act was done may, if he thinks fit, afterwards ratify & adopt it. Such ratification has the effect of prior authority, & the result is that if the prior authority of the principal would not have justified the act, both the agent & the principal may be sued as trespassers; & that if such authority would have justified the act, *i.e.*, if the principal could lawfully have authorised it beforehand, then the agent is also justified by matter *ex post facto*, & the vested right of action is extinguished. Nor is the principle applied exclusively to private transactions in which, if the act be unlawful in itself, ratification does not free the agent from responsibility. It has been equally applied to the exercise of sovereign authority whereby the act of the agent, though originally unlawful, becomes after ratification an act of state, the original right of action is divested, & all civil liability extinguished (WILLES, J.).—PHILLIPS *v.* EYRE, No. 1002, *ante*.

For full anns., *see* S. C. No. 1002, *ante*.

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the sale made by M. in the previous July, relating back to the date of the contract, such ratification would not operate so as to affect the rights of deft., who had been cutting hay on the land under a permit given to him in Feb., 1910, by M., with the authority of S., granting him the right to cut & remove the hay on the land "providing that the land is unsold before the hay is cut."—OLIVER *v.* SLATER (1910), 16 W. L. R. 107.—**CAN.**

1167 ii. —— *Partial delivery of goods sold — Subsequent repudiation barred.*]—A commercial traveller took an order for goods, & his principals on receipt of the order shipped a portion of the goods & promised to forward the balance:—*Held:* having thus adopted the acts of their agent, they could not afterwards repudiate his authority, & were liable to pltf. for damages for not supplying all the goods ordered.—LUCY *v.* DONOVAN (1875), 3 Pug. 128.—**CAN.**

1167 iii. —— *Penalty for non-delivery.*]—A contract made by an agent, on behalf of his principal, to deliver a certain article upon a certain date, with penalties for non-delivery upon that date, if subsequently ratified & adopted by the principal, will bind the latter to deliver such article within a reasonable time, even although the agent had no authority to enter into such contract, but will not bind the principal in such manner as to render him liable to penalties for non-delivery, unless there is proof that the principal knew of & assented to the condition that he would be liable to the penalties mentioned in the contract.—LANGLANDS FOUNDRY CO., LTD. *v.* WORTHINGTON PUMPING ENGINE CO. (1896), 22 D. L. R. 144.—**AUS.**

Part VIII.—Relations between Principal and Agent.

SECT. 1.—IN GENERAL.

Nature of Relationship, *see* Part I., *ante*.

Breach of Contract by Agent, *see* Sect. 2, Sub-sect. 8, *post*.

Breach of Contract by Principal, *see* Sect. 3, Sub-sect. 3, *post*.

SECT. 2.—PRINCIPAL'S RIGHTS AGAINST AGENT.

SUB-SECT. 1.—WHERE AGENT FAILS TO OBEY INSTRUCTIONS.

A. In General.

1173. Notice may amount to instructions.]—An action is maintainable by owners of a ship against the master for carrying goods which the owners had covenanted with third parties not to carry, of which covenant the master had notice, & the carriage of which goods caused pltfs. to incur penalties. HUSSEY *v.* PENSEY (1666), 2 Keb. 88; 84 E. R. 55.

Annotations:—**Reld.** Swinfen *v.* Chelmsford (1860), 29 L. J. Ex. 382; Barker *v.* Braham & Norwood (1773), 2 Wm. Bl. 866.

1174. Conditions under which instructions must be obeyed.]—The correspondent of a foreign merchant is bound to obey orders of his principal to insure: (1) where he has effects of the merchant in his hands; (2) where the course of dealing has been that the merchant has been accustomed to send orders for insurance & the agent has been accustomed to comply, unless the agent has given notice to discontinue the course of dealing; (3) where bills of lading are sent to the agent with an order to insure, in which case the agent cannot accept the bills of lading without obeying the order to insure.

One person cannot compel another to make an insurance for him against his consent; but if the directions to insure be given to him to whom the application would naturally be made in the usual course of trade, & he do not give notice of his dissent, he must be answerable for his neglect because he deprives the other of any opportunity of applying elsewhere to procure the insurance (ASHHURST, J.).—SMITH *v.* LASCELLES (1788), 2 Term Rep. 187; 100 E. R. 101.

Annotation:—**Apld.** Callender *v.* Oelrichs (1838), 5 Bing. N. C. 58.

1175. No liability for failure to carry out illegal act.]—Where the mate of a ship or a sailor is to receive something at the end of the voyage in lieu of wages, *e.g.*, slaves, he cannot insure it; nor can he recover the value of such a thing in an action against his agent for negligence in not procuring such an insurance.—WEBSTER *v.* DE TASTET (1797), 7 Term Rep. 157; 101 E. R. 908.

Annotations:—**Consd.** Cohen *v.* Kittell (1889), 22 Q. B. D. 680. **Mentd.** White *v.* Wilson (1800), 2 Bos. & P. 116; King *v.* Glover (1806), 2 Bos. & P. N. R. 206; Jesse *v.* Roy (1834), 3 L. J. N. S. Ex. 268; Egerton *v.* Brownlow (1853), 8 St. Tr. N. S. 193; Hawkins *v.* Twizell (1856), 5 E. & B. 883.

1176. ——.]—Pltf. employed deft. to bet on commission, & deft. failed to make certain bets pursuant to pltf.'s instructions; pltf. sued deft. for breach of contract as his agent, claiming as damages the excess of gains over losses which should have been received by deft., had the bets in question been made, after deducting the amount of his commission:—*Held:* as by Gaming Act, 1845 (c. 109), s. 18, the bets would not have been recoverable at law, pltf. could not maintain the action.—COHEN *v.* KITTELL (1889), 22 Q. B. D. 680; 58 L. J. Q. B. 241; 60 L. T. 932; 53 J. P. 469; 37 W. R. 400; 5 T. L. R. 345, D. C.

1177. —— **Except so far as act legal.**]—A broker who has neglected to insure the premium according to directions of his principal cannot set up as a defence that he was directed also to insure British capture; for that is not a crime so as to render the whole insurance illegal, though it would be void *pro tanto*.—GLASER *v.* COWIE (1813), 1 M. & S. 52; 105 E. R. 20.

See, further, GAMING & WAGERING.

1178. Broker selling below price ordered.]—If a broker, being authorised to sell goods for a certain price, sells them at an inferior price, he is not liable in trover for the amount of the goods; but the proper remedy is by an action upon the case.—DUFRESNE *v.* HUTCHINSON (1810), 3 Taunt. 117; 128 E. R. 48.

1179. No failure to obey where no instructions.]—Insurance brokers are not liable to an action for neglecting to insert in a policy a liberty to carry simulated papers, if the written instruction given them contained no direction for that purpose, although it may have been verbally communicated to them that simulated papers were to be used in the voyage.—FOMIN *v.* OSWELL (1813), 3 Camp. 357.

1180. No liability when no damage.]—Where a ship was condemned for carrying simulated papers, &, the policy containing no liberty to do so, the assured could not recover upon it:—*Held:* action could not be maintained against the insurance brokers for having neglected to include the premiums & duties, contrary to instructions given them for effecting the policy, as in the result the assured were not damnified by this neglect.—FOMIN *v.* OSWELL, No. 1179, *ante*.

1181. Exact obedience required.]—Where an insurance broker, when instructed to effect a policy on goods, is informed that they were loaded at a prior port to that from which risk is to commence, he is liable to an action for negligence if he effects the policy in common form "beginning with the adventure upon said goods from loading thereof aboard said ship."

A broker is bound to have knowledge & diligence & must execute his orders; but it is not every mistake which makes him responsible. Where the principal imputes misconduct he ought to show that his directions were intelligible & precise. If the instructions had been doubtful I should think pltf. not entitled to recover (GIBBS, C.J.).—PARK *v.* HAMOND (HAMMOND) (1816), 2 Marsh. 189; 6 Taunt. 495; 4 Camp. 344; 128 E. R. 1127.

Annotation:—**Folld.** Rickman *v.* Carstairs (1833), 5 B. & Ad. 651.

1182. ——.]—It is the duty of an agent to exercise his authority exactly in the terms in which it is given.

Where the promoter of a co. was authorised to apply for 500 shares in the co. in defts.' name:—*Held:* not a proper exercise of the authority to apply for 300 shares.—HOLOPHANE, LTD. *v.* HESSELTINE (1896), 13 T. L. R. 7; 41 Sol. Jo. 28, C. A.

1183. ——.]—A procuration or order ought to be executed fully according to the extent or bounds of power given. If it marks precisely what is to be done, he who accepts it ought to keep to what is prescribed in it. If it be indefinite, he

should set such bounds to it, or give it such extent, as may reasonably be presumed to be the intention of the person who grants it.—THE HAPPY RETURN (1828), 2 Hag. Adm. 198.

For full anns., *see* SHIPPING & NAVIGATION.

1184. —— Any deviation at agent's risk.]—An agent may deviate from his instructions in his endeavours to do the best for his principal; but he takes upon himself the risk whether his principal will approve of his conduct. If the principal does not express his dissent within a reasonable time, it will be considered that he approves of the arrangements made by his agent, who will then be exonerated from all consequences.—PRINCE *v.* CLARK (CLARKE) (1823), 1 B. & C. 186; 2 Dow. & Ry. K. B. 266; 1 L. J. O. S. K. B. 69; 107 E. R. 70.

Annotation:—**Apld.** Peru Republic *v.* Peruvian Guano Co. (1887), 36 Ch. D. 489.

1185. —— Goods not delivered according to instructions.]—S. having proposed to pltfs. to purchase certain goods, pltfs. wrote their agents in the following terms:—"Les informations sur S. sont telles que nous ne pouvons lui livrer les 2500 caisses que contre connaissements, si vous voulez nous vous enverrons les connaissements, et vous ne les lui delivrerez que contre payement." The goods were afterwards consigned, with a bill of lading, to defts. for S., & defts. put them on board a ship named by him, keeping the mate's receipt, & the ship sailed before S. had paid or any bills of lading on board her had been made up. In an action for delivering the goods without obtaining the price of them:—*Held:* defts. liable, as they had not carried out instructions given them by pltfs. not to deliver the bills of lading to S. without the price.—STEARINE KAARSEN FABRICK GOUDA CO. *v.* HEINTZMANN, No. 1660, *post*.

1186. —— Leave to assign lease handed over contrary to instructions.]—A tenant, restrained by terms of his lease from assigning without the consent in writing of his lessor, applied to the lessor for leave to assign. The lessor signed a licence to assign, which he handed to an agent with instructions not to part with it until he got payment of the rent then due from the tenant. The agent, in the presence of the intending assignee, handed over the licence to the tenant on receipt of a cheque, drawn by the tenant to the order of the agent, for the rent & his professional charges, & the assignment was then completed. The cheque was dishonoured:—*Held:* (1) the agent being intrusted to hand over a document of title as well as to receive payment, there was no general usage authorising him to take a cheque in payment in lieu of cash; (2) as the cheque was for charges as well as rent, it was not in a form in which it could be handed over to the principal; (3) the agent was responsible to his principal for the full amount of the arrears of rent.—PAPÉ *v.* WESTACOTT, [1894] 1 Q. B. 272; 63 L. J. Q. B. 222; 70 L. T. 18; 42 W. R. 131; 10 T. L. R. 51; 38 Sol. Jo. 39; 9 R. 55, C. A.

Annotation:—**Refd.** Hine *v.* S.S. Insce. Syndicate, The Netherholme, Glen Holme & Rydal Holme (1895), 72 L. T. 79.

Payment by cheque, *see, further*, Part V., Sect. 3, Sub-sect. 13, B, *ante*.

1187. No liability when instructions obeyed.]—A contract for the purchase of a cargo of olive oil, delivered on the quay alongside the vessel, provided that the goods were to be removed from the quay by purchasers after passing the scale, & to be at their risk from the time of weighing; payment to be made by cash for one-half the amount of the invoice, remainder by bills at four months. In an action by the seller against the broker for a breach of duty in delivering the goods to the purchaser, who became bkpt., without receiving payment of cash at the time of delivery:—*Held:* (1) on true construction of the contract the goods were to be delivered to purchasers at the quay, & cash was not to be paid till after completion of delivery of the

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PART VIII. SECT. 2, SUB-SECT. 1.—A.

1184 i. *Exact obedience required—Any deviation at agent's risk.*]—The owners of several lots of land employed an agent to sell them, at the same time delivering to him blank agreements executed by them, & orally instructing him to reserve timber fit for saw logs. The agent sold one of the lots, & delivered to the purchaser an agreement without any reservation of timber, whereupon the vendors refused to adopt the sale, & commenced felling timber upon the land. Upon a bill filed by the purchaser for specific performance:—*Held:* (1) the writing contained the true agreement between the parties, & the vendors' remedy against their agent was for breach of their instructions; (2) defts. must pay the value of the timber removed by them, with the costs of the suit.—JURY *v.* BURROWS (1862), 9 Gr. 367; *affd.* on rehearing, 1864.—**CAN.**

1184 ii. —— ——.]—Deft., D., part owner, with pltf. & the other defts., of a barque, was authorised by the other owners to sell her, & did so, depositing pltf.'s share of the proceeds to his own credit in the bank. Pltf. wrote to C. in these terms: "I want you to put my share of the money in the bank, to my credit. I have written D. stating that I have authorised you to do so." C. had, before this letter came to him, drawn the money from the bank, the manager having advanced it to him on his own cheque; but deft., D., upon the letter being shown to him by C., signed a release to the bank from any claim on account of the payment of the money to C.:—*Held:* (1) D. was not justified in releasing the bank; (2) in so doing he assumed the liability which the bank had incurred by the unwarrantable payment to C. of the money placed to his, D.'s, credit; (3) pltf. was entitled to a decree for the amount of his share deposited in the bank.—BEGGS *v.* MCDONALD, R. E. D. 17.—**AUS.**

1184 iii. —— ——.]—Pltf. asked deft. to buy certain land for him & gave him the money to be paid as deposit. Deft. bought another piece of land by mistake:—*Held:* pltf. could recover the money paid by him to deft., though the latter had paid it over to the vendor, as money had & received to pltf.'s use.—ALLISON *v.* BYRNE (1872), 3 V. R. L. 155.—**AUS.**

1184 iv. —— —— *Insurance in breach of instructions.*]—Deft., an insurance agent, was prohibited by pltfs., his principals, from insuring grain separators. J. & D. obtained from deft. a policy on pltfs.' form insuring a grain separator for $600. A loss occurring, J. & D. sued pltfs., who paid the loss & costs of action. Deft. did not pay over to pltfs. the premium nor forward the application of J. & D.:—*Held:* deft. liable on the grounds of negligence & breach of authority for the loss & costs of pltfs. at the suit of J. & D. *Connecticut Fire Insce. Co.* v. *Kavanagh*, [1892] A. C. 473, refd.—INDEPENDENT CASH MUTUAL FIRE INSURANCE CO. *v.* WINTERBORN (1913), 24 O. W. R. 6; O. W. N. 674; 10 D. L. R. 113.—**CAN.**

a. *Principal's remedy for disobedience.*]—Action by agent against principal:—*Held:* upon the facts deft. had no right to a set-off against pltf., nor could he support a plea of payment, or accord & satisfaction; if he had any remedy at all it was by action for negligence in not obeying instructions.—SWORD *v.* CARRUTHERS (1850), 7 U. C. R. 313.—**CAN.**

b. —— *No liability where subsequent loss due to principal's unreasonable conduct.*]—B., as A.'s agent, chartered a ship from C., who by the charterparty was bound to deliver as customary—viz., on the quay side. A. objected to this clause as contrary to his instructions to discharge into lighters, but C. declined to alter the clause, & on A. refusing to take delivery discharged & stored the cargo, claiming against A. for damages, freight demurrage & disbursements. A. having been found liable, sued B. for the amount he was condemned in & costs of arbn.:—*Held:* (1) B. not liable, A.'s refusal to take delivery being unreasonable; (2) in any case B. could not be liable for the costs of an arbn. to which he was not a party.—BARKLY & SONS *v.* SIMPSON (1897), 34 Sc. L. R. 276; 24 R. 346; 4 S. L. T. 249.—**SCOT.**

c. *Agent not absolved from duty to obey by making advances to principal.*]—The mere fact that an agent has made advances to his principal does not relieve the agent from obeying his principal's instructions.—*Re* M. (1909), 10 S. R. N. S. W. 175.—**AUS.**

1188 i. *No liability when instructions obeyed—What amounts to obedience.*]—An agent to whom the principal has remitted a sum of money to pay a debt owing by the principal to a third party resident abroad, & who, during the time necessary to find the creditor & obtain a power of attorney enabling him to make payment, has deposited the sum in a local responsible & duly constituted bank, is not responsible upon the subsequent failure of the bank before it is possible for the agent to carry out his instructions.—TEMPEST *v.* BERTRAND (1901), Q. R. 19 S. C. 365.—**CAN.**

Sect. 2.—Principal's rights against agent: Sub-sect. 1, A. B. C. & D.]

goods by their having been weighed & the invoice made out; (2) the broker was not liable.—GOWER *v.* JONES (1831), 1 L. J. K. B. 10.

1188. —— What amounts to obedience.]—A. having directed his agent B. to invest for him £1,850 at 5 per cent., so that he might call in £1,100 of it ready at any time, & B. having, after A.'s death, brought forward a mtge. security to himself for £2,500, & a deed-poll, executed by himself, declaring £1,850 of it to be the money of A.:—*Held:* (1) this did not discharge B.; (2) B. must pay the money into ct.—EVERY *v.* MOULD (1831), 1 L. J. Ch. 23.

1189. —— —— Instructions substantially obeyed.]—In an action by a share-broker against a person for not accepting certain shares in a foreign ry., it appeared there were no shares, strictly so called, in the market, but pltf. had bought what was current in the market as shares in that co., namely, a letter of allotment:—*Held:* this satisfied the authority to buy shares.—MITCHELL *v.* NEWHALL (NEWARK) (1846), 15 M. & W. 308; 4 Ry. & Can. Cas. 300; 15 L. J. Ex. 292; 7 L. T. O. S. 88; 10 Jur. 318.

1190. —— —— ——.]—Deft., who resided at Liverpool, gave to pltf., who carried on business at Pernambuco, an order to purchase 100 bales of cotton of a specified quality, in the following terms: "I beg to confirm my letter of Feb. 23, & hope you will have executed fully all the cotton ordered & consider still in force. If executed please regard this as a new order for 100 more." Pltf., acting on this order, purchased in the market, & paid for, 94 bales of the specified cotton. No direct evidence was given as to the then state of the Pernambuco market; but the circumstances of the case rendered it reasonable to infer that pltf., in purchasing 94 bales, had done all that was practicable. Deft. declined to pay for these bales or the commission on the ground that his order had been inadequately performed:—*Held:* (1) the order must be construed with reference to the state of market for which it had been given; (2) it had been substantially complied with; (3) judgment was rightly entered for pltf.—JOHNSTON *v.* KERSHAW (1867), L. R. 2 Exch. 82; 36 L. J. Ex. 44; 15 L. T. 485; 15 W. R. 354.

Annotation:—**Consd.** Ireland *v.* Livingston (1871-2), L. R. 5 H. L. 395.

1191. Prompt obedience required.]—A., by letter, requested B. to purchase for him 150 bales of cotton; the letter contained the following terms: —"Upon executing the above & forwarding bill of lading I will accept your draft at 60 days' sight after receipt of bill of lading":—*Held:* B. was bound to deliver the bill of lading as soon after arrival as he could, without reference to arrival or unloading of cargo.—BARBER *v.* TAYLOR (1839), 5 M. & W. 527; 9 L. J. Ex. 21; 151 E. R. 223.

1192. Direct instructions supersede duties implied from nature of agency—Broker.]—Declaration stated that deft. had been retained by pltfs. as their broker to sell & deliver certain goods, according to terms of contract, to such person as should become purchaser. It then alleged deft. sold goods to P., & P. purchased at certain times of delivery, amount to be paid on delivery:—*Held:* (1) the duty of deft. did not appear, from the declaration, to have arisen from his character as broker, but arose as an inference of law from the contract stated in the declaration; (2) this was an express contract by deft. with pltfs. to deliver what he sold for ready money only; (3) an action against deft. for delivering without the price being paid might be brought in tort as well as in *assumpsit*.—BOORMAN *v.* BROWN (1842), 3 Q. B. 511; 2 Gal. & Dav. 793; 11 L. J. Ex. 437; 114 E. R. 603, Ex. Ch.; *affd. sub nom.* BROWN *v.* BOORMAN (1844), 11 Cl. & Fin. 1, H. L.

Annotations:—**Distd.** Courtenay *v.* Earle (1850), 10 C. B. 73; Howard *v.* Shepherd (1850), 19 L. J. C. P. 249; Dutton *v.* Powles (1861), 2 B. & S. 174. **Apld.** Baylis *v.* Lintott (1873), L. R. 8 C. P. 345; Hyman *v.* Nye (1881), 6 Q. B. D. 685. **Mentd.** Marfell *v.* South Wales Ry. Co. (1860), 8 C. B. N. S. 525; Midland Ry. Co. *v.* Withington District L. B. (1883), 49 L. T. 489, C. A.; Steljes *v.* Ingram (1903), 19 T. L. R. 534.

1193. —— Underwriter.]—In an action against an underwriter for not insuring, the declaration set out that the underwriter had undertaken to insure a certain ship, upon the usual terms of insurance of ships; & the breach was that, though a reasonable time had elapsed, etc., yet the underwriter had not caused the said ship to be insured, according to the usual terms of marine insurance, etc. Deft. contended he was bound only to use a proper degree of care & diligence to perform what he had undertaken:—*Held:* (1) the declaration had well alleged an absolute duty to do a specific thing; (2) the action was founded on an express contract which cast upon deft. the duty not only to use proper care & diligence in effecting the policy, but at all events to insure the ship mentioned.—TURPIN *v.* BILTON (1843), 5 Man. & G. 455; 6 Scott, N. R. 447; 12 L. J. C. P. 167; 7 Jur. 950; 134 E. R. 641.

Annotations:—**Refd.** Xenos *v.* Wickham (1867), L. R. 2 H. L. 296, H. L.; Great Western Insce. Co. *v.* Cunliffe (1874), 9 Ch. App. 531, n.

1194. Agent's duties limited by instructions.]—An agent is not bound to perform any act he does not consider himself strictly bound to do by the instruction of his principal (DR. LUSHINGTON).—THE HOPEWELL (1855), 2 Ecc. & Ad. 249.

1195. No liability for obeying instructions ineffectually revoked.]—T., a married woman, being entitled for her separate use to dividends of certain Govt. stock standing in the name of pltf. as her trustee, pltf. gave to defts., a banking co., a power of attorney to receive the dividends & at the same time directed them to pay the dividends to T. T. directed defts. to pay the dividends to S. & B., bankers at Brussels, to whom she had pledged them for advances made by S. & B. to her husband. Defts. for some time paid the dividends to S. & B., but at length T. wrote to defts. as follows:—"I think it right to inform you that in consequence of the death of one of my trustees, as well as my having left Brussels, I have been obliged to have a new power of attorney made to receive my own dividends, & I shall not have occasion to trouble you to do so." No new power of attorney was made out, & defts. received the ensuing half-yearly dividend & transmitted it to S. & B. Pltf. sued defts. for that dividend:—*Held:* (1) the letter of T. did not amount to a revocation of the authority she had given defts. to pay the money they received on her account to S. & B.; (2) pltf. could not recover.—CLERK (CLARKE) *v.* LAURIE (1857), 2 H. & N. 199; 26 L. J. Ex. 317; 29 L. T. O. S. 203; 3 Jur. N. S. 647; 5 W. R. 629; 157 E. R. 83, Ex. Ch.

Annotations:—**Distd.** Frith *v.* Frith, [1906] A. C. 254, P. C. **Refd.** Fitzmaurice *v.* Bayley (1857), 30 L. T. O. S. 230, Exch. **Mentd.** *Re* Hannan's Empress Gold Mining & Development Co., Carmichael's Case, [1896] 2 Ch. 643, C. A.

1196. Not liable for consequences of act ordered.]—An agent, being authorised to do an imprudent act which the principal ought never to have authorised to be done, is not liable for loss occasioned by his doing the act in question.

Where a co. is formed for the purchase of a business & the power to make the purchase is distinctly conferred upon the directors, they are not personally responsible for the consequences of making the purchase, although the business turns

out to be of a ruinous character, unless the character of the business was obviously apparent when the purchase was made.—OVEREND, GURNEY *v.* GIBB, No. 1265, *post.*

Annotations:—**Consd.** Parker *v.* Lewis (1873), 28 L. T. 91. **Distd.** *Re* Railway & General Light Improvement Co., Marzetti's Case (1880), 42 L. T. 206, C. A. **Consd.** Grimwade *v.* Mutual Soc. (1884), 52 L. T. 409. **Refd.** *Re* Montrotier Asphalte Co., Perry's Case (1876), 34 L. T. 716; New Sombrero Phosphate Co. *v.* Erlanger (1877), 5 Ch. D. 73, C. A.; Phosphate Sewage Co. *v.* Hartmont (1877), 5 Ch. D. 394, C. A.; Leeds Estate Building & Investment Co. *v.* Shepherd (1887), 36 Ch. D. 787; *Re* Faure Electric Accumulator Co. (1888), 40 Ch. D. 141; Lagunas Nitrate Co. *v.* Lagunas Syndicate, [1899] 2 Ch. 392, C. A.; *Re* National Bank of Wales, [1899] 2 Ch. 629, C. A.; *Re* Brazilian Rubber Plantations & Estates, [1911] 1 Ch. 425.

B. Where agent cannot obey instructions.

1197. Agent must notify principal.]—In *assumpsit* for breach of an undertaking to effect an insurance according to special instructions, the declaration alleged the duty of defts. to be to effect the insurance according to instructions, or, in event of their inability to do so, to give pltf. notice of such inability:—*Held:* this was a duty necessarily implied from the nature of the employment.—CALLANDER (CALLENDER, CALLENDAR) *v.* OELRICHS (1838), 5 Bing. N. C. 58; 1 Arn. 401; 6 Scott, 761; 8 L. J. C. P. 25; 2 Jur. 967; 132 E. R. 1026.

1198. Agent must prove or plead impossibility at trial.]—An underwriter who seeks to excuse himself on the ground of impossibility of finding persons ready or willing to underwrite the particular risk, or on any other justifiable ground of excuse, must either show it in evidence at the trial as an answer to the breach so alleged or plead it by way of excuse as he should be advised (TINDAL, C.J.).—TURPIN *v.* BILTON, No. 1193, *ante.*

Annotations:—**Refd.** Xenos *v.* Wickham (1867), L. R. 2 H. L. 296, H. L.; Great Western Insce. Co. *v.* Cunliffe (1874), 9 Ch. App. 531 n.

C. Where Instructions allow a Discretion.

1199. Agent not liable if he acts bonâ fide.]—Pltf. instructed deft., his agent, to insure a cargo, no directions how or with whom to insure being given. Deft. *bonâ fide* insured the cargo with an office whose practice it was to insert a particular exception. There was another office whose policies did not contain the exception, & with whom the insurance could have been effected at the same premium. The cargo was lost by a cause within the exception:—*Held:* deft. not liable.

It is left to the discretion of the agent, who, if he means no fraud, is at liberty to elect between the offices (LORD MANSFIELD, C.J.).—MOORE *v.* MOURGUE (1776), 2 Cowp. 479; 98 E. R. 1197.

Annotation:—**Consd.** Doorman *v.* Jenkins (1834), 2 Ad. & El. 256.

1200. ——.]—If a merchant orders an insurance broker to effect a policy of insurance for him on a cargo of corn, without giving any directions as to those with whom the policy is to be effected, & the insurance broker effects the policy with one of the chartered cos., by whose policies corn is warranted against partial losses, although the ship be stranded; upon a large partial loss happening upon this cargo after a stranding of the ship, the merchant cannot maintain an action against the insurance broker for not effecting the policy with private underwriters who, by the common form of a policy of insurance, would have been liable for this partial loss. Although an insurance broker is bound to obey the positive directions of the assured to abandon, yet if it is referred to his discretion whether to abandon or not, & he acts *bonâ fide*, he is not liable to an action for neglecting to abandon.—COMBER *v.* ANDERSON (1808), 1 Camp. 523.

1201. ——.]—An agent is bound to act in the best manner he can for his principal, & in matters which are left to an agent's discretion, he can only act for the benefit of his principal.

A foreign merchant directed his correspondent in England to treat any consignment as his son's, who was in England & superintended the sales & purchases, & to acknowledge him owner of the money, so that he might dispose thereof as if it was his own money. By the direction of the son, moneys in the hands of correspondent, belonging to the father, were applied by him in paying a private debt of the son to the correspondent:—*Held:* the transaction was valid.—PARIENTE *v.* LUBBOCK, No. 1209, *post.*

D. Where Instructions ambiguous.

1202. Definite instructions not extended by subsequent ambiguous words.]—A mercantile house accepted a commission to sell & transfer stock "when the funds should be at 85 per cent., or above that price," & had not sold when the funds reached 85:—*Held:* (1) they were bound to sell when the funds reached 85, & had not a general authority to defer selling till the funds should reach a higher price than 85; (2) they must account to their employer for the price of the stock with interest; he, in return, accounting to them for the dividends he had subsequently received in ignorance of the fact of the funds having reached that price.—BERTRAM, ARMSTRONG & CO. *v.* GODFRAY (1830), 1 Knapp, 381; 12 E. R. 364.

Annotation:—**Consd.** Murtunjoy Chuckerbutty *v.* Cockrane (1865), 10 Moo. Ind. App. 229, P. C.

1203. "May" interpreted as "must"—"Proceeds."]—Pltfs., London merchants, sent to defts., commission agents in China, certain goods, to be sold by the latter on the terms contained in the following letter: "If tea is not obtainable at our

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PART VIII. SECT. 2, SUB-SECT. 1.—B.

d. *Sale as instructed impossible—Exchange effected—Goods received lost by smuggling.*]—Pltf.'s action was for the value of lumber shipped under an agreement that deft. should carry it & sell it, as agent for pltf., for cash or bills of exchange on France. Deft. could not sell wholly for cash & exchanged the lumber for tobacco, which, on its return, was smuggled into port & seized by the revenue officers:—*Held:* pltf. being wholly innocent of the fraud, was entitled to judgment.—BLETHEN *v.* GARDNER (1881), 2 M. & G. 417; 2 C. L. T. 263.—**CAN.**

PART VIII. SECT. 2, SUB-SECT. 1.—C.

1199 i. *Agent not liable if he acts bonâ fide.*]—Pltf. intrusted defts., commission agents, with a quantity of flour either to sell for him at T., or to send it to be sold at Q. or other places, as circumstances might require. He directed that the flour should be insured, & defts. effected an insurance. The flour was shipped to Q., but was lost owing to the negligence & want of skill of the captain. The policy contained an express stipulation that the co. would not be liable for any loss occasioned by the want of ordinary care or skill in the navigation of the vessel, & pltf. failed to recover on it; but it appeared that this was the ordinary form of policy, & that defts. could not have procured any other:—*Held:* pltf. could maintain no action against defts. for taking such form of policy. *Semble:* if an insurance might have been effected on more favourable terms, yet defts. would have been justified in insuring as they did, having received no special instructions, & the co. being one with which such insurances were usually effected by the trade.—SILVERTHORNE *v.* GILLESPIE (1852), 9 U. C. R. 414.—**CAN.**

1199 ii. ——.]—A. executed a bill of sale to pltf., & delivered it to deft. to hold as the agent of both parties:—*Held:* deft.'s refusal to deliver the bill of sale to pltf., without the consent of A., was not a conversion.—DEVER *v.* MYSHRALL (1856), 3 All. 354.—**CAN.**

1199 iii. ——.]—A person authorised by power of attorney to appear & defend suits may refuse to accept service of summons & appear in a suit brought against his principal, & may either act upon the power or not, as he may think proper.—*Re petition of* LUCHMEE CHUND (1882), I. L. R. 8 Calc. 317.—**IND.**

Sect. 2.—Principal's rights against agent: Sub-sect. 1, D.; sub-sect. 2, A. (a).]

limits, you may invest one half of the whole proceeds in silk, at prices not exceeding, etc. If silk is obtainable much below these prices, you may substitute it in part for tea, even if the latter is to be had within our limits, at your discretion":—*Held:* on looking at the whole of the letter the words "you may invest" were to be construed as directory, & not as giving defts. a discretionary power.

The declaration stated that in consideration that pltfs. at London would consign to defts. at China goods for sale & receipt of proceeds by defts. for pltfs. for reward, defts. promised to invest & remit proceeds to pltfs. within a reasonable time after receiving the "proceeds," by the purchase, to the amount of £500, of any other article than tea & silk, if defts. thought fit; that if within such reasonable time tea could not be bought by defts. & silk could, within certain prices agreed upon, & if defts. did not purchase any other article than tea & silk, then they would purchase silk to the extent of half the proceeds & consign it to pltfs.; that defts. received the goods, sold them, & received the "proceeds" thereof; that while they held them for more than a reasonable time, they did not invest any part of them in any other article than tea or silk within the prices so agreed on for more than a reasonable time after they had received the "proceeds." Plea, that after defts. received the "proceeds" they could not have bought silk within the prices agreed upon:—*Held:* upon the true construction of the term "proceeds" the question raised was not whether defts. could have bought silk after they had received the whole proceeds, but whether they could have bought it after they had received a part or parts, for the remittance of which more than a reasonable time had elapsed, such time commencing as soon as a part considerable enough to be remitted was received.—ENTWISLE (ENTWISTLE) *v.* DENT (1848), 1 Exch. 812; 18 L. J. Ex. 138; 10 L. T. O. S. 419; 154 E. R. 346.

1204. Agent adopting reasonable construction—Agent not liable.]—Declaration stated that, in consideration that pltf. would employ deft. as a coal-factor to sell certain coals on account of pltf., deft. promised pltf. that he would not sell the said coals otherwise than for ready money, & alleged for breach that deft. sold the coals otherwise than for ready money, to wit, at two months' credit:—*Held:* the action was not sustained by the production of the following letter of instructions given by pltf. to deft., & by proof of a sale of the coals at 15*s.* 6*d.* per ton, at a credit of two months: "Please sell for me 250 tons of anthracite coal, at such price as will realise me not less than 15*s.* per ton, net cash, less your commission for such sale."—BODEN *v.* FRENCH (1851), 10 C. B. 886; 20 L. J. C. P. 143; 17 L. T. O. S. 77; 138 E. R. 351.

1205. —— ——.]—JOHNSTON *v.* KERSHAW, No. 1190, *ante*.

For full anns., *see* S. C. No. 1190, *ante*.

1206. —— ——.]—Where a letter of orders constituting a contract from a merchant to his commission agent is so worded as to be capable of two interpretations, if the agent fairly & honestly assumes it to bear one of those interpretations, & acts on that assumption, the merchant cannot be released from his contract on the ground that he intended it to bear the other. As the error arose from his own indistinctness of expression, he must bear the loss.

A. wrote to B. & Co., at Mauritius, desiring them to ship him 500 tons of sugar at 26*s.* 9*d.* to cover freight & insurance, adding "Fifty tons more or less of no moment, if it enables you to get a suitable vessel. I should prefer the option of sending vessel to London, Liverpool, or the Clyde; but if that is not compassable, you may ship to either Liverpool or London." B. & Co. could only procure, at the price mentioned, nearly 400 tons, which they purchased from several different persons, & shipped in one vessel to Liverpool. A. refused the cargo, & wrote to cancel the order so as to prevent any further shipment:—*Held:* in the circumstances, A. was bound to accept the cargo.—IRELAND *v.* LIVINGSTON (1872), L. R. 5 H. L. 395; 41 L. J. Q. B. 201; 27 L. T. 79; 1 Asp. M. L. C. 389, H. L.

Annotations:—**Consd. & Expld.** Jefferson *v.* Querner (1874), 30 L. T. 867, Q. B. **Distd. & Extd.** Imperial Ottoman Bank *v.* Cowan (1874), 31 L. T. 336, Ex. Ch. **Expld.** *Re* Tappenbeck, *Ex p.* Banner (1876), 24 W. R. 476, C. A. **Consd. & Distd.** Cassaboglou *v.* Gibb (1883), 11 Q. B. D. 797, C. A. **Expld. & Distd.** Lindsay, Gracie *v.* Barter (1885), 1 T. L. R. 568. **Consd.** Dufoncet *v.* Bishop (1886), 18 Q. B. D. 373. **Consd. & Expld.** Loring *v.* Davis (1886), 32 Ch. D. 625. **Expld. & Folld.** Swan *v.* Mellen (No. 2) (1892), 36 Sol. Jo. 668, C. A. **Consd. & Apld.** Furness, Withy *v.* White, [1894] 1 Q. B. 483, C. A. **Expld. & Folld.** Schofield *v.* Londesborough, [1896] A. C. 514, H. L. **Expld.** Dupont *v.* British South Africa Co. (1901), 18 T. L. R. 24, K. B. D. **Expld. & Extd.** Miles *v.* Haslehurst (1906), 23 T. L. R. 142, K. B. D. **Consd. & Expld.** Houlder *v.* Comr. of Public Works, Comr. of Public Works *v.* Houlder, [1908] A. C. 276, P. C. **Expld. & Extd.** Kepitigalla Rubber Estates *v.* National Bank of India, [1909] 2 K. B. 1010. **Consd.** Landauer *v.* Craven & Speeding, [1912] 2 K. B. 94. **Consd. & Expld.** Karberg *v.* Blythe, Green, Jourdain, Schneider *v.* Burgett & Newsam (1915), 85 L. J. K. B. 665, C. A.; Weigall *v.* Runciman, [1915] W. N. 401, K. B. D. **Refd.** Bank of England *v.* Vagliano, [1891] A. C. 107, H. L.; Ströms Bruks Aktie Bolag *v.* Hutchison, [1905] A. C. 515, H. L.; Biddell *v.* Clemens Horst, [1911] 1 K. B. 214; The Kronprinzessin Cecilie (1915), 32 T. L. R. 139; Groom *v.* Barber, [1915] 1 K. B. 316; Macmillan *v.* London Joint Stock Bank, [1917] 2 K. B. 439, C. A.

1207. —— ——.]—If a principal gives an agent instructions so obscure as reasonably to admit of two constructions, he cannot complain if the agent honestly acts upon one construction which may be held to be incorrect.

A ship was chartered by a co. running a regular line to proceed from Calcutta to N.Y., & was in accordance with the charterparty consigned to agents nominated by the charterers. The ship was to discharge her cargo as fast as she could put out & according to the custom of the port. The bills of lading, which were in the American & Indian Line form, contained a clause: "Customs formalities & detentions at N.Y. to be at the risk & expense of consignee of goods." According to the law of the United States goods could not be removed from a ship until the Customs examination had taken place & duty paid, but if the ship belonged to a regular line the cargo might be unloaded on to a wharf, where Customs formalities must be complied with. On arrival of the ship at N.Y. she discharged on to a wharf & the cargo was tiered, expenses being thereby incurred for wharf hire, watching cargo, & breaking down cargo for Customs examination. Delivery of the cargo from the wharf was not completed until seven days after the ship had left the wharf. The ship was not discharged as fast as she could put out to the extent of five days, owing to compliance with Customs formalities. The agents took no steps to enforce against the consignees any claim for expenses, charges, demurrage, or detention

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1204 i. *Agent adopting reasonable construction—Agent not liable.*]—If an agent disobey the instructions of his principal he is liable to pay any loss which in the ordinary course of things is the result of such disobedience, but where the instructions given by the principal are capable of two different meanings, &, the agent adopting & acting upon one of them, the principal is held bound, the words used must be fairly & reasonably susceptible of either meaning, & the language used is not to be tortured to raise a doubt.—GLOBE & RUTGERS FIRE INSURANCE Co. *v.* WETMORE & Co. (1915), 49 N. S. R. 55.—CAN.

caused by compliance with Customs formalities. The charterers assumed full responsibility for the acts of the agents:—*Held:* in absence of specific instruction to the agents to assert a lien there was no breach of duty on the part of the agents in abstaining from asserting a lien or from bringing a number of actions against the consignees.—COBRIDGE S.S. CO., LTD. *v.* BUCKNALL STEAMSHIP LINES, LTD. (1910), 15 Com. Cas. 138, C. A.

1208. —— ——.]—If the instructions of a principal are given in such ambiguous terms as to be susceptible of different meanings, & the agent *bonâ fide* adopts one of them, not only is the agent protected by the transaction being upheld, but the principal is responsible to the other principal for the interpretation which the agent reasonably & *bonâ fide* put on those ambiguous instructions.

Defts., having received a telegram from A., a foreign shipowner, authorising them to "fix steamer, prompt loading 3,000 tons coal, Newport, Cagliari, Messina, or Palermo, twenty shillings. If cannot do better wire immediately," signed, as agents for A., a charterparty letting a ship to pltfs. A. refused to let the ship on the ground that he had authorised defts. to hire, & not to let, a ship, & pltfs. were obliged to hire another ship at greater expense. In an action for breach of warranty of authority:—*Held:* (1) the word "fix" meant "let"; (2) if the telegram was ambiguous defts. had acted *bonâ fide* & reasonably in the interpretation which they gave to it, & the shipowner would have been responsible to pltfs. for such interpretation; (3) on the facts defts. having inserted in the charterparty terms which were outside the authority, in whatever way it might be read, were liable.—WEIGALL & CO. *v.* RUNCIMAN & CO. (1916), 85 L. J. K. B. 1187; 115 L. T. 61, C. A.

1209. Full authority not cut down by ambiguous expressions.]—The ordinary import of language of a letter giving full authority to deal with the property of another ought not to be cut down or restricted by merely ambiguous or uncertain expressions in other parts of the document.

Where a foreign merchant wrote to his English correspondent directing the latter to consider any consignment from him as the property of his son, who was residing in England, so that the son might place & dispose of the father's money as if it were the son's own property, & stating that, as the son informed the father of everything, the consignor would not continue writing, but that whatever the son said for him was to be the same as if he had said it himself, & must guide the consignee:—*Held:* (1) the son was thus constituted not merely an agent with full powers to act for his father, but the consignee was justified in setting off, with the son's concurrence, a debt due to the father against one due from the son; (2) although on one or two occasions the consignee had required a written authority from the son before so acting, neither this circumstance nor the terms of the letters rendered any writing necessary, but a verbal direction or subsequent adoption by the son was sufficient; (3) the consignee's firm having been changed by the death of a member of it, subsequently to the date of the letters, made no difference in these respects, the letters having imposed a duty on the consignee's house, which continued as long as the relation between pltf. & it, however it might be composed.—PARIENTE *v.* LUBBOCK (1856), 8 De G. M. & G. 5; 44 E. R. 290.

1210. Construction of commercial document for jury—Less reasonable construction.]—B. & Co., T.'s agents, acting upon ambiguous instructions from him, signed a charterparty with L. & Co. which T. repudiated. L. & Co. brought an action against B. & Co. for damages for breach of warranty of authority in them to enter into the charterparty. The jury found B. & Co. had put a construction on the instructions sent to them by T. which no reasonable man should have done:—*Held:* (1) the question of construction was one for the jury, as the instructions of defts. were contained in a commercial document; (2) as pltfs. had only had to show that the construction of defts. was the less reasonable one, they were entitled to judgment in the action.—LINDSAY, GRACIE & CO. *v.* BARTER & CO. (1885), 2 T. L. R. 4, C. A.

1211. Agent misinterpreting instructions—Principal bound.]—Deft. having entered through his brokers into a contract, which was void under Leeman's Act & was formally repudiated by his solrs., wrote to his brokers a private letter framed in terms capable of two interpretations, namely, that the brokers were merely authorised to go on with or repudiate the contract as they thought best. The brokers by their conduct affirmed the contract:—*Held:* deft. could not repudiate the act of his agents on the ground that they had misinterpreted his instructions.—LORING *v.* DAVIS (1886), 32 Ch. D. 625; 55 L. J. Ch. 725; 54 L. T. 899; 34 W. R. 701; 2 T. L. R. 645.

Annotations:—**Followed.** Weigall *v.* Runciman, [1915] W. N. 401. **Referred.** Hardoon *v.* Belilios, [1901] A. C. 118, P. C.

1212. —— ——**Telegram to master of ship.**]—A joint telegram in ambiguous terms was sent by shipowners & charterers to the master of a chartered ship. The master *bonâ fide* interpreted the telegram in a sense not intended by the senders:—*Held:* senders bound by master's interpretation.—MILES *v.* HASLEHURST, No. 1213, *post.*

1213. —— —— ——.]—The crew of a chartered ship at Hong Kong refused to proceed to Vladivostock unless paid a bonus. Pltf., the charterer, agreed with defts., the shipowners, to pay the bonus, conditionally on the ship's arrival at Vladivostock or capture, & a joint telegram was sent to the master authorising him to pay the bonus on these terms. Owing to the ambiguous language of the telegram, the master signed notes making the bonus payable in any event, & these notes were duly paid by defts. Pltf. thereupon paid the amount of the notes to defts. The ship did not arrive at Vladivostock, & was not captured, but was lost at sea. Pltf. having brought an action to recover back the amount paid to defts.:—*Held:* pltf. could not recover, as he was equally responsible with defts. for the ambiguity of the telegram.—MILES *v.* HASLEHURST & CO. (1906), 23 T. L. R. 142; 12 Com. Cas. 83.

SUB-SECT. 2.—WHERE AGENT FAILS TO EXERCISE DUE CARE, SKILL, AND DILIGENCE.

A. Paid Agents.

(*a*) *In General.*

1214. Degree of care, skill, & diligence required.]—A man who is employed to act for another as his agent is bound to exercise all the skill & knowledge he has of a particular business, all the diligence,

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PART VIII. SECT. 2, SUB-SECT. 2.—A. (a.).

1214 i. *Degree of care, skill, & diligence required.*]—Agents to purchase indigo seed on the most favourable terms cannot experiment by sowing a sample & waiting before they purchase to see whether it will germinate. They are bound to act to the best of their judgment, & to use proper care & skill as agents in purchasing, & their action cannot be repudiated unless guilty of negligence.—BETTS *v.* ARBUTHNOT (1872), 19 W. R. P. C. 65.—**IND.**

1214 ii. ——.]—A. asked B. to recommend a vessel fulfilling certain require-

Sect. 2.—*Principal's rights against agent: Sub-sect.* 2, *A.* (*a*) & (*b*).]

zeal, & energy he is capable of, & any interests he may have himself he is bound to exercise to the fullest extent for the sole & exclusive benefit of the person for whom he is acting (COZENS-HARDY, M.R.).—PRICE *v.* METROPOLITAN HOUSE INVESTMENT AGENCY CO. No. 1848, *post.*

1215. —— Question of fact.]—Whether the agent has used due diligence or not is a question of fact for the jury, & if the agent went on the statement of others, that is no excuse, as it was his duty to ascertain how the fact was, or to report to his employers that he only went on the information of others & that the fact was uncertain.—MONEYPENNY *v.* HARTLAND (1824), 1 C. & P. 352.

Annotations:—**Distd.** Smith *v.* Archibald (1849), 14 L. T. O. S. 174. **Mentd.** Wood *v.* Argyll (1844), 6 Man. & G. 928; Day *v.* Sharp (1846), 7 L. T. O. S. 62.

1216. —— ——.]—Where pltf. instructed deft. to effect policies, etc., & it did not distinctly appear in the evidence at what time the policies were actually executed:—*Held:* it was properly left to the jury to say if the policies were executed in a reasonable time.—TURPIN *v.* BILTON, No. 1193, *ante.*

Annotations:—**Refd.** Xenos *v.* Wickham (1867), L. R. 2 H. L. 296, H. L.; Great Western Insce. Co. *v.* Cunliffe (1874), 9 Ch. App. 531 n.

1217. —— ——.]—On the employment of any mercantile or commercial agent, it is for the jury, in absence of express evidence of the nature of his duties on such employment, to judge, from their own knowledge, what those duties are; & thus on the employment of an insurance agent to effect an insurance, or get it effected, it is for the jury, in absence of express evidence, to judge whether he was employed to get the insurance effected, or only to place the business in the hands of brokers to effect it, & whether he is responsible for their neglect or default, especially in not getting it effected with responsible insurers, & in not informing his employer, the insured, who they are, in order to enable him to sue them. It is matter of law that the agent is only bound to use due care & do what is usual, but it is matter for the jury what this duty involves, or whether there has been a breach of it.—HURRELL *v.* BULLARD (1863), 3 F. & F. 445.

1218. —— —— Evidence of other agents admissible.]—Where the issue is whether the agent exercised a reasonable & proper care, skill & judgment, the fact that other persons exercising the same calling would, or would not, have acted in the same way, is material in determining it. If as many would have acted as the agent acted, & as many otherwise, he would be entitled to a verdict.—CHAPMAN *v.* WALTON (1833), 10 Bing. 57; 3 Moo. & S. 389; 2 L. J. C. P. 910; 131 E. R. 826.

Annotation:—**Consd.** The Lancastrian (1916), 32 T. L. R. 655, C. A.

1219. *S. P.* ROWCLIFFE *v.* LEIGH (1877), 37 L. T. 557, C. A.

1220. —— —— But judge may withdraw question from jury.]—COMMONWEALTH PORTLAND CEMENT CO. *v.* WEBER, LOHMANN, No. 1238, *post.*

1221. —— Presumption in favour of agent.]—It is to be presumed that a broker who has bought goods for his principal has done everything requisite, according to the usual course of dealing, for completion of the purchase.—BOVILLE *v.* BRADBURY (1815), 1 Stark. 136.

1222. —— What is gross negligence.]—In the case of an agent holding himself out for careful & skilful performance of a particular duty, gross negligence includes want of that reasonable care, skill, & expedition which may properly be expected from persons so holding themselves out & their servants.

For all practical purposes the rule may be stated to be, that the failure to exercise reasonable care, skill, & diligence is gross negligence (*per* CUR.).—BEAL *v.* SOUTH DEVON RY. CO. (1864), 3 H. & C. 337; 11 L. T. 184; 12 W. R. 1115; 159 E. R. 560, Ex. Ch.

Annotations:—**Apprvd.** Giblin *v.* McMullen (1868), 5 Moo. P. C. C. N. S. 434, P. C. **Refd.** Grill *v.* General Iron Screw Collier Co. (1866), Har. & Ruth. 654; Lord *v.* Midland Ry. Co. (1867), L. R. 2 C. P. 339. **Mentd.** Garton *v.* Bristol & Exeter Ry. Co. (1861), 30 L. J. Q. B. 273; Peek *v.* North Stafford Ry. Co. (1862-3), 10 H. L. Cas. 473; Rooth *v.* N. E. Ry. Co. (1867), 15 L. T. 624; M. S. & L. Ry. Co. *v.* Brown (1883), 8 App. Cas. 703; Dickson *v.* G. N. Ry. Co. (1886), 18 Q. B. D. 176, C. A.; Sutcliffe *v.* G. W. Ry. Co., [1910] 1 K. B. 478, C. A.

1223. —— —— Question of fact.]—Whether the existence of gross negligence is a question of law or fact will always depend on circumstances. There may be cases where the question of gross negligence is matter of law more than of fact, & others where it is a matter of fact more than of law (TAUNTON, J.).—DOORMAN *v.* JENKINS (1834), 2 Ad. & El. 256; 4 Nev. & M. K. B. 170; 4 L. J. K. B. 29; 111 E. R. 99.

Annotations:—**Refd.** Balfe *v.* West (1853), 13 C. B. 466. **Mentd.** Giblin *v.* M'Mullen (1868), L. R. 2 P. C. 317; Whitehouse *v.* Pickett, [1908] A. C. 357; Newman *v.* Bourne & Hollingsworth (1915), 31 T. L. R. 209.

1224. *S. P.* BEAUCHAMP *v.* POWLEY (1831), 1 Mood. & R. 38.

Annotation:—**Refd.** Balfe *v.* West (1853), 13 C. B. 466.

(*b*) *Extent and Limits of Duty.*

1225. Agent not liable if he does what is usual.]—In an action of account for a watch & sword delivered to deft. *ad mercandizandum*, deft. pleaded that in order to keep them safe until he had an opportunity to sell them he put them into a warehouse which was broken into by enemies; that the watch was taken away & lost, & the sword was claimed by an Englishman, & deft. was forced to go away before he met with the Englishman to get it again:—*Held:* this was *primâ facie* a good account, for the bailiff *ad mercandizandum* was not obliged to keep the goods always about him.—GOSWILL *v.* DUNKLEY (1726), 2 Stra. 680; 93 E. R. 779.

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ments; B. did so, but advised A. to have it inspected. A., however, wrote he would take it on B.'s recommendation & that he could draw on A., & authorised B. to buy. The vessel was infected with dry rot, which could not have been detected by inspection:—*Held:* B. had fulfilled his duty to use ordinary diligence in the conduct of the transaction.—HACKETT *v.* RORKE (1905), 37 N. S. R. 435.—**CAN.**

1214 iii. ——.]—Deft., manager of a shop of pltf., acknowledged from time to time the value of goods received from pltf., but on a certain stock-taking a shortage of stock was shown, & though no fraud was shown, deft. was unable to account for the shortage:—*Held:* deft. was liable for the loss sustained, as it was part of his duty as manager to see the goods invoiced corresponded with the goods received, & he had failed in that duty.—TYLER *v.* LOGAN (1904), 7 F. (Ct. of Sess.) 123.—**SCOT.**

1222 i. —— *What is gross negligence.*]—Pltf. left an agreement for the purchase of a lot with deft., a real estate agent, who made a payment under it which was repaid by pltf. Deft. had paid the wrong party:—*Held:* there was gross negligence.—WORSLEY *v.* BRUNTON (1909), 12 W. L. R. 531.—**CAN.**

1225 i. *Agent not liable if he does what is usual.*]—In an action for payment of differences for iron carried over by pursuers on instructions of defender, it was shown that pursuers were unable to obtain a settlement, & defender alleged pursuers were not entitled, having become truly principals in the transactions, which were as follows: pursuers bought at the price at which defender bought & sold to him for settlement at a later date at threepence a ton higher, the threepence being retained by them for storage & interest, no commission being charged; pursuers repeatedly told defender they could not hold his iron; this mode of dealing he understood & acquiesced in, & it was a mode customary in that market:—*Held:* no breach of employment by pursuers proved & no damage resulted to defender from the procedure,

1226. ——.]—An admission by an agent that he has sold property of his principal upon credit will not entitle the principal to an inquiry as to wilful default, if the agent insist by his answer that the credit was given in the usual way of business & pltf. makes out no case to the contrary.—PELHAM *v.* HILDER (1841), 1 Y. & C. Ch. Cas. 3; 62 E. R. 765.

1227. —— **Discounting bills for his own account in ordinary course—Bona fides.**]—In an action brought by a banking co. against their late manager & cashier to recover moneys belonging to the bank, alleged to have been improperly applied in discounting bills, etc., for his own advantage, it appeared that such transactions were all in the ordinary course of the business of the bank; that he had not exceeded the power & authority with which he was intrusted: & that no case of bad faith could be proved against him: —*Held:* no such action could be sustained.—BANK OF UPPER CANADA *v.* BRADSHAW (1867), L. R. 1 P. C. 479; 4 Moo. P. C. C. N. S. 406; 16 E. R. 371, P. C.

1228. Agent not liable if he follows best available advice.]—An agent, who acts on the best advice he is able to get in the affairs of his principal, is not liable to an action for damages arising from that act.

B., upon demand made to surrender a ship, whereof he was agent, on the African coast, not having the benefit of legal advice, consulted the Governor & Council of the colony, & on their advice delivered up the ship. Pltf., principal, was nonsuited in an action against B. for breach of duty.—MILES *v.* BERNARD (1795), Peake, Add. Cas. 61.

1229. Agent liable for delay caused by neglect.]—VARDEN *v.* PARKER, No. 1402, *post.*

1230. Negligence of principal no defence.]—Deft., being employed by pltf. to sell furniture for ready money only, sold it, but took in payment a bill of exchange drawn by purchaser on a third person. Pltf. refused to take the bill & applied for the proceeds of sale, but his agent afterwards obtained the bill from deft. to get it discounted. It was never presented for payment; the drawer never had notice of its dishonour, & 10 days elapsed after it became due, before deft. had such notice. In an action brought against deft. for negligence in selling otherwise than for ready money:—*Held:* deft. was liable notwithstanding pltf. had not presented the bill for payment &, by not giving notice of dishonour to the drawer, had discharged him from liability on the bill. *Semble:* deft. might sustain a cross-action against pltf. to recover any damage sustained by him, in consequence of such negligence preventing him from recovering on the bill. —FERRERS (EARL) *v.* ROBINS (1835), 2 Cr. M. & R. 152; 1 Gale, 70; 5 Tyr. 705; 4 L. J. Ex. 178; 150 E. R. 65.

1231. ——.]—Pltf. suffered considerable losses through negligence of deft., his agent & manager. The jury found pltf. also was guilty of negligence which partly contributed to the loss:—*Held:* this was no answer to pltf.'s claim, as pltf. owed no duty to deft.

When one person has undertaken to another to do something & has undertaken to take reasonable care to do it properly, he cannot turn round & say that the latter ought to take reasonable care to see that the former does his duty (LORD ESHER, M.R.). —BECKER *v.* MEDD (1897), 13 T. L. R. 313, C. A.

1232. Duties of foreign agents.]—A claim to salvage of a vessel & cargo derelict on the coast of Africa was forfeited by misconduct of the salvor in retaining possession of & improperly dealing with property salved.

It is the bounden duty of agents abroad to adopt any means in their power for preservation of their employers' property.—THE LADY WORSLEY (1855), 2 Ecc. & Ad. 253.

1233. Duty limited to matters within scope of employment.]—Defts., merchants at B., who acted as brokers for pltfs., merchants at L., wrote to pltfs. proposing to them to purchase a quantity of scrap iron of a specified quality. Pltfs. desired an offer of cost & freight to Rotterdam. Defts. stated the price, but were unable to make an offer as to freight, as they had then no ship available. Before pltfs. had closed with the offer defts. proposed a ship for conveyance of the iron. Pltfs. accepted the purchase, but objected to the ship as too small to take the whole cargo, desiring defts. to look out for another. Defts., as agents for both parties, entered into & accepted the contract of sale, & transmitted same to pltfs. They engaged a vessel to convey the iron, received the same, & caused it to be shipped, assuring pltfs. the cargo which was fully disclosed to him.—HOPE *v.* CLAVERING (1897), 5 S. L. T. 39.—**SCOT.**

e. Agent not liable where no negligence.]—Pltfs. were carriers whose business it was to receive money from customers for transmission. Upon receipt of money from a customer a document was given to him, signed on behalf of pltfs., &, where the transaction took place at an agency, countersigned by an agent. Pltfs. had appointed deft. an agent & supplied him with blank forms of these documents called "express money orders," signed on behalf of pltfs. Under his contract with pltfs., deft. accepted the responsibility of the due issue & sale of the money orders, agreed to account for each money order & its proceeds, to hold the proceeds in trust for pltfs. & pay them to pltfs. when required after making certain deductions, & not to deal with the money received for transmission in respect of them in any other manner. A clerk of deft. stole a number of forms, forged his name to the countersigning, & put them off. They were presented at another agency of pltfs. & there paid. Pltfs. sued to recover the money so paid:—*Held:* deft. was not authorised to issue the orders in question, they were issued in fraud of pltfs., & deft. was not liable.—DOMINION EXPRESS CO. *v.* KRIGBAUM (1909), 13 O. W. R. 364, 924; 18 O. L. R. 533.—**CAN.**

f. Agent for both parties — For one principal in private capacity—For the other ex officio.]—A., being in uncontrolled management of the National Bank in Calcutta & purporting to act under a power of attorney intended to be given to him in his private capacity, but addressed to him as "acting manager of the National Bank" by B., a constituent of the bank, without drawing any cheque on B.'s account, & simply by means of transferring in the books of the bank Rs.15,000 from B.'s deposit account with the bank to the account of C., who was indebted to the National Bank, purported to make an advance of Rs.15,000 from B. to C., whereas, in fact, the real transaction amounted only to transferring the liability of C. to that extent from the bank to B.:—*Held:* so far as this transaction was concerned, A. could not divest himself of his character of bank manager, &, acting as the agent of both parties, he acted to the prejudice of B. & to the advantage of the bank, & there was, in fact, a breach of his duty to B. to which the bank was a party.—BEER *v.* NATIONAL BANK OF INDIA (1873), 19 W. R. 67.—**IND.**

1233 i. *Duty limited to matters within scope of employment—Failure to insure or advise of shipment.*]—Defts., agents to dispose of certain teas of pltfs., not having succeeded, at request of pltfs. shipped them back without insuring & without advising pltfs. of shipment in time for them to insure:—*Held:* defts. not liable for damage caused by loss of the vessel on which the teas had been shipped.—MAITLAND *v.* TYLEE (1858), 7 C. P. 335.—**CAN.**

1233 ii. —— *Failure to complete blank in lien note.*]—Deft., pltf.'s agent, sold R. a waggon, for the price of which R. gave a lien note, reserving to pltf. title & possession till payment. Deft. guaranteed R.'s note, but pltf. failed to register it, & it was sold in good faith to a purchaser, who thus acquired a title:—*Held:* (1) deft. was under no duty to fill up the blanks in the affidavit of *bona fides*, but only in the note itself, which he did; (2) even if such was his duty, his neglect in no way contributed to pltf.'s failure to register the note; & deft. was accordingly discharged from liability on his guarantee.—GRAY-CAMPBELL, LTD. *v.* REIMER (1917), 2 W. W. R. 991; 11 Alta. L. R. 437; 36 D. L. R. 181.—**CAN.**

g. Duty of agent receiving money subject to conditions.]—Where an agent, vested with limited authority, receives a payment which does not fulfil the conditions on which he is authorised to receive payments, he should place the money *in medio* until further instructed by his principal.—MCPHERSON *v.* FIDELITY TRUST & SAVINGS CO., LTD., & MOSES GIBSON (1912), 17 B. C. R. 182.—**CAN.**

Sect. 2.—*Principal's rights against agent: Sub-sect.* 2, *A. (b) & B. (a) & (b).*]

was considered a first-rate description of scrap iron. Defts.' profit was derived from commission from the seller & the shipowner. In an action against defts. for not using proper & reasonable care, skill & diligence in accepting & shipping the iron:—*Held:* the employment of defts. as brokers & shipping agents did not raise a duty to examine the iron for pltfs., there being no evidence of usage or contract that they should do so.

Defts. acted both as brokers & shipping agents. That which is not a duty in either capacity singly cannot become a duty by two capacities being combined, unless there is a usage that where there is such combination, such duty arises (POLLOCK, C.B.).—ZWILCHENBART (ZUILCHENBART) *v.* ALEXANDER (1861), 1 B. & S. 250; 30 L. J. Q. B. 254; 4 L. T. 412; 7 Jur. N. S. 1157; 9 W. R. 670; 121 E. R. 708, Ex. Ch.

1234. Duty to use cable.]—An agent whose duty it is in the ordinary course of business to communicate information to his principal as to the state of a ship & cargo ought to do so by telegraph where that means of communication is in general use; & if the agent omits to discharge this duty, & the principal, being thus left in ignorance of a fact material to be communicated, effects an insurance, the insurance is void, on the ground of concealment or misrepresentation.

Pltf.'s agent at Smyrna, having shipped a cargo, sent the shipping documents on Jan. 19. The hips sailed on Jan. 23, but, stranded on the same day, & the cargo became a total loss. The agent was informed on Jan. 24, & wrote to pltf. on Jan. 26, the next post-day, informing him of the loss; he purposely abstained from telegraphing, in order that pltf. might not be prevented from insuring. After receiving the letter of Jan. 19, but before receiving the letter of Jan. 26, pltf., on Jan. 31, effected an insurance, being in ignorance of the loss:—*Held:* pltf. could not recover.—PROUDFOOT *v.* MONTEFIORE (1867), L. R. 2 Q. B. 511; 8 B. & S. 510; 36 L. J. Q. B. 225; 16 L. T. 585; 15 W. R. 920; 2 Mar. L. C. 512.

Annotations:—**Consd. & Distd.** Stribley *v.* Imperial Marine Insce. Co. (1876), 1 Q. B. D. 507; Blackburn, Low *v.* Vigors (1887), 12 App. Cas. 531.

1235. Agent liable for exceeding his authority.]—It is a breach of duty on the part of an agent appointed to manage the business of a firm (1) to sign documents in the firm's name without authority; (2) to leave signed cheques, blank as to amount, in hands of clerks, to be used at their discretion; (3) to deposit the firm's cash to a large amount in certain banks without consent of all the partners; (4) to increase wages of the firm's servants or to make agreements for their employment for a term of years; (5) to substitute for the original more expensive machinery without the authority of all the partners.—BEVERIDGE *v.* BEVERIDGE (1872), L. R. 2 Sc. & Div. 183.

1236. Agent liable where he acts with blind confidence.]—On a motion by beneficiaries of a will to make resp., a trustee of the will & salaried manager of a colliery appointed by the ct. in an administration suit, liable for sums intrusted by him to a solr. for payment into ct., it appeared he had paid sums to the solr. knowing of his prior bkpcy., & the solr. had embezzled those sums:—*Held:* (1) resp. was justified in employing a solr., & one who, though he had been a bkpt., was still on the rolls; (2) if resp., in his capacity as paid agent, had lost the money by failure of a bank into which he had paid it, he would not have been liable; (3) as he had made no inquiries as to what had become of the moneys after they had passed into his solr.'s hands, & asked for no vouchers of payment into ct., & had acted with blind confidence, & without the caution required of a paid agent or a bailee for reward, he was liable to refund the sums lost by the fraud of his solr. to the beneficiaries.—*Re* MITCHELL, MITCHELL *v.* MITCHELL (1884), 54 L. J. Ch. 342; 52 L. T. 178; 1 T. L. R. 153.

1237. Agent liable for failure to give notice of material fact.]—A. instructed B. to sell cattle for ready money. B. sold the cattle to C., who obtained delivery of them from A. in consequence of B.'s failure to notify him that C. had not paid for them:—*Held:* A. was entitled to recover from B. the amount due from C.—KIDD *v.* HORNE (1885), 2 T. L. R. 141.

1238. Duty limited to acts contemplated at time of employment.—Pltfs. claimed damages from defts., who had contracted for certain fixed charges to lighter & load on ry. trucks pltfs.' machinery, for not clearing the goods in less than 24 hours, whereby they became liable to a heavy customs duty, under an Ordinance not in force when the contract was made:—*Held:* there was no breach of the agent's duty to use reasonable care, the imposition of the duty not being in the contemplation of the parties when the contract was made, & the judge was right in not leaving the question to the jury & nonsuiting pltfs.—COMMONWEALTH PORTLAND CEMENT CO., LTD. *v.* WEBER, LOHMANN & CO., LTD., [1905]

1235 i. *Agent liable for exceeding his authority.*]—Defts., agents to sell pltf.'s sheep, after the latter had approved & signed the proposed contract between him & the purchaser, & acting outside their authority & not in the usual course of business, added a term of an onerous nature to the document, which was then signed by the purchaser. Defts. gave no notice of this term to pltf., & the purchaser repudiated the contract, as the conditions of the term had not been fulfilled:—*Held:* pltf. had a good cause of action against defts., the declaration alleging negligence in defts.—KENDALL *v.* DOUTREBANDE (1891), 12 N. S. W. 51.—**AUS.**

h. *Agent negligent but acting bonâ fide.*]—A principal who had written urgent letters to his agent, & failed to obtain an answer, employed solrs. to see to his interests; but the agent, though repeatedly applied to by them, gave them no information, & the solrs. applied for an account & injunction:—*Held:* the agent because of his neglect must pay costs up to the hearing, even though his neglect did not proceed from motives of dishonesty or of concealment.—DOUGLASS *v.* WOODSIDE (1865), 11 Gr. 375.—**CAN.**

1236 i. *Agent liable where he acts with blind confidence.*]—An agent employing an auctioneer must use diligence to make a reasonable bargain for his remuneration. The auctioneer having retained out of the money received by him an excessive fee:—*Held:* the agent was chargeable with the excess.—VIVIAN *v.* SCOBLE (1883), 1 M. R. 125.—**CAN.**

1237 i. *Agent liable for failure to give notice of material fact.*]—Defts., commission merchants, wrote pltf. that onions were selling $1 a bag, & as a result pltf. sent a consignment which after two months' delay defts. sold for 65 cents a bag; in an action in substance for damages for breach of duty:—*Held:* pltf. was induced to send the consignment by the price quoted, but no such price was obtainable on that market, &, it being the duty of an agent to disclose every material fact, defts. were liable.—MALCOLM *v.* DOMINION FRUIT EX. (1910), 15 O. W. R. 652.—**CAN.**

1237 ii. ——.]—An agent is liable for goods shipped by him according to order & lost, but of which shipment due notice has not been sent by him to his employers.—ANDREW *v.* ROSS (1810), Fac. Coll.—**SCOT.**

1237 iii. —— *Defect in vendor's title.*]—An agent employed to buy a grocery, including the stock & goodwill, is liable in damages for the loss incurred by his principal through defects in the title of vendor of which he was aware at the time of the sale, as if he knew that the seller himself had acquired the property under the condition that default to pay the price would entitle the owner to take it back, or that part of the stock was held in like manner, & that the seller was in default.—AUTHIER *v.* BEAULIEU (1913), Q. R. 45 S. C. 70.—**CAN.**

1237 iv. —— *Not after agency ceased.*]—The rule that an agent dealing with his principal must impart knowledge acquired by his office does not apply where the relation has ceased, & there is another agent with equal means of knowledge to guard the interest of the principal in the transaction.—SCOTT *v.* DUNBAR (1828), 1 Moll. 457.—**IR.**

A. C. 66; 74 L. J. P. C. 25; 91 L. T. 813; 53 W. R. 337; 31 T. L. R. 149; 10 Asp. M. L. C. 27, P. C.

B. Professional Agents.

(a) In General.

1239. Standard of skill required.]—Public profession of an art is a representation & undertaking to all the world that the professor possesses requisite care & skill. Where a skilled labourer, artisan, or artist is employed, there is on his part an implied warranty that he is of skill reasonably competent to the task he undertakes.—HARMER *v.* CORNELIUS (1858), 5 C. B. N. S. 236; 28 L. J. C. P. 85; 32 L. T. O. S. 62; 22 J. P. 724; 4 Jur. N. S. 1110; 6 W. R. 749; 141 E. R. 94.

Annotations:—**Apld.** Cuckson *v.* Stones (1859), 1 E. & E. 248. **Distd.** Andrews *v.* Garstin (1861), 10 C. B. N. S. 444.

1240. —— Ordinary skill only.]—Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care & skill. He does not undertake, if he is an attorney, that at all events the client shall gain his cause, nor does a surgeon undertake that he will perform a cure; nor does he undertake to use the highest possible degree of skill. There may be persons who have higher education & greater advantages than he has, but he undertakes to bring a fair, reasonable, & competent degree of skill (TINDAL, C.J.).—LANPHIER *v.* PHIPOS (1838), 8 C. & P. 475.

For full anns., *see* MEDICINE & PHARMACY.

1241. —— Error of judgment not actionable.]—Professional men, possessed of a reasonable portion of information & skill, according to the duties they undertake to perform, & exercising what they so possess with reasonable care & diligence in the affairs of their employers, certainly ought not to be held liable for errors in judgment, whether in matters of law or discretion. Every case ought to depend upon its own peculiar circumstances, & when an injury has been sustained which could not have arisen except from the want of such reasonable skill & diligence or the absence of the employment of either on the part of the agent, the law holds him liable.—HART & HODGE *v.* FRAME, SON & CO. (1839), 6 Cl. & Fin. 193; Macl. & Rob. 595; 3 Jur. 547; 7 E. R. 670, H. L.

Annotation:—**Refd.** Purves *v.* Landell (1845), 12 Cl. & Fin. 91, H. L.

1242. Knowledge expected from paid professional agent.]—It is part of the duty of one who holds himself out as skilled in a branch of professional knowledge to become acquainted with decisions which have an important bearing upon the practice relating to that branch, & ignorance of such an important change in the practice is some evidence of negligence.—LEE *v.* WALKER (1872), L. R. 7 C. P. 121; 41 L. J. C. P. 91; 26 L. T. 70.

Annotation:—**Refd.** *Ex p.* Bailey (1872), 8 Ch. App. 60.

(b) Particular Classes of Professional Agents.

1243. Accountant—Extent of duties.]—In an action to recover damages against defts. in respect of their alleged negligence in performance of duties as accountants in examination of accounts of a business in which pltf. was then proposing to invest money, & in which he did so invest:—*Held:* pltf. had failed to show that the alleged negligence of defts. had induced him to invest money in the business, & caused the loss he had sustained.

Although it is not the duty of accountants to take stock in auditing accounts of a business, they may well call for explanations of particular items in stock sheets (COZENS-HARDY, M.R.).—SQUIRE, CASH CHEMIST, LTD. *v.* BALL, BAKER & CO., MEAD *v.* BALL, BAKER & CO. (1911), 106 L. T. 197; 28 T. L. R. 81, C. A.

1244. Agent to invest money—Failure to invest.]—If my bailiff by employing my moneys whereof he was receiver might have procured to me profit & gain, but he neglects it, he shall be chargeable to me in right, & shall answer for it.—COLLET & ROBSTON'S CASE (1588), 2 Leon. 118; 74 E. R. 407.

1245. —— Investment on bad security.]—A scrivener, disposing of money deposited generally in his hands upon bad security, is answerable for its loss, there being no proof of any fraud or collusion in the scrivener.—CLARKE *v.* PERRIER (1679), Freem. Ch. 48; 22 E. R. 1050.

1246. ——.]—If A. is intrusted with the money of B. to lay out & lends to one who passes for a substantial man & takes reasonable security for it & afterwards the other becomes insolvent, A. should not be charged.—ANON. (1701), 12 Mod. Rep. 509; 88 E. R. 1482.

1247. ——.]—A scrivener, etc., receiving money, & giving a note to place it out at interest, is bound to do so, & is not discharged from paying interest for it, unless his employer accepts security & interest.—BARWELL *v.* PARKER (1751), 2 Ves. Sen. 363; 28 E. R. 233.

Annotations:—**Refd.** Pearce *v.* Slocombe (1838), 3 Y. & C. Ex. 84; Blair *v.* Bromley (1847), 2 Ph. 354; *Re* German Mining Co. (1853), 22 L. J. Ch. 926; Moore *v.* Knight (1890), 63 L. T. 831.

1248. ——.]—*Qu.:* if an agent undertakes to invest money in a copyhold security, whether it amounts to a warranty by him that such security shall be valid & sufficient.—BROWN *v.* HOWARD (1820), 2 Brod. & Bing. 73; 4 Moore, C. P. 508; 129 E. R. 885.

For full anns., *see* LIMITATION OF ACTIONS.

1249. Army agent.]—If an officer on foreign service sends in his resignation to the agent of the regiment for sale of his commission, the agent must take care to secure to him the purchase-money.—STURDY *v.* ROSS (1796), 1 Esp. 450.

Auctioneer.]—*See* AUCTION & AUCTIONEERS.

1250. Auditor.]—An auditor is not bound to do more than exercise reasonable care & skill in making inquiries & investigations. He must be honest,

PART VIII. SECT. 2, SUB-SECT. 2.—B. (b).

c. *Agent to collect rent—Failure to act.*]—A power of attorney was prepared & executed by two of four tenants in common, appointing an agent to receive the rents & profits of the estate, & was transmitted to the agent, who had undertaken to procure its execution by the other owners. The power never was executed by them, & the agent more than a year afterwards declined to act in the matter, alleging that such execution was necessary to enable him to receive the rents:—*Held:* the agent was liable for rents & profits received, or which but for his wilful default might have been received by him, from time of the power being sent to him until his repudiation.—BRADBURNE *v.* SHANLY (1859), 7 Gr. 569.—**CAN.**

1245 i. *Agent to invest money—Investment on bad security.*]—Agents, who procure their principal to advance money upon representations made by them, which representations besides being untrue are made without due skill & diligence & negligently, are liable to their principal, & the burden to reinstate the principal in the position in which but for their wrong he would be lies upon them. The agents' liability is to the extent of the over-valuation of the property mtged., & not the full amount of the loan with interest with an assignment over of the mtge. to the agents for their indemnity.—LOWENBURG, HARRIS & CO. *v.* WOLLEY (1895), 25 S. C. R. 51.—**CAN.**

1245 ii. —— ——.]—It is a breach of duty in a person intrusted with money to invest in real estate, to invest on the security of a second mtge., unless with the sanction of the lender, which such person must prove.—CARTER *v.* HATCH (1880), 31 C. P. 293.—**CAN.**

1245 iii. —— ——.]—Agents on commission to invest money by way of loan on real securities are not liable for breach of trust unless fraud is shown for lending to themselves, & the failure of securities from such debtors raises no presumption of fraudulent design; nor on the ground of negligence only can they be made liable, although trustees where confidence & not obligation is the ground of duty would be liable.—GRAHAM *v.* BARKER (1845), Rcd. & Eq. Judg. (Eq.) 1.—**AUS.**

Sect. 2.—Principal's rights against agent: Sub-sect. 2, B. (b) & C.]

i.e., he must not certify what he does not believe to be true, & he must take reasonable care & skill before he believes that what he certifies is true. Where suspicion is aroused more care is obviously necessary; but an auditor is not bound to exercise more than reasonable care & skill, even in a case of suspicion, & he is perfectly justified in acting on the opinion of an expert where special knowledge is required (LINDLEY, L.J.).—*Re* LONDON & GENERAL BANK, [1895] 2 Ch. 673; 64 L. J. Ch. 866; 73 L. T. 304; 44 W. R. 80; 11 T. L. R. 573; 39 Sol. Jo. 706; 2 Mans. 555; 12 R. 520, C. A.

Annotations:—**Consd.** *Re* Kingston Cotton Mill Co., [1896] 2 Ch. 279, C. A. **Refd.** R. *v.* Roberts, [1908] 1 K. B. 407, C. A.; *Re* Republic of Bolivia Exploration Syndicate, [1914] 1 Ch. 139. **Mentd.** *Re* National Bank of Wales, [1899] 2 Ch. 629, C. A.

1251. ——.]—An auditor is not bound to be suspicious where there are no circumstances to arouse suspicion; he is only bound to exercise a reasonable amount of care & skill.

For some years before a co. was wound up, balance-sheets, signed by the auditors, were published by the directors to the shareholders, in which the value of the co.'s stock-in-trade at the end of each year was grossly overstated. The auditors relied on certificates wilfully false, given by J., one of the directors, who was manager, as to the value of the stock-in-trade. Dividends were paid for some years on the footing that the balance-sheets were correct; but if the stock-in-trade had been stated at its true value it would have appeared that there were no profits out of which a dividend could be declared. If the auditors had compared the different books & added to the stock-in-trade at the beginning of the year the amounts purchased during the year, & deducted the amounts sold, they would have seen that the statement of the stock-in-trade at the end of the year was so large as to call for explanation; but they did not do so:—*Held:* it being no part of the duty of the auditors to take stock, they were justified in relying on the certificates of J., a person of acknowledged competence & high reputation, & were not bound to check his certificates in the absence of anything to raise suspicion, & they were not liable for the dividends wrongfully paid.—*Re* KINGSTON COTTON MILL CO., [1896] 2 Ch. 279; 65 L. J. Ch. 673; 74 L. T. 568; 12 T. L. R. 430; 40 Sol. Jo. 531; 3 Mans. 171, C. A.

Annotations:—**Apld.** *Re* Western Counties Steam Bakeries & Milling Co., [1897] 1 Ch. 617, C. A. **Consd.** Squire, Cash Chemist *v.* Ball, Baker, Mead *v.* Ball, Baker (1911), 106 L. T. 197, C. A.; *Re* Republic of Bolivia Exploration Syndicate, [1914] 1 Ch. 139. **Refd.** Squire, Cash Chemist *v.* Ball, Baker, Mead *v.* Ball, Baker (1911), 27 T. L. R. 269. **Mentd.** Dixon *v.* Kennaway, [1900] 1 Ch. 833.

1252. Broker.]—Where a broker acts both as broker & principal in the same transaction, any contract arising out of such conduct is, upon the principles of common law, good for nothing, & no action can be maintained upon so fraudulent a transaction. A broker is to be considered as an agent of the seller or the buyer, or of both, bound honestly to exercise his skill & fairly to communicate his opinion on the subject of the purchase to those who, for that purpose, have confidently employed him. It requires little observation to show how disqualifying a circumstance to the fair discharge of that duty will arise from the interference of his own interest (LORD ELDON, C.).—*Re* MOLINE, *Ex p.* DYSTER, No. 1839, *post.*

Annotations:—**Distd.** Cope *v.* Rowlands (1836), 2 M. & W. 149. **Apld.** *Re* Pemberton, *Ex p.* Huth (1840), Mont. & Ch. 667. **Refd.** Bank of Bengal *v.* Macleod (1849), 5 Moo. Ind. App. 1.

For full anns., *see* S. C. No. 1839, *post.*

1253. —— Duty to make binding contract.]—It is the duty of brokers to make the contract so as to be binding on both parties.—GRANT *v.* FLETCHER (1826), 5 B. & C. 436; 8 Dow. & Ry. K. B. 59; 108 E. R. 163.

Annotations:—**Refd** Goom *v.* Affalo (1826), 5 L. J. O. S. K. B. 31; Henderson *v.* Barnewall (1827), 1 Y. & J. 387; Wilkins *v.* Wright (1833), 3 Tyr. 824; Sievewright *v.* Archibald (1851), 17 Q. B. 103.

1254. ——.]—A broker of London who negotiates a contract between buyer & seller of merchandise is bound either to enter the contract correctly in his book forthwith, or deliver a correct note of contract to both buyer & seller, & is liable to his principal for any damage the latter may sustain by his negligence in this respect.—SIVEWRIGHT *v.* RICHARDSON (1852), 19 L. T. O. S. 10.

1255 ——.]—Pltf. directed his brokers, defts., to buy for him 50 bales of cotton "to arrive," & they, having like instructions from other principals, entered into a single contract in their own name with H. & Co. for the purchase of 300 bales, on account of pltf. & their other principals, & sent pltf. a contract note advising him of their purchase of 50 bales on his account from H. & Co., & pltf. paid defts. £800 on account of his purchase. The quality of the cotton on its arrival being disputed, pltf. declined to accept his share of the 300 bales. In an action to recover his £800 from defts. as money had & received:—*Held:* (1) pltf. entitled so to recover it back, as defts. had not made such a contract on his behalf as would entitle him to sue upon it in his own name; (2) there was an entire failure of consideration.—BOSTOCK *v.* JARDINE (1865), 3 H. & C. 700; 6 New Rep. 164; 34 L. J. Ex. 142; 12 L. T. 577; 11 Jur. N. S. 586; 13 W. R. 970; 159 E. R. 707.

Annotations:—**Refd.** Robinson *v.* Mollett (1875), L. R. 7 H. L. 802. **Mentd.** Mollett *v.* Robinson (1870), L. R. 5 C. P. 646.

1256. —— Duties increased by acting in dual capacity.]—Where a person undertakes the combined duties of broker & shipping agent, it may be that some implied contract on his part may arise which would not arise where he acts in either capacity singly (WILLIAMS, J.).—ZWILCHENBART *v.* ALEXANDER, No. 1233, *ante.*

1257. —— Duty to get best price possible.]—Brokers employed to sell goods are bound to do so in the usual way, & if it is usual to send the seller an estimate of value, in order that he may be enabled to fix a reserved price, they ought to do so, & whether it is so or not, they are bound, for their own guidance, to make a careful estimate of the value, & if they sell, even by public auction, at a price much below the fair value, their not having made such an estimate will be evidence of negligence & of a loss caused thereby, for which they will be liable. Brokers employed to sell upon the ordinary terms are bound to employ due care & diligence, but will not be liable for mere mistake without negligence. It is not a question merely of price or value, but whether they were guilty of negligence in not getting a better price, & in not using ordinary care to

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1253 i. *Broker—Duty to make binding contract—Cannot fulfil duty after revocation.*]—A broker, who at the time of making a contract has failed to bind his principal by a written note or memorandum, cannot sign an effectual note or memorandum after his authority as agent to sell has been withdrawn.—STEVENSON *v.* SMITH (1907), 7 W. L. R. 161; 13 B. C. R. 213.—**CAN.**

1256 i. —— *Duties increased by acting in dual capacity.*]—When to the ordinary business of a broker some special employment & undertaking is superadded by express contract, his liability results from such contract, & not simply from his character of broker.—DEADY *v.* GOODENOUGH (1856), 5 C. P. 163.—**CAN.**

do so (BLACKBURN, J.).—SOLOMON *v.* BARKER (BARBER) (1862–3), 2 F. & F. 726; 11 W. R 375.

1258. —— Duty to give notice.]—Where it is a broker's duty to collect payment of a debt due to the principal, the broker is guilty of negligence in not giving notice to his principal if payment has been refused.—TALLERMAN *v.* ROSE (1866), 15 L. T. 450.

1259. —— —— Confined to facts reasonably material.]—Brokers acting for owners, shippers of cocoa lying in warehouse at Liverpool, acted also as brokers to the purchaser of a number of bags of this cocoa. The brokers had been informed by the shippers that there was a note on the bill of lading: "Bags in bad condition, stained & damp, cocoa mouldy." The brokers employed a firm of experts to examine the cocoa, & they reported that some of the mouldy cocoa being removed, the rest would be a merchantable article. Upon this the brokers sent a sample of the cocoa to the purchasers, & the contract was concluded:—*Held:* the sale was one by sample, & the brokers acting honestly were only under a duty of communicating such facts as reasonable men would think material in the ordinary course of business, &, in the circumstances, were not under an obligation to inform the purchasers of the note on the bill of lading.—PAYNE *v.* LEWIS & PEAT (1917), 61 Sol. Jo. 507.

1260. Factor.]—A factor must not give credit to a known bkpt.—DODDERIDGE *v.* ANTHONY (1622), Win. 52; 124 E. R. 44.

1261. ——.]—It is a breach of duty on the part of a factor employed to sell goods to take a bond from the buyer to himself in payment, unless he notifies his principal.—DASHWOOD *v.* ELWALL (1681), 2 Cas. in Ch. 56; 22 E. R. 844.

1262. House & estate agent.]—Pltf. had employed deft. as house agent to let or procure a tenant for her house. Deft. introduced as tenant an insolvent person, being aware of his condition:—*Held:* (1) deft. liable to indemnify pltf. the loss she had suffered through incompetency of the tenant to pay rent, & other expenses; (2) the judge was right in directing the jury to use their knowledge of business in deciding deft.'s duty as house agent.—HEYS (HAYES) *v.* TINDALL (1861), 1 B. & S. 296; 30 L. J. Q. B. 362; 4 L. T. 403; 9 W. R. 664; 121 E. R. 724; previous proceedings, 2 F. & F. 444.

1263. —— Negligence of principal no defence.]—An agent for the purchase of a public-house is liable in damages to his employer for negligently conducting the purchase, although he advises his employer to examine the business for himself, & the employer does so.—SMITH *v.* BARTON (1866), 15 L. T. 294.

Insurance agent & insurance broker.]—*See* INSURANCE.

1264. Land agent—Liable for sums not received through neglect.]—Upon a bill filed against exors. of a land steward & paid agent:—*Held:* his estate liable to make good such sums as, but for his wilful neglect & default, he might have received.—SALISBURY *v.* MORRICE (1842), 11 L. J. Ch. 114.

Master of ship.]—*See* SHIPPING & NAVIGATION.

1265. Mercantile agent.]—A person acting as agent for another is bound to use all ordinary prudence that can be properly & legitimately expected from any person conducting affairs of the world, namely, the same amount of prudence he would exercise on his own behalf, & which depends upon circumstances; it would be extremely wrong to import into consideration of the case of a person acting as mercantile agent in the purchase of a business concern those principles of extreme caution which might dictate the course of one who is not at all inclined to invest his property in ventures of such a hazardous character (LORD HATHERLEY, C.).—OVEREND, GURNEY & CO. *v.* GIBB (1872), L. R. 5 H. L. 480; 42 L. J. Ch. 67, H. L.

Annotations:—**Consd.** Parker *v.* Lewis (1873), 28 L. T. 91. **Distd.** *Re* Railway & General Light Improvement Co., Marzetti's Case (1880), 42 L. T. 206, C. A. **Consd.** Grimwade *v.* Mutual Soc. (1884) 52 L. T. 439. **Refd.** *Re* Montrotier Asphalte Co., Perry's Case (1876), 34 L. T. 716; New Sombrero Phosphate Co. *v.* Erlanger (1877), 5 Ch. D. 73, C. A.; Phosphate Sewage Co. *v.* Hartmont (1877), 5 Ch. D. 394, C. A.; Leeds Estate Building & Investment Co. *v.* Shepherd (1887), 36 Ch D. 787; *Re* Faure Electric Accumulator Co. (1888), 40 Ch. D. 141; Lagunas Nitrate Co. *v.* Lagunas Syndicate, [1899] 2 Ch. 392, C. A.; *Re* National Bank of Wales, [1899] 2 Ch. 629, C. A.; *Re* Brazilian Rubber Plantations & Estates, [1911] 1 Ch. 425.

Patent agent.]—*See* PATENTS & INVENTIONS.

1266. Shipbroker.]—Defts., shipbrokers, had arrangements for shipment of cargoes, under which pltfs.' ship was booked for Dec. 17. Pltfs.' ship being delayed on a previous voyage, defts. interposed two ships, the second of which was loading when pltfs.' ship arrived. In consequence, pltfs.' ship was delayed till Jan. 28:—*Held:* (1) defts. had not committed a breach of contract to use their best endeavours to load the ship in rotation on or about a specified day, the ship not having arrived at the port of loading until too late to load on or about that date; (2) defts. not liable to the shipowners for delay.—NITRATE PRODUCERS' S.S. CO. *v.* WILLS & CO. (1905), 21 T. L. R. 699, H. L.

Solicitor.]—*See* SOLICITORS.

Stockbroker.]—*See* STOCK EXCHANGE.

Surveyor.]—*See* BUILDING CONTRACTS, ENGINEERS & ARCHITECTS.

Valuer.]—*See* VALUERS & APPRAISERS.

C. Gratuitous Agents.

1267. Difference in degree of care required from gratuitous & paid agents.]—Where money has been paid for the performance of certain acts, the person receiving it is, by law, answerable for any neglect on his part, the payment of money being a sort of insurance for the due performing of what he has undertaken; & this rule has few exceptions. But where the undertaking is gratuitous, & the party has acted *bonâ fide*, it is not consistent either with the spirit or policy of the law to make him liable to an action.

A., a general merchant, undertook voluntarily to enter a parcel of goods of B. together with a parcel of his own at the Custom House for exportation, but made the entry under a wrong denomination, whereby both parcels were seized:—*Held:* A. having taken the same care of the goods of B. as of his own, not having received any reward, & not being of a profession or employment which necessarily implied skill in what he had undertaken, was

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1262 i. *House & estate agent—Sale to party known to be without funds.*]—WALDER *v.* CUTTS (1909), V. L. R. 261.—AUS.

1264 i. *Land agent—Particular instances of neglect—Right of inquiry on general allegation.*]—General allegations of wilful neglect, though supported by specific evidence of neglect in particular cases, are not, in a petition against a land agent, sufficient to entitle the petitioner to an inquiry touching wilful neglect.—BOND *v.* M'WATTY (1862), 13 I. Ch. R. 174; 7 Ir. Jur. 315 (C.).—IR.

p. *Parliamentary agent—Failure to insert clause in bill.*]—A., a parliamentary agent, sued B. for work & services in obtaining the passing of a private Act of Parliament. B. pleaded that it was part of A.'s employment to prepare & submit to Parliament a clause in the bill for providing for the payment of the costs of passing the bill out of moneys to be raised in pursuance of same; & that by reason of the carelessness, negligence, unskilfulness, & default of A., the clause was so incorrectly framed that after the passing of the Act containing such clause it became impossible to enforce the payment of the costs in the manner thereby contemplated:—*Held:* the omission of pltf. to prepare an efficient clause for the above purpose materially affected the quality of the entire work, & the defence was a good bar to the entire action, & did not merely go in reduction of damages.—BAKER *v.* MILWARD (1858), 8 I. C. L. R. 514, C. P.—IR.

Sect. 2.—Principal's rights against agent: Sub-sect. 2, C.; sub-sect. 3, A. (a).]

not liable to an action for loss occasioned to B.—SHELLS *v.* BLACKBURNE (1789), 1 Hy. Bl. 158; 126 E. R. 94.

Annotations:—**Folld.** Doorman *v.* Jenkins (1834), 2 Ad. & El. 256; Fish *v.* Kelly (1864), 17 C. B. N. S. 194. In the case of one who holds out a certain profession the law supposes him to be of competent skill & he is responsible for any failure in that respect as is put by Heath, J., in *Shiels* v. *Blackburne* (ERLE, C.J.). **Apprvd.** Giblin *v.* McMullen (1869), 21 L. T. 214, P. C.

1268. ——.]—What is reasonable varies in the case of a gratuitous bailee & that of a bailee for hire. From the former is reasonably expected such care & diligence as persons ordinarily use in their own affairs, & such skill as he has. From the latter is reasonably expected care & diligence, such as are exercised in the ordinary & proper course of similar business, & such skill as he ought to have, namely, the skill usual & requisite in the business for which he receives payment.—BEAL *v.* S. DEVON RY. CO., No. 1222, *ante*.

Annotations:—**Consd.** Lord *v.* Midland Ry. Co. (1867), L. R. 2 C. P. 339. **Refd.** Grill *v.* General Iron Screw Collier Co, (1866), Har. & Ruth. 654; Rooth *v.* N. E. Ry. Co. (1867), 15 L. T. 624; Giblin *v.* McMullen (1868), 5 Moo. P. C. C. N. S. 434, P. C.; Sutcliffe *v.* G. W. Ry. Co., [1910] 1 K. B. 478, C. A.

For full anns., *see* S. C., No. 1222, *ante*.

1269. Liable for negligence.]—Where A. gratuitously undertook to move goods & they were damaged by his negligence in moving them, an action lay; but no action would have lain for the nonfeasance.

If the agreement had been executory, to carry these goods from the one place to the other once a day, deft. had not been bound to carry them (HOLT, C.J.).—COGGS *v.* BERNARD (BARNARD) (1703), 2 Ld. Raym. 909; Com. 133; 1 Salk. 26; 3 Salk. 11; Holt, K. B. 13; 92 E. R. 107.

Annotations:—**Consd.** R. *v.* Cording (1832), 1 Nev. & M. K. B. 35; Ross *v.* Hill (1846), 2 C. B. 877; Blakemore *v.* Bristol & Exeter Ry. Co. (1858), 8 E. & B. 1035; Skelton *v.* L. & N. W. Ry. Co. (1867), L. R. 2 C. P. 631. If a person undertakes to perform a voluntary act he is liable if he performs it improperly, but not if he neglects to perform it—such is the result of the decision in the case of *Coggs* v. *Bernard* (WILLES, J.); Bergheim *v.* G. E. Ry. Co. (1873), 3 C. P. D. 221, C. A. **Refd.** Anon. (1692), 2 Salk. 522; Buckmyr *v.* Darnall (1704), 2 Ld. Raym. 1085; Shelton *v.* Osborn (1729), 1 Barn. K. B. 260; Boucher *v.* Lawson (1736), Lee. Temp. Hard. 194; Kettle *v.* Bromsall (1738), Willes, 118; Charitable Corpn. *v.* Sutton (1742), 9 Mod. Rep. 349; Pasley *v.* Freeman (1789), 3 Term Rep. 51; Elsee *v.* Gatward (1793), 5 Term Rep. 143; Guilliam *v.* Barnett (1804), 2 Smith, K. B. 155; Cavenagh *v.* Such (1815), 1 Price, 328; Pippin *v.* Sheppard (1822), 11 Price, 400; *Ex p.* Cording (1832), 4 B. & Ad. 198; M'Kenzie *v.* M'Leod (1834), 10 Bing. 385; Vaughan *v.* Menlove (1837), 3 Bing. N. C. 468; G. N. Ry. Co. *v.* Shepherd (1852), 8 Exch. 30; Shepherd *v.* G. N. Ry. Co. (1852), 19 L. T. O. S. 324; Balfe *v.* West (1853), 13 C. B. 466; Crouch *v.* L. & N. W. Ry. Co. (1854), 14 C. B. 255; Dansey *v.* Richardson (1854), 3 E. & B. 144; Syred *v.* Carruthers (1858), E. B. & E. 469; MacCarthy *v.* Young (1861), 6 H. & N. 329; Swire *v.* Leach (1865), 5 New Rep. 314; Grill *v.* General Iron Screw Collier Co. (1866), 12 Jur. N. S 727; Readhead *v.* Midland Ry. Co. (1867), L. R. 2 Q. B. 412; Giblin *v.* M'Mullen (1868), 5 Moo. P. C. C. N. S. 434, P. C.; Nugent *v.* Smith (1875), 1 C. P. D. 19; Harris *v.* G. W. Ry. Co. (1876), 1 Q. B. D. 515; Hoare *v.* G. W. Ry. Co. (1877), De Colyar's County Court Cases, 192; Foulkes *v.* Metropolitan District Ry. Co. (1880), 28 W. R. 526, C. A.; Cutler *v.* North London Ry. Co. (1887), 56 L. T. 639; The Moorcock (1889), 14 P. D. 64, C. A.; Cheshire *v.* Bailey, [1905] 1 K. B. 237, C. A.; Clarke *v.* West Ham Corpn., [1909] 2 K. B. 858, C. A.; Bath *v.* Standard Land Co., [1911] 1 Ch. 618, C. A. **Mentd.** Grand Opinion for Prerogative concerning Royal Family (1717), Fortes. Rep. 401; Robinson *v.* Green (1723), 1 Stra. 574; Hartop *v.* Hoare (1743), 3 Atk. 44; Ryall *v.* Rowles (1749-50), 1 Ves. Sen. 348; Mason *v.* Lickbarrow (1790), 1 Hy. Bl. 357; Storr *v.* Crowley (1825), M'Cle. & Yo. 129; Whitehead *v.* Greetham (1825), 2 Bing. 464; Corbett *v.* Packington (1827), 6 B. & C. 268; Gledstane *v.* Hewitt (1831), 1 Tyr. 445; Boorman *v.* Brown (1842), 3 Q. B. 511; Lewis *v.* Nicholson (1852), 21 L. J. Q. B. 310; Micklethwaite *v.* Merrill (1852), 19 L. T. O. S. 60; Crouch *v.* G. W. Ry. Co. (1857), 3 Jur. N. S. 796; Baxendale *v.* Eastern Counties Ry. Co. (1858), 27 L. J. C. P. 137; Williams *v.* Wheeler (1860), 8 C. B. N. S. 299; Belfast & Ballymena Ry. Cos. *v.* Keys (1861), 9 H. L. Cas. 556; Marriott *v.* Anchor Reversionary Co. (1861), 3 De G. F. & J. 177; Martin *v.* Reid (1862), 11 C. B. N. S. 730; Taylor *v.* Caldwell (1863), 3 B. & S. 826; Beal *v.* South Devon Ry. Co. (1864), 11 L. T. 184, Ex. Ch.; Pigot *v.* Cubley (1864), 15 C. B. N. S. 701; P. & O. Steam Navigation Co. *v.* Shand (1865), 3 Moo. P. C. C. N. S. 272; Donald *v.* Suckling (1866), L. R. 1 Q. B. 585; Redhead *v.* Midland Ry. Co. (1869), L. R. 4 Q. B. 379, Exch.; Liver Alkali Co. *v.* Johnson (1874), L. R. 9 Exch. 338, Ex. Ch.; Searle *v.* Laverick (1874), L. R. 9 Q. B. 122; Cohen *v.* G. E. Ry. Co. (1876), 45 L. J. Q. B. 298, Exch.; Shaw *v.* G. W. Ry. Co., [1894] 1 Q. B. 373; The Winkfield, [1902] P. 42, C. A.; Wallis *v.* G. N. Ry. Co. (1903), 12 Ry. & Can. Tr. Cas. 38, (Ry. & Can. Com.; Harris *v.* Perry, [1903] 2 K. B. 219, C. A.; Shrimpton *v.* Hertfordshire County Council (1910), 74 J. P. 305, C. A.; Attenborough *v.* Solomon, [1913] A. C. 76; Hatton *v.* Car Maintenance Co. (1914), 110 L. T. 765.

1270. ——.]—Case will lie where a party undertakes to get a policy done for another therein without any consideration, if the party so undertaking it takes any steps for that purpose, but does it so negligently that the person has no benefit from it. WILKINSON *v.* COVERDALE (1793), 1 Esp. 74.

Annotation:—**Refd.** Balfe *v.* West (1853), 13 C. B. 466.

1271. —— **Trust money mixed with his own.**]—A person gratuitously acting in the collection of debts, etc., under a trust deed, mixed the money he received with his own money, by placing it in his bankers' hands in his own name & upon his own general account. The bankers were in the habit of paying him interest of 3 per cent. upon money in their hands. He informed the trustees the money was in a bank, but did not state with whom; nor that it was mixed with his own moneys; nor that interest was to be paid upon it. The bankers having failed:—*Held:* he was answerable for loss upon the trust money.—MASSEY *v.* BANNER, No. 1367, *post*.

Annotations:—**Folld.** Macdonnell *v.* Harding (1834), 7 Sim. 178. **Distd.** Pennell *v.* Deffell (1853), 4 De. G. M. & G. 372; Owen *v.* Cronk (1894), 2 Mans. 115, C. A.

For full anns., *see* S. C. No. 1367, *post*.

PART VIII. SECT. 2, SUB-SECT. 2.—C.

1269 i. *Liable for negligence.*]—Deft., an insurance agent, gratuitously undertook to effect a further policy on pltfs.' mills, & to give the necessary notices to the cos. with which pltfs. were already insured of the further assurance. Deft. neglected to give the notices & on a loss occurring these cos. disputed liability on the ground of lack of notice, but compromised, paying pltfs. $6,000 in lieu of the full $7,000:—*Held:* deft. liable to pltfs. for the $1,000 difference. *Coggs* v. *Bernard* (1703), 2 Ld. Raym. 909; *Elsee* v. *Gatward* (1793), 5 Term Rep. 143; *Wilkinson* v. *Coverdale* (1793), 1 Esp. 74; *Wallace* v. *Tolfair* (1786), 2 Term Rep. 188 n., refd. —BAXTER *v.* JONES (1903), 6 O. L. R. 360; 23 C. L. T. 258; 2 O. W. R. 573.—**CAN.**

1269 ii. ——.]—PARKER *v.* MCARA BROTHERS & WALLACE. p. 456, u, *post*.—**CAN.**

1269 iii. ——.]—A voluntary agent is not liable for non-feasance or a total neglect to execute the orders of his principal; but for a misfeasance, or partial & imperfect performance, he is responsible.—YOUNG'S TRUSTEES *v.* ATTWOOD & HAYNES (1821), 1 Nfld. L. R. 233.—**NFLD.**

1269 iv. —— *Gross negligence.*]—A gratuitous agent if grossly negligent is liable for any loss sustained by his principal. Gross negligence is a question on the facts of each particular case.—AGNEW *v.* INDIAN CARRYING CO. (1865), 2 Mad. 449.—**IND.**

1269 v. —— ——.]—A store being broken open by thieves, deft. *bonâ fide* on behalf of the owner took possession to protect the goods, thereby becoming *negotiorum gestor*, & only liable for gross negligence:—*Held:* deft. not liable to the true owner for the value of the goods.—AMOD SALIE *v.* RAGOON (1903), T. S. 100.—**S. AF.**

1269 vi. —— *Investment otherwise than as agreed.*]—Pltf. intrusted $500 to deft., which was to be lent to H., "being secured on H.'s storehouses," bearing interest at 9 per cent., for two years deft. not to be responsible for the money. Deft., who acted gratuitously, took a second mtge. upon the property, extending the time of payment for three years:—*Held:* (1) this was clearly such breach of his agreement, & such dealing with pltf.'s money, as to make him liable; (2) pltf. should recover interest at 9 per cent. for two years only, & at 6 per cent. thereafter.—HOLMES *v.* THOMPSON (1876), 38 U. C. R. 292.—**CAN.**

1272. ——Investment on bad security.]—Declaration stated that pltf. had retained deft. at his request to lay out £700 in the purchase of an annuity, that deft. promised to lay it out securely, that pltf. delivered to him the money for that purpose, & that deft. laid it out insecurely. After verdict:—*Held:* consideration for deft.'s promise sufficiently stated.—WHITEHEAD *v.* GREETHAM (1825), 2 Bing. 464; M'Cle. & Yo. 205; 10 Moore, C. P. 183; 130 E. R. 385, Ex. Ch.

Annotations:—**Distd.** Shillibeer *v.* Glyn (1836), 2 M. & W. 143. **Refd.** Balfe *v.* West (1853), 13 C. B. 466; Banbury *v.* Bank of Montreal, [1917] 1 K. B. 409, C. A.

1273. —— ——.]—Where a declaration in *assumpsit* alleged that in consideration that pltf. would retain & employ defts. to lay out a sum of money in the purchase of an annuity, they undertook to do their duty in the premises, that pltf. did retain & employ them, but defts. did not do their duty, but, on the contrary, took an insufficient security for the payment of the annuity, whereby pltf. lost the money, on motion in arrest of judgment:—*Held:* the count was bad, inasmuch as it did not state that any reward was to be paid to defts., or that they were employed in any particular character so as to make them responsible for taking a bad security, although not guilty of negligence or dishonesty.—DARTNALL *v.* HOWARD & GIBBS (1825), 4 B. & C. 345; 6 Dow. & Ry. K. B. 438; 3 L. J. O. S. K. B. 246; 107 E. R. 1088.

1274. ——.]—A., leaving his house for a considerable time, requested B., the landlord, to let it, saying the key was in the custody of C. A person wished to look at the house, but, C. having absconded, the key could not be obtained. B. entered by raising the sash of the first floor window, & after showing the house to several persons, left it in the same state as before. On A.'s return it was discovered the house had been robbed. In an action brought by A. to recover the value of the goods from B.:—*Held:* B. was not justified in opening the window, & in that way going into the house.—ANCASTER *v.* MILLING (1823), 2 Dow. & Ry. K. B. 714; *sub nom.* ACASTER *v.* BINNEY, 1 L. J. O. S. K. B. 168.

Annotations:—**Refd.** Arkins *v.* Brunten (1866), 15 L. T. 84.

SUB-SECT. 3.—PRINCIPAL'S RIGHTS IN REGARD TO ACCOUNTS.

A. The Right to an Account.

(a) Agent's Duty to keep and produce Accounts.

1275. In general.]—It is one of the first duties of an agent to keep a clear account, & to communicate the contents of it (LORD ELDON, C.).—CHEDWORTH *v.* EDWARDS, No. 1364, *post.*

Annotations:—**Consd.** Harington *v.* Hoggart (1830), 1 B. & Ad. 577; *Re* Hallet's Estate, Knatchbull *v.* Hallett (1880), 13 Ch. D. 696, C. A. **Refd.** Lupton *v.* White (1808), 15 Ves. 432.

For full anns., *see* S. C. No. 1364, *post.*

1276. Failure to keep accounts—Loss of costs.]—A confidential agent, in that character bound to keep regular accounts, having neglected to do so, & to preserve vouchers against himself, though he had preserved those in his own favour, was on the ground of gross neglect of duty not allowed a charge in respect of bills of costs for business done as a solr.—WHITE *v.* LINCOLN (LADY), NEWCASTLE (DUKE) *v.* KINDERLEY (1803), 8 Ves. 363; 32 E. R. 395.

Annotations:—**Apld.** Lupton *v.* White (1808), 15 Ves. 432; Leeds *v.* Amherst (1850), 20 Beav. 239; Gray *v.* Haig (1855), 20 Beav. 219. **Distd.** *Re* Lee, *Ex p.* Neville (1868), 4 Ch. App. 43; Cheese *v.* Keen, [1908] 1 Ch. 245.

1277. —— No loss of costs.]—L. acted as solr. for N. in various matters, & particularly in raising money for him on mortgages & bills of exchange. He also acted as receiver of N.'s rents. The course as to the transactions for raising money appeared to have been that on each occasion L. received the money, retained out of it a sum agreed upon for his costs of that transaction, & handed over the balance. The rents which he received were all duly accounted for, & accounts settled, not including any items for costs. After the death of the solr. a large bill of costs was sent in, which was referred for taxation. The taxing master required a cash account, but no sufficient materials existed for making it out, & the taxing master certified that nothing was due to the solr., as he had received large sums of money, of his disposal of which no account was furnished:—*Held:* the bill of costs as taxed must be paid, for that the principle of *White* v. *Lincoln* (*Lady*), *supra*, did not apply where the solr. was not the general agent of the client, so as to be able to receive the client's moneys at all times, without his knowledge, but only received money for him in respect of separate transactions of which the client was aware at the time & knew what was to be received.

The case of a general agent in regard to the keeping of accounts is to be distinguished from that of a solr., as the principal of a general agent has no means of knowing, except through the agent's accounts, what the agent has received on his behalf, & if such agent omits to keep proper accounts, the ct. will charge him with all moneys he might in the discharge of his duty have received for his principal.—*Re* LEE, *Ex p.* NEVILLE (1868), 4 Ch. App. 43; 19 L. T. 435; 17 W. R. 108, C. A.

Annotation:—**Distd.** Cheese *v.* Keen, [1908] 1 Ch. 245.

PART VIII. SECT. 2, SUB-SECT. 3.—A. (a).

1275 i. *In general.*]—An assignment of property having been made to deft. as agent for pltf., for which he refused to account, pltf. filed a bill for an account. The ct. decreed an account, although deft. denied his agency, & swore that a receipt produced by pltf. was a forgery, & the evidence upon the point was conflicting.—ROSENBERGER *v.* THOMAS (1853), 4 Gr. 473.—**CAN.**

q. *Duty to explain accounts.*]—Though there be no written contract to that effect an agent must render proper accounts & attend to explain them, producing vouchers. To do this he must have reasonable access to papers in the principal's possession.—ANNODA PERSAD ROY *v.* DWARKANATH GANGOPADHYA (1881), I. L. R. 6 Calc. 754; 8 C. L. R. 321.—**IND.**

r. ——.]—The obligation of an agent towards his principal does not terminate merely by submission of account papers. He is bound to explain those papers, & if on accounts taken it is found that he has in his hands money which belongs to his principal he is bound to pay that sum.—MADHUSUDDAN SEN *v.* RAKHAL CHANDRA DAS BASAK (1915), 19 C. W. N. 1070.—**IND.**

s. *Persons bound to account — Assignee of "agents on commission."*]—L. & S. were "agents on commission" of fifteen cents a barrel of flour on consignment, & were to render monthly statements giving particulars of sales to pltfs., who were then to draw on them at fifteen days for the flour sold at current prices, less commission:—*Held:* the relation of L. & S. to pltfs. was that of agent & principal, & deft. as assignee of L. & S. was under a duty to account.—WESTERN CANADA FLOUR MILLS *v.* MIDDLEBORO (1911), 19 O. W. R. 722; 2 O. W. N. 1379.—**CAN.**

t. —— *Corporation acting as agent.*]—A corpn., acting within its corporate powers, which accepts from a bank money orders to be put in circulation, by sale or otherwise, is bound to account for the proceeds & is liable for any balance remaining after deduction of charges. This liability arises from the bare fact of the acceptance of, & the dealing with, the money orders, & is not affected by any irregularity in, or invalidity of, the contract or agreement under which they took place.—CAMBRIDGE CORPN. *v.* SOVEREIGN BANK (1909), Q. R. 18 K. B. 423.—**CAN.**

u. *No duty to produce accounts to bankrupt principal—Account rendered to Official Assignee.*]—On the principal's bkpcy. agents who had managed her property accounted to the Official Assignee:—*Held:* principal not entitled to an account from the agents.—BRIGGS *v.* HARCOURT (1911), 31 N. Z. L. R. 366.—**N.Z.**

v. *Collateral transaction tainted with illegality.*]—DE LAVAL SEPARATOR CO. *v.* WALWORTH, p. 443, z, *post.*—**CAN.**

Sect. 2.—*Principal's rights against agent: Sub-sect.* 3, *A.* (*a*) & (*b*).]

1278. Delay in production of accounts—Loss of costs.]—Where a solr., who received rents of certain property on behalf of the client, was called upon for a general account, the fact that he had not kept the accounts in such a state that they could be readily produced & the delay had been the immediate cause of bringing an action for an account, although the sum justly due was less than that claimed, & the decision of the ct. was in favour of the solr.: —*Held:* sufficient reason for depriving the agent of the costs of the action.—MACDOWAL *v.* BUCHAN (1817), 5 Dow, 127; 3 E. R. 1275.

1279. Offer to pay gross sum no excuse for non-production of accounts.]—If an agent does not render accounts within reasonable time, he must bear the costs of a suit instituted to have the accounts taken; it will not be any excuse for him that he offered to pay on account a gross sum, which would have covered all that was due from him.—COLLYER *v.* DUDLEY (1823), Turn. & R. 421; 2 L. J. O. S. Ch. 15; 37 E. R. 1163.

For full anns. *see* PRACTICE & PROCEDURE.

1280. Settlement does not discharge duty to account.]—A. had long employed B. as his steward, professional adviser, & general confidential agent. Disputes having arisen between them, an agreement was entered into between B. & a clergyman acting on behalf of A., by which a gross sum was to be paid to B. in lieu of all his claims, but no accounts or vouchers were rendered or produced by B., nor was any bill of costs delivered:—*Held:* the agreement did not protect B. from rendering an account to his principal.—JENKINS *v.* GOULD (1827), 3 Russ. 385; 38 E. R. 620.

1281. Reasonable account insufficient.]—In an action of account, it is not sufficient for deft. to plead that he rendered to pltf. a reasonable account; that which amounts to a plea of *plene computavit* must be rendering an account to pltf.'s satisfaction or an account which shows an agreed balance between pltf. & deft. Where deft. rendered an account in which he charged himself as factor for the whole, & pltf. required him to furnish an account in which he should charge himself as factor for one moiety only, & as owner of the other, & thus make himself liable to a moiety of the losses arising from sale of the whole:—*Held:* (1) the pleading of such account did not amount to a plea of *plene computavit*; (2) pltf. was entitled to his judgment *quod computet*.—BAXTER *v.* HOZIER (1839), 5 Bing. N. C. 288; 7 Scott, 233; 8 L. J. C. P. 169; 132 E. R. 1115.

Annotations:—**Refd.** Cottam *v.* Partridge (1842), 4 Man. & G. 271; Purcell *v.* Harding (1866), 15 W. R. 128.

1282. Factor.]—Amongst the most important duties of a factor are those which require him to give to his principal free & unbiassed use of his own discretion & judgment, to keep & render just & true accounts, & to keep the property of his principal unmixed with his own or the property of any other. —CLARKE *v.* TIPPING, No. 1370, *post*.

Annotations:—**Refd.** *Re* Whitehead, *Ex p.* Burnand's Exor. (1860), 2 L. T. 776; Williamson *v.* Barbour (1877), 9 Ch. D. 529; *Re* Pollard, *Ex p.* Dickin (1878), 8 Ch. D. 377, C. A.

1283. Mutuality—Absence of—No duty to account.]—On a bill for an account it did not appear that the account between pltf. & deft. was mutual, as consisting of receipts & payments by each party on account of the other, & that the payments forming one side of the account were other than matters of set-off as against the receipts on the other side:—*Held:* notwithstanding a statement in the bill that deft. had, in a particular sale or transaction, acted as pltf.'s agent in receiving moneys on his account, a demurrer to the act must be allowed.—PHILLIPS *v.* PHILLIPS (1852), 9 Hare, 471; 22 L. J. Ch. 141; 68 E. R. 596.

Annotations:—**Folld.** Padwick *v.* Stanley (1852), 9 Hare, 627. **Consd.** Padwick *v.* Hurst (1854), 18 Beav. 575; Shepard *v.* Brown (1862), 4 Giff. 208; Hemings *v.* Pugh (1863), 4 Giff. 456. Wherever an agency partakes of a fiduciary character this ct. has jurisdiction & will direct an account, although the receipts & payments are all on one side & there are no mutual payments between the parties; that rule has not been shaken by the decision in *Phillips* v. *Phillips*, though there are passages in the judgment in that case which may seem at first to be inconsistent with the principle to which I have adverted (STUART, V.-C.); Edwards-Wood *v.* Baldwin (1863), 4 Giff. 613; Makepeace *v.* Rogers (1865), 4 De G. J. & Sm. 649. *Phillips* v. *Phillips* went upon the footing of the account there in question being a current account between the parties, & the bill made no case of general agency, alleging only an isolated agency transaction (TURNER, L.J.). **Refd.** Scott *v.* Liverpool Corpn. (1858), 3 De G. & J. 334; Smith *v.* Levlaux (1863), 1 Hem. & M. 123; Dabbs *v.* Nugent (1865), 14 W. R. 94; St. Aubyns *v.* Smart (1867), L. R. 5 Eq. 183.

1284. Broker.]—*Qu.:* whether the law merchant casts upon a broker the duty of giving his principal an accurate & full account of his purchase for him. —THOM *v.* BIGLAND (1853), 8 Exch. 725; 1 C. L. R. 38; 22 L. J. Ex. 243; 21 L. T. O. S. 62; 1 W. R. 290; 155 E. R. 1544.

Annotations: — **Consd.** Connecticut Fire Insce. Co. *v.* Kavanagh, [1892] A. C. 473, P. C.; Nocton *v.* Ashburton, [1914] A. C. 932, H. L. **Refd.** Liverpool Adelphi Loan Assocn. *v.* Fairhurst (1854), 9 Exch. 422; Joliffe *v.* Baker (1883), 11 Q. B. D. 255.

1285. Agent also acting as solicitor must account.] —It is no objection to a claim or bill filed for an account against a confidential agent that he has been also employed as solr. in respect of the same matter.—ODDY *v.* SECKER (1854), 2 Sm. & G. 193; 65 E. R. 361.

1286. Accounts destroyed by agent.]—When an accounting party destroys accounts before matters have been finally adjusted, & still more pending litigation, the ct. will presume everything most unfavourable to him, consistent with the established facts. The ct. deals severely with any irregularities on the part of an agent, & requires him to act strictly, in all matters relating to such agency for the benefit of his principal. It is imperative upon an agent to preserve correct accounts of all his dealings & transactions; & loss, & still more, destruction, of such evidence by the agent falls most heavily upon himself.—GRAY *v.* HAIG, HAIG *v.* GRAY, No. 1371, *post*.

Annotations:—**Consd. & Distd.** Stainton *v.* Carron Co. (1857), 24 Beav. 346. **Refd.** *Re* Whitehead, *Ex p.* Burnand's Exor. (1860), 2 L. T. 776.

1287. Agent liable to penalties for acting without licence—Duty to account not excused.]—A person who holds himself out as a broker of the city of London, & is employed by a person who believes him to be such, cannot, when sued by his principal for an account of his transactions as such broker on the principal's behalf, protect himself from discovery on the ground that it may render him liable to penalties for having acted as a broker without having been admitted as such. *Qu.:* whether it would make any difference that the principal at the time of employing the broker knew he was not duly admitted.—ROBINSON *v.* KITCHEN (1856), 8 De G. M. & G. 88; 25 L. J. Ch. 441; 26 L. T. O. S. 304; 2 Jur. N. S. 294; 4 W. R. 344; 44 E. R. 322, C. A.

1288. Course of dealing inconsistent with keeping accounts—No duty to account.]—It is the ordinary duty of a confidential steward or agent, from the nature of his employment, when he has the capacity for so doing, to preserve & render an account of his dealings & transactions on behalf of his principal. In a case where no duty to keep accounts was undertaken, & the education & capacity of deft., as well as the course of dealing between him & his employer, were inconsistent with his keeping

regular accounts, a bill by the personal representative of the employer for an account was dismissed with costs.—TINDALL *v.* POWELL (1858), 32 L. T. O. S. 8; 4 Jur. N. S. 944; 6 W. R. 850.

For full anns., *see* EQUITY.

1289. Agent cannot take advantage of his omission to keep accounts.]—Stat. Limitations does not apply to prevent a party at any time calling upon his agent to account for moneys belonging to his principal placed in his hands.

Where there was a continuous account between B. & bkpt., unbalanced from 1827 down to 1839, the bkpcy. occurring in 1840, but there appeared in bkpt.'s books within 6 years of the bkpcy. entries of a payment made, & a sum of money received to & on account of B.:—*Held:* (1) sufficient to take the case out of Stat. Limitations; (2) bkpt. could not take advantage of his own omission in neglecting to keep proper accounts between himself & B.—*Re* WHITEHEAD, *Exp.* BURNAND (1860), 2 L. T. 776.

1290. Agent bound to account to successors in office of principal.]—Overseers & churchwardens of a parish filed a bill against deft., who had been appointed collector of rates by pltfs.' predecessors in office but who had ceased to be such collector prior to the succession to office of pltfs., praying an account of the rates collected by deft. & the delivery up of certain rate-books in his possession. Deft.'s defence to the suit was (1) he had never been employed as agent of pltfs. & was not liable to account to them; & (2) he had already accounted to his employers, pltfs.' predecessors in office:—*Held:* (1) deft. was liable to account to pltfs. for rates received by him; (2) although pltfs. could not open any account settled between deft. & their predecessors in office, they were at liberty to surcharge & falsify same; (3) in taking the accounts deft. was to have all just allowances; (4) he must pay costs of the suit up to & including the hearing.—SELLAR *v.* GRIFFIN (1863), 32 Beav. 542; 33 L. J. Ch. 6; 8 L. T. 230; 27 J. P. 340; 9 Jur. N. S. 612; 11 W. R. 583; 55 E. R. 213.

1291. Duty of public officer to account.]—Previously to 1833, the clerk of patents received fees paid by patentees for his own use, but by an Act passed in that year he received a fixed salary, & was required to hand over all fees to the Exchequer:—*Held:* (1) liable to account to the Crown in equity in respect of such fees, & in respect of all interest & profits made by use of them; (2) an information for this purpose was properly filed in the Ct. of Ch.—A.-G. *v.* EDMUNDS (1868), L. R. 6 Eq. 381; 37 L. J. Ch. 706; 18 L. T. 505.

1292. No duty to produce accounts to improper person nominated by principal.]—A firm of merchants residing abroad brought an action against their agent in this country, claiming production of documents relating to their business to a person appointed by them for that purpose. The agent put in a defence stating that the person appointed by pltfs. was a clerk in a rival & unfriendly house of business, for which reason he objected to produce the documents to him, but he was willing to produce them to any proper person. Pltfs. moved, under R. S. C., O. 25, r. 4, to strike out the defence:—*Held:* (1) although a principal had a general right to the production of documents in the hands of his agent to any person appointed by him, he could not insist on their being produced to an improper person; (2) the defence disclosed a reasonable answer to the claim.—DADSWELL *v.* JACOBS (1887), 34 Ch. D. 278; 56 L. J. Ch. 233; 55 L. T. 857; 35 W. R. 261, C. A.

Annotation:—Consd. Bevan *v.* Webb, [1901] 2 Ch. 59, C. A.

See, generally, DISCOVERY, INSPECTION & INTERROGATORIES.

1293. Traveller appointed by liquidator.]—Where a traveller employed by the liquidator of a co. in voluntary liquidation to collect debts due to the co., agreed, with the assent of the liquidator, to hold the moneys collected to the use of the co.:—*Held:* the traveller liable to account to the co.—MONKWEARMOUTH FLOUR MILL CO., LTD. *v.* LIGHTFOOT (1897), 13 T. L. R. 327; 41 Sol. Jo. 407.

(b) Sufficiency of Agent's Accounts.

1294. Where agent has acted dishonestly.]—Pltf. was appointed agent-general of defts. at C. in Africa: out-factories were to send their accounts to defts., & pltf. was also to take the accounts of the out-factories & enter them in books kept for defts. at C. E. was gold-taker & warehousekeeper. At expiration of his service pltf. came home, having handed over the books & accounts to his successor. In taking an account between pltfs. & defts.:—*Held:* (1) pltf. to be discharged of all goods delivered into the warehouse at C. that went to the out-factories & were delivered there, or were not delivered through default of the master of the ship, or any other accident; (2) pltf. should be charged with all goods belonging to the co. which he, or any by his order, took out of the warehouse & disposed of; & with all goods that went to other factories, which were afterwards embezzled by him or his order, or for his use; (3) pltf. should be charged with such of the co.'s goods as came to C. & were not delivered into the warehouse, or consigned to any other factory, but came to pltf.'s hands or use; (4) if any goods came to any out-factories, & product had been answered to pltf., & he had not answered it to the co., pltf. was to be charged therewith; (5) in this & all other matters of the account wherein pltf. was charged, he should not be allowed anything in discharge but what he proved; (6) in all cases not before directed where E. might be charged, pltf. to be discharged; (7) as to the accounts which pltf. had delivered to his successor, pltf.'s affidavit that he had so delivered should be sufficient.—MELLISH *v.* ROYAL AFRICAN CO. (1679), 2 Cas. in Ch. 11; 22 E. R. 822.

1295. Separate accounts for various transactions.]—An attorney procured money on mtge. for his client from other clients, & gave up to the client-mtgor. a bond, obtained from that client in respect of separate transactions between themselves, as part consideration of the mtge.:—*Held:* (1) there must be a separate account as to the mtge. transaction in order to clear the estates, the attorney being in possession as agent for the mtgees.; (2) the account must be confined to money actually advanced by the clients, the mtgees.; (3) the mtge. security must be cut down, as to the other alleged part of the consideration, which was referred to a general account between the attorney & the client-mtgor.—MORGAN *v.* LEWES, No. 1359, *post.*

Annotations:—Consd. Blagrave *v.* Routh (1856), 2 K. & J. 509. Foll. Gresley *v.* Mousley (1861), 3 De F. & J. 433.

1296. Only transactions concerning principal to be shown.]—In a suit by a principal against his agent, the latter was ordered on motion to produce books of account in his possession, relating to pltf.'s affairs, sealing up such parts as did not concern pltf., & pledging himself by affidavit to seal up

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PART VIII. SECT. 2, SUB-SECT. 3.—A. (b).

1296 i. *Only transactions concerning principal to be shown.*]—An agent for sale of a patent article who is entitled to use it in his own trade is not bound to account for the net profits of each job in which he so uses it, but only for the market value of the article itself as fixed by the patentee.—GILKISON *v.* RAMAGE & SON (1851), 1 Stuart, 88.—SCOT.

w. *Vouchers for payments necessary.*]—When an agent's account is being taken items of payment alleged to have been made by him cannot be passed without a voucher or a clear account of the facts.—FOX *v.* BENI PERSHAD KOER (1908), 3 C. W. N. 212.—IND.

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those parts alone.—GERARD *v.* PENSWICK (1818), 1 Swan. 533; 1 Wils. Ch. 222; 36 E. R. 494.

1297. ——.]—Deft. was agent to pltfs. for sale of patent ruffles according to the terms of agreement. Pltfs., believing deft. had violated these terms, filed a bill against him for an account, & took out a summons for the production of documents. Deft., by his affidavit, admitted possession & relevancy of the documents, & agreed to produce certain documents relating exclusively to transactions with pltfs., but declined to produce certain other documents on the ground that they contained the whole of his business transactions, except those contained in the documents he had agreed to produce. Pltfs. took out a further summons to produce the other documents:—*Held:* (1) deft. must be allowed to seal up names & addresses of his customers; (2) he was only bound to produce entries showing quantities & prices of goods sold.—HEUGH *v.* GARRETT (1875), 44 L. J. Ch. 305; 32 L. T. 45, C. A.

1298. Agreement not to give details of traveller's expenses.]—A written agreement between pltf. & his traveller provided for payment of travelling expenses of the latter, but did not lay down any mode in which they should be ascertained & stated. Before the agreement the traveller had been in the habit of stating after each journey those expenses as a gross sum, omitting all details, & this practice continued for some years after it:—*Held:* (1) a contract so to state & accept the amount of those expenses was to be implied from this course of conduct; (2) pltf. had no power to determine it during the stipulated term.—HUNTER *v.* BELCHER, No. 1348, *post.*

1299. Details which rent collector must give—All necessary details must be given.]—An agent employed by a testator to collect rents, & continued in that employment by his trustees after his death, furnished accounts showing only sums received & names of the tenants who paid them:—*Held:* the trustees entitled to require such an account, as would identify the particular properties from which rents arose.—FINCH *v.* BURDEN (1865), 12 L. T. 302.

(c) Admissibility of Charge and Credit Items in Accounts.

1300. Gratuities.]—*Qu.:* whether on taking accounts against a steward he will be allowed credit for gratuities on his statement in examination, without proof of payment, or giving particulars.

The order as signed & inrolled directed allowing of credit to deft. for gratuities, but this was omitted in the entering book in the registrar's office; hence the master made no allowance, but on exceptions to his report the allowance was made.—TREDCROFT *v.* WHITE (1671), 3 Rep. Ch. 72; 21 E. R. 732.

1301. Entertainment expenses.]—On an account being taken between pltfs. & one of their factors, general expenses incurred by the factor in entertainments were improperly included in the price of the goods, but were ordered to be allowed in the factor' accounts if *bonâ fide* expended & necessary for the affairs of pltfs., sums under £40 to be allowed on proof of payment by the factor's own oath.—EAST INDIA CO. *v.* BLAKE, No. 1663, *post.*

1302. Factor—Sales on credit.]—In an action of account against a factor, he shall not be allowed a sale upon credit, although the goods were *bonâ peritura;* for, without a special commission, a factor cannot sell goods of his principal, except for ready money.—ANON. (1676), 2 Mod. Rep. 100; 86 E. R. 964.

1303. Reasonable charges.]—Deft., a shipbroker, was pltf.'s agent in suing for & recovering a sum of money for damages done to pltf.'s ship, & recovered & received £2,000 for pltf.'s use, & paid him all but £40, which he retained for his labour & services, & which was found by the jury to be a reasonable allowance which he ought to retain:—*Held:* pltf. was not entitled to recover the £40.

This is an action for money had & received to pltf.'s use. Pltf. can recover no more than he is in conscience & equity entitled to, which can be no more than what remains after deducting all just allowances which deft. has a right to retain out of the sum demanded. This is not in the nature of a cross-demand or mutual debt; it is a charge, which makes the sum of money received for pltf.'s use so much less (LORD MANSFIELD).—DALE *v.* SOLLET (1767), 4 Burr. 2133; 98 E. R. 112.

Annotation:—**Distd.** *Re* Royal British Bank, *Ex p.* Banes (1857), 28 L. T. O. S. 296.

1304. Commission to sub-agent.]—Where a person employed to make purchases abroad on behalf of the Govt., for which he was to be paid *bonâ fide* commission by way of percentage on the amount, engaged mercantile men resident abroad to the advantage of the service, for which he allowed them to charge a percentage according to the usage of trade, which he treated as part of the prime cost in charging his own commission on his accounts:—*Held:* such percentage was not improperly charged to the Govt. or payable by him out of his own commission.—A.-G. *v.* LINDEGREN (1819), 6 Price, 287; 146 E. R. 811.

1305. Charges which will not be allowed.]—M., a partner with D. & B., acted as agent for P. & Co. till 1809; at which time a balance was due to M., & bills accepted by him were outstanding, & afterwards paid by the firm in which he was a partner. D., B., & M. were appointed under special contract, & acted as agents for P. & Co., from the time when M. ceased to be their agent, in 1809, until 1814. In taking the account between P. & Co. & D., B., & M.:—*Held:* (1) the accounts between P. & Co. & M. were properly excluded; (2) as these accounts were not liquidated nor capable of immediate liquidation, a debt from P. & Co. to M. could not be allowed in compensation (set-off) against a debt or balance owing from D. B. & Co. to M., if such debts could at all, by the law of Scotland, be set off against each other; (3) charges by an agent for printing documents, the effect of which is to save his personal labour in writing, ought not to be allowed in account with his principal; (4) a judgment ought not to be varied, nor a cause remitted, on account of improper charge of interest upon a balance, if of trifling amount, especially if there be omission to charge interest upon balances on the other side of the account.—DOWNE *v.* PITCAIRN (1829), 4 Bli. N. S. 550; 5 E. R. 196.

1306. Bill of costs.]—In a suit by a principal against his steward & agent, the decree, in conformity to the prayer of the bill, directed an account to be taken of rents, profits & timber-money received by deft. on pltf.'s account;

PART VIII. SECT. 2, SUB-SECT. 3.—A. (o).

1303 1. *Reasonable charges.*]—In account & reckoning between a trust & its factor, after twenty years of litigation, the factor was found indebted to the trust:—*Held:* the factor was entitled, as at the commencement of that period, to place to his credit the sum of £525 for personal trouble & remuneration, so as to stop the running of interest on the sums he was due to the trust.

Where great expense had been incurred in obtaining an accountant's report on a certain branch of the accounts, on which the factor was found wrong, although half the expense was thrown on the factor, as occasioned by the confused manner in which the accounts had been kept:—*Held:* the manager was entitled to professional assistance in making up his accounts, & the other half formed a proper charge against the trust.—PEDDIE *v.* BEVERIDGE (1860), 22 D. 707.—**SCOT.**

x. *Items admissible on credit side of account sales.*]—MAYEN *v.* ALSTON (1892), I. L. R. 16 Mad. 238.—**IND.**

& also directed the master, in taking accounts, to make all just allowances. Deft., a solr., had acted as such for pltf. during his stewardship; & bills of costs were due to him from pltf. The master, at pltf.'s request, taxed the bills, &, in taking accounts under the decree, included the reduced amounts of them amongst just allowances to which deft. was entitled. Pltf. excepted to the report on that account; & the ct. allowed the exceptions.—JOLLIFFE *v.* HECTOR (1841), 12 Sim. 398; 59 E. R. 1185.

Annotation :—**Refd.** Wilkes *v.* Saunion (1877), 7 Ch. D. 188.

1307. Charges not in accordance with usual course of dealing between principal & agent.]—Where an agent for sale of goods claimed an allowance in respect of warehousemen's salaries, no such claim having been made in the accounts for 14 years :—*Held :* the claim must be disallowed.—GRAY *v.* HAIG, HAIG *v.* GRAY, No. 1371, *post.*

Annotations :—**Consd. & Distd.** Stainton *v.* Carron Co. (1857), 24 Beav. 346. **Refd.** *Re* Whitehead, *Ex p.* Burnand's Exor. (1860), 2 L. T. 776.

1308. Usual charges.]—BARING *v.* STANTON, No. 1613, *post*

For full anns., *see* S. C. No. 1613, *post.*

1309. Company acting as agents—Charges for directors' services.]—A co. agreed with pltf. to manage, develop, & realise pltf.'s property, on terms under which the co. was to become entitled to one-third of the ultimate profit. In course of such management the co. paid a special salary to its secretary for keeping books of account of the property. The co. also (as the articles of assocn. allowed) (1) employed a firm of solrs., of which one of the directors was a member, to act professionally in connection with the property, & paid their bills of costs, including profit items; (2) employed another director, who was an estate agent, to manage at a salary the working of some sand & gravel pits; (3) employed another director, who was an auctioneer, to conduct the sales of the property at the usual commission. In an action for account brought by pltf. impeaching these disbursements :—*Held :* (1) on the true construction of the agreement the co. was bound to keep accounts at its own expense as part of the consideration moving from the co.; (2) the secretary's salary must be disallowed; (3) if the employment & remuneration were in other respects proper, payments made by the co. to the three directors ought not to be disallowed on the mere ground that the co. employed its own directors, who stood in no fiduciary relation to pltf. & were entitled to be paid remuneration for these services as between themselves & the co.—BATH *v.* STANDARD LAND CO., LTD., [1911] 1 Ch. 618; 80 L. J. Ch. 426; 104 L. T. 867; 27 T. L. R. 393; 55 Sol. Jo. 482; 18 Mans. 258, C. A.

(d) Agent's Accounts binding on himself.

1310. Agent bound by his own accounts.]—A., being agent for the grantor & grantee of an annuity, delivered an account to the grantee, by which it appeared that he, the agent, had received certain payments on account of the annuity; these payments, in fact, had not been received :—*Held :* the agent was bound by the account he had delivered, unless he could show he had given credit for those payments by mistake.—SHAW *v.* PICTON (1825), 4 B. & C. 715; 7 Dow. & Ry. K. B. 201; 4 L. J. O. S. K. B. 29; 107 E. R. 1226.

Annotations :—**Apld.** Shaw *v.* Dartnall (1826), 6 B. & C. 56. **Distd.** Pierce *v.* Evans (1835), 1 Gale, 265. **Apld.** Swan *v.* North British Australasian Co. (1862), 7 H. & N. 603. Cave *v.* Mills (1862), 7 H. & N. 913. **Refd.** Hume *v.* Bolland (1832), 1 Cr. & M. 130; Townsend *v.* Crowdy (1860), 8 C. B. N. S. 477. **Mentd.** Bate *v.* Lawrence (1844), 7 Man. & G. 405.

1311. ——.]—The paymasters of a military corps had given credit in account to an officer in that corps from Jan. 1, 1817, to Nov. 5, 1820, for increased pay, erroneously supposed to be granted by a general order of Aug. 27, 1806, to an officer of his situation, & a statement of that account was delivered to the officer in 1821. In Dec., 1816, the paymasters were informed by the Board of Ordnance that the increased pay granted by the order of 1806 would not be allowed to persons in the situation of the officer in question. The paymasters did not communicate this information to the officer until 1821, & subsequently to that time they continued to receive his pay. In an action brought by his personal representative to recover such pay :—*Held :* it was not competent to the paymasters to retain any of such sums of money on account of the sums which they had credited him for by way of increased pay, & which they had allowed him to consider his own for so long a period.—SKYRING *v.* GREENWOOD (1825), 4 B. & C. 281; 6 Dow. & Ry. K. B. 401; 107 E. R. 1064.

Annotations :—**Apld.** Bate *v.* Lawrence (1844), 7 Man. & G. 405; Parrott *v.* Anderson (1851), 7 Exch. 93; R. *v.* Treasury Lords, *Re* Queen Dowager's Annuity (1851), 20 L. J. Q. B. 305. **Expld.** Cave *v.* Mills (1862), 7 H. & N. 913. Having undertaken to render accounts the agent was bound to render them honestly & with reasonable skill & care, not with absolute accuracy but with no defect arising from fraud or negligence; the duty of care was as great as the duty of honesty & negligence as much a breach of duty as fraud in the rendering of the accounts ;—if *Skyring v. Greenwood* proves anything, it proves that (BRAMWELL, B.). **Consd.** Miles *v.* Scotting (1885), Cab. & El. 491. **Distd.** R. *v.* Blenkinsop, [1892] 1 Q. B. 43. **Consd.** Deutsche Bank, London Agency *v.* Beriro & Co. (1895), 73 L. T. 669, C. A.; Baker *v.* Courage (1909), 101 L. T. 854. **Refd.** Higgs *v.* Scott (1849), 7 C. B. 63; Townsend *v.* Crowdy (1860), 8 C. B. N. S. 477; Swan *v.* North British Australasian Co. (1862), 7 H. & N. 603; De Cordova *v.* De Cordova (1879), 4 App. Cas. 692, P. C.; Daniell *v.* Sinclair (1881), 6 App. Cas. 181, P. C. **Mentd.** Vagliano *v.* Bank of England (1889), 5 T. L. R. 489, C. A.

1312. —— Except in certain circumstances.]—An agent's account, in which he charges himself with sums received, is not conclusive against him as to the fact of those receipts. The account may be opened to let in the fact of the sums not having been received, in the following cases : (1) if the account, on the face of it, discloses that the money has not been actually received; (2) if the principal shows by his conduct he knows the money has not been actually received; (3) if the principal does not express his dissent to a subsequent correction of the account by the agent, in which correction he relieves himself from the sum with which he had previously charged himself.—SHAW *v.* DARTNALL (1826), 6 B. & C. 56; 9 Dow. & Ry. K. B. 54; 5 L. J. O. S. K. B. 35.

Annotations :—**Distd.** Shaw *v.* Woodcock (1827), 7 B. & C. 73; Hume *v.* Bolland (1832), 1 Cr. & M. 130; Garnett *v.* M'Kewan (1872), 42 L. J. Ex. 1. **Refd.** Swan *v.* North British Australasian Co. (1862), 7 H. & N. 603.

1313. —— Unless contrary proved.]—If an agent credits his principal for money received, it will be concluded it has been received until the contrary shall be proved.

The agent for the grantee of several annuities delivered him four accounts in 18 months, & gave him credit for all half-yearly instalments of the

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PART VIII. SECT. 2, SUB-SECT. 3.—A. (d).

1310 i. *Agent bound by his own accounts — Representatives & sureties of deceased agent not bound.*]—Pltfs. sued for the recovery of money due on a promissory note executed by their deceased agent S. in their favour after settlement of accounts for the sum due to them. Defts., brothers of S., were sued both in their character as representatives in interests of S. & as sureties for him under a surety bond executed by them in favour of pltfs. Defts. disputed the amount due & claimed as set-off the amount payable by pltfs. to their brother on account of salary :—*Held :* the rule that settled accounts as between principal & agent will not be re-opened, unless fraud or undue influence is established, is applicable only as between principal & agent, & defts. were entitled to re-open accounts.—KALAND SINGH *v.* GIR PROSAD DAS 1913), 17 C. W. N. 1060.—**IND.**

Sect. 2.—Principal's rights against agent: Sub-sect. 3, A. (d), (e) & (f).]

several annuities then due, but stated that some of them had not been received. He charged commission on all instalments, & paid the balance of the accounts as if they had been received, & in the later accounts never brought forward those sums, nor intimated that he expected them to be repaid. Upon a bill of exceptions :—*Held :* upon this evidence, it was a proper direction that the jury might infer an agreement whereby the agent made himself personally responsible for payment of those annuity instalments in default of payment by the grantors.—SHAW *v.* WOODCOCK (1827), 7 B. & C. 73 ; 9 Dow. & Ry. K. B. 889 ; 5 L. J. O. S. K. B. 294 ; 108 E. R. 652.

Annotations :—**Refd.** Wakefield *v.* Newbon (1844), 6 Q. B. 276 ; Oakes *v.* Hudson (1851), 20 L. J. Ex. 284.

1314. —— Agent not bound by showing balance to appropriate subsequent payments.]—Where an account is delivered by an agent in which he charges himself with a balance, & he continues to receive moneys for his principal, his subsequent payments are not necessarily to be first applied to the extinction of the previous balance, where the subsequent receipts are equal to the subsequent payments.—LYSAGHT *v.* WALKER (1831), 5 Bli. N. S. 1 ; 2 Dow & Cl. 211 ; 5 E. R. 208, H. L.

For full anns., *see* GUARANTEE.

1315. —— Except when mistake made by agent.]—Deft., a sharebroker, bought for pltf., also a sharebroker, shares in the S. S. Ry., & sent to him an account debiting him with only the premium, not the deposit, though deft. had paid both. Afterwards deft. sold the same shares for pltf. & sent him an account crediting him with a sum made up of both principals, & debited or credited them at the prices charged as above to himself on the purchase & sale by deft. :—*Held :* deft. was not precluded from charging pltf. with the deposit on the first transaction, but, upon pltf. bringing *assumpsit* for a balance, might set off such deposit.

Deft. bought also for pltf. shares in the T. & D. Ry. which then were only unissued scrip, so that no deposit was payable. By the custom of the market (Liverpool), the price did or did not include the deposit according as the scrip had issued or not ; & the published share lists showed how that was. Deft., before the scrip issued, sent pltf. bought & sold notes, stating the price without the deposit ; but he daily sent pltf. the share lists. After the scrip issued deft. paid the deposit ; but he still omitted in accounts afterwards sent to debit pltf. with the deposit. Pltf. had made these purchases for his own principals ; & he debited them at a price not including the deposit ; but whether the contract as between him & the principals was a time bargain, or shares were actually delivered, did not appear :—*Held :* deft. was not, upon either supposition, precluded from charging for the deposit, & setting off, as in the former case.—DAILS *v.* LLOYD (1848), 12 Q. B. 531 ; 5 Ry. & Can. Cas. 572 ; 17 L. J. Q. B. 247 ; 11 L. T. O. S. 327 ; 12 Jur. 827 ; 116 E. R. 967.

Annotations :—**Apld.** Townsend *v.* Crowdy (1860), 8 C. B. N. S. 477. **Refd.** Bayley *v.* Wilkins (1849), 7 C. B. 886.

1316. ——.]—An agent appropriating, in his accounts with his principal, sums received to the payment of specific items, is estopped from disputing payment of those items.

Where the agents of a foreign ship furnished coals to the ship on several voyages, & the accounts were balanced & settled :—*Held :* they were estopped from appropriating receipts to a previous agency account for the ship, & suing the ship for coals as necessaries supplied & unpaid for.—THE WEST FRIESLAND (1860), Sw. 456 ; *sub nom.* THE TWENTJE, 13 Moo. P. C. C. 185 ; 2 L. T. 613 ; 8 W. R. 423 ; 15 E. R. 70.

Annotations :—**Refd.** Foong Tai *v.* Buchheister, [1908] A. C. 458, P. C. ; The El Salto (1908), 25 T. L. R. 99. **Mentd.** The Underwriter (1868), 25 L. T. 279 ; The Riga (1872), L. R. 3 A. & E. 516 ; The Rio Tinto (1884), 9 App. Cas. 356, P. C. ; The Heinrich Bjorn (1885), 10 P. D. 44, C. A. ; The Heinrich (1886), 11 App. Cas. 270.

1317. ——.]—An agent, who managed the money matters & investments of his principal, rendered accounts charging interest on mtges. as received, & representing there were no arrears. He also paid over balances appearing due on such accounts :—*Held :* (1) the agent could not, on the death of the principal, charge his estate with interest, on the plea that it had not been actually received from the mtgors., but had been advanced by the agent to the principal for his accommodation ; (2) he was allowed to use the name of the representatives of the principal to recover what might be due from mtgors. on giving an indemnity.—OWENS *v.* KIRBY (1861), 30 Beav. 31 ; 54 E. R. 799.

1318. ——.]—Pltf., a surveyor of turnpike roads, rendered annual accounts to the trustees of moneys received, & also of moneys expended by him in repairs of roads for 1856, 1857, & 1858, each of which accounts, after giving credit for his yearly salary, showed a balance due to himself. These accounts were received, passed & settled by the trustees in the belief that they were correct, but in point of fact pltf. had expended more money in such repairs in each year than he had charged in such accounts. On rendering his account for 1859 & being challenged by the trustees as to its correctness, he acknowledged it was incorrect, & that he had laid out more money than he had charged therein, & he thereupon claimed payment from the trustees of the sums omitted in such last-mentioned account, as well as of those omitted in the accounts for the previous years, but the trustees refused to pay him either, & did not pass the account for 1859. There was no actual fraud in fact contemplated by pltf., who knowingly omitted the items, partly through negligence, partly to avoid complaints from the trustees & in the expectation of their being in better funds in future years. On an action by pltf. against the trustees, through their clerk, to recover the omitted items :—*Held :* (1) pltf. was not entitled to recover in respect of sums kept out of the accounts before 1859, on the broad principle that a man shall not be allowed to "blow hot & cold," to affirm at one time & deny at another, making a claim on those whom he has deluded to their disadvantage, & founding that claim on the very matters of delusion ; (2) that principle did not apply to the account for 1859 ; (3) pltf. ought to recover for the sums really & properly expended by him in that year.—CAVE *v.* MILLS (1862), 7 H. & N. 913 ; 31 L. J. Ex. 265 ; 6 L. T. 650 ; 8 Jur. N. S. 363 ; 10 W. R. 471.

1315 i.——*Except when mistake made by agent.*]—On termination of deft.'s agency for pltf., he gave her $125 in cash & a note for $253, in consideration of the assignment by her to him of all debts due in respect of the property managed by deft. during the period of the agency. Deft. refused payment of the note on the ground of the discovery subsequent to making it that $100 less was due in respect of the assigned debts than deft. supposed. Deft.'s attorney had knowledge at the time the note was given of the sum actually due :—*Held :* the mistake was not an efficient cause of the settlement ; & pltf., who was not accessory to the mistake, was entitled to recover on the note. WORRALL *v.* PETERS (1902), 35 N. S. R. 26 ; 32 S. C. R. 52. **CAN.**

1315 ii. ——.] Accounts between a principal & agent were rendered half-yearly & the balances found discharged : on the agent resigning an account was rendered, which the principal disputed, alleging disbursements included in it had been incurred in periods of former accounts. *Held :* the action was relevant as it was not excluded by the doctrine of filed accounts, though a heavy *onus* was on pursuer of showing disbursements were not covered by previous accounts.—STRUTHERS *v.* SMITH (1913), 2 S. L. T. 155.—**SCOT.**

1319. Affidavits not generally admitted to discharge agent.]—Affidavits of an accounting party are not receivable to discharge him as to items of account above the sum of 40*s.*, according to the ordinary rule in ordinary circumstances, but they may in special circumstances. These ought to be stated by the master, as a ground for reception of affidavits. The same rule applies in case of books of account. They will not be received to discharge a party who kept them, though they will for the purpose of charging him, even though they were open to inspection of parties to whom the account is to be rendered, & have been all along in their keeping. In special circumstances they may be received to discharge the accounting party, but the master must state what the special circumstances are.—GAS LIGHT & COKE CO. *v.* SYMONDS (1848), 12 L. T. O. S. 238.

1320. Agent cannot surcharge & falsify his own accounts.]—M. brought an action against his agent C., alleging generally that he had falsified certain accounts, & they were then open. C. pleaded that the accounts were settled, & asked for specific statements of falsification. The ct., having held the accounts were settled & C. was entitled to costs of hearing, gave leave to M. to amend his pleadings within 14 days by stating specific items which were false:—*Held:* C. had no right to surcharge or falsify & could not be allowed to insert any items in the accounts in his own favour which were not included in them.—MOZELEY (MOZLEY) *v.* COWIE (1877), 47 L. J. Ch. 271; 38 L. T. 908; 26 W. R. 854.

(e) Where the Right arises.

1321. Factor.]—The remedy against a factor is account, but if he converts, trover lies.—ANON. (1701), 12 Mod. Rep. 514; 88 E. R. 1487.

1322. —— Guarantor of, not entitled.]—A. guaranteed payment of all purchases made by B., a factor in England, for C., a merchant abroad, subject to approval of D., C.'s agent:—*Held:* A., being simply paymaster or guarantor for C., could not maintain a bill for an account against B., unless he stated a case of collusion between B. & D.—DARTHEZ *v.* LEE & LAMA (1835), 2 Y. & C. Ex. 5; 5 L. J. Eq. 73.

1323. Broker.]—An action of *assumpsit* cannot be maintained on a running account between merchant & broker, the proper remedy at law being an action of account.—SCOTT *v.* M'INTOSH (1809), 2 Camp. 238.

Annotation:—**Refd.** Tomkins *v.* Wiltshire (1814), 1 Marsh. 115.

1324. Confidential agent.]—Where a confidential agent had been in possession of estates since 1780, without giving any account to his principal, residing in Ireland:—*Held:* an account must be directed.—ORMOND (LADY) *v.* HUTCHINSON (1809), 16 Ves. 94; 33 E. R. 919.

Annotation:—**Refd.** Tomson *v.* Judge (1855), 3 Drew, 306.

1325. ——.]—An action of account will not lie against the representative of a confidential agent, who has never been called on to account by his employer; but if the employer can show that moneys have been received by such agent & not accounted for, or that such agent has appropriated to his own purposes his employer's money, his remedy must be debt for ascertained defalcation, or *assumpsit* on the agent's implied promise, for damages to that amount, on such breach of duty.—ERMATINGER *v.* AUGUSTUS (1844), 4 L. T. O. S. 189.

1326. Agent for sale.]—A bill for an account will lie, by the principal, against an agent employed to sell goods for him.—MACKENZIE *v.* JOHNSTON (1819), 4 Madd. 373; 56 E. R. 742.

Annotations:—**Distd.** Phillips *v.* Phillips (1852), 9 Hare, 471. **Apld.** Williams *v.* Trye (1854), 18 Beav. 366. **Consd.** Shepard *v.* Brown (1862), 4 Giff. 208. **Apld.** Makepeace *v.* Rogers (1865), 4 De G. J. & Sm. 649. **Refd.** Lees *v.* Laforest (1851), 14 Beav. 250. **Mentd.** Pearce *v.* Creswick (1843), 2 Hare, 286.

1327. Foreign agent.]—Pltfs. appointed A., B., & C. their foreign agents; A. retired, & pltfs. appointed B., C., & D. agents. The transactions being separate:—*Held:* a bill for an account of the two agencies was multifarious as regarded A. *Semble:* if the dealings had not been separate, but a mere continuation, the decision would have been otherwise.—BENSON *v.* HADFIELD (1842), 5 Beav. 546; 12 L. J. Ch. 89; 49 E. R. 690.

(f) Jurisdiction and Procedure in Actions for Account.

1328. When action lies in equity.]—The case being very much entangled, & the transactions of long standing, the ct. chose rather to dismiss the bill, & leave pltf. to his action at law, than direct an account before the master.—STURT *v.* MELLISH (1743), 2 Atk. 610; 26 E. R. 765.

For full anns., *see* TRUSTS & TRUSTEES.

1329. —— Bare relationship of agency insufficient.]—The bare relation of principal & agent is not sufficient to entitle the former to relief in equity, if the account can be fairly tried at law.—KING *v.* ROSSETT (1827), 2 Y. & J. 33.

Annotations:—**Consd. & Distd.** Bowles *v.* Orr (1835), 1 Y. & C. Ex. 464. **Dbtd.** Makepeace *v.* Rogers (1856), 5 New Rep. 399.

1330. —— ——.]—An author agreed with a publisher for the publication of 500 copies of his work. The work was published & an account rendered, presenting no intricacy. After action brought by the publisher for the balance, a bill was filed by the author to have the account taken in equity, specifying no error & alleging no fraud. A demurrer was allowed.—BARRY *v.* STEVENS (1862), 31 Beav. 258; 35 L. J. Ch. 785; 6 L. T. 568; 9 Jur. N. S. 143; 10 W. R. 822; 54 E. R. 1137.

1331. —— —— Unless pecuniary relation existing.]—Eq. Cts. have concurrent jurisdiction with cts. of law in matters of account. In cases of principal & agent the cts. will entertain a bill by a principal against his agent, because discovery is usually sought for in such a case, & there is a pecuniary relation existing between them; but where a principal, taking a balance of account to be as stated by the agent, brings an action to recover it, the cts. will not, at the instance of the agent alleging an

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PART VIII. SECT. 2, SUB-SECT. 3.—A. (f).

z. *When action lies — How far barred by illegality.*]—The general rule that persons who enter into dealings forbidden by law must not expect any assistance from the law is not applicable to exonerate an agent from accounting to his principal by reason of past unlawful acts or intentions of the principal collateral to the agency. If money is paid to him in respect of an illegal transaction, he is bound to account for it to his principal, provided that the contract of agency is not itself illegal.—DE LAVAL SEPARATOR CO. *v.* WALWORTH (1908), 7 W. L. R. 395; 13 B. C. R. 295.—**CAN.**

1328 i. *When action lies in equity.*]—Account in equity can be had by a principal from the agent for the principal's money in the agent's hands, & a bill will lie for an account as between principal & agent. *Semble:* fraud may be sufficiently stated in a bill by allegations of pretence, & information & belief, merely.—HOFER *v.* SILBERBERG (1877), 3 V. L. R. 125.—**AUS.**

a. *Burden of proof — When shifted to agent.*]—In a suit by a principal against an agent for an account, on the fact of agency being established it is the duty of the ct. to direct an account to be taken of deft.'s dealings as agent. When once pltf. has shown that deft. is an accounting party, it is then for deft. to prove the amount of his receipts & disbursements. *Hurronath Roy Bahadoor* v. *Krishna Coomar Bukshi*, L. R. 13 Ind. App. 123, & *Ram Das* v. *Bhagwat Das*, [1905] W. N. 1, refd.—RAGHUNATH *v.* GANPATJI (1905), I. L. R. 27 All. 374.—**IND.**

Sect. 2.—*Principal's rights against agent: Sub-sect.* 3, *A.* (*f*) *& B.* (*a*) *&* (*b*).]

unsettled account of which the balance was part, but which latter fact was distinctly denied by the principal in his answer, restrain an action at law.—DIROM *v.* COOK (1851), 18 L. T. O. S. 165.

1332. —— ——.]—A bill for an account by a principal against his agent in the matter of a single transaction, & not tainted with fraud, cannot be sustained in equity; pltf. in such a case having his remedy by action at law.—NAVULSHAW *v.* BROWNRIGG (1852), 2 De G. M. & G. 441; 21 L. J. Ch. 908; 20 L. T. O. S. 25; 16 Jur. 979; 42 E. R. 943.

Annotations:—**Apprvd.** Gobind Chunder Sein *v.* Ryan (1861), 15 Moo. P. C. C. 230, P. C. **Consd.** Jewan *v.* Whitworth (1866), L. R. 2 Eq. 692; Portalis *v.* Tetley (1867), L. R. 5 Eq. 140; MOXON *v.* Bright (1869), 4 Ch. App. 292; Kaltenbach *v.* Lewis (1885), 10 App. Cas. 617, H. L.

1333. —— —— **Unless agent in fiduciary position.**]—Where the relation between a principal & agent partakes of a fiduciary character, an Eq. Ct. has jurisdiction, & will direct an account, though receipts & payments are all on one side.—HEMINGS *v.* PUGH (1863), 4 Giff. 456; 9 L. T. 283; 9 Jur. N. S. 1124; 12 W. R. 44; 66 E. R. 785.

Annotations:—**Refd.** Makepeace *v.* Rogers (1865), 5 New Rep. 399. **Mentd.** Flockton *v.* Peake (1864), 12 W. R. 464.

1334. ——.]—In the absence of special circumstances, such as an account settled, or a release given, a bill for an account lies in equity by a principal against his agent, the fiduciary character of the relation between the parties being sufficient to support the bill, it being unnecessary to allege fraud or misrepresentation.

A bill by a landowner & principal against his receiver & agent alleged receipt by the latter of rents, purchase-moneys of real estates, & dividends on stock & shares, & charged possession of documents belonging to the principal. An account & delivery of the documents were prayed. A demurrer to the bill was overruled.—MAKEPEACE *v.* ROGERS (1865), 4 De G. J. & Sm. 649; 5 New Rep. 499; 34 L. J. Ch. 396; 12 L. T. 221; 11 Jur. N. S. 314; 13 W. R. 566; 46 E. R. 1070, C. A.

Annotation:—**Distd.** St. Aubyns *v.* Smart (1867), L. R. 5 Eq. 183.

1335. ——.]—An action having been brought for wages by a toller or agent of tin mines against his principal, the lessee of the mines, a bill for an account & an injunction to restrain the action was filed by deft. at law. After answer put in admitting unadjusted accounts:—*Held:* the question might be decided & accounts taken in an Eq. Ct.—CREASE *v.* PENPRASE (1837), 7 L. J. Ex. Eq. 8; 1 Jur. 840.

1336. —— **Agent charged with neglect.**]—*Qu.:* whether a principal can sustain a bill against his agent for anything more than a mere account; & if it is sought to charge an agent with default & neglect in managing his principal's property, that is the proper subject of an action at law, & not of a bill in equity.—HUTCHINGS *v.* BATSON (1843), 1 L. T. O. S. 410.

1337. —— **How far illegality of transaction bars action.**]—WILLIAMS *v.* TRYE, No. 1592, *post.*

1338. Common law jurisdiction—Present practice.]—An order that an account be taken may be made, & the account taken, in Q. B. Div.—YORK *v.* STOWERS (1883), Bitt. Rep. in Ch. 2.

1339. Parties—Who should be joined as.]—A. shipped goods from Cadiz for B., in Flanders, & received payment from B.; Flanders being occupied by th French, the ship entered an English port, & C., being agent for the shipowners, & acting & holding himself out also as agent for persons interested in the cargo, possessed himself of the cargo, sold it, & retained proceeds. Upon a bill filed by the representatives of B. against C. for an account:—*Held:* (1) A. ought not to be made a party to such a bill; (2) as C. was agent of the shipowners, it was not necessary to make them, or the captain, parties to such bill, in respect of freight due on B.'s share of the cargo.—MOONS *v.* DE BERNALES (1822), 1 L. J. O. S. Ch. 53.

1340. —— **All necessary parties to be joined.**]—On a bill filed by the assignee of R. & Co. against D. & Co. for an account of moneys received by D. & Co. on account of R. & Co. as their correspondents & agents:—*Held:* (1) it was not enough to state that persons, who in respect of interest were necessary parties, were out of jurisdiction: (2) the bill must go on to pray process against them, for one reason, that they might have an opportunity of appearing to the suit & taking, as parties, what course in it they deemed most for their advantage.—MUNOZ *v.* DE TASTET (1826), 1 Beav. 112; 4 L. J. Ch. 97; 48 E. R. 881.

Annotation:—**Folld.** Taylor *v.* Fisher (1835), 4 L. J. N. S. Ch. 95.

1341. Costs.]—In a suit praying accounts against an agent the ct. will not at the hearing, except in an extreme case, direct payment of costs up to the hearing, but will reserve the question of costs till further directions.—JELLICOE *v.* PRICE (1841), 1 Y. & C. Ch. Cas. 74; 62 E. R. 796.

1341 i. *Costs.*]—A principal filed a bill for an account against his agent, who alleged by his answer that the principal was indebted to him. A balance being found against the agent of $282, the ct. ordered him to pay the costs of the suit.—SMITH *v.* HENDERSON (1870), 17 Gr. 6.—**CAN.**

1341 ii. —— *Requests for account disregarded.*]—Where an agent had disregarded requests for an account & had filed an improper account in a suit against him for an account:—*Held:* he must pay the costs of the suit.—SIMONDS *v.* COSTER (1906), 3 N. B. Eq. 329; E. L. R. 544—**CAN.**

1341 iii. —— *Accounts kept in confused manner.*]—Where an agent has kept his accounts in a confused manner, his exor. must pay the costs of the suit.—NORBURY *v.* CALBECK (1818), 2 Moll. 461.—**IR.**

b. *Decree.*] — The decree in a suit against a land agent will not direct an account of what he might, without wilful default, have received, unless a special case be made by the petition & proved.—BROOKE *v.* ELLIOTT (1857), 6 I. Ch. R. 310; 2 Ir. Jur. 362 (R.).—**IR.**

c. —— *No power to set aside agreement.*]—In a suit between principal & agent, upon an agreement by which the agent was to receive a commission of 20 per cent. on all sales of real estate, the decree directed the master to take certain accounts, & ordered the agent to pay into ct. any balance found due by him, "less deft.'s commission of 20 per cent.":—*Held:* the master had no jurisdiction to set aside the agreement.—VIVIAN *v.* SCOBLE (1883), 1 M. R. 125.—**CAN.**

d. *Pleading.*]—Bill against agent & receiver of pltf., praying account of sums received in each of several years, & of the names of the payers:—*Held:* an answer setting forth in the schedule the names, sums, & denominations of land, & repeating them for each year, was prolix & impertinent.—USHER *v.* MOORE (1833), I. L. R. N. S. 219.—**IR.**

e. —— *Allegation of wilful default.*]—To justify the ct. in decreeing an account for wilful default against a land agent, some instance of wilful default must be specified in the petition, & proved at the hearing. That rule is not satisfied by a reference in the petition to accounts furnished by the agent, which show remission of rents by him, though there is evidence establishing that the remission was wrongful.—PENNEFATHER *v.* BOLTON (1863), 14 I. C. R. 335; 8 Ir. Jur. 221, C. A.—**IR.**

f. —— ——.]—In an action by a principal against an agent, claiming an account of all moneys received by deft. on account of pltf., or which might have been received by deft. but for his wilful default, the question of wilful default ought not in general to be reserved, but should be disposed of at the hearing; & if no wilful default is then proved the ct. will dismiss the action, so far as it is an action for wilful default, & grant the usual account between principal & agent.—BOYLAN *v.* CUSACK (1890), 25 L. R. Ir. 269.—**IR.**

g. —— *Sum admitted to be due.*]—In a suit by a principal against his agent for an account, a sum admitted by answer to be due will be ordered to be paid into ct.—BLAKE *v.* COMINS (1849), 1 I. R. Jur. 330.—**IR.**

1342. Interlocutory order—When made.]—Pltfs., trustees of a will, filed a bill against their agent for the purpose of carrying out the trusts of the will, praying for an account of trust moneys received by him, & for delivery up to them of securities, etc., belonging to the trust property. An order for an account, & for delivery to pltfs. of securities, etc., was made before hearing on motion of pltfs., they appearing to be entitled to such account & delivery of securities upon admissions of fact in the answer.—RUMSEY *v.* READE (1876), 1 Ch. D. 643; 45 L. J. Ch. 489; 33 L. T. 803; 24 W. R. 245; 3 Char. Pr. Cas. 351.

B. Principal's Right to have settled Accounts opened.

(a) When Accounts are deemed to be settled.

1343. Accounts must be approved by principal himself.]—Deft. was factor of pltfs. at J. in India. His accounts were examined & allowed by the factory at J., & again by the chief factory at B., but on being sent to pltfs. were excepted to in writing by pltfs., & sent back to the chief factory at B. to be re-examined. The chief factory at B., having again considered them, rejected the exceptions & allowed the accounts. To a claim for an account deft. objected to answer on the ground that the accounts had been settled:—*Held:* (1) nothing could discharge deft. but a release or discharge from pltfs., since otherwise their agents by mutual connivance might ruin them; (2) deft. must answer.—EAST INDIA CO. *v.* MAINSTON (1676), 2 Cas. in Ch. 218; 22 E. R. 918.

1344. What amounts to approval of accounts.]—If a merchant keeps an account current for 2 years without objection, it is considered as a stated account.—TICKEL *v.* SHORT (1751), 2 Ves. Sen. 239; 28 E. R. 154.

1345. ——.]—Insurance brokers holding a policy for the purpose of adjusting a loss, suffered an underwriter's name to be struck out upon his signing the adjustment: he gave them credit in his books for the loss, & became bkpt., but they never took credit for the amount in their books. On the contrary, they gave the assured notice of bkpcy., & there was afterwards a settlement of accounts between the brokers & the assured comprehending the policy in question, in which no demand was made upon them in respect of bkpt.'s subscription:—*Held:* they were not liable to the assured for the sum due from bkpt. on the policy.—OVINGTON *v.* BELL (1812), 3 Camp. 237.

1346. ——.]—If a public board enters into an express contract, in distinct terms, with a person of competent ability, for undertaking a difficult & hazardous state enterprise, & performance of confidential service under the Govt., on behalf of the public, in consideration of a stipulated remuneration by way of commission on the prime cost of purchases made by him, the ct. will not (on an official information filed against him by the A.-G. after his accounts have been allowed by the public office) entertain any question involving merely the propriety or prudence of the contract itself or excess of the remuneration agreed to be paid to the individual for performance of the particular service.

The mere passing of the accounts of a public officer by auditors of the department under which he has been employed does not preclude the ct. (in a proper case) from decreeing an account in respect of allowances contrary to reason & equity & not brought to the notice of the Board when his accounts were passed. Where the public functionary had received gratuities & presents from foreign agents on the amount of their commission equal to 1 per cent. he was ordered to refund the whole, notwithstanding that practice was also proved to be usage of the trade; the custom being contrary to reason & equity, & subservient to fraud, & the fact not having been brought before the Board when the accounts were passed.—A.-G. *v.* LINDEGREN, No. 1304, *ante*.

1347. ——.]—MOZELEY *v.* COWIE, No. 1320, *ante*.

1348. ——.]—Although accounts rendered & not objected to are not of necessity to be considered as settled, yet they will be so treated where they have been entered in the books of persons to whom they were rendered, & balances shown upon them have been paid.—HUNTER *v.* BELCHER (1864), 2 De G. J. & Sm. 194; 10 L. T. 548; 10 Jur. N. S. 663; 12 W. R. 782; 46 E. R. 349, C. A.

1349. ——.]—Pltf. was the commercial agent of the East India Co. at Amboyna. It was his duty to send his account to J., the co.'s agent at Banda, to examine & transmit to the Governor of Madras. On pltf.'s accounts there appeared a balance of 1,325 dollars against him, but on reference to accounts kept by J. of the same transactions, instead of a deficiency, 4,771 dollars appeared due to pltf. The co. then allowed the 1,325 dollars only:—*Held:* this was not a sufficient admission & recognition of the correctness of J.'s accounts, so as to entitle pltf. without further evidence to the 4,771 dollars.—FARQUHAR *v.* EAST INDIA CO. (1845), 8 Beav. 260; 50 E. R. 102.

1350. Accounts deemed settled though item reserved.]—A Calcutta firm & its English agent agreed to strike a balance in respect of disputed accounts, reserving one considerable item for future investigation:—*Held:* the transaction amounted to an adjustment & the accounts could not be reopened in the absence of fraud.—MCKELLAR *v.* WALLACE (1853), 8 Moo. P. C. C. 378; 5 Moo. Ind. App. 372; 1 Eq. Rep. 309; (1854), 22 L. T. O. S. 309; 14 E. R. 144, P. C.

Annotation:—**Distd.** Perry *v.* Attwood (1856), 6 E. & B. 691.

(b) Opening of settled Accounts.

1351. Circumstances in which accounts opened—Gift accepted by agent from principal.]—Securities taken by an attorney from his client during the time of their connection as such for a present, the balances of accounts settled for money lent & laid out, costs, & business done, & the price of a horse sold, void as to the present; & pltf. submitting to pay what should be actually due, the accounts were opened as to the whole; the horse being sold soon after he was purchased from the attorney for a price much less than was then stipulated, an inquiry into his value was directed.—NEWMAN *v.* PAYNE (1793), 2 Ves. 199; 4 Bro. C. C. 350; 30 E. R. 593.

Annotations:—**Distd.** Booth *v.* Creswicke (1844), 13 L. J. Ch. 217. **Refd.** Lewis *v.* Morgan (1796), 3 Anst. 769; Langstaffe *v.* Taylor (1807), 14 Ves. 262; Lupton *v.* White (1808), 15 Ves. 432; Wood *v.* Downes (1811), 18 Ves. 120.

1352. —— Errors & overcharges.]—The ct., instead of giving liberty to surcharge & falsify, opens accounts, although extending over

PART VIII. SECT. 2, SUB-SECT. 3.—B. (a).

1344 i. *What amounts to approval of accounts.*]—Accounts were delivered in 1862 & 1865 by an agent to his principal, & the confidential relationship existed for two years after the latter account had been rendered:—*Held:* these accounts were not stated accounts.—SMITH *v.* REDFORD (1872), 19 Gr. 274.—**CAN.**

PART VIII. SECT. 2, SUB-SECT. 3.—B. (b).

1352 i. *Circumstances in which accounts opened—Errors & overcharges.*]—Legal proceedings between an agent & client were terminated by an agreement that a certain balance was due to the agent. In an action of count & reckoning against the agent:—*Held:* accounts could not be re-opened so as to diminish that balance except so far as errors of calculation or clerical blunders could be shown, although the accounts were alleged to contain overcharges & mistakes.—COLVIL *v.* JAMESON (1839), 1 D. 526.—**SCOT**

Sect. 2.—Principal's rights against agent: Sub-sect. 3, B. (b), C. & D.]

a great number of years, & closed for a long period, (1) where errors are shown in them to a considerable extent, both in amount & number of items; (2) where, assuming fiduciary relations to exist between parties, errors to a less considerable extent are shown; (3) where fiduciary relations existing, one or more fraudulent insertions or omissions in the account are shown. A fraudulent overcharge is an overcharge deliberately made, which the man making it must know to be an overcharge. *Semble:* in an action between principals & agents impeaching the agents' accounts, actual knowledge of antecedent fraud in the agents by one who subsequently became a member of the firm of the principals would not, if proved, be a bar to their claim.—WILLIAMSON *v.* BARBOUR (1877), 9 Ch. D. 529; 50 L. J. Ch. 147; 37 L. T. 698; 27 W. R. 284, n.

Annotations:—**Distd.** Ward *v.* Sharp (1884), 53 L. J. Ch. 313. **Consd.** Arnold & Butler *v.* Bottomley, [1908] 2 K. B. 151, C. A. **Reid.** Gething *v.* Keighley (1878), 9 Ch. D. 547; Emma Silver Mining Co. *v.* Grant (1880), 29 W. R. 481; Hyman *v.* Helm (1883), 24 Ch. D. 531; Mutrie *v.* Binney (1887), 56 L. T. 455, C. A.; *Re* Webb, Lambert *v.* Still, [1894] 1 Ch. 73, C. A.; The Pongola (1895), 73 L. T. 512; Stubbs *v.* Slater, [1910] 1 Ch. 195.

1353. —— Undue influence.]—An account which had been settled between a client & her solr., including arranged bills of costs, was ordered to be opened, & the bills of costs taxed, after the lapse of nearly two years, without actual proof of error or overcharge, on the ground that the client had acted under undue influence & without sufficient information, & that much of the business charged for was unnecessary & improper.—WATSON *v.* RODWELL (1878-9), 11 Ch D. 150; 48 L. J. Ch. 209; 39 L. T. 614; 43 J. P. 542; 27 W. R. 265, C. A.

1354. —— —— Pecuniary pressure & no independent advice.]—Accounts between a mtgee.-solr. & his client, the mtgor., stated & signed more than 30 years ago, were opened on the grounds (1) the client had no independent advice, & signed without examination or explanation, (2) the accounts contained improper items, & (3) a third person was put forward as mtgee. Agreements giving the solr., the mtgee. of a colliery, commission on sales of coke & coal were set aside, & agreements giving him lump sums as commission in the purchase of additions to the colliery were directed to stand for what it should be found on inquiry ought to be allowed, on the ground that such agreements were obtained from the client under pecuniary pressure & without independent advice.—WARD *v.* SHARP (1884), 53 L J. Ch. 313; 50 L. T. 557; 32 W. R. 584.

1355. —— Pressure — Independent advice — Lapse of time.]—When it was alleged that the agent of the former owner of estates devised to pltf. had, within a few days after the decease, obtained a conveyance of part of the property, in discharge of a settled balance alleged to be due to him, & had obtained it by asserting that he had a secret whereby pltf.'s title might be impeached, but pltf. had under legal advice acquiesced & confirmed the transaction, & after the lapse of more than fifteen years sought to open the accounts on the ground of fraud:—*Held:* the bill should be dismissed—DE MONTMORENCY *v.* DEVEREUX (1840), 7 Cl. & Fin. 188; West, 64; 1 Dr. & Wal. 119; 2 Dr. & Wal. 410; 4 Jur. 403; 7 E. R. 1039, H. L.

1356. —— Solicitor's charges — Insufficient ground for opening.]—S. & S., the trustees & exors. of a will, solrs. carrying on business in partnership & authorised by the will to charge for professional business done by them for the estate, wound up the estate & sent an account to the 5 residuary legatees with a letter saying that, if they would call at the office of the exors. at a day named, the exors. would give them any explanations they might require, & would hand them over cheques for their shares of the residue. The account was not a complicated one, & among the items was, "Paid Messrs. S. & Co. costs relating to exorship. & counsel's fees & payments made by them, £116 17*s.* 2*d.*" The ultimate balance shown was £331 3*s.* 4*d.*, the bulk of the testator's property having been disposed of by specific bequests. The residuary legatees attended, signed at the foot of the account a memorandum, "We have examined & approved of the foregoing account," received cheques for their shares, & executed a release to the trustees & exors. The trustees & exors. never informed the residuary legatees that they were entitled to have a bill of costs delivered, & to have it taxed if they thought fit. Nine years afterwards three of the residuary legatees brought an action to have it declared that the release was not binding on them, & to have a bill of costs delivered & taxed. On production of documents there were found in the costs ledger of the solrs. items which came to more than the amount charged for costs in their account; there was no evidence of excessive charge beyond a deposition by an experienced solr.'s clerk that in his opinion at least one-sixth would be taxed off the amount of costs appearing in the ledger, & there was no proof of error in the rest of the account. ROMER, J., dismissed the action. On appeal:—*Held:* (1) although it was the duty of the solr. trustees to have informed the residuary legatees that they were entitled to have a bill of costs, & if they thought fit to have it taxed or moderated, the omission to do so was not by itself a sufficient ground for opening a settled account; (2) in order to do so it was necessary to show that injustice would be done by allowing the settled account to stand; (3) if excessive charges had been shown the account must have been opened; (4) as no error had been shown, the action had been rightly dismissed.—*Re* WEBB, LAMBERT *v.* STILL, [1894] 1 Ch. 73; 63 L. J. Ch. 145; 70 L. T. 318, C. A.

1357. —— —— No independent advice.]—K. was a builder, & from 1883 to 1904 employed C. as his solr., who financed him in numerous transactions. No bills of costs were delivered, but from time to time accounts were stated between them, & the amount due for loans, interest & costs was agreed, & C. took mtges. for the agreed amounts. By 1904 all the mtges., except two, had been paid off, either by sales or by K. paying off & taking reconveyances of the mtges., & on each occasion the amount due was agreed. In 1905 C. died, & in 1906 his exors. brought an action against K. to enforce the two subsisting mtges. K. counterclaimed for an account of all the transactions & dealings between himself & C. from 1883, alleging (as the fact was) that he had had no independent advice, & in some of the settled accounts he proved errors in respect of interest, & that he had been charged profit costs prior to Mtgees. Legal Costs Act, 1895 (c. 25):—*Held:* K. was entitled to open all the accounts & to tax, surcharge, & falsify, & his right was not barred by Stat. Limitations, although all the settled accounts but one had been agreed more than 6 years before the date of his counterclaim.—CHEESE *v.* KEEN, [1908] 1 Ch. 245; 77 L. J. Ch. 163; 98 L. T. 316; 24 T L. R. 138.

See, further, SOLICITORS.

1358. Evidence—Allegations necessary when principal has previously admitted account correct.]—A party who has once admitted an account delivered to be correct cannot afterwards file a bill to have the account taken in equity upon the mere allegation he had no means of ascertaining the account so delivered was correct, without charging specific acts of fraud against deft.; & it is not necessarily

an allegation of fraud to say that the accounting party agreed to deliver up certain chattels demanded by the other upon condition of having his alleged balance admitted & paid.—DARTHEZ *v.* LEE & LAMA, No. 1322, *ante*.

1359. —— Securities not admissible—Oath of agent, when admissible.]—An attorney & agent advanced money to his client & principal in various sums & at different periods, from 1773 to 1778, taking securities & getting accounts settled. The transactions being impeached in 1783 :—*Held :* (1) the settled accounts should be opened & the whole transactions sifted ; (2) securities should not be admitted as evidence of demands ; (3) the attorney should only be allowed in account the money actually advanced & proved to be so by other evidence than securities & settlement of accounts. But as, in the case of accounts in some sense settled, & a considerable period having elapsed before they were impeached, vouchers might have been delivered up or lost, the oath of the party was admitted as evidence as to the existence & import of such vouchers.—MORGAN *v.* LEWES (1816), 4 Dow, 29 ; 3 E. R. 1079.

Annotations :—**Distd.** Blagrave *v.* Routh (1856), 2 K. & J. 509. **Apld.** Gresley *v.* Mousley (1861), 3 De G. F. & J. 433.

1360. —— Absence of vouchers.]—A large shareholder was the manager of a co. He rendered accounts regularly from 1826 to his death in 1851. These accounts were not challenged in his life, but after his death items exceeding £2,000 a year were questioned by the co., for which no vouchers could be produced, & no satisfactory explanation given. The account was opened for the whole period of 25 years, & it was directed to be taken with special direction. Special decree for taking a general account, with a direction to treat the books as conclusive, except as to items challenged within 6 weeks, with liberty to surcharge & falsify.—STAINTON *v.* CARRON CO. (1857), 24 Beav. 346 ; 27 L. J. Ch. 89 ; 30 L. T. O. S. 299 ; 3 Jur. N. S. 1235 ; 53 E. R. 391.

For full anns., *see* CONTRACT.

C. Principal's Right to surcharge and falsify settled Accounts.

1361. Circumstances in which right arises.]—An account between principal & agent was settled from loose papers, the agent having kept no regular books ; after his death liberty was given to surcharge & falsify upon an allegation of errors since discovered.—HARDWICKE (LORD) *v.* VERNON (No. 2) (1798–9), 4 Ves. 411 ; 31 E. R. 209.

Annotations :—**Consd. & Foll.** Ormond *v.* Hutchinson (1809), 16 Ves. 94. **Refd.** *Re* Whitehead, *Ex p.* Burnand's Exor. (1860), 2 L. T. 776 ; Makepeace *v.* Rogers (1865), 13 W. R. 450 ; Turner *v.* Burkinshaw (1867), 15 W. R. 753, C. A. ; Rishton *v.* Grissell (1870), L. R. 10 Eq. 393 ; Harsant *v.* Blaine (1887), 56 L. J. Q. B. 511, C. A.

1362. ——.]—M. brought an action against his agent C., alleging generally that he had falsified certain accounts, & that they were then open. C. pleaded that the accounts were settled, & asked for specific statements of falsification. The ct., having held the accounts were settled & C. was entitled to costs of hearing, gave leave to M. to amend his pleadings within 14 days by stating specific items which were false :—*Held :* M. was entitled to surcharge & falsify all settled accounts. —MOZELEY *v.* COWIE, No. 1320, *ante*.

1363. ——.]—Where an account is impeached, if a single important error is established the ct. will not, except in the case of fraud, order the whole account to be opened, but will make a decree that pltf. may be at liberty to surcharge & falsify.

In a partnership action, where one error of £950 was established in an account long settled :—*Held :* (1) in taking the accounts pltf. was at liberty to surcharge & falsify ; (2) such liberty should not be limited to errors appearing from the books.—GETHING *v.* KEIGHLEY (1878), 9 Ch. D. 547 ; 48 L. J. Ch. 45 ; 27 W. R. 283.

Annotations :—**N.F.** Ward *v.* Sharp (1884), 53 L. J. Ch. 313. **Refd.** *Re* Webb, Lambert *v.* Still, [1894] 1 Ch. 73, C. A.

D. Principal's Rights when Agent has failed to keep Principal's Money separate.

1364. Injunction granted.]—Where deft. was placed in the situation of steward & universal agent over certain property & for many years received the rents, etc., without any account, mixing the proceeds with his own funds :—*Held :* although this showed astonishing improvidence in pltf., yet an injunction was ordered against a transfer of stock standing in deft.'s name until information as to what part of the property was the principal's.—CHEDWORTH (LORD) *v.* EDWARDS (1802), 8 Ves. 46 ; 32 E. R. 268.

Annotations :—**Expld.** Lupton *v.* White (1808), 15 Ves. 432. **Foll.** Pennell *v.* Deffell (1853), 4 De G. M. & G. 372. **Distd.** *Re* Hallett's Estate, Knatchbull *v.* Hallett (1880), 13 Ch. D. 696, C. A. **Refd.** Harington *v.* Hoggart (1830), 1 B. & Ad 577 ; *Re* Suisse (1842), 6 Jur. 654 ; Makepeace *v.* Rogers (1865), 5 New Rep. 399. **Mentd.** Bodenham *v.* Hoskyns (1852), 2 De G. M. & G. 903 ; Powdrell *v.* Jones (1854), 18 Jur. 1111 ; Wickham *v.* Gatrill (1854), 23 L. T. O. S. 252.

1365. Agent liable for whole amount.]—An agent, or bailiff, confounding his principal's property with his own is chargeable with the whole, except what he can prove to be his own. The ct. refused in such a case a prospective direction to admit books, not legal evidence, though such a direction is usual in a fair case, as where from want of notice of an adverse claim a strict account cannot be given, & merely gave liberty to apply upon any question of evidence.—LUPTON *v.* WHITE, WHITE *v.* LUPTON (1808), 15 Ves. 432 ; 33 E. R. 817.

Annotations :—**Foll.** Skipworth *v.* Skipworth (1840), 9 L. J. Ch. 182. **Apld.** Gray *v.* Haig, Haig *v.* Gray (1854-1855), 20 Beav. 219. **Distd.** Walsh *v.* Secretary of State for India (1863), 10 H. L. Cas. 367. **Apld.** Cook *v.* Addison (1869), L. R. 7 Eq. 466 ; *Re* Oatway, Hertslet *v.* Oatway (1903), 72 L. J. Ch. 575. **Refd.** Spence *v.* Union Marine Insce. Co. (1868), L. R. 3 C. P. 427.

1366. ——.]—It is a well-established doctrine that if a trustee or agent mixes & confuses the property which he holds in a fiduciary character with his own property, so that they cannot be separated with perfect accuracy, he is liable for the whole (STUART, V.-C.).—COOK *v.* ADDISON (1869), L. R. 7 Eq. 466 ; 38 L. J. Ch. 322 ; 20 L. T. 212 ; 17 W. R. 480.

1367. Agent liable for failure of bank.]—A person gratuitously acting in the collection of debts, etc., under a trust deed, mixed the money he received with his own money, by placing it in his banker's hands in his own name & upon his own general account. The bankers were in the habit of paying him interest at 3 per cent. upon money in their hands. He informed the trustees that the money was in a bank, but did not state with whom ; nor that it was mixed with his own moneys ; nor that interest was to be paid upon it. The bankers having failed :—*Held :* he was answerable for loss upon the trust money.—MASSEY *v.* BANNER (1820), 1 Jac. & W. 241 ; 37 E. R. 367.

Annotations :—**Expld.** Pennell *v.* Deffell (1853), 4 De G. M. & G. 372 ; Cooks *v.* Gray (1857), 5 W. R. 749. **Refd.** Macdonnell *v.* Harding (1834), 7 Sim. 178 ; Owen *v.* Cronk (1894), 2 Mans. 115, C. A.

1368. ——.]—If an attorney has the money of a client in his hands, & pays such money to the credit of his own private account at his banker's, & that banker fails, he will be liable for the amount to the client, although he does so *bonâ fide*, & has a large sum of money of his own at that banker's.

There are three modes which a person may adopt when the money of others is placed in his hands. The first is for him to keep it in his own house ; . . . another is for the party to pay it into his

Sect. 2.—Principal's rights against agent: Sub-sect. 3, D.; sub-sect. 4, A. (a) & (b).]

banker's on his general account; but the third & correct mode is for the party to open a new account in his own name for this particular purpose, . . . & so to earmark the money as belonging to that estate. . . . But if the person having the money mixes it with his own he thereby makes himself personally debtor to the estate (ABBOTT, C.J.).—ROBINSON *v.* WARD (1825), 2 C. & P. 59; Ry. & M. 274.

1369. —— Jointly with trustee.]—Preparatory to the final winding up of a trust, the agent & solr. of the trustees paid the trust money to his bankers, to the credit of his general account with them, & informed the *cestui que trust* that the money was lying idle at his bankers'. The *cestui que trust* took no notice of the information, & more than a month afterwards the bankers failed:—*Held:* as the agent did not inform the *cestui que trust* that the money had been paid to the credit of his general account, & as payment to the bankers was not necessary to winding up the trust, the agent & the trustees were jointly liable for the money.—MACDONNELL *v.* HARDING (1834), 7 Sim. 178; 4 L. J. Ch. 10; 58 E. R. 805.

1370. Accounts opened.]—Where a factor violated all his duties:—*Held:* (1) no credit was due to his accounts; (2) the principal was not bound by them; (3) the accounts were opened from the beginning on the ground that the relief ought not, in such circumstances, to be limited to a right to surcharge & falsify.—CLARKE *v.* TIPPING (1846), 9 Beav. 284; 50 E. R. 352.

Annotations:—**Mentd.** *Re* Whitehead, *Ex p.* Burnand's Exor. (1860), 2 L. T. 776; Williamson *v.* Barbour (1877), 9 Ch. D. 529; *Re* Pollard, *Ex p.* Dickin (1878), 8 Ch. D. 377, C. A.

1371. Commission disallowed.]—If an agent by his own conduct makes it impossible to ascertain the amount of profit realised, he will be disallowed the commission which otherwise according to the contract he would be allowed to claim.

A. appointed B. his agent for the sale of spirits on commission. B. had made profits by the sale of A.'s goods, for which he had not given credit; he had also made profits by selling his own spirits mixed with those of A., & had destroyed books of account pending the litigation. The ct. in taking the accounts disallowed him £7,000, the amount of commission to which by the contract he would have been entitled if his conduct had been proper.—GRAY *v.* HAIG, HAIG *v.* GRAY (1855), 20 Beav. 219; 52 E. R. 587.

Annotations:—**Consd. & Distd.** Stainton *v.* Carron Co. (1857), 24 Beav. 346. **Refd.** *Re* Whitehead, *Ex p.* Burnand's Exor. (1860), 2 L. T. 776.

SUB-SECT. 4.—PRINCIPAL'S RIGHT TO RECOVER MONEY HELD BY AGENT TO HIS USE.

A. Where the Right arises.

(a) In General.

1372. When action will lie.]—To an action of *assumpsit* deft. pleaded in abatement that he was bailiff, & that pltf. ought to bring account:—*Held:* where there is an express promise, *assumpsit* lies as well as account.—WILKIN *v.* WILKIN (1691), 1 Salk. 9; 91 E. R. 8.

1373. ——.]—An action lies to recover money received in account to another's use.—ANON., No. 1246, *ante*.

1374. Principal's money paid by agent to agent's creditor.]—A. orders B. to receive money from C. for him. B. orders C. to pay it to D., to whom B. owes money. C. pays it. A. can maintain an action against B. as for so much money received to his use. So if in such case B. has drawn a bill upon C. for the money, or generally for so much money, if C. has no effects of B. in his hands, his answering such bill is a payment of A.'s debts to B. for which A. can maintain action against him.—ANON. (No. 3) (1701), 12 Mod. Rep. 565; 88 E. R. 1524.

1375. Unpaid bills in hands of agent.]—Bills remitted to a factor or banker, while unpaid, are in the nature of goods unsold, & if the factor becomes bkpt. must be returned to the principal, subject to such lien as the factor may have thereon.—ZINCK *v.* WALKER (1777), 2 Wm. Bl. 1154; 96 E. R. 681.

Annotations:—**Distd.** Bolton *v.* Puller (1796), 1 Bos. & P. 539. **Apld.** Parke *v.* Eliason (1801), 1 East, 544.

1376. Insurance broker settling accounts with underwriter.]—WILKINSON *v.* CLAY (1815), 6 Taunt. 110; 4 Camp. 171; 128 E. R. 974.

Annotation:—**Refd.** Atkins *v.* Owen (1836), 4 Ad. & El. 819.

1377. Money collected under bogus scheme.]—Deft. had been employed as pltf.'s agent in raising a loan for establishing a colony on the coast of Honduras, & as such had received deposits from subscribers, & had given scrip certificates, on which it was stated the loan was for the use of the Poyais State. In an action for the money raised by deft.:—*Held:* it was incumbent on pltf. to prove the existence of such a State, on the ground that the parties to a mere bubble to deceive the public could not maintain an action against each other.—M'GREGOR *v.* LOWE (1824), 1 C. & P. 200; Ry. & M. 57.

Annotation:—**Consd.** Nicholson *v.* Gooch (1856), 5 E. & B. 999.

1378. Goods wrongfully pledged.]—Where a factor has raised money by a wrongful pledge of goods of his principal, it is competent to the latter, in taking

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PART VIII. SECT. 2, SUB-SECT. 4.—A. (a).

1372 i. *When action will lie.*]—A person who authorises another to do a specific act, *e.g.*, to withdraw from the bank a sum of money belonging to the principal, may sue the agent for an amount alleged to have been retained by him without bringing an action to account.—O'BRIEN *v.* BRODEUR (1896), Q. R. 10 S. C. 155.—**CAN.**

1372 ii. ——.]—*Assumpsit* on account stated lies against a collector of taxes for a balance admitted due to his principal, though the former has given a bond to the principal to account for moneys collected.—ST. JOHN CORPN. *v.* BALDWIN (1847), 3 Kerr, 477.—**CAN.**

1372 iii. ——.]—An agent, holding a power of attorney, had collected & not paid over a dividend awarded pltf. by a ct. of bkpcy.:—*Held:* pltf.'s recourse was not confined to an action to account, but he could sue for the specific sum awarded by the ct.—PHILLIPS *v.* JOSEPH (1875), 15 L. C. J. 335, S. C.; 19 L. C. J. 162, Q. B.—**CAN.**

h. *Money received on sale of land above authorised price.*]—Deft., a real estate broker, was authorised by pltf. to sell land at $15 an acre *plus* commission of 50 cents an acre. Deft. subsequently agreed, through B., to whom he paid $2 an acre, with H. for its sale to H. at $17 an acre & a cash payment of $1,920. Deft. represented to pltf. that he had sold the land to P. at $15 an acre & that P. had resold it to H.:—*Held:* deft. was only entitled to 50 cents an acre commission, & he was liable to pltf. for cash payment received & could not deduct the $2 per acre paid to B.—CRAM *v.* BIEHN (1912), 21 W. L. R. 937; 2 W. W. R. 813; 5 D. L. R. 572; Sask. L. R. 247.—**CAN.**

k. *Money received by agent under insurance policy.*]—Pltfs. agreed to import all goods required by them through defts. & paid them commission. Certain goods having been shipped & destroyed by fire:—*Held:* defts. were agents to import the goods & were bound to pay over to pltfs. all excess recovered under insurance policies over the costs & charges of the goods destroyed.—HODGSON & Co. *v.* PORTER & Co. (1877), Buch. 100.—**S. AF.**

l. *Money embezzled by co-agent prosecuted to conviction.*]—In an action by a principal against his agent for a sum of money representing the sale of money orders, wherein the declaration alleged a contract of agency, & also that deft. had received for sale a certain number of money orders belonging to pltf. upon terms requiring deft. to account for them:—*Held:* the fact that the principal had another person arrested & convicted for theft as agent of money orders did not relieve deft. of his civil responsibility to account for the sale of same money orders.—DOMINION EXPRESS CO. *v.* DINI (1913), Q. R. 46 S. C. 396.—**CAN.**

the account between himself & the factor, to abandon the goods & treat the money raised thereon as money had & received to his own use.—BONZI *v.* STEWART (1842), 4 Man. & G. 295 ; 5 Scott, N. R. 1 ; 11 L. J. C. P. 228 ; 134 E. R. 121.

For full anns., *see* No. 516, *ante*.

1379. Deposit on purchase paid to agent as distinguished from auctioneer.]—Pltf. was employed as solr. for the vendor of real estate. By conditions of sale the deposit was to be paid into his hands " as agent for the vendor," & he signed the contract of sale & receipt for the deposit as such " agent " :—*Held :* (1) he was not, like an auctioneer, a stakeholder ; (2) he was liable to pay over the deposit to the vendor on demand, & in default to pay interest from the time of such demand.—EDGELL *v.* DAY (1865), L. R. 1 C. P. 80 ; 35 L. J. C. P. 7 ; 13 L. T. 328 ; 12 Jur. N. S. 27 ; 14 W. R. 87.

Annotation :—**Apld.** Ellis *v.* Goulton, [1893] 1 Q. B. 350, C. A.

1380. Sums advanced agent on commission account.]—Where deft., a commercial traveller, was authorised by pltf. to deduct certain sums from the amount he might receive on his account, to be repaid out of the commission deft. was to be paid by other employers :—*Held :* the sums might be recovered under a count for money lent.—SHEPHERD *v.* PHILIPS (1849), 2 Car. & Kir. 722.

Sums deposited with stakeholder.]—*See* GAMING & WAGERING.

1381. Money collected by stranger.]—The assignee of a bkpt. becoming insane, A., his brother, managed bkpt.'s affairs, & new assignees were afterwards appointed :—*Held :* (1) A. was a mere stranger, as he could not be agent of an insane person ; (2) the money received by A., whilst he so acted for his brother in the management of bkpt.'s affairs, was money had & received to the use of the newly-appointed assignees.—STEAD *v.* THORNTON (1832), 3 B. & Ad. 357 n. ; 1 L. J. K. B. 74 ; 110 E. R. 134.

For full anns., *see* BANKRUPTCY & INSOLVENCY.

1382. Money expended by agent in illegal disbursements.]—Money deposited with an agent, & expended by him in illegal disbursements, cannot be recovered by the principal, if the principal was at the time aware of the illegal disbursements, or if he subsequently assented to them.—BAYNTUN *v.* CATTLE (1833), 1 Mood. & R. 265.

For full anns., *see* ELECTIONS.

1383. Money paid to agents on account of purchase made by them on principal's instructions.]—Pltf. instructed defts., share brokers at Liverpool, to buy for him " 20 or 30 shares in the L. Ry., for the next account." Defts. bought the shares of other brokers, without disclosing their principal. They informed pltf. by letter of that purchase ; & before the account day, which was the last day of the month, received from him £148, price of shares. Before the time when the shares were to be delivered, the co. made a call of £5 per share. Pltf. was made aware of the fact that this call had been made ; but he refused to pay it, & subsequently repudiated the contract. Pltf. brought an action to recover back the £148 he had paid to defts., & the jury found a verdict for pltf. A rule *nisi* was granted on the ground that an action for money had & received was not maintainable as defts. were not principals, but pltf.'s agents for the purpose of buying the shares, & they had discharged their duty as agents.—MCEWEN *v.* WOODS (1847), 11 Q. B. 13 ; 5 Ry. & Can. Cas. 335 ; 17 L. J. Q. B. 206 ; 12 Jur. 329 ; 116 E. R. 379.

1384. Money received under contract subsequently rescinded.]—Where a horse was sold by an agent with a false warranty that the horse was free from vice, & the purchaser on discovering the deceit rescinded the contract, returned the horse & received back the money :—*Held :* (1) the principal's right to the price of the horse as money received to his use arose from the contract of sale ; (2) on that being rescinded his right to the money was gone.

If before the contract was rescinded by the purchaser the agent had paid the price over to the principal, he might have recovered it back on the purchaser's rescinding the contract (PARKE, B.).—MURRAY *v.* MANN (1848), 2 Exch. 538 ; 17 L. J. Ex. 256 ; 12 Jur. 634.

Annotations :—**Apld.** Stevens *v.* Legh (1853), 2 C. L. R. 251. **Refd.** Holland *v.* Russell (1861), 30 L. J. Q. B. 308. **Mentd.** Clarke *v.* Dickson (1858), 27 L. J. Q. B. 223 ; Brady *v.* Todd (1861), 9 C. B. N. S. 592 ; Udell *v.* Atherton (1861), 7 H. & N. 172.

1385. ——.]—Pltf. instructed deft. to sell a horse for him, representing to deft. that it was a useful horse, etc., but that he was not to warrant it. Deft. sold the horse & represented it as a useful horse ; the purchaser afterwards rescinded the contract on the ground of fraud, & gave deft. notice not to pay over the purchase-money to pltf. In an action by pltf. for the purchase-money :—*Held :* these facts afforded deft. a good defence.—STEVENS *v.* LEGH (LEE) (1853), 2 C. L. R. 251 ; 22 L. T. O. S. 84 ; 2 W. R. 16.

(b) Money paid to Agent for particular Purpose.

1386. Money to be carried from one place to another.]—A sum of money was delivered by pltf. to deft. to carry to a particular place, & there to pay to a certain person for pltf. Deft. took the money, but in answer to pltf.'s inquiries said he had lost it :—*Held : assumpsit* for money had & received was maintainable on proof of these facts merely, though it was objected that the proper form of action was a special action for deft.'s negligence.—BARRY *v.* ROBERTS (1835), 1 Har. & W. 242.

1387. Money to provide for particular bills.]—A. agreed to consign goods to B. & C. abroad, to be there sold on commission, on his account, on which deft. guaranteed B. & C. should sell them to the best advantage, & render a just account of sales. Before any consignments were made, C. had ceased to be a partner with B., & deft. became one in his stead under the firm of B. & Co. A. afterwards consigned goods to B. & Co., who remitted the proceeds thereof to deft. for the purpose of being handed over to A., who in consequence drew bills on deft., which he by letter agreed to accept, de-

PART VIII. SECT. 2, SUB-SECT. 4.—A. (b).

m. *Money to buy land.*] — Pltf. intrusted deft., an agent, with money to be invested in the purchase of lands. Deft. invested it in two lots which were subject to a mtge., & on deft.'s representation that the lots were of a certain frontage pltf. was willing to accept them though incumbered. Before the conveyance was tendered, pltf. discovered that one of the lots instead of being thirty-three feet in front was only seventeen feet, & he declined to carry out the proposal & brought an action to recover the money intrusted to deft. :—*Held :* any ratification by pltf. was based upon deft.'s representation that the lots were of a certain frontage, &, the representation being untrue, the ratification failed & pltf. was entitled to recover back his money.—BUTTERWORTH *v.* SHANNON (1885), 11 A. R. 86. —**CAN.**

n. *Money to be paid wife on getting divorce.*]—Where money was paid by a husband to a third person to be paid to his wife on her obtaining a divorce :—*Held :* (1) the payee was not a mere stakeholder, holding as the agent of the husband ; (2) his position was more analogous to that of a trustee for the wife & children, coupled with a trust for the husband if the arrangement was not carried out ; (3) viewing the husband's position in the most favourable light, it was not stronger than that of a purchaser who had, under the terms of a contract, paid an auctioneer a deposit ; (4) in the circumstances, he had not established any right to recover back the sum deposited.—LIVINGSTONE *v.* ELMSLIE (1902), 21 L. R. 640.—**N.Z.**

Sect. 2.—Principal's rights against agent: Sub-sect. 4, A. (b) & (c), B. & C. (a).]

pending on A.'s promise to provide for them, if remittances should not arrive from B. & Co. to meet them. A. became bkpt.; previous to this B. & Co. had remitted to deft., directing him to pay A. on account of goods consigned by him, which were not received by deft. till after the bkpcy. B. & Co. sent other remittances with similar directions, with which deft. credited bkpt. in his account, & debited him for acceptances given by him before bkpcy., but which were paid afterwards. In an action by the assignee to recover those subsequent payments:—*Held:* he was not entitled to recover, as there was a specific appropriation of the proceeds to provide for deft.'s acceptances before bkpcy.—THOMAS *v.* DA COSTA (1818), 8 Taunt. 345; 2 Moore, C. P. 386; 129 E. R. 416.

1388. ——.]—A. paid to a banking co. a sum of money, for the specific purpose of providing for a bill of exchange, for that amount, drawn by A. upon the co.'s London bankers. A. was at that time indebted in a larger amount to the co., who, instead of applying the money according to his instructions, placed it to the credit of his account with them. The bill was refused acceptance, & while it remained unpaid in the hands of the holder A. became bkpt. In a special action of *assumpsit*:—*Held:* his assignees were entitled to recover from the co. the whole amount deposited.—HILL *v.* SMITH (1844), 12 M. & W. 618; 13 L. J. Ex. 243; 2 L. T. O. S. 424; 8 Jur. 179; 152 E. R. 1346.

Annotations:—**Distd.** Garnett *v.* M'Kewan (1872), L. R. 8 Exch. 10. **Reld.** Alder *v.* Keighley (1846), 15 M. & W. 117; Bell *v.* Carey (1849), 8 C. B. 887; Valpy *v.* Oakeley (1851), 16 Q. B. 941; Ashdown *v.* Ingamells (1880), 5 Ex. D. 280, C. A.

(c) Money received by Agent in respect of Illegal or Wagering Transactions.

1389. Stolen custom duties.]—The East India Co. sued their factor for an account of £12,000 in gold he carried hence into East India. He upon his account demanded (according to the usual custom allowance) for so much paid for customs to the King in India. It was insisted that he never paid the customs there for the gold; so the question was whether the factor or the principal merchant should have the benefit of the customs. This question was referred to merchants. Two merchants certified that, by the course of merchants, the factor should retain the benefit of non-payment of customs, for if the principal freight by his non-payment of customs had been lost, he must have answered for it to the employer, & so run the hazard wholly. In this case the factor, by the law in East India, had it been discovered he had concealed the gold & not entered it into the custom-books, would have lost his life as a felon. Two other merchants certified that the employer was to have the benefit of non-payment of customs. Upon these certificates:—*Held:* the factor should have the benefit of the customs, for it was a duty to be paid, & the employer could make no title to it against him who was in possession, as he who had possession had right against all but him who had the very right.—SMITH *v.* OXENDEN (OXINDEN) (1663), 1 Cas. in Ch. 25; Freem. Ch. 173; 22 E. R. 675, 1139.

1390. ——.]—Equity will not recognise a custom of merchants which is grounded on fraud: a factor was held bound to account for customs on goods which it was alleged he had not paid, notwithstanding, by the custom of merchants, factors had the benefit of customs stolen, since they, & not the merchants, were liable to penalties if discovered.—BORRE (BORR) *v.* VANDE (VANDALL, VARDE) (1663), 1 Cas. in Ch. 30; Nels. 87; Freem. Ch. 174; 21 E. R. 796.

1391. ——.]—*Held:* the factor (not the employer) should have the benefit of stolen customs.—KNIPE *v.* JESSON (1666), 1 Cas. in Ch. 76; 22 E. R. 702.

1392. ——.]—Where a factor smuggled foreign customs, & yet set them down to his master as paid upon account, the rule that the ct. would not relieve, for that the factor ventured his life, was questioned, for that he ventured his master's goods as well as his own life.—ANON. (1683), Skin. 149; 90 E. R. 70.

1393. ——.]—A factor of the East India Co. carried over £1,200 in gold to India, where a custom was due for it, but saved by the factor, & never paid:—*Held:* (1) the factor had the benefit of it, & not the East India Co., for it was due from them & ought to have been paid; (2) they could not make a title to it against one who had the possession, for that was sufficient against all persons but against him who had the very right; (3) the non-payment was at the peril of the factor.—BOULTON *v.* ARLSDEN (1697), 3 Salk. 235; 91 E. R. 797.

1394. Goods imported without payment of duty.]—A corpn. having a customary duty on corn imported, it is a good custom that factors free of the corpn. shall receive to their own use that part of the duty which arises from corn assigned to them as factors.—COCKSEDGE *v.* FANSHAW (1779), 1 Doug. K. B. 119; 99 E. R. 80; *affd. sub nom.* FANSHAW *v.* COCKSEDGE (1783), 3 Bro. P. C. 690, H. L.

Annotations:—**Apld.** Goodman *v.* Saltash Corpn. (1882), 7 App. Cas. 633. **Mentd.** Mounsey *v.* Ismay (1863), 1 H. & C. 729; R. *v.* Rollett (1875), L. R. 10 Q. B. 469; Sewell *v.* Burdick (1884), 10 App. Cas. 74.

1395. Goods exported without payment of duty.]—In an action for not accounting for goods delivered in this country to deft., the master of a ship, to be sold by him abroad, it is no defence that the goods were exported without paying duties, unless it be proved that the evasion of the duties was part of the agreement between pltf. & deft.—CATLIN *v.* BELL (1815), 4 Camp. 183.

1396. Illegal contract—Void insurance.]—A., having received money to the use of B., on an illegal contract between B. & C., namely, an insurance void under 7 Geo. 1, stat. 1, c. 21, s. 2, shall not be allowed to set up illegality of contract as a defence in an action brought by B. for money had & received.—TENANT *v.* ELLIOTT (1797), 1 Bos. & P. 3; 126 E. R. 744.

Annotations:—**Folld.** Farmer *v.* Russell (1798), 1 Bos. & P. 296. **Distd.** Thomson *v.* Thomson (1802), 7 Ves. 470; Hastelow *v.* Jackson (1828), 8 B. & C. 221. **Consd.** Sharp *v.* Taylor (1849), 2 Ph. 801; **Distd.** Nicholson *v.* Gooch (1856), 5 E. & B. 999; **Consd. & Distd.** Sykes *v.* Beadon (1879), 11 Ch. D. 170; **Folld.** Bridger *v.* Savage (1885), 12 Q. B. D. 363, C. A. **Reld.** Bousfield *v.* Wilson (1846), 16 M. & W. 185; Grell *v.* Levy (1864), 16 C. B. N. S. 73; Beeston *v.* Beeston (1875), 45 L. J. Q. B. 230, Exch.; Davies *v.* London & Provincial Marine Insce. Co. (1878), 38 L. T. 478; Gordon *v.* Metropolitan Police Chief Comr., [1910] 2 K. B. 1080, C.A. **Mentd.** R. *v.* Tankard (1893), 63 L. J. M. C. 61, C. C. R.

1397. ——.]—If A. receives the money of B. to the use of C., it may be recovered by C. in an action for money had & received, though the consideration on which B. paid it is illegal. *Qu.:* whether the case would be varied if A. was a party to the

contract between B. & C.—FARMER *v.* RUSSELL (1798), 1 Bos. & P. 296; 126 E. R. 913.

Annotations:—**Distd.** Hastelow *v.* Jackson (1828), 8 B. & C. 221; Nicholson *v.* Gooch (1856), 5 E. & B. 999. **Consd.** Sykes *v.* Beadon (1879), 11 Ch. D. 170. **Reid.** Bousfield *v.* Wilson (1846), 16 M. & W. 185; Sharp *v.* Taylor (1849), 2 Ph. 801; Beeston *v.* Beeston (1875), 45 L. J. Q. B. 230, Exch.; Gordon *v.* Metropolitan Police Chief Comr., [1910] 2 K. B. 1080, C. A.

1398. ——.]—Money paid to an agent for the use of his principal may be recovered by the principal, though paid in pursuance of an illegal agreement.—THOMSON *v.* THOMSON (1802), 7 Ves. 470; 32 E. R. 190.

For full anns., *see* CONTRACT.

1399. ——.]—B., employed by A. to purchase for him certain transferable shares in an unincorporated co., charged & received from him £25 beyond the market price of such shares at the time:—*Held:* an action would not lie to recover back this sum, the co. being within 6 Geo. 1, c. 18, & the parties *in pari delicto*.—BUCK *v.* BUCK (1808), 1 Camp. 547.

1400. ——.]—A broker cannot set up in answer to an action for money had & received on the sale of shares, that it was for certain shares in a ry. which required the authority of Parliament to carry it into effect, & that, as no such Act had been obtained, the sale was illegal.—BOUSFIELD *v.* WILSON (1846), 16 M. & W. 185; 4 Ry. & Can. Cas. 687; 16 L. J. Ex. 44; 8 L. T. O. S. 194.

1401. ——.]—Where money is received by an agent for his principal from a third person under a contract which is illegal & unenforceable at law, the principal may recover the money from the agent in an action of money had & received, for the receipt of the money is a legal act; where the receipt itself is illegal & expressly forbidden by stat., no action lies, at the suit either of the principal, or, in case of his bkpcy., of his assignees (CROMPTON, J.).—NICHOLSON & TUCKER *v.* GOOCH (1856), 5 E. & B. 999; 25 L. J. Q. B. 137; 26 L. T. O. S. 258; 2 Jur. N. S. 303; 4 W. R. 285; 119 E. R. 752.

Annotations:—**Reid.** Rourke *v.* Short (1856), 2 Jur. N. S. 352. **Mentd.** *Re* Ryder (1857), 29 L. T. O. S. 217; Monk *v.* Sharp (1857), 2 H. & N. 540; Paull *v.* Best (1863), 3 B. & S. 537; Topping *v.* Keysell (1864), 16 C. B. N. S. 258.

Gaming & wagering transactions.]—*See* GAMING & WAGERING; STOCK EXCHANGE.

B. When the Right arises.

1402. Not until money received by agent.]—Where an agent is employed to sell goods, & sells them on credit, he cannot be called upon to pay the money over to the principal until he has received the whole from the persons to whom he sold the goods, unless the delay in payment has been occasioned by his neglect.—VARDEN *v.* PARKER (1798), 2 Esp. 710.

1403. When agent has received credit in account with third party.]—As soon as an insurance broker has received credit in account with an underwriter for a loss upon a policy, his principal may maintain money had & received against him to recover the amount; & in such action, if the underwriter's name is erased from the policy, deft. can neither dispute the liability of the underwriter for the loss, nor his own receipt of the sum subscribed.—ANDREW *v.* ROBINSON (1812), 3 Camp. 199.

Annotations:—**Distd.** Ovington *v.* Bell (1812), 3 Camp. 237. **Apld.** Wilkinson *v.* Clay (1815), 6 Taunt. 110. **Distd.** Benson *v.* Maitland (1820), Gow, 205. **Reid.** Atkins *v.* Owen (1836), 4 Ad. & El. 819; Story *v.* Story (1843), 2 L. T. O. S. 227; Holland *v.* Russell (1863), 8 L. T. 468, Exch.

1404. Goods consigned for sale—After reasonable time.]—If the agent to whom goods have been consigned by his principal for sale refuses after a reasonable time has elapsed to account for them, it is to be presumed the agent has sold them. In such a case a bill of particulars stating demand to be for the goods, which it specifies, & for money had & received, etc., is sufficient.—HUNTER *v.* WELSH (1816), 1 Stark. 224.

For full anns., *see* CONTRACT.

1405. Money entrusted to agent for particular purpose.]—*Qu.:* whether an action for money had & received lies against an agent entrusted with money for a particular purpose, until he violates his duty by applying it to some other purpose.—HARDMAN *v.* BELLHOUSE, No. 1412, *post*.

For full anns., *see* S. C. No. 1412, *post*.

1406. No action if agent has delayed but not refused to obey instructions.]—Pltf., a merchant in London, consigned certain cottons to deft. & his partners, commission agents at Bombay, with directions to sell same & remit proceeds to pltf. in good bills on London. The goods were sold by deft. & his partners in Bombay in Aug., 1847, & produced 8 rupees & upwards per piece, but no remittances either in money or bills having been made to pltf., an action for money had & received was commenced against deft., who had come over to England:—*Held:* (1) pltf. was not prevented from recovering in an action for money had & received by reason of the proceeds having been received in foreign money; (2) no action for money had & received lay in the circumstances, as there had been no countermand by pltf. of the original directions, & deft. had never wholly refused to perform the contract, but had merely neglected to do so.—EHRENSPERGER *v.* ANDERSON (1848), 3 Exch. 148; 18 L. J. Ex. 132; 12 L. T. O. S. 292; 154 E. R. 793.

Annotation:—**Mentd.** Corcoran *v.* Proser (1873), 22 W. R. 222, Exch.

1407. When period allowed for sale or return of goods expires.]—Where goods are sent by a manufacturer to an agent on sale or return for 6 months, the 6 months are reckoned from the time when the agent received the goods.—JACOBS *v.* HARBACH (1886), 2 T. L. R. 419.

C. How Agent's Duty to pay over Principal's Funds may be discharged.

(a) In General.

1408. Payment to third party for principal's use.]—A., residing at X., employed B., residing at Y., to procure payment of a bill there, & to remit the produce direct to him at X. B. received payment of the bill, but remitted the produce to a third person at Z. for A.'s use, whereby the whole got into the hands of A.'s creditors:—*Held:* A. could not maintain an action for money had & received against B. to recover the amount of the sum received in payment of the bill.—DUNCAN *v.* SKIPWITH (1809), 2 Camp. 68.

1409. Payment according to principal's instructions.]—An action for money had & received does not lie when the agent has paid over the money in

PART VIII. SECT. 2, SUB-SECT. 4.—C. (a).

1409 i. *Payment according to principal's instructions.*]—Pltf. alleged that he gave a cheque for $200 to defts. to pay as a deposit on a purchase by defts. of land warrants for him, & that before the purchase he revoked the authority. Defts. proved that they entered into a contract in writing so to purchase, &, on receipt of pltf.'s cheque, handed over to him the contract; & that they handed pltf.'s cheque over to the person from whom they had purchased, & that person received the money thereon:—*Held:* pltf. could not succeed in the action.—DART *v.* COWARD INVESTMENT CO. (1910), 14 W. L. R. 52.—**CAN.**

1409 ii. ——.]—An agent cannot discharge himself of moneys for which he is liable to account, by proving payments to third parties, unless he can show that such payments were made by the express authority of the principal, or with his knowledge & consent.—FAGAN *v.* CHUNDER KANT BANERJEE (1867), 7 W. R. 452.—**IND.**

Sect. 2.—Principal's rights against agent: Sub-sect. 4, C. (a) & (b).]

accordance with his instructions.—WHITEHEAD *v.* HOWARD, No. 1505, *post.*

For full anns., *see* S. C. No. 1505, *post.*

1410. ——.]—Pltf., by letter, desired his agent to receive a sum of money for him, &, after making certain payments, transmit the surplus through defts., a mercantile firm in London, to be placed to pltf.'s credit at Calcutta. The agent paid the surplus, £419, to defts., showing them pltf.'s letter. Defts. received the sum on pltf.'s account, entered it in their books to the account of C. & Co., their correspondents at Calcutta, & wrote to C. & Co., informing them they had so done, & desiring that C. & Co. would account with pltf., at the rate of so much per rupee. Defts. charged 1 per cent. commission. Before the letter from defts. arrived at Calcutta, C. & Co. stopped payment. Defts., after placing the £419 to account, paid bills drawn on them by C. & Co. to a much larger amount; but it did not appear whether or not the general balance between the two firms was altered by such payments. On *assumpsit* brought against defts. for money had & received, & plea, as to the £419, that defts. had remitted it as desired:—*Held:* defts. not liable, having done all that pltf. required of them, & they contracted to do, for the purpose of remitting the £419; & having bound themselves to credit C. & Co. in that amount, if that firm did not reject the transaction.—M'CARTHY *v.* COLVIN (1839), 9 Ad. & El. 607; 1 Per. & Dav. 429; 8 L. J. Q. B. 158; 112 E. R. 1342.

1411. ——.]—Paying money away by an agent by direction of his principal is the same as paying it to the principal & so far discharges the agent.—BLYTH *v.* WHIFFIN (1872), 27 L. T. 330.

1412. Payment by bill of exchange.]—Pltfs., brokers in England, were in the habit of consigning to deft., a merchant & broker at Montreal, goods on sale & return, & of receiving in payment bills purchased by deft. Pltfs. having requested that undoubted bills should be sent them, deft. remitted a bill drawn by parties whose credit at the time was supposed to be good. Pltfs. on receiving the bill returned for answer that it had been refused acceptance, & requested deft. to do what was needful to procure security from the drawer, & to take all legal & necessary steps for security of pltfs. In an action by pltfs. for money had & received, to recover from deft. the proceeds of consignment to which the bill had reference, deft. pleaded delivery to pltfs. & acceptance by them of the bill in full satisfaction. The judge told the jury that if, by the course of dealing between the parties, pltfs. were bound to take the bill, that was a taking in full satisfaction:—*Held:* (1) it was too late for deft., on the argument on the rule, to contend that an action for money had & received would not lie; (2) the judge misdirected the jury; (3) there was evidence of an acceptance of the bill, in full satisfaction & discharge.—HARDMAN *v.* BELLHOUSE (1842), 9 M. & W. 596; 11 L. J. Ex. 135.

Annotation:—**Distd.** Croft *v.* Lumley (1857-58), 6 H. L. Cas. 672.

1413. Payment by transfer in common agent's books.]—Where a mercantile firm in England borrows money of another firm, & both have a common agent abroad, if that agent credit the lending firm with sums received for the borrowing firm, in pursuance of an agreement between them, that credit is not a payment. The transfer from one account to another in an agent's books is not payment as between agent & transferee of such account, & the entry is not an acknowledgment unless the transferee is informed of the fact.—MCLARTY *v.* MIDDLETON (1858), 6 W. R. 379; subsequent proceedings, 4 L. T. 852; 9 W. R. 861; 1 Mar. L. C. 114.

1414. Payment by instructions of Court.]—By a judgment in a partition action it was ordered that hereditaments should be sold by pltf. by public auction in such way as he should think fit, & the purchase-money be paid into ct. The sale took place under conditions of sale which provided for payment of purchase-money at the office of the solrs. of the vendors, & which also contained a reference to a certificate in the partition action. The required deposit was paid by purchaser to the auctioneers, who acknowledged the receipt & signed the memorandum of sale as "agents for the vendors." The auctioneers paid the balance of the deposit (after deducting for costs) to the solrs. for vendors. The vendors then sought to recover such amount in an action against the auctioneers:—*Held:* as the sale was under an order of ct., the auctioneers had authority to pay the deposit to the solrs. of the vendors, & were not liable to refund.—BROWN *v.* FAREBROTHER (1888), 58 L. J. Ch. 3; 59 L. T. 822.

1415. Evidence—When onus of proof on principal to show no payment.]—Where a servant is in the habit of receiving sums of money for his master's use, & by established course of dealing the servant pays these over to the master from time to time, without written vouchers passing between them, the presumption of law is that all sums so received by the servant are regularly paid over to the master; where there has been such a course of dealing, in an action by the master against the servant for money had & received, it is not enough for the master to prove sums have been received by the servant to his use; the *onus* lies upon him to prove by positive evidence the servant has not duly accounted with him.—EVANS *v.* BIRCH (1811), 3 Camp. 10.

1416. —— **Of payment.**]—In an action to recover money collected by deft. as pltf.'s agent, an acknowledgment, "Balanced up to this day, as per cash book—S. F. Nov. 19, 1845," written on the back of an unstamped receipt, not in evidence, was held admissible without a stamp, on production of the cash book.—FINNEY *v.* TOOTEL (1848), 5 C. B. 504; 3 New Prac. Cas. 40; 17 L. J. C. P. 158; 10 L. T. O. S. 393; 12 Jur. 291; 136 E. R. 975.

(b) Agent's Right to set off Sums due to him by Principal.

Set-off between agent & the trustee or assignee of bankrupt principal, *see, generally,* BANKRUPTCY & INSOLVENCY.

1417. Agreement by broker to sell for third party's account.]—B. & T. being indebted to W., B. agreed

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n. *Principal's money stolen from agent.*]—Pltf. sued for money advanced by him to defts. to purchase wheat for him, alleging that they had not purchased or accounted. Defts. pleaded, in substance, that the money, while kept unmixed with their own as pltf.'s money, was stolen from them by persons unknown, without any neglect on their part:—*Held:* the matter was a question for the jury & not for the ct.—BICKLE *v.* MATHEWSON (1866), 26 U. C. R. 137. —CAN.

1415 i. *Evidence—When onus of proof on agent to show payment.*]—Agents who have collected money on account of an insolvent estate are severally bound to prove to the assignee or his representative that the expenditure of the several amounts charged in their accounts has been actually & properly made & the *onus probandi* rests on such agents. It is incumbent on such agents to offer proof in support of all the items in their accounts which are impugned, & the propriety, or the actual expenditure of such items should form the subject-matter of issues properly framed.—NUJUF ALI *v.* PATTERSON (1870), 2 N. W. 104.—IND.

PART VIII. SECT. 2, SUB SECT. 4.—C. (b).

o. *Money due for commission—Right limited to specific sum.*]—The right of an agent to retain money for agency & commission is exercisable only upon the specific money on account of which the charge is made.—QUEBEC & HALI-

to sell W. 45 hogsheads of tobacco, to be accounted for by him in part of his demand; & it was agreed that the whole should be sold by X., factor for B. The tobacco was delivered to X., & produced £2,000. X. refused to account to W., saying that B. & T. were indebted to his firm. There was evidence that X. understood the agreement between W. & B.:—*Held:* X. was bound to account to W. for the sum produced by the sale of the tobacco, but without interest.—WEYMOUTH *v.* BOYER (1792), 1 Ves. 416; 1 Hov. Suppl. 165; 30 E. R. 414.

Annotations:—**Mentd.** Harford *v.* Rees (1852), 9 Hare, App. ii., lxx.; Blogg *v.* Johnson (1867), 2 Ch. App. 225.

1418. Payment made voluntarily by broker.]—Deft., as broker for B., purchased A.'s goods, for whom he sold them under a *del credere* commission, & did not disclose at the time the name of A., but disclosed it soon after, afterwards paying A. the price. In an action by the assignees of B. to recover the balance due upon a resale of goods made by deft. on account of B.:—*Held:* deft. was not entitled to set off under either 2 Geo. 2, c. 22, s. 13, or 5 Geo. 2, c. 30, s. 28, the payment made to A., as deft., who acted as broker & not as principal, could not acquire, by a voluntary payment made after expiry of the stipulated time for credit, a right of set-off or a right under the former Act. The principal must always be debtor, & that, whether he were known in the first instance or not, except where the broker had by the form of the instrument made himself liable.—MORRIS *v.* CLEASBY (1816), 4 M. & S. 566; 105 E. R. 943.

Annotations:—**Apld.** Campbell *v.* Hassel (1816), 1 Stark. 233. **Consd.** Wolff *v.* Koppell (1843), 22 L. J. Ex. 103 n.; Gabriel *v.* Churchill & Sim, [1914] 1 K. B. 449. **Reid.** Hornby *v.* Lacy (1817), 6 M. & S. 166; Fleet *v.* Murton (1871), 41 L. J. Q. B. 49. **Mentd.** Magor *v.* Wilks (1827), 5 L. J. O. S. K. B. 308.

1419. Effect of agreement not to set off.]—MCGILLIVRAY *v.* SIMSON, No. 2009, *post.*

For full anns., *see* S. C. No. 2009, *post.*

1420. Agreement to accept principal's bills against goods shipped.]—It was agreed between A., in London, & B., in the West Indies, that the former should accept bills drawn upon him by B. to a specified amount, upon A. having bills of lading filled up to his order for coffee, sugar, cotton & rum, & that after deducting his (A.'s) advances, charges & commission, the balance was to be paid to C., a merchant in London, for whom B. acted as agent in the West Indies. B. shipped goods with a bill of lading filled up to A.'s order. At the time when the goods arrived C. had become bkpt. A. demanded the goods, but the captain having wrongfully refused to deliver them, he brought trover against the captain. Before any assignees were chosen under C.'s commission the cause was referred to arbitrators, but they not having made any award the cause was tried, & A. recovered the proceeds of the goods. The assignees of C. having brought *assumpsit* for money had & received to recover the proceeds:—*Held:* (1) A. was authorised by the bill of lading to act for the benefit of all concerned, & to do all that was necessary to obtain possession of the goods; (2) there being nothing to show that a reference was an improper step, A. was entitled to deduct the costs of the reference as well as of the cause.—CURTIS *v.* BARCLAY (1826), 5 B. & C. 141; 7 Dow. & Ry. K. B. 539; 4 L. J. O. S. K. B. 82; 108 E. R. 52.

Annotation:—**Apld.** Williams, Torrey *v.* Knight, The Lord of the Isles, [1894] P. 342.

1421. Right to set-off not lost by giving principal credit in account.]—In general, an agent is not warranted in paying a debt due from his principal, without previous authority, or subsequent assent. But where a person fills the character of agent to two parties, & receives from one a sum on account of the other, which sum he carries to the account:—*Semble:* he may make any deductions afterwards from that sum, which the person who paid it would have had a right to make, in the form of set-off.

By the articles of war, & by several royal warrants, certain regulations were made with respect to payment & assignment of allowance to colonels of regiments, called off-reckonings. A colonel died in Feb., 1822, & a few days after a successor was appointed; but no inspection or return of the state of regimental appointments or accoutrements was made until Jan., 1823, when they were reported serviceable, except in event of the regiment being ordered on a foreign station. In Apr. & Sept., 1823, other inspections & returns were made, by which it appeared that numerous articles were unfit for service, & the agents of the late colonel (who had also received a power from his exors. to assign the off-reckonings, which they had done, to two of their clerks), contrary to the direction of his exors., but in conformity with the decision of the consolidated board of general officers, paid for articles supplied to make up the deficiency:—*Held:* such agents might set off this payment against the off-reckonings, but not against the private account of testator.—WEMYSS *v.* GREENWOOD, COX & HAMMERSLEY (1827), 5 L. J. O. S. K. B. 257.

1422. Set off of unsecured debt against surplus on realised securities for another debt.]—P. & Co., having borrowed a large sum of the Bank of Bengal, deposited the co.'s paper with the Bank to a greater amount as a collateral security, accompanied with a written agreement, authorising the Bank, in default of repayment of the loan by a given day, "to sell the co.'s paper for the reimbursement of the Bank, rendering to P. & Co. any surplus." Before default was made in the repayment of the loan, P. & Co. were declared insolvents, under Indian Insolvent Act, 1828 (c. 73), s. 36, by which it was declared that where there had been mutual credit given by the insolvents, & any other person, one debt or demand might be set off against the other, & that all such debts as might be proved under a commission of bkpcy. in England might be proved in the same manner under the above Act. At the time of the adjudication of insolvency the Bank were also holders of two promissory notes of

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FAX STEAM NAVIGATION CO. *v.* CUNARD (1835), Ber. 90.—**CAN.**

p. *Sum due for costs & fees—Money in hands of agent quâ garnishee.*]—Deft., threatened with action by his brother & pltf. on same debt, borrowed the amount necessary to pay it; but, in order not to be liable to pay it twice, he demanded, & it was understood, besides, between these two brothers that the money should be placed in the hands of the garnishee, awaiting the decision of the case, & that the sum should be surrendered either to the brother or to deft. himself to pay pltf. according to the judgment which might be rendered:—*Held:* the sum so entrusted to the garnishee had been so intrusted as a deposit, & he could not, consequently, set off what was due to him by deft. for costs & fees as an advocate in the cause.

Even if a garnishee can be considered an agent & not a depositary, he cannot invoke a set-off, seeing that it was a question of a special mandate of a sum confided by the principal for a special purpose.

The set-off has no place when the evident will of the parties is opposed to it.—DUGGAN *v.* GAUTHIER (1896), 1 G. I. Dig. 1892-98, pp. 84-85.—**CAN.**

q. *Money lent or due under collateral transaction.*]—An agent, sued by his principal for money received, cannot deduct in the first instance from such money the amount of a claim for money lent, or for any independent transaction between himself & his principal, treating the balance as the only sum held for the use of pltf.; but he must plead his demand by way of set-off against his gross receipts.—HAMILTON *v.* STREET (1851), 8 U. C. R. 124.—**CAN.**

r. *Counterclaim for wrongful acts of principal.*] — CANADIAN LAKE TRANSPORTATION CO. *v.* BROWNE (1913), 24 O. W. R. 149; 4 O. W. N. 880; 14 D. L. R. 744: 25 O. W. R. 365: 5 O. W. N. 376.—**CAN.**

Sect. 2.—Principal's rights against agent: Sub-sect. 4, C. (b) & D.]

P. & Co. which they had discounted for them, before the transaction of the loan & the agreement as to the deposit of the co.'s paper. The time for repayment of the loan having expired, the Bank sold the co.'s paper, the proceeds of which, after satisfying the principal & interest due on the loan, produced a considerable surplus. In an action by the assignees of P. & Co. against the Bank to recover the amount of the surplus :—*Held :* (1) the Bank could not set off the amount of the two promissory notes ; (2) the case did not come within the clause of mutual credit in the Act.—YOUNG *v.* BANK OF BENGAL (1836), 1 Deac. 622 ; 1 Moo. P. C. C. 150 ; 1 Moo. Ind. App. 87 ; 18 E. R. 34.

Annotations :—**Consd.** Fearnley *v.* Wright (1840), 1 Scott, N. R. 657, Ex. Ch. **Distd.** Alsager *v.* Currie (1844), 12 M. & W. 751 ; Naoroji *v.* Chartered Bank of India (1868), L. R. 3 C. P. 444. **Consd.** Astley *v.* Gurney (1869), L. R. 4 C. P. 714, Ex. Ch. in *Young v. Bank of Bengal* there was no power to sell except upon a default of repayment of a loan by a certain day & the day had not arrived at the time of the bkpcy., & therefore at that time there was no authority to sell & no credit given (CLEASBY, B.). **Distd.** *Re* Daintrey, *Ex p.* Mant, [1900] 1 Q. B. 546, C. A. **Refd.** Bittleston *v.* Timmis (1845), 1 C. B. 389.

1423. Death of principal—Right of agent executor.]—A testator, at his death, was indebted to A., his attorney & general agent, in £900 & upwards ; the agent, who had in his hands a sum of £900, was appointed exor. On a deficiency of assets :—*Held :* A. was entitled to retain the £900 in payment of his claim against testator.—POTTER *v.* FOWLER (1837), 6 L. J. Ch. 273.

1424. Payments made according to custom.]—Defts., wool brokers, were instructed by H. & Co. to buy a cargo of wool of R. & Co., for whom they also acted as brokers. R. & Co. objected to take the names of H. & Co., & defts. sent them a sold note, "sold to our principals, &c.," without naming H. & Co. in the note. The bought note which they sent to H. & Co. was made out "Bought for H. & Co., &c.," & H. & Co. were never informed that their names had been objected to or were not mentioned in the sold note. Evidence was given that it was the custom of the trade that brokers should either name their principals or not as they thought proper. Defts. resold the wool on H. & Co.'s instructions. H. & Co. became bkpt. when defts. paid R. & Co. for the wool. In an action by the trustees of H. & Co. under a deed of inspection for the proceeds of the wool sold by defts. :—*Held :* (1) defts. entitled to set off the amount they had paid to R. & Co. for the wool ; (2) evidence of the custom of the trade was admissible to show they had authority to make themselves personally liable on the sold note ; (3) the contract was not invalidated by the variance between the bought & sold notes.—CROPPER *v.* COOK (1868), L. R. 3 C. P. 194 ; 17 L. T. 603 ; 16 W. R. 596.

Annotations :—**Consd.** Mollett *v.* Robinson (1870), L. R. 5 C. P. 646. **Refd.** Calder *v.* Dobell (1871), L. R. 6 C. P. 486.

1425. Money in hands of agent quâ banker.]—K., an officer in the army, kept a current account with C. & Co. as his bankers. On K.'s retirement from the army the sum of £3,000, the value of his commission, was paid to C. & Co. as the army agents of his regiment, & was in due course carried to a deposit account kept by C. & Co. with the Army Purchase Comrs., there to remain till K.'s retirement was gazetted. At this time K.'s current account was overdrawn by £647. The day after K.'s retirement was gazetted C. & Co. received a notice of a deed by which K. had mtged. the value of his commission to secure the repayment of £5,000. The mtgee. having claimed payment of the whole £3,000, C. & Co. claimed to deduct out of it the £647 :—*Held :* (1) as soon as the retirement of K. was gazetted, the £3,000 became in the hands of C. & Co. money received to the use of K. ; (2) independently of the question whether C. & Co. had a banker's lien, they had at common law the right to set off against such moneys the debt due to them.—ROXBURGHE *v.* COX (1881), 17 Ch. D. 520 ; 50 L. J. Ch. 772 ; 45 L. T. 225 ; 30 W. R. 74, C. A.

Annotations :—**Apld.** Johnstone *v.* Cox (1881), 19 Ch. D. 17, C. A. **Foll.** Webb *v.* Smith (1885), 30 Ch. D. 192, C. A. **Refd.** *Re* Dallas, [1904] 2 Ch. 385, C. A. **Mentd.** *Re* Gregson, Christison *v.* Bolam (1887), 36 Ch. D. 223.

1426. Company—Debt due from, set off against sum due to liquidator.]—Deft., to whom a co. was indebted for commission earned as its traveller, & who was employed by the liquidator of the co., which was being voluntarily wound up, to collect debts due to the co., was held entitled to set off the one against the other.—MONKWEARMOUTH FLOUR MILL CO. *v.* LIGHTFOOT, No. 1293, *ante.*

Insurance agents & brokers.]—*See* INSURANCE.

D. Estoppel of Person purporting to act as Agent.

1427. Agent cannot dispute his principal's title.]—Deft. received the effects of an intestate under an administration granted to him in Bengal as the attorney of pltf., a bond creditor of intestate. Administration was afterwards granted in this country, & notice was given by the English administrators to deft. not to pay over the effects in his hands to pltf. :—*Held :* (1) deft. could not deny pltf.'s title ; (2) he was bound to pay over to him the effects of intestate in his hands.—FARRINGDON *v.* CLARKE (CLERK) (1782), 2 Chit. 429 ; 3 Doug. K. B. 124 ; 99 E. R. 572.

Annotation :—**Expld.** Whyte *v.* Rose (1842), 3 Q. B. 493.

1428. ——.]—*Qu. :* whether a broker who sells goods & receives money for them on account of his principal can controvert his title to the goods in an action brought against him by the principal for the money.—JONES *v.* DWYER (1812), 15 East, 21 ; 104 E. R. 752.

For full anns., *see* BANKRUPTCY & INSOLVENCY.

1429. ——.]—A. deposited goods with B. as security for money advanced by B., with a promise to deliver the bill of lading, on its arrival, indorsed to B. C. was employed as broker to dispose of the goods for B.'s benefit. Before the bill of lading arrived, the goods were attached in the mayor's ct. in the hands of C. by a creditor of A. :—*Held :* (1) the transfer of the property to B. was complete, though the bill of lading had never been indorsed ;

PART VIII. SECT. 2, SUB-SECT. 4.—D.

1427 i. *Agent cannot dispute his principal's title.*]—A factor for sale cannot, in an action by the consignor for not accounting, set up, as a defence, that the goods were not the property of the consignor, but of a third person, he having received no notice to that effect.—M'CLELAND *v.* WHITE (1831), Hayes, 240.—**IR.**

1427 ii. —— *Agent & principal both creditors.*]—A principal is entitled to recover money paid to his agent by his debtor, the agent also being a creditor.

V. at the expiration of a hire-purchase agreement was indebted to pltf. in respect thereof, &, desiring to renew the contract, gave deft., a law agent, instructions to that effect. V. paid deft. £20 on pltf.'s account. Pltf. verbally arranged terms with deft., & authorised deft. to recover the arrear instalments from V., to enter into a fresh contract with him, to take possession if arrears were not paid by a certain day & to telegraph his acceptance of these instructions. Deft. did not reply &, without informing pltf. thereof, renewed the contract with V. V. paid deft. a further £10, leaving it to him to appropriate it either to pltf.'s or his own account with V. Pltf. sued deft. for £30. Deft. contended that he was authorised by V. to purchase from pltf. & that the £20 was credited to V. in a running account between him & V. ; that he was never pltf.'s agent, & acted for V. only :—*Held :* as deft. was acting for pltf. when he received the £20 & as a fact received it on pltf.'s account, he could not appropriate it to his own account.—DAVIE *v.* SACHS (1911), C. P. D. 992.—**S. AF.**

(2) the foreign attachment was no answer to an action by B. against C. for the proceeds.—GILES *v.* NATHAN (1814), 1 Marsh. 226.

1430. ——.]—A ship originally belonged to one of two partners, & had been conveyed to deft. for securing a debt, & he became sole registered owner & afterwards, as agent for both partners, insured the ship & freight, & charged them with the premiums, etc., &, on a loss happening, received the money from the underwriters:—*Held:* he was accountable to the assignees of the surviving partner for the surplus, after payment of his own debt, & not to the exors. of deceased partner, to whom the ship originally belonged.

The right of pltfs. to recover here depends on a settled rule of law, that an agent shall not be allowed to dispute the title of his principal, & that he shall not, after accounting with his principal & receiving the money in that capacity, afterwards say that he did not do so, & did not receive it for the benefit of his principal, but for that of some other person. Here deft. has received the money as agent for the partnership, & he cannot now be permitted to say that he received it for the benefit of [the original owner] alone (ABBOTT, C.J.).—DIXON *v.* HAMOND (1819), 2 B. & Ald. 310; 106 E. R. 380.

Annotations:—**Folld.** Roberts *v.* Ogilby (1821), 9 Price, 269. **Distd.** Philips *v.* Robinson (1827), 4 Bing. 106; Hardman *v.* Willcock (1832), 9 Bing. 382. **Refd.** Zulueta *v.* Vinent (1852), 1 De G. M. & G. 315.

1431. ——.]—A broker who has received the proceeds of a policy of insurance cannot, as agent, dispute the claim of his only known principal on the ground that other persons are interested in the subject-matter of the insurance.

Where the letters between the parties showed the broker had considered himself as dealing with one of the owners only of the ship, & as having insured for him alone:—*Held:* they were conclusive against the broker as fixing him with an agency for his correspondent solely.—ROBERTS *v.* OGILBY (1821), 9 Price, 269; 147 E. R. 89.

Annotations:—**Distd.** Hardman *v.* Willcock (1832), 9 Bing. 382 n.; Suart *v.* Welch (1839), 4 My. & Cr. 305.

1432. ——.]—Under an arrangement between A., a merchant at M., & C., a merchant at L., A. bought goods for C. in A.'s name & consigned them for sale in A.'s name to houses in I., the correspondents of B. At the time of the arrangement & of the shipment of the goods C. was the factor of B. at L. (which fact was known to A.), & advised B. of the shipments, & as to the advances B. might make thereon to A. B. had from time to time accounted with A. & handed over to him the balance of the proceeds of each shipment after deducting commission, etc. C. having become bkpt., B. refused to pay over to A. the balance in his hands, claiming a lien thereon in respect of the debt due to him from C. on the ground that the goods were the property of C. & not of A., & alleging that the course of dealing between A. & C. was a fraud upon B. A. having brought an action for money had & received against B., the judge left it to the jury at the trial to say: (1) whether, as between A. & B., the goods were the property of A.; (2) whether the transaction between A. & C. amounted to a fraud on B., which was productive of injury to the latter. The jury having found a verdict for A. for the amount of the balance in the hands of B., the ct. refused to grant a rule *nisi* for a new trial.—SCOTT *v.* CRAWFORD (1842), 4 Man. & G. 1031; 5 Scott, N. R. 781; 134 E. R. 1031.

1433. ——.]—A consignor who has purchased goods on account & at the risk of his correspondent, & delivered them to the carrier, has no right, by reason of a variation of accounts between him & his correspondent, or of a disagreement between them, to depart from his duty & deliver them to another person; & a person taking from the consignor with notice of the circumstances is subject to the rights of the correspondent.—GREEN *v.* MAITLAND (1842), 4 Beav. 524; 49 E. R. 442.

1434. —— **Where he has agreed to account.**]—Where A. agreed to remit certain consignments to B., & B. agreed to account with A. for the proceeds of such consignments:—*Held:* it was not competent at any time afterwards for B. to assert a paramount title to the proceeds of such consignments.—ZULUETA *v.* VINENT (1852), 1 De G. M. & G. 315; 19 L. T. O. S. 330; 42 E. R. 573.

1435. —— **By disputing the authority under which he acted.**]—A party who has under an authority from the assignee acted upon a bill of sale by selling the goods cannot, in an action by the assignee for the proceeds, impeach its validity. Neither can he, if the authority to sell is in general terms to sell all the effects at a certain place, & he has afterwards admitted "a balance" in his hands on the sale, set up in such an action that part of the goods sold were not comprised within the bill of sale, & that the proceeds of the goods which were so have been exhausted by expenses or payments in pursuance of the authority.—BAKER *v.* DALE (1858), 1 F. & F. 271.

1436. —— **Notice of title of principal's husband.**]—A married woman sued deft., whom she had before marriage appointed her agent, for moneys received by him as her agent since marriage in respect of property to which she was before her marriage entitled, as to part absolutely & as to part as trustee:—*Held:* (1) she could recover in respect of both; (2) deft. could not set up a mere notice of the title of the husband as a defence unless such notice amounted to a claim for him.—KINGSMAN *v.* KINGSMAN (1880), 6 Q. B. D. 122; 50 L. J. Q. B. 81; 44 L. T. 124; 45 J. P. 357; 29 W. R. 207, C. A.

For full anns., *see* INFANTS & CHILDREN.

1437. —— **By requiring concurrence of third parties.**]—E. having died in Ireland intestate, letters of administration were granted in Ireland to pltf. Part of his assets being in India, pltf. sent out a power of attorney to F. & Co. in India, who procured letters of administration to be granted to them in India for the use & benefit of pltf., received the Indian assets, paid the Indian debts, & remitted the surplus to their agents in England. The Irish letters of administration were sealed in England:—*Held:* the agents in England were bound to hand over the fund to pltf., & could not require the concurrence of the next of kin, they not having taken any legal proceedings to prevent pltf. from receiving the assets.—EAMES *v.* HACON (1881), 18 Ch. D. 347; 50 L. J. Ch. 740; 45 L. T. 196; 29 W. R. 877, C. A.

Annotation:—**Consd.** *Re* Kloebe, Kannreuther *v.* Geiselbrecht (1884), 28 Ch. D. 175.

1438. —— **By pleading he acted as principal.**]—In an action by pltf. to recover the amount of bets executed for him by deft. on commission, the defence was that the bets had been made between the parties as principals & were void. The accounts & letters treated the bets as made with third parties:—*Held:* deft. was estopped from denying that he had acted as pltf.'s agent.—MOORE *v.* PEACHEY (1891), 7 T. L. R. 748.

Annotation:—**Refd.** Potter *v.* Codrington (1892), 9 T. L. R. 54.

1439. Agent claiming adverse title—Must show acts inconsistent with agency.]—An agent claiming an adverse title, proved by acts of ownership, must distinctly negative the conclusion that such acts of ownership are to be attributed to his character of agent.—A.-G. *v.* LONDON CORPN. (1850), 2 Mac. &

Sect. 2.—Principal's rights against agent: Sub-sect. 4, D. & E.; sub-sect. 5.]

G. 247; 19 L. J. Ch. 314; 14 L. T. O. S. 501; 14 Jur. 205; 42 E. R. 95.

For full anns., *see* CHARITIES.

1440. ——.]—So long as an agent is in receipt of rent of land, Stat. Limitations will not run against his employer; & if a person commence to receive rents as agent for another, & continue to receive such rents, without paying them over, he must be presumed to receive as agent till the contrary is shown.—SMITH *v.* BENNETT (1874), 30 L. T. 100.

1441. —— Father acting for infant son.]—H. & his wife were entitled to gavelkind land in equal moieties, as tenants in common in fee. The wife died in 1870, leaving two sons, S. & J., then an infant. J. attained 21 in 1877. By the custom of gavelkind, on the mother's death her moiety descended on her two sons in equal moieties, as tenants in common, subject to the right of H. to receive one moiety of the rent so long as he remained a widower. Upon her death H. entered into receipt of the entirety of the rent, & continued in such receipt, without accounting to either of his sons, or acknowledging their title in writing, for more than 12 years: —*Held:* (1) as to that moiety of the one-fourth to which J. became entitled in possession on the death of his mother, H. must be taken to have entered into possession as bailiff for his infant son; (2) the possession taken in that capacity could not change its character on the infant attaining 21; (3) the title of J. to that one-eighth was not barred by Real Property Limitation Act, 1833 (c. 27), s. 12; (4) as to that moiety of the one-fourth to which S. became entitled in possession on his mother's death, the same presumption did not arise; (5) there being no evidence that H. had entered into receipt of the rent as his agent, the title of S. to that one-eighth was barred by the stat.—*Re* HOBBS, HOBBS *v.* WADE (1887), 36 Ch. D. 553; 57 L. J. Ch. 184; 58 L. T. 9; 36 W. R. 445.

Annotations:—**Folld.** Tinker *v.* Rodwell (1893), 9 T. L. R. 657. **Mentd.** Garner *v.* Wingrove (1905), 53 W. R. 588.

1442. Effect of estoppel—Agent real owner allowing principal to expend money on estate.]—Where an agent had permitted his principal to expend money on an estate which the agent afterwards claimed as his own, & to which the real representative established a legal title by ejectment:—*Held:* an injunction must be granted to restrain an action brought by the agent's representative for mesne profits.—CAWDOR (LORD) *v.* LEWIS (1835), 1 Y. & C. Ex. 427; 4 L. J. Ex. Eq. 59; 160 E. R. 174.

Annotations:—**Distd.** Barnard *v.* Wallis (1840), 2 Ry. & Can. Cas. 162. **Mentd.** Rawson *v.* Samuel (1841), Cr. & Ph. 161.

1443. —— Agent real tenant paying rent to principal.]—Where A. took a lease in writing in his own name of certain premises & subsequently occupied part only, & paid rent for so much as he occupied to B., as whose agent he in fact took the lease:—*Held:* (1) B. might distrain for the part so occupied; (2) A. was precluded in replevin from disputing his title.—CLARKE *v.* WATERTON (1838), 2 Mood. & R. 87.

1444. ——Solicitor paying off client's mortgage—Possession of mortgaged property.]—A solr. who pays off a mtge. debt due from his client must be taken to act as the agent of the client & not on his own behalf; & if he receives the rent of the mtged. property Stat. Limitations will not run against the client.—WARD *v.* CARTTAR (1865), L. R. 1 Eq. 29; 35 Beav. 171; 55 E. R. 860.

Annotation:—**Refd.** Rochefoucauld *v.* Boustead, [1897] 1 Ch. 196, C. A.

1445. —— Principal gets benefit of agent's possession.]—Where a person receives rent claiming to receive it on behalf of the true owner, who can & does ratify the agency undertaken on his behalf, though without his antecedent authority, the case is the same as if the owner had himself received the rent (LORD SELBORNE).—LYELL *v.* KENNEDY, KENNEDY *v.* LYELL, No. 1516, *post.*

For full anns., *see* S. C. No. 1516, *post.*

1446. —— —— Although agent real owner.]—Possession of an agent is possession of the principal; & the principal may acquire a possessory title to real estate by receiving rents for 20 years through an agent, although that agent is the person really entitled to the estate.—WILLIAMS *v.* POTT (1871), L. R. 12 Eq. 149; 40 L. J. Ch. 775.

Annotation:—**Refd.** Mitchell *v.* Mosley, [1914] 1 Ch. 438, C. A.

E. Agent's Right to interplead.

See INTERPLEADER.

SUB-SECT. 5.—PRINCIPAL'S RIGHT TO INTEREST.

1447. Agent failing to ship goods.]—An agent entrusted to receive sugars in the West Indies, which were due on bond carrying £10 per cent., the common interest of the country, & to send them to England, received the sugars, but did not send them, & died:—*Held:* his exor. should pay £10 per cent. interest.—ELLIS *v.* LOYD (1701), 1 Eq. Cas. Abr. 289; 21 E. R. 1052.

1448. Agent failing to invest.]—An agent of an administrator keeping money of the intestate's in his hands, which he had proposed to his principal to lay out in the funds, was ordered to pay interest. —BROWNE *v.* SOUTHOUSE (1790), 3 Bro. C. C. 107; 29 E. R. 437.

Annotations:—**Consd.** Rocke *v.* Hart (1805), 11 Ves. 58. **Apld.** Harington *v.* Hoggart (1830), 1 B. & Ad. 577. **Refd.** Tebbs *v.* Carpenter (1816), 1 Madd. 290; Blair *v.* Bromley (1847), 2 Ph. 354; Moore *v.* Knight (1890), 63 L. T. 831.

1449. Agent applying money to his own use.]—Where money is remitted to an agent, if he applies that money to his own use, he is liable to pay the interest from the time he has so applied it. *Aliter*, where he has so suffered it to lie dead in his hands. —ROGERS *v.* BOEHM (1798), 2 Esp. 702.

Annotations:—**Distd.** Harington *v.* Hoggart (1830), 1 B. & Ad. 577. **Apld.** Morison *v.* Thompson (1874), L. R. 9 Q. B. 480.

1450. Agent holding proceeds of prize.]—The Prize Ct. of Appeals has jurisdiction to decree that one who was co-agent of the captors, in whose

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PART VIII. SECT. 2, SUB-SECT. 5.

1448 i. *Agent failing to invest.]* — A party receiving money as attorney is bound to lay it out at interest within six months, & is liable in 5 per cent. interest on all money not so laid out.—BROWN'S TRUSTEES *v.* BROWN (1830), 4 W. & S. 28.—**SCOT.**

1448 ii. —— *Gratuitous agent.]*—HOLMES *v.* THOMPSON, 38 U. C. R. 292.—**CAN.**

s. *Agent failing to pay creditor.]*—DUBUC *v.* BOLDUC (1885), 14 R. L. 359; Q. B. 1885.—**CAN.**

t. *Agent failing to pay over money collected.]*—The mandator has a direct action against his mandatory for moneys collected & not paid over, & that without resorting to the action mandati. And for such moneys the mandator will be entitled to claim both principal & interest from his mandatory.—JOSEPH & PHILLIPS (1875), 19 L. C. J. 162, Q. B.—**CAN.**

u. *Agent investing funds negligently.]* —PARKER *v.* MCARA BROTHERS & WALLACE (1913), 23 W. L. R. 1443; 10 D. L. R. 37.—**CAN.**

1449 i. *Agent applying money to his own use.]*—An agent who had received money for his principal, & had used it for many years in his own business, instead of remitting it to his principal, was charged with 6 per cent. interest & annual rests.—LANDMAN *v.* CROOKS (1854), 4 Gr. 353.—**CAN.**

hands the proceeds of the prize after condemnation & sale were placed, should, after a decree of restitution with interest pronounced against the captors, pay interest on such proceeds while in his hands to claimant.—WILLIS *v.* APPEALS IN PRIZE CAUSES COMRS. (1804), 5 East, 22 ; 102 E. R. 977.

Annotations :—**Distd.** Harington *v.* Hoggart (1830), 1 B. & Ad. 577. **Refd.** The Brig Louis (1804), 5 Ch. Rob. 147.

1451. Agent acting fraudulently.]—A steward was decreed to pay interest & costs in case of fraud & wilful concealment.—HARDWICKE *v.* VERNON, No. 1502, *post*.

Annotations :—**Apld.** Pearse *v.* Green (1819), 1 Jac. & W. 135 ; *Re* Whitehead, *Ex p.* Burnand (1860), 2 L. T. 776. **Distd.** Turner *v.* Burkinshaw (1867), 2 Ch. App. 488. **Refd.** Teed *v.* Beere (1859), 28 L. J. Ch. 782 ; Springett *v.* Dashwood (1860), 2 Giff. 521 ; Makepeace *v.* Rogers (1865), 5 New Rep. 399 ; Rishton *v.* Grissell (1870), L. R. 10 Eq. 393 ; Harsant *v.* Blaine Macdonald (1887), 56 L. J. Q. B. 511, C. A.

For full anns., *see* S. C. No. 1502, *post*.

1452. Agent not liable for interest on occasional balances.]—*Semble* : a public servant to whom money is from time to time imprested is not chargeable with interest on occasional balances in his hands, & certainly not when the amount is trifling, the occasions unavoidable & time of holding such balance short.—A.-G. *v.* LINDEGREN, No. 1304, *ante*.

1453. Agent not keeping his accounts ready.]—The first duty of an agent is to be constantly ready with his accounts, & neglect in this is a ground for charging him with interest.

The owners of a privateer, acting for themselves & crew, in sale of prizes, having neglected to render accounts & delayed distribution of the proceeds, were charged with interest on the balances & costs.—PEARSE *v.* GREEN (1819), 1 Jac. & W. 135 ; 37 E. R. 327.

Annotations :—**Apld.** Springett *v.* Dashwood (1860), 2 Giff. 521. **Folld.** Fry *v.* Fry (1864), 10 Jur. N. S. 983 ; Blogg *v.* Johnson (1867), 2 Ch. App. 225. **Expld.** Turner *v.* Burkinshaw (1867), 2 Ch. App. 488. It is the first duty of an agent, as Sir Thomas Plumer said in *Pearse* v. *Green*, to be constantly ready with his accounts ; this must mean that the agent must be ready to render his accounts when they are demanded ; if no demand is made upon him it is the simple case of an agent retaining money which he ought to pay over but which he has not been required to pay ; & there is no case of which I am aware where under such circumstances, without anything more, the agent has been made to pay interest (LORD CHELMSFORD, C.). Rishton *v.* Grissell (1870), L. R. 10 Eq. 393. **Apprvd.** Harsant *v.* Blaine Macdonald (1887), 56 L. J. Q. B. 511, C. A. **Refd.** *Re* Whitehead, *Ex p.* Burnand (1860), 2 L. T. 776.

1454. Agent receiving deposit on sale—Where agent is auctioneer.]—An auctioneer who is employed to sell an estate, & who receives a deposit from the purchaser, is a mere stakeholder, liable to be called upon to pay the money at any time ; & although he place the money in the funds & make interest of it, he is not liable to pay such interest to the vendor when the purchase is completed, though vendor (without the concurrence of vendee) gave him notice to invest the money in Govt. securities.—HARINGTON *v.* HOGGART (1830), 1 B. & Ad. 577 ; 9 L. J. O. S. K. B. 14 ; 109 E. R. 902.

Annotation :—**Apprvd.** Edgell *v.* Day (1865), 35 L. J. C. P. 7.

1455. —— Where agent not auctioneer.]—EDGELL *v.* DAY, No. 1379, *ante*.

For full anns., *see* S. C. No. 1379, *ante*.

1456. Agent not liable when not in default.]—In 1827, the administratrix of an intestate, who had carried on business at Calcutta, sent out letters of attorney to C. & Co. to collect assets in India. C. & Co. collected the assets & remitted the proceeds in 1829 to B. & Co., their correspondents in London, with directions to pay same to the administratrix upon having a proper discharge. The letters of administration being insufficient, B. & Co. refused to pay over the money. On a bill filed by the next of kin against the administratrix & B. & Co., an injunction was obtained restraining the administratrix from collecting the assets & B. & Co. from paying over the fund. B. & Co. by their answer admitted possession of the fund, & offered to pay it upon being indemnified. No further steps were taken in the suit until 1841, when a bill of revivor & supplement was filed ; & under an order in the cause, the fund, *minus* expenses, was paid into ct. without prejudice to the question of interest. Since 1829 the fund had been lying at the bankers' of B. & Co. mixed up with other moneys of the firm :—*Held* : (1) B. & Co. were merely agents of C. & Co. ; (2) no demand having been made by a person competent to give a discharge, B. & Co. were not liable to pay interest on the fund in their hands ; (3) B. & Co. were in no default in not themselves applying to pay the fund in ct., there being no personal representative properly constituted before the ct.—WOLFE *v.* FINDLAY (1847), 6 Hare, 66 ; 16 L. J. Ch. 241 ; 8 L. T. O. S. 408 ; 11 Jur. 82 ; 67 E. R. 1085.

Annotations :—**Dbtd.** Crossley *v.* City of Glasgow Life Assce. Co. (1876), 4 Ch. D. 421. With the greatest possible deference to Wigram, V.-C., who decided *Wolfe* v. *Findlay*, I should have decided the contrary on the very plainest principles of equity ; the agents were admittedly trustees of the money ; I should never have allowed them to keep the money for ten years & mix it with their own moneys (JESSEL, M.R.). **Apprvd.** Webster *v.* British Empire Mutual Life Assce. Co. (1880), 15 Ch. D. 169, C. A.

1457. Interest payable though not claimed.]—To a bill against an agent for an account & payment of balance due, deft. answered he had paid over more than he had received, & claimed a balance due to him. The bill did not pray interest, & it being proved the balance was against him :—*Held* : (1) he must pay, in addition to the balance due from him, the costs of suit ; (2) deft. was chargeable with interest at £5 per cent. from the filing of the bill.—FRY *v.* FRY (1864), 10 Jur. N. S. 983.

1458. Interest not chargeable until account settled.]—An agent had entire management of his principal's affairs for several years, during which he was never called upon to account ; errors were then discovered in some accounts furnished by him, & he paid a small sum admitted to be due, alleging that this was a final settlement, & that only a small sum, if anything more, was due. On a bill being filed & accounts taken, a large sum was found due from him :—*Held* : in the circumstances, there having been no wilful withholding of accounts, or any fraudulent falsification of them, he was not chargeable with interest on the balances in his hands until the date of the certificate.—TURNER *v.* BURKINSHAW (1867), 2 Ch. App. 488 ; 17 L. T. 83 ; 15 W. R. 753.

1459. Compound interest, when chargeable.]—An agent, acting under a power of attorney, received

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1451 i. *Agent acting fraudulently.*]—An agent retaining his principal's money, which he has not been required to pay, should not ordinarily be required to pay interest ; but if his conduct has been fraudulent, he should be charged with interest.—MONOHUR DOSS *v.* SITUL PERSHAD (1875), 23 W. R. 325.—**IND.**

1453 i. *Agent not keeping his accounts ready.*]—An agent refusing to account & pay over the balance is chargeable with interest.—SIMONDS *v.* COSTER (1906), 3 N. B. Eq. 329 ; 1 E. L. R. 544.—**CAN.**

1457 i. *Interest payable though not claimed—Discharge of agent.*]—Principals were accustomed not to charge their agent on stated accounts with interest on balances in his hands. On his discharge :—*Held* : they could enforce payment of the balance then due together with interest on it.—BATEMAN *v.* M'ELLIGOTT (1844), 7 I. Eq. R. 471.—**IR.**

1459 i. *Compound interest, when chargeable.*]—In an accounting between an agent & his employer, the ct. allowed the balances to be struck annually, so as to charge compound interest, & also the interest of a heritable debt retained in security of certain obligations of warrandice to be annually accumulated in same way.—QUEENSBERRY'S (DUKE) EXORS. *v.* TAIT (1826), 5 S. 180.—**SCOT.**

Sect. 2.—Principal's rights against agent: Sub-sects. 5, 6 & 7, A.]

certain moneys for investment, which he paid into his own account at his bank. The principal died in 1859; his widow took out administration in 1867, & in 1868 filed a bill for an account against the agent. There was no proof the agent had made any interest or profit by the money in his hands:—*Held:* (1) compound interest was only allowed where the accounting party had used the money in business; (2) mixing the money with the ordinary account of a firm of solrs. at a bank was not such employment in business as would render a member of the firm liable to compound interest; (3) the agent was chargeable with simple interest at the rate of 5 per cent.—BURDICK *v.* GARRICK (1870), 5 Ch. App. 233; 39 L. J. Ch. 369; 18 W. R. 387.

Annotations:—**Apld.** Gray *v.* Bateman (1872), 21 W. R. 137. **Distd.** Boatwright *v.* Boatwright (1873), 43 L. J. Ch. 12; Watson *v.* Woodman (1875), L. R. 20 Eq. 721. **Extd.** Banner *v.* Berridge (1881), 18 Ch. D. 254. **Apld.** *Re* Exchange Banking Co., Flitcroft's Case (1882), 21 Ch. D. 519, C. A.; *Re* Bell, Lake *v.* Bell (1886), 34 Ch. D. 462. **Consd.** Dooby *v.* Watson (1888), 39 Ch. D. 178. **Apprvd.** Lyell *v.* Kennedy, Kennedy *v.* Lyell (1889), 14 App. Cas. 437. **Distd.** Phillips *v.* Homfray (1890), 44 Ch. D. 694. **Apld.** *Re* Sharpe, *Re* Bennett, Masonic & General Life Assce. Co. *v.* Sharpe, [1892] 1 Ch. 154, C. A.; Soar *v.* Ashwell, [1893] 2 Q. B. 390, C. A. **Consd. & Distd.** Friend *v.* Young, [1897] 2 Ch. 421. **Folld.** North American Land & Timber Co. *v.* Watkins, [1904] 1 Ch. 242. **Apprvd.** Reid-Newfoundland Co. *v.* Anglo-American Telegraph Co., [1912] A. C. 555, P. C. **Apld.** Henry *v.* Hammond, [1913] 2 K. B. 515. **Refd.** Touche *v.* Met. Ry. Warehouses Co. (1871), 40 L. J. Ch. 496; Gilroy *v.* Stephens (1882), 51 L. J. Ch. 834; Charles *v.* Jones (1887), 35 W. R. 645; *Re* Allsop, Whittaker *v.* Bamford, [1914] 1 Ch. 1, C. A.; Nocton *v.* Ashburton, [1914] A. C. 932, H. L. **Mentd.** Silkstone & Haigh Moor Coal Co. *v.* Edey, [1900] 1 Ch. 167.

1460. Interest chargeable from date of refusal to pay over sum due.]—A person who has received money as agent is bound not only to account for it, but also to pay it over to his principal when requested, &, in an action for money had & received, is chargeable with interest on the amount so received from the date of refusal to pay it over.—HARSANT *v.* BLAINE, MACDONALD & CO. (1887), 56 L. J. Q. B. 511; 3 T. L. R. 689, C. A.

Annotation:—**Apld.** Barclay *v.* Harris & CROSS (1915), 85 L. J. K. B. 115.

1461. ——.]—Pltf. instructed deft., his solr., to recover a sum of money for him. He did so, but did not pay it to pltf. Subsequently pltf. demanded payment of this sum:—*Held:* interest on this sum was payable by deft. as from the date of the demand only, & not from the date when the money was received by deft.—BARCLAY *v.* HARRIS & CROSS (1915), 85 L. J. K. B. 115; 112 L. T. 1134; 31 T. L. R. 213.

1462. Where balances held by agent at principal's request.]—Deft. had been steward to Lord S. He had, according to his duty, from time to time informed him what money was in his hands, & undertaken with him upon his wish that there should be always a large sum in his hands for which he should be responsible from time to time:—*Held:* in the circumstances deft. could not be affected by a demand of interest of the money he had in his hands (LORD THURLOW, C.).—SALISBURY (LORD) *v.* WILKINSON (undated), cited 8 Ves. 48; 32 E. R. 268.

SUB-SECT. 6.—ATTACHMENT OF DEFAULTING AGENT.

See CONTEMPT OF COURT, ATTACHMENT & COMMITTAL.

SUB-SECT. 7.—IN RESPECT OF CONTRACTS ENTERED INTO BY AGENT ON PRINCIPAL'S BEHALF.

A. As regards Land.

1463. Agent purchasing for himself—Specific performance refused.]—Deft. bought an estate for pltf., but there was no written agreement between them, nor was any part of the purchase-money paid by pltf. Deft. articled for the estate in his own name & refused to convey to pltf. A bill to compel a conveyance was dismissed with costs, there being no written evidence that the estate was purchased for pltf. & pltf. not having paid any money, & there having been no fraud used by deft. to prevent an execution of the agreement.—BARTLETT *v.* PICKERSGILL (1760), 1 Cox, Eq. Cas. 15; 1 Eden, 515; 4 East, 577 n.; 29 E. R. 1041.

Annotations:—**Distd.** Heard *v.* Pilley (1869), 4 Ch. App. 548. **Consd. & Apprvd.** James *v.* Smith, [1891] 1 Ch. 384. **Dbtd.** Rochefoucauld *v.* Boustead, [1897] 1 Ch. 196, C. A. *Bartlett v. Pickersgill* cannot be regarded as law at the present day; the case not only seems to be but is inconsistent with all modern decisions on the subject (LINDLEY, L.J.). **Refd.** Abrahams *v.* Bunn (1768), 4 Burr. 2251. **Mentd.** R. *v.* Boston (1804), 4 East, 572; A.-G. *v.* Woodhead (1815), 2 Price, 3; Thurtell *v.* Beaumont (1823), 1 Bing. 339; R. *v.* Dunston (1824), Ry. & M. 109; Maclean *v.* Maclean (1829), 2 Hag. Ecc. 601; Kenrick *v.* Kenrick (1831), 4 Hag. Ecc. 114; Blakemore *v.* Glamorganshire Canal Co. (1835), 2 Cr. M. & R. 133; Stoate *v.* Stoate (1860), 30 L. J. P. M. & A. 102.

1464. —— Agent held trustee for principal.]—If an agent employed to purchase an estate becomes the purchaser for himself, he is to be considered as a trustee for his principal.—LEES *v.* NUTTALL (1835), 2 My. & K. 819; 39 E. R. 1157.

Annotation:—**Refd.** Chattock *v.* Muller (1878), 8 Ch. D. 177.

PART VIII. SECT. 2, SUB-SECT. 7.—A.

1464 i. *Agent purchasing for himself—Agent held trustee for principal.*]—W. & H., being in fact agents for undisclosed principals, agreed with R. to join equally in the purchase of land & paid to R. £1,024, being one-fifth of the purchase-money. This was wholly the money of their principals, but R. had no notice that W. & H. were agents only. R. with the money subscribed by W. & H. & others selected land at Gipps Land & signed a memorandum in writing dated May 13, 1841, that he would, when the Crown grant issued, stand seised of that land in trust for W. & H. & the other co-contributors. R. obtained the Crown grant for the land & dealt with it as his own. The representatives of some of the undisclosed principals of W. & H. on behalf of themselves & other undisclosed principals sued R. in equity to establish a trust against one-fifth of the land:—*Held:* (1) R. held one-fifth of the land on an express trust within Stat. Limitations for W. & H. or their principals; (2) pltfs. suing sufficiently affirmed the investment on behalf of all the undisclosed principals.—HUNTER *v.* RUTLEDGE (1869), 6 W. W. & a'B. 331.—**AUS.**

1464 ii. —— ——.]—W. was manager of a squatting station on which lands were opened for selection under Land Act, 1862. W. selected large positions, the purchase-money & rents for which were in the first place paid out of the estate of the principal, but were subsequently repaid to that estate by W. by means of money borrowed by him from a bank on the security of the Crown grants of the land selected:—*Held:* W. should be deemed to have purchased as a trustee for the personal estate of the principal.—LEMPRIERE *v.* WARE (1871), 2 V. R. 1.—**AUS.**

1464 iii. —— ——.]—An agent for the purchase of property purchased in his own name & with his own money:—*Held:* the agent was trustee for his principal.—ARCHIBALD *v.* GOLDSTEIN (1884), 1 M. R. 45, 146.—**CAN.**

1464 iv. —— ——.]—Where an employee, standing in a fiduciary relation to his absent principal, purchases land with the principal's money for his principal, but takes the deed in his own name, putting it with the title deeds of his principal after registry, & that land is so intimately connected with other land of his principal that its independent ownership would be prejudicial to the ownership of his principal, he cannot retain such land for his own benefit,

1465. —— ——.]—A.'s interest in leasehold lands having been set up for public sale, under writs of *fi. fa.*, C., his attorney, being the real pltf. in one of the writs, but not pressing the sale, attended, & having made the largest bidding, he was declared purchaser, & paid the purchase-money, which was not more than sufficient to satisfy the writs prior to his own, & the expenses. A. claimed the benefit of the purchase, alleging that C. bid as his agent, & purchased in trust for him, which C. denied, but offered to give up the purchase if A. would pay him the purchase-money & other demands he had on him. A. was not then able to raise the money, but after 10 years, during which C. dealt with the lands as his own, he filed his bill, charging that C. bid for & purchased the lands as his agent in trust for him; that C. said so at & after the sale in conversation with friends of A., & they on that understanding did not bid; all which C. positively denied in his answer:—*Held:* (1) the material question being whether C. was acting on behalf of A. in bidding for & purchasing his property, C. might take an issue to try that question, but if he declined, he should be declared a trustee for A.; (2) A.'s equity against C., if C. was acting on his behalf, was not affected by the lapse of 10 years, there being no acquiescence by A., & C. being aware of his rights; (3) if an attorney was not acting as attorney for his client on a particular occasion, he might throw off that character & exercise his independent rights.—AUSTIN *v.* CHAMBERS (1837-8), 6 Cl. & Fin. 1; 7 E. R. 598.

For full anns., *see* SOLICITORS.

1466. —— ——.]—The trustees of a marriage settlement being empowered by it to invest the trust funds in freeholds or copyholds of inheritance with consent of the husband & wife, authorised the husband to purchase a certain estate, as an investment of part of the trust funds; afterwards they sold out a sufficient part of those funds to pay for the estate, & the husband received the proceeds. The estate was copyhold for lives, & the purchase was made without the wife's consent:—*Held:* as between the husband & trustees, he must be considered to have purchased the estate for them.—TRENCH *v.* HARRISON (1849), 17 Sim. 111; 60 E. R. 1070.

For full anns., *see* EQUITY.

1467. —— ——.]—Pltf. & deft., being both desirous of purchasing the same estate, agreed that deft. should purchase the whole estate & cede to pltf. certain specified fields. Deft. purchased the estate, throughout the negotiations treating the matter as a joint affair. Subsequently he wrote to pltf. that he intended to keep the whole estate, alleging that in their agreement he had reserved the right to deal with the property as he liked in case he purchased the whole. In an action for specific performance:—*Held:* deft. had purchased partly as agent of pltf., & there would be a reference to ascertain what portion pltf. was entitled to.—CHATTOCK *v.* MULLER (1878), 8 Ch. D. 177.

1468. —— ——.]—Property in Germany, belonging to a limited co., was vested in certain persons as trustees for securing payment of debentures. The trustees, professing to act under a power of sale in the trust instrument, caused certain proceedings to be instituted in a German ct.: the result was the trust property was sold at an undervalue by

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but takes a mere legal title which he cannot convey to another. Any attempt on his part so to convey is a dereliction of duty, & constructive notice to the vendee is sufficient to prevent it from becoming effective.—LEWIS MILLER & Co. *v.* HALIFAX POWER Co. (1915), 48 N. S. R. 370.—**CAN.**

1464 v. —— ——.]—An agent employed to purchase land for his principal purchased it for himself in his own name, in fraud of his principal:—*Held:* a constructive trust arose which was not within Stat. Frauds, s. 7, & which might therefore be established by parol evidence. In such case an agent who has taken a conveyance of the land in his own name would stand in the position of a purchaser with notice of an equity: *Bartlett v. Pickersgill* (1760), 4 East. 577 n., consd.—MORRIN *v.* KISSLING, 4 J. R. N. S. C. A. 1.—**N.Z.**

1464 vi. —— *Agent not held trustee—Scheme to evade laws.*]—There is no fiduciary duty in an agent towards his principal to assist him in evading the provisions of the law.—GANGA BAKSH *v.* RUDAR SINGH (1900), 22 All. 434.—**IND.**

1464 vii. —— *Questions for jury.*]—A bill was filed charging deft. with having purchased certain lands as pltf.'s agent & with his money, & praying to have deft. declared trustee of the land for pltf. Issues were directed to be tried as to the agency, & as to the payment of the amount of purchase-money having been made out of moneys belonging to pltf., or having been charged against him in account by deft.—MACAULAY *v.* PROCTOR (1851), 2 Gr. 390.—**CAN.**

1464 viii. —— *Ejectment of other agents by agent purchaser.*] — K., registered owner of land subject to a mtge. to C. Co. who took abortive sale proceedings, authorised pltf. to sell the land. Pltf., without the knowledge of K., purchased the land from C. Co., & entered into possession of it, but subsequently removed to another place, when the wife of K., & D., an agent of K., entered on the land & refused to deliver up possession. Pltf. having brought an action of ejectment:—*Held:* the rule that an agent cannot buy his principal's property without the latter's consent gave a remedy to the principal but was not available as a defence to an action of ejectment brought by such agent against other agents of the principal.—PALMASON *v.* KJERNESTED (1917), 3 W. W. R. 312; 36 D. L. R. 448.—**CAN.**

1464 ix. —— *Suit for possession.*]—Where the purchaser at an execution sale is agent of the execution debtor & buys the property as such, though he advances the purchase-money on the understanding that he is to be repaid, a suit for possession of the property is maintainable by the latter against the former. Such transaction is not a mere benami purchase, & is not a bar to such suit under s. 317 of the Civil Procedure Code.—SANKUNNI NAYAR *v.* NARAYANAN NUMBUDRI (1893), I. L. R. 17 Mad. 282.—**IND.**

1464 x. —— *Necessity of showing agent had sufficient funds of principal to pay price.*]—To establish a *primâ facie* case of constructive purchase by an agent out of the funds of the principal, it must be proved that at the time of the purchase the agent had in his hands funds of the principal sufficient to make the purchase.—ROOKONISSA *v.* WOOLFUT ALI, SUFDUR ALI *v.* WOOLFUT ALI (1865), 3 W. R. 232.—**IND.**

v. Agent taking conveyance in own name—Principal not estopped by evidence in other action.]—Pltfs. & their father had been in possession of lands about twenty or thirty years, the title, however, being all the while in another person. Pltfs. employed one of defts., F., to obtain a conveyance, which he took in his own name for the avowed purpose of defeating the claim of P., & in a suit by P. against pltfs. to establish his right to the land one of them swore that the deed to deft. (the agent) was *bonâ fide* & for his own benefit; & subsequent to the dismissal of the bill in that suit pltfs. took a lease of the premises from F.:—*Held:* pltfs. were not precluded from establishing the agency of F., & afterwards showing themselves entitled to the land as owners.—WASHBURN *v.* FERRIS (1864), 14 Gr. 516; *affd.* 16 Gr. 76.—**CAN.**

w. Agent obtaining land as security for advances—Made with principal's funds without authority.]—Deft. had acted gratuitously as agent of pltf., transmitting to her the interest of charges to which she was entitled. One charge was paid to deft., which pltf. directed him to invest on a specified real security. He was unable so to do; but without her authority lent it to L., for whom he was also agent, & who was indebted to him on the security of a bond, with warrant of attorney to enter judgment. He inclosed the bond & warrant to her in a letter, stating, contrary to the fact, that the money had been applied to pay off a charge on his estate:—*Held:* deft. was a trustee for pltf. as to so much of his security as would be sufficient to pay her claim, & must execute a deed declaring the trust.—O'BEIRNE *v.* CORNWALL (1852), 3 I. Ch. R. 130; 5 Ir. Jur. 13.—**IR.**

x. Person purporting to purchase as agent — Admissibility of evidence.] — Where deft. in buying certain land, for the purchase of which pltf., his brother, had been negotiating with an agent of the vendors, deceived the agent by spoken words & by a course of conduct, & induced him to believe, contrary to the fact, that deft. was so buying with pltf.'s concurrence, & where pltf. within a reasonable time ratified the contract of sale:—*Held:* pltf. entitled to a declaration that in the purchase of the land deft. acted as pltf.'s agent.

At the trial the agent's manager was asked: "If you had known that deft. was negotiating for himself that day, & without the knowledge of his brother, would you have negotiated with him?" &, after objection, the question was allowed as admissible.—JOHNSON *v.* JOHNSON, [1916] S. R. Q. 1.—**AUS.**

Sect. 2.—Principal's rights against agent: Sub-sect. 7, A. & B.; sub-sect. 8, A.]

the officer of the ct., part of the property being purchased by a person who was agent of the co. & held a fiduciary position. The trustees took no steps to get in any of the purchase-moneys:—*Held:* (1) the breach of trust thus committed justified the removal of the trustees from office; (2) the purchase by the agent must be declared to be for the benefit of the trust for the debenture-holders.—REID *v.* HADLEY (1885), 2 T. L. R. 12.

1469. Lease—Agent held trustee for principal.]—The lease of three contiguous houses occupied by A., B., & C. being about to expire, A. & B., for the purpose of continuing their tenancy & of securing a good neighbour in place of C., who was quitting, agreed that one or other of them should apply for a new lease for their mutual benefit. B., having applied for & being granted a new lease, claimed to hold it for his own benefit:—*Held:* (1) B. was a trustee of the lease for A.; (2) Stat. Frauds no defence.—ATKINS *v.* ROWE (1728), Mos. 39; 25 E. R. 257.

1470. —— Specific performance granted.]—A decree was granted for specific performance of a lease to pltfs. according to the terms of an agreement entered into with two defts., it appearing that one deft., who resisted the decree & claimed the benefit of the agreement for himself, acted as pltfs.' agent in negotiating the lease from his co-deft., so that his own intention was immaterial, & the ct. being satisfied, upon the evidence, that the real object & understanding of the contracting parties was an agreement for a lease for the benefit of pltfs.—TAYLOR *v.* SALMON (1838), 4 My. & Cr. 134; 41 E. R. 53.

Annotations:—**Apld.** Carter *v.* Palmer (1841-42), 8 Cl. & Fin. 657. **Refd.** Nelthorpe *v.* Holgate (1844), 8 Jur. 551; Dale *v.* Hamilton (1846), 5 Hare, 369; Luddy's Trustee *v.* Peard (1886), 33 Ch. D. 500. **Mentd.** Wallworth *v.* Holt (1841), 4 My. & Cr. 619; Mozley *v.* Alston (1847), 1 Ph. 790; Carlisle *v.* S. E. Ry. Co. (1850), 2 H. & Tw. 366; Fawcett *v.* Laurie (1860), 1 Drew. & Sm. 192.

1471. Agent appointed by parol—Specific performance granted.]—In a bill filed by a purchaser for specific performance of a contract it was alleged that the contract was made by one of defts. as agent for pltf., but that the agent claimed the benefit of the contract for himself. It appeared by the statements in the bill that the agent was appointed merely by parol. Demurrers by defts., the agent & vendor, were overruled.—HEARD *v.* PILLEY (1869), 4 Ch. App. 548; 38 L. J. Ch. 718; 21 L. T. 68; 33 J. P. 628; 17 W. R. 750.

Annotations:—**Folld.** Cave *v.* Mackenzie (1877), 46 L. J. Ch. 564. **Consd.** James *v.* Smith, [1891] 1 Ch. 384. **Refd.** Chattock *v.* Muller (1878), 8 Ch. D. 177; Rochefoucauld *v.* Boustead, [1897] 1 Ch. 196, C. A.

1472. —— ——.]—A contract for the purchase of land made by an agent in his own name vests the equitable estate in the principal, & may be established by him against the agent & persons claiming under him, although the agent be appointed merely by parol.

Pltfs. appointed by parol A. as their agent to purchase land on their behalf. A. entered into a contract for purchase of the land in his own name, & then assigned the benefit of the contract to B. for valuable consideration. In an action by pltfs. against A. & B. to establish the agency, the vendor not being a party:—*Held:* (1) the appointment of A. was an agency within Stat. Frauds, s. 4, & not a trust or confidence within s. 7, & was not required to be evidenced by writing; (2) the plea of purchase for value without notice raised by B. was of no avail, inasmuch as the prior equitable title vested in pltfs. by force of the contract.—CAVE *v.* MACKENZIE (1877), 46 L. J. Ch. 564; 37 L. T. 218.

Annotations:—**Refd.** Chattock *v.* Muller (1878), 8 Ch. D. 177; James *v.* Smith, [1891] 1 Ch. 384.

1473. —— Specific performance refused.]—Where an agent, appointed by parol to purchase, purchased in his own name with his own money & took a conveyance to himself & denied the agency:—*Held:* Stat. Frauds, s. 7, was a good defence.—JAMES *v.* SMITH, [1891] 1 Ch. 384; 63 L. T. 524; 39 W. R. 396; *affd* on another point, 65 L. T. 544, C. A.

Annotation:—**Refd.** Rochefoucauld *v.* Boustead, [1897] 1 Ch. 196, C. A.

See, further, TRUSTS & TRUSTEES.

B. Other Contracts.

1474. Sale of goods—Goods sold on principal's instructions.]—An agent selling goods, & disclosing the vendee's name, is not liable for the price to his principal unless acting under a *del credere* commission.—ALSOP *v.* SILVESTER (1823), 1 C. & P. 107.

—— —— Agent acting under del credere commission.]—*See* Part III., *ante*.

1475. —— —— Price received by agent.]—VARDEN *v.* PARKER, No. 1402, *ante*.

1476. —— Goods bought on principal's instructions.]—A., acting for B., a foreign principal, but in his own name, bought of C. in London a cargo of wheat on board a certain vessel represented to be on its way from Galatz, payment to be made in cash on delivery of the shipping documents. Having paid the price at the request of his prin-

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1469 i. *Lease—Agent held trustee for principal.*]—A., employed by B., agent of C., to select land under Land Act, 1862 (No. 145), selected land, & paid the first year's rent in advance with the money of C., the receipt for which was held by C. C. then took possession of the land, & had kept it ever since without opposition, & paid each year's rent as it fell due, taking the receipts in A.'s name. A lease of the land was issued to A., who denied any agreement with C., & refused to execute a transfer of the lease to C.:—*Held:* A. was a trustee for C., & transfer by A. to C. should be decreed with costs.—HALEIGH *v.* MCGRATH (1877), 3 V. L. R. 250.—**AUS.**

1469 ii. —— *Agent not held trustee for principal.*]—Payment by an undertenant, C., to a head landlord, A., with the assent of the intermediate landlord, B., of the head rent reserved by the lease made to B., does not of itself make C. such agent to B. as to induce the ct. to decree a reversionary lease of the premises obtained by C. from A., a trust for B., although such lease was obtained by misrepresentation.—MAUNSELL *v.* O'BRIEN (1835), 1 Jones, 176.—**IR.**

y. *Mineral claim—Agent held trustee for principal.*]—Where a person on behalf of another records a mineral claim in his own name, the ct. will compel him to transfer the claim to his principal.—FERO *v.* HALL (1898), 6 B. C. R. 421; 1 M. M. C. 238.—**CAN.**

PART VIII. SECT. 2, SUB-SECT. 7.—B.

1476 i. *Sale of goods—Goods bought on principal's behalf.*]—Pltf. sued for a declaration that he was the owner of certain property, & that deft., who purchased as agent, was merely a trustee for pltf. in same:—*Held:* the agency having been proved to have at first existed, it was incumbent upon the agent to show that the agency had been determined.—MARSH *v.* LLOYD (1910), 15 O. W. R. 721.—**CAN.**

1476 ii. —— *Goods bought on principal's instructions.*]—In a petition by R. & Co. alleging that certain goods taken by the curator of L., an insolvent, were their property, which property was simply on storage with L. & deliverable on demand without charge:—*Held:* L. was the agent of R. & Co. to buy for them with their money at a fixed commission, & the curator could not exercise anything in the nature of a "pauliana" recourse against the goods, even though L. bought in his own name. *Re* LEMELIN, LEMOINE & PARADIS (1902), Q. R. 22 S. C. 87.—**CAN.**

1476 iii. —— *Agent cannot claim to have bought as principal.*]—Where a man steps in during an auction sale & assumes the character of a principal's agent, & purchases goods, he cannot afterwards be allowed, in equity, to turn round & claim to have purchased, not for the principal, but for himself, & to obtain a profit out of his purchase.—LOKHEE NARAIN ROY CHOWDHRY *v.* KALLY PUDDO BANDOPADHYA (1875), 23 W. R. 358; L. R. 2 I. A. 154.—**IND.**

a. *Acquisition of timber—Agent held trustee for principal.*]—Deft., as general

cipal, A. drew upon him for the amount, & the bill was duly paid. B. afterwards came to London, saw the contract, & ratified all that A. had done. It turned out that the cargo had been fraudulently disposed of by the captain prior to the date of the contract of sale by C. to A.:—*Held:* B. could not maintain an action against A. to recover back the money paid, as upon a failure of consideration; but his only remedy, whether in his own name or in that of A., was against C., the seller.—RISBOURG *v.* BRUCKNER (1858), 3 C. B. N. S. 812; 27 L. J. C. P. 90; 30 L. T. O. S. 258; 6 W. R. 215; 140 E. R. 962.

1477. —— **Agent guaranteeing purchasers' acceptance—Bill not duly presented by principal.**]—Pltfs., through their agent, sold goods to C. & P. & took their acceptance for the amount, half of which was guaranteed by deft., the agent. Before the bill became due C. & P. became insolvent, of which deft. was then informed, & also that pltfs. looked to him for the sum which he had guaranteed:—*Held:* in these circumstances it was unnecessary for pltfs. to present the bill when due or give deft. notice of the non-payment of it.—HOLBROW (HOLBOROW) *v.* WILKINS (1822), 1 B. & C. 10; 2 Dow. & Ry. K. B. 59; 1 L. T. O. S. K. B. 11; 107 E. R. 5.

Annotations:—**Consd.** Van Wart *v.* Woolley (1824), 3 B. & C. 439. **Refd.** Hitchcock *v.* Humfrey (1843), 6 Scott, N. R. 540.

1478. Bills of exchange—Agent purchasing on principal's instructions & indorsing.]—A. in London acted as agent of B. & Co. at Paris for a small commission upon their general business. B. & Co. requested A. to remit them a bill on Portugal, which A. did, & indorsed it. The bill was dishonoured by non-acceptance:—*Held:* (1) A. was bound by his unqualified indorsement; (2) evidence to show that A. was acting merely as B. & Co.'s agent was not admissible.—GOUPY *v.* HARDEN (1816), Holt, N. P. 342; 2 Marsh. 454; 7 Taunt. 159; 129 E. R. 64.

Annotations:—**Consd.** Castrique *v.* Buttigieg (1855), 10 Moo. P. C. C. 94. **Mentd.** Fry *v.* Hill (1817), 7 Taunt. 397.

1479. —— ——.]—Where a solr., acting in getting in debts due to the estate of an intestate under the authority of & as local agent to the administrator, another person being the immediate & general agent of the administrator, under whose directions the solr. acts, has received money in the course of his agency, which it is his duty according to his instructions to remit to the general agent; if, in order to effect the object of remittance more conveniently, he procure a banker's bill for that purpose, which is accidentally drawn in his favour so that it becomes necessary he should indorse it, & he does so, an Eq. Ct. will restrain an action commenced against him on such indorsement, whether brought by the indorsee (the principal agent) or by a banker with whom the bill has been deposited, for the purposes of being presented for acceptance & payment by the drawee, although the banker may have given credit for the amount, if the latter can be shown to have had any knowledge or information of the circumstances attending the transaction, & of the relative situation of the parties.—KIDSON *v.* DILWORTH & WELCH (1818), 5 PRICE, 564; 146 E. R. 695.

Annotation:—**Consd.** Castrique *v.* Buttigieg (1855), 10 Moo. P. C. C. 94.

1480. —— ——.]—Resp. acted as agent in Malta for applt. for the purpose of buying & remitting to applt. in England bills on England, on account of money received by resp. in Malta. In the course of his agency resp. purchased bills in Malta & indorsed them to applt., without any reservation in the indorsement as to his liability:—*Held:* in the absence of special circumstances, showing that any liability was intended, by the general mercantile law, which must be taken to be in force in Malta, resp. was not liable to applt. upon the bills being dishonoured.—CASTRIQUE *v.* BUTTIGIEG (1855), 10 Moo. P. C. C. 94; 4 W. R. 445; 14 E. R. 427, P. C.

Annotation:—**Expld. & Distd.** Abrey *v.* Crux (1869), L. R. 5 C. P. 37.

1481. —— **Under commission del credere.**]—A factor, under a commission *del credere*, sells goods & takes accepted bills from the purchasers. These bills he indorses to a banker at the place of sale, & receives the banker's bill, payable to the factor's order on a house in London. This last bill the factor indorses & transmits to his principal, who gets the same accepted. The acceptors & the drawer fail. The factor is answerable for the amount of the bill, being personally liable, under his commission *del credere*, to satisfy his principal for the price of the goods sold.—MACKENZIE & LINDSAY *v.* SCOTT (1796), 6 Bro. Parl. Cas. 280; 2 E. R. 1081.

SUB-SECT. 8.—OTHER CASES OF AGENTS' BREACH OF DUTY.

A: Breach of Covenant not to engage in similar Business, etc.

1482. Injunction—Where no express negative covenant.]—An agreement entered into by H. to act as manager to the W. Chemical Co. for a term of years provided that he should "give the whole of his time to the co.'s business," but contained no negative covenant by him. H. intimated to the co. his intention of forming & becoming director of a rival co. in the immediate neighbourhood, though still willing to act as manager of the original co., which now applied for an injunction to restrain H. from committing any breach of his agreement to give the whole of his time to them:—*Held:* the contract being one for personal service, of which specific performance would not have been granted, & there being no express negative covenant by deft., no injunction could be granted.—WHITWOOD CHEMICAL CO. *v.* HARDMAN, [1891] 2 Ch. 416; 60 L. J. Ch. 428; 64 L. T. 716; 39 W. R. 433; 7 T. L. R. 325, C. A.

Annotations:—**Consd.** Star Newspaper *v.* O'Connor & Wetton (1893), 9 T. L. R. 526. **Foll.** Davies *v.* Foreman, [1894] 3 Ch. 654; Mutual Reserve Fund Life Assocn. *v.* New York Life Insce. Co. (1896), 13 T. L. R. 32, C. A. **Distd.** Ehrmann *v.* Bartholmew, [1898] 1 Ch. 671; Metropolitan Electric Supply Co. *v.* Ginder, [1901] 2 Ch. 799. **Folld.** Kirchner & Co. *v.* Gruban, [1909] 1 Ch. 413. **Refd.** Ryan *v.* Mutual Tontine Westminster Chambers Assocn., [1893] 1 Ch. 116, C. A.; Silver *v.* Gatti (1893), 37 Sol. Jo. 776; Alexander *v.* Mansions Proprietary (1900), 16 T. L. R. 431; Chapman *v.* Westerby (1913), 58 Sol. Jo. 50.

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manager of a co., engaged a timber cruiser to cruise & locate certain timber, which he did. On his way home from his work the cruiser discovered a quantity of timber, which he disclosed to deft., & entered into an arrangement with him for staking & acquiring it, but declined to deal with deft. as representative of the co. The expenses of the timber cruiser, of the advertising, & other preliminaries of the acquisition of the second lot of licences, including a sum of $2,000 for fees to the Crown, were paid by the co., & were charged in the co.'s books in a manner exactly similar to that adopted in respect of the first lot of licences. When the second lot of licences was found to be of a great value, deft. attempted to treat these disbursements as loans to himself from the co.:—*Held:* deft. was a trustee for the co.—KENDALL *v.* WEBSTER (1909), 14 B. C. R. 390; 15 B. C. R. 268; 10 W. L. R. 442.—**CAN.**

Sect. 2.—Principal's rights against agent: Sub-sect. 8, A. B. C. & D.]

1483. —— ——.]—By an agreement containing no express negative stipulations, deft. agreed to serve pltf. as manager for a term of years. In breach of the agreement deft. left pltf.'s service & engaged in a similar business :—*Held:* (1) the ct. had jurisdiction to grant an injunction; (2) in the circumstances an injunction ought not to be granted.—JACKSON *v.* ASTLEY (1883), Cab. & El. 181.

1484. —— Negative covenant affirmative in substance.]—A stipulation by an agent that he will not give notice to leave his principal's service within a specified period is, though negative in form, affirmative in substance, & ought not to be enforced by injunction.—KIRCHNER & Co. *v.* GRUBAN, [1909] 1 Ch. 413; 78 L. J. Ch. 117; 99 L. T. 932; 53 Sol. Jo. 151.

For full anns., *see* INJUNCTION.

1485. —— No sufficient negative covenant ascertainable.]—A., who had agreed with pltfs. "to act exclusively for them as their supervisor," agreed to enter another employment as manager. The ct. refused an interlocutory injunction to restrain such employment on the ground there was no ascertainable sufficient negative covenant.—MUTUAL RESERVE FUND LIFE ASSOCN. *v.* NEW YORK LIFE INSURANCE CO. (1896), 75 L. T. 528; 13 T. L. R. 32; 41 Sol. Jo. 47, C. A.

Annotation :—**Refd.** Chapman *v.* Westerby (1913), 58 Sol. Jo. 50.

1486. —— Remedy where liquidated damages provided for.]—An assurance co. appointed an agent, & by the terms of agreement between them it was provided that in the event of the agent ceasing to act for the co. he should not give information as to the co.'s connections, or interfere directly or indirectly with their business, or represent any other co. doing similar business, within a radius of 50 miles from the headquarters of his agency for one year from the date of his ceasing to act, & in case of breach he should pay the co. £100 as ascertained & liquidated damages :—*Held:* the co. could not, upon the agent's breach of agreement, claim an injunction as well as the £100 liquidated damages, but must elect between the two remedies.—GENERAL ACCIDENT ASSURANCE CORPN. *v.* NOEL, [1902] 1 K. B. 377; 71 L. J. K. B. 236; 86 L. T. 555; 50 W. R. 381; 18 T. L. R. 164.

Annotations :—**Distd.** Upton *v.* Henderson (1912), 106 L. T. 839. **Refd.** Stiles *v.* Ecclestone (1903), 88 L. T. 294; Mason *v.* Provident Clothing & Supply Co., [1913] A. C. 724.

1487. —— ——.]—Deft. had agreed to act as servant to pltf. & no other person for 7 years, with power to either party to determine the agreement on payment of £500, & subsequently engaged himself to another master without paying the £500. An injunction which had been granted on motion was, on appeal, dissolved on deft. bringing into ct. £600.—THORNTON *v.* KENDALL (1863), 27 J. P. 308; 11 W. R. 352, C. A.

See, further, MASTER & SERVANT.

Covenant amounting to restraint of trade & unreasonable.]—*See* TRADE & TRADE UNIONS.

B. Where Agent describes himself as such without Authority.

1488. Use of term "agent," how far permissible.]—When articles of a particular kind have become generally known in commerce under the name of the original manufacturer, or patentee, any person has a right, after expiration of the patent, to manufacture such articles & sell them under that name; but he may not, by inscribing the name as a proper name on his shop-front, or otherwise, lead the public to belive he is selling as agent for the original manufacturer. *Qu.:* whether apart from circumstances showing a fraudulent intention, a person has a right to advertise himself as "agent for the sale of" a particular article without authority from any definite principal.—WHEELER & WILSON MANUFACTURING CO. *v.* SHAKESPEAR (1869), 39 L. J. Ch. 36.

For full anns., *see* TRADE MARKS, TRADE NAMES & DESIGNS.

1489. —— Agent acting bonâ fide.]—Pltf., who had appointed defts. sole agents for the sale of his goods in the United Kingdom, alleged that he had determined their agency, but defts. asserted that their agency continued & issued notices & advertisements representing that they were his sole agents. Pltf. claimed an interim injunction to restrain defts. from circulating or publishing such notices or advertisements :—*Held:* in absence of malice or bad faith on the part of defts., the injunction must be refused.—HIRSCHLER *v.* HERTZ & COLLINGWOOD (1895), 11 T. L. R. 466; 39 Sol. Jo. 623.

1490. —— Reasonable probability of injury to principal.]—An injunction will be granted to restrain a person untruly representing another as his principal, when there is reasonable probability of injury arising to that other from the misrepresentation.

Defts., by circulars, advertisements, & general conduct of his business as a dealer in cycles, was held by the ct. to have intended the public to believe that the proprietors of a newspaper were either his principals or responsibly connected with him in the sale of his cycles. There was a reasonable probability of the proprietors of the newspaper being exposed to litigation, & perhaps made responsible, if they had not taken steps to disconnect themselves from deft. :—*Held:* the proprietors were entitled to an interim injunction to restrain deft. until the trial or further order from holding himself out in this manner.—WALTER *v.* ASHTON, [1902] 2 Ch. 282; 71 L. J. Ch. 839; 87 L. T. 196; 51 W. R. 131; 18 T. L. R. 445.

Annotations :—**Consd.** Wertheimer *v.* Stewart, Cooper & Co. (1906), 23 R. P. C. 481. **Refd.** Clerk *v.* Motor Car Co. & Ford (1905), 49 Sol. Jo. 418.

C. When Agent discloses confidential Information or seeks to prejudice Principal's Business.

1491. General rule.]—Good faith underlies the whole of an agent's obligation to his principal; & an agent has no right to employ as against his principal materials which he has obtained only for his principal & in the course of his agency (LINDLEY, L.J.).—LAMB *v.* EVANS, [1893] 1 Ch. 218; 62

PART VIII. SECT. 2, SUB-SECT. 8.—A.

1486 i. *Injunction — Remedy where liquidated damages provided for.*]—Under contract between a London tailor & his agent in Edinburgh the latter was not to carry on his trade in Edinburgh for twelve months after the agency should cease, & covenanted punctually to perform all conditions on his part, binding himself in £200, to be considered as liquidated damages, & not by way of penalty. The agent openly exercised his trade within the twelve months :—*Held:* interdict should be granted, though it was insisted damages only could be claimed. —CURTIS *v.* SANDISON (1831), 10 S. 72. —**SCOT.**

b. *No breach where agreement to enter similar business not acted upon.*]—Pltf. contracted with deft. to act as his agent & not to sell or canvass for any threshing machines except those manufactured by deft. He then entered into an agency agreement with a rival manufacturer, but before acting for the latter, deft. refused to pay commission to him on a sale :—*Held:* the agreement was no violation of the agreement with deft., & commission must be allowed.—GRAHAM *v.* J. I. CASE THRESHING MACHINE CO. (1909), 9 M. R. 27. **CAN.**

L. J. Ch. 404; 68 L. T. 131; 41 W. R. 405; 9 T. L. R. 87; 2 R. 189, C. A.

Annotations:—**Distd.** Trego *v.* Hunt, [1895] 1 Ch. 462, C. A. **Apld.** Louis *v.* Smellie (1895), 11 T. L. R. 336; Robb *v.* Green, [1895] 2 Q. B. 1; Walter *v.* Lane, [1900] A. C. 539; Afialo *v.* Lawrence & Bullen, [1903] 1 Ch. 318, C. A. **Folld.** Lawrence & Bullen *v.* Afialo, [1904] A. C. 17; Measures *v.* Measures, [1910] 1 Ch. 336; Morris *v.* Saxelby, [1915] 2 Ch. 57, C. A.; Alperton Rubber Co. *v.* Manning (1917), 86 L. J. Ch. 377. **Refd.** Worthington Pumping Engine Co. *v.* Moore (1902), 19 T. L. R. 84; Ashburton *v.* Pape, [1913] 2 Ch. 469, C. A.; London Electric Supply Corpn. *v.* Westminster Electric Supply Corpn. (1913), 11 L. G. R. 1046, H. L.

1492. —— Trade secret.]—Where the owner of a secret in trade employs persons under contract or duty, express or implied, those persons will be restrained from setting up against their employer a knowledge of the secret acquired whilst in his employment.—MORISON *v.* MOAT (1852), 21 L. J. Ch. 248; 16 Jur. 321.

Annotations:—**Consd. & Distd.** Reuter's Telegraph Co. *v.* Byron (1874), 43 L. J. Ch. 661. **Consd.** Tuck *v.* Priester (1887), 19 Q. B. D. 629, C. A. **Refd.** Lamb *v.* Evans, [1893] 1 Ch. 218; Robb *v.* Green, [1895] 2 Q. B. 315, C. A.; Ashburton *v.* Pape, [1913] 2 Ch. 469, C. A.

1493. —— Information acquired in confidence—Knowledge of patent.]—Though a rival manufacturer is entitled to avail himself of any flaw in a patent, or of any distinction between his own invention & the patent in question, an agent of the patentee is in a different position. Information which he has acquired he has acquired in confidence; & there is a *primâ facie* presumption that he is not competing fairly with the patentee.—WHEATSTONE *v.* WILDE (1861), Griffin's Patent Cases (1887), 247.

1494. —— Materials collected in course of agency.]—Canvassers who had been employed by the proprietor of a trades' directory under agreements which bound them to devote themselves in a particular district exclusively to the obtaining from traders advertisements to be inserted in the directory, & to supply blocks & materials necessary for producing such advertisements, proposed at expiration of their agreements to assist a rival publication in procuring similar advertisements:—*Held:* they were not entitled to use for the purposes of any other publication materials which, while in pltf.'s employment, they had obtained for the purpose of his publication.—LAMB *v.* EVANS, No. 1491, *ante*.

Annotations:—**Distd.** Trego *v.* Hunt, [1895] 1 Ch. 462, C. A. **Apld.** Louis *v.* Smellie (1895), 11 T. L. R. 336; Robb *v.* Green, [1895] 2 Q. B. 1; Walter *v.* Lane, [1900] A. C. 539; Afialo *v.* Lawrence & Bullen, [1903] 1 Ch. 318, C. A.; Lawrence & Bullen *v.* Afialo, [1904] A. C. 17; Measures *v.* Measures, [1910] 1 Ch. 336; Morris *v.* Saxelby, [1915] 2 Ch. 57, C. A.; Alperton Rubber Co. *v.* Manning (1917), 86 L. J. Ch. 377. **Refd.** Worthington Pumping Engine Co. *v.* Moore (1902), 19 T. L. R. 84; Ashburton *v.* Pape, [1913] 2 Ch. 469, C. A.
For full anns., *see* S. C. No. 1491, *ante*.

1495. —— Making copies of documents not permissible.]—No man who is in the employment of another is entitled to use or even take a copy, for his own private purposes, of any document of his employer which comes to his hands or to which he has access in the course of his employment. The director of a co. was ordered to deliver up lists of customers of that co. or copies thereof which were in his possession or under his control.—MEASURES BROTHERS *v.* MEASURES, [1910] 1 Ch. 336; 79 L. J. Ch. 707; 102 L. T. 7; 26 T. L. R. 251; 54 Sol. Jo. 249; 18 Mans. 40; *affd.* on another point, 2 Ch. 248, C. A.

Annotation:—**Refd.** Alperton Rubber Co. *v.* Manning (1917), 86 L. J. Ch. 377.

1496. —— Qualifications on—Applicable only when information is in fact confidential.]—Pltfs., a telegraph co. in London, made an arrangement with defts., being two individuals in Australia, for transmission of messages, in which certain words were used as short expressions of names & addresses of the principal customers; & defts. were described as pltfs.' agents. The parties quarrelled, & one of defts. came to England to carry on an independent telegraph business with his partner in Australia, & sent circulars to pltfs.' customers, mentioning he had their cyphers. On motion to restrain him from using the cyphers:—*Held:* (1) there was nothing confidential in the cyphers; (2) he was entitled to use them.—REUTER'S TELEGRAM CO. *v.* BYRON (1874), 43 L. J. Ch. 661.

Annotations:—**Distd.** Merryweather *v.* Moore, [1892] 2 Ch. 518. **Consd.** Lamb *v.* Evans, [1893] 1 Ch. 218, C. A. **Mentd.** Robb *v.* Green, [1895] 2 Q. B. 1.

1497. —— —— Independent investigations.]—*Semble:* a confidential agent is, in absence of agreement to the contrary, at liberty to disclose a trade secret of his employers, after termination of his employment, if he has acquired knowledge of the secret through an independent investigation made by himself.—ESTCOURT *v.* ESTCOURT HOP ESSENCE CO., LTD. (1875), 10 Ch. App. 276; 44 L. J. Ch. 223; 32 L. T. 80, C. A.

For full anns., *see* TRADE MARKS, TRADE NAMES & DESIGNS.

See, further, MASTER & SERVANT.

D. Other Cases.

1498. Slander of principal's business—Letters addressed to agent on principal's business—Redirection by post office.]—B. was employed to manage one of L.'s branch offices for the sale of machines, & resided on the premises. He was dismissed by L., & on leaving gave the postmaster directions to forward to his private residence all letters addressed to him at L.'s branch office. He admitted that among the letters so forwarded to him were two which related to L.'s business, & he did not hand them to L., but returned them to the senders. After his dismissal he went about among the customers, making oral statements reflecting on the solvency of L., & advised some of them not to pay L. for machines which had been supplied through himself. L. brought an action to restrain B. from making statements to customers or any

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PART VIII. SECT. 2, SUB-SECT. 8.—C.

1494 i. *General rule—Materials collected in course of agency.*]—Pltf. was employed as agent of defts. on commission to procure orders in a defined territory. During his employment pltf. prepared a mailing list of customers & prospective customers in his own territory for use in carrying on defts.' business, also a card index of five hundred or six hundred names of such customers, & he kept a ledger containing particulars of sales made for defts. During the last three months of his employment pltf. made an agreement with another firm, in the same line of business as defts., to enter their service on the expiration of his then current engagement, & planned to take with him to the other firm as much as possible of the business worked up by him for defts. Defts., on learning of this, dismissed pltf., entered his office, & took away or destroyed the mailing list, card index, & ledger above referred to, & also a list pltf. had prepared of likely buyers all over Canada outside of pltf.'s territory:—*Held:* (1) pltf. was entitled to damages for the trespass committed by defts. in entering his office, & for the destruction of the list of likely buyers; (2) defts. were entitled to damages on their counterclaim against pltf. on account of his conduct, as above stated; (3) the mailing list, card index, & ledger were the property of defts., & pltf. could not recover anything in respect of them. *Robb* v. *Green,* [1895] 2 Q. B. 315, & *Lamb* v. *Evans,* [1893] 1 Ch. 218, folld.—MARTIN *v.* BROWN (1910), 19 M. R. 680.—**CAN.**

1496 i. —— *Qualifications on—Notes made by record-searcher.*] — A., employed to search records, made shorthand notes of entries, of which he supplied a transcript. In an action for delivery up of the shorthand notes or alternatively an interdict against him from communicating their contents to any one:—*Held:* the shorthand notes remained A.'s property, & there was no evidence of actual or apprehended invasion of legal rights to justify granting the interdict. *Ex p. Horsfall,* 7 B. & C. 528, distd.—CRAWFORD (EARL) *v.* PATON (1910), 1 S. L. T. 423, O. H.—**SCOT.**

Sect. 2.—Principal's rights against agent: Sub-sect. 8, D.; sub-sect. 9, A. & B.]

other person or persons that L. was about to stop payment, or was in difficulties or insolvent, & from in any manner slandering L. or injuring his reputation or business, & from giving notice to the post office to forward to B.'s residence letters addressed to him at L.'s office, & also asking that he might be ordered to withdraw the notice already given to the post office:—*Held:* (1) the ct. had jurisdiction to restrain a person from making slanderous statements calculated to injure the business of another person; (2) this jurisdiction extended to oral as well as written statements, though it required to be exercised with great caution as regards oral statements; (3) in the present case an injunction ought to be granted; (4) deft. had no right to give a notice to the post office the effect of which would be to hand over to him letters of which it was probable that the greater part related only to L.'s business; (5) the case was one in which a mandatory injunction compelling deft. to withdraw his notice could properly be made, pltf. being put under an undertaking only to open the letters at certain specified times, with liberty for deft. to be present at the opening.—LOOG (HERMANN) *v.* BEAN (1884), 26 Ch. D. 306; 53 L. J. Ch. 1128; 51 L. T. 442; 48 J. P. 708; 32 W. R. 994, C. A.

Annotations:—**Distd.** Liverpool Household Stores Assocn. *v.* Smith (1887), 37 Ch. D. 170, C. A. **Apld.** Puddephatt *v.* Leith (1915), 85 L. J. Ch. 185. **Mentd.** Monson *v.* Tussauds, [1894] 1 Q. B. 671, C. A.

1499. Agent disabling himself from carrying out agency.]—Pltfs. entered into a contract with defts., who carried on business in partnership, whereby the latter were appointed sole buying agents for pltfs. for a certain district in England, the intention being that the whole district should be represented by defts. for a period of 5 years. Pltfs. agreed that defts. should retain the agency so long as they met their engagements & kept strictly to the terms of the engagement for 5 years, & in consideration defts. agreed to act as buying agents for the district on the terms stated in the agreement, & to accept delivery & pay for a minimum quantity of pltfs.' products during each year of the term. Defts. had the option of renewing the agreement at its termination. During the 5 years defts. dissolved partnership & pltfs. sued for damages for breaches of the contract committed after the dissolution:—*Held:* (1) there was no implied term in the contract that defts. would not dissolve partnership during the term & thus disable themselves from carrying out the contract; (2) defts. were not liable.—BOVINE, LTD. *v.* DENT & WILKINSON (1904), 21 T. L. R. 82.

Annotation:—**Refd.** Lazarus *v.* Cairn Line of Steamships (1912), 106 L. T. 378.

1500. Agent attempting wrongfully to sell principal's property.]—A bill stated that pltf. had appointed W. to reside in a house, & hold possession of certain furniture therein, as his agent; that in pltf.'s absence deft. W., colluding with deft. R., had assigned same to R. as security for money advanced; & that R. threatened & intended to sell same. Upon general demurrer:—*Held:* pltf. entitled to an injunction to restrain W., as his agent, from parting with the goods, & embarrassing the title of the principal.—WOOD *v.* ROWCLIFFE (ROECLIFFE) (1847), 2 Ph. 382; 17 L. J. Ch. 83; 10 L. T. O. S. 231; 11 Jur. 915; 41 E. R. 990.

Annotations:—**Distd.** Gobind Chunder Sein *v.* Ryan (1861), 15 Moo. P. C. C. 230; Baines *v.* Swainson (1863), 4 B. & S. 270. **Apld.** Cole *v.* North Western Bank (1874), L. R. 9 C. P. 470; Cole *v.* North Western Bank (1875), L. R. 10 C. P. 354. **Refd.** Lamb *v.* Attenborough (1862), 1 B. & S. 831. **Mentd.** Carrington *v.* Pell (1849), 3 De G. & Sm. 512; Daniell *v.* Daniell (1849), 3 De G. & Sm. 337.

1501. ——.]—M., manager of E.'s business, was allowed to send out bills to customers in his (M.'s) own name. M. afterwards locked E. out of the business premises, & E. several times had to break the lock to get in. M. made an assignment of the premises & stock-in-trade to P., & O. advertised them for sale. E. filed his bill against M. & P. to restrain his exclusion from, & the sale of, the premises. Defts. demurred for want of equity. The demurrer was overruled with costs.—EACHUS *v.* MOSS (1866), 14 W. R. 327.

SUB-SECT. 9.—APPLICATION OF THE STATUTE OF LIMITATIONS AS BAR TO PRINCIPAL'S RIGHTS.

See, also, LIMITATION OF ACTIONS.

A. In General.

1502. Fraud of agent.]—Where an agent, such as a steward, is guilty of fraud, wilful concealment, etc., there is no limitation of time.—HARDWICKE (EARL) *v.* VERNON (1808), 14 Ves. 504; 33 E. R. 614.

Annotations:—**Apld.** Teed *v.* Beere (1859), 28 L. J. Ch. 782; *Re* Whitehead, *Ex p.* Burnand (1860), 2 L. T. 776. **Refd.** Pearse *v.* Green (1819), 1 Jac. & W. 135. **Mentd.** Oddy *v.* Secker (1854), 2 Sm. & G. 193; Springett *v.* Dashwood (1860), 2 Giff. 521; Makepeace *v.* Rogers (1865), 5 New Rep. 399; Turner *v.* Burkinshaw (1867), 2 Ch. App. 488; Rishton *v.* Grissell (1870), L. R. 10 Eq. 393; Harsant *v.* Blaine, Macdonald (1887), 56 L. J. Q. B. 511, C.A.

1503. Negligence.]—Stat. Limitations applies to an action against an agent for negligence.—WHITEHEAD *v.* HOWARD, No. 1505, *post.*

Annotation:—**Apld.** *Re* Triston (1850), 1 L. M. & P. 74. For full anns., *see* S. C. No. 1505, *post.*

1504. ——.]—ARMSTRONG . MILBURN (1886), 54 L. T. 723; 2 T. L. R. 615, C. A.

1505. No antecedent debt.]—To a declaration alleging that deft. promised to invest pltf.'s money on good security & in breach invested it on bad security, deft. pleaded Stat. Limitations. At the trial pltf. proved that within 6 years deft. acknowledged the security to be bad & promised pltf. should be paid:—*Held:* (1) there was no antecedent debt to which the subsequent promise could apply, that being a promise to pay a debt with which deft. was not originally chargeable, whilst the declaration alleged an undertaking as to the validity of the security; (2) deft. was not liable on account stated, as there was no existing antecedent debt between him & pltf.; (3) deft. was not liable for money had & received, as the money had been paid over to the grantor.—WHITEHEAD *v.* HOWARD (1820), 2 Brod. & Bing. 372; 5 Moore, C. P. 105; 129 E. R. 1010.

Annotations:—**Apld.** Lemere *v.* Elliott (1861), 6 H. & N. 656. **Refd.** *Re* Triston (1850), 1 L. M. & P. 74.

1506. Agency continuous.]—The relations between co-owners of a vessel engaged in foreign

1506 i. *Agency continuous—Until accounts settled.*]—In 1894 defts., as agents for sale of pltf., sold goods; in 1898 pltf. sued for the price, there being at that time an open account between them:—*Held:* defts. liable to pltf. as agents until they had accounted to him, & his claim as to the goods was not barred.—FINK *v.* BULDEO DASS (1899), I. L. R. 26 Calc. 715; 3 C. W. N. 524.—**IND.**

1506 ii. —— *Until payment over.*]—If an agent for the sale of goods receives the price, a demand made by the principal for the money is made "during the continuance of the agency" within Limitation Act (XV. of 1877), & an action for the price is brought within time, if within three years from the demand.—BABU RAM *v.* RAM DAYAL (1890), I. L. R. 12 All. 541.—**IND.**

1506 iii. —— *Form of decree.*]—Pltf. alleged a continued agency & sued for recovery of a specific balance against deft. Deft. was employed as dewan, & denied any kind of accountability, but

voyages & her managing owners are, in absence of any evidence to show that each voyage is a separate trading transaction, to be treated, in relation to profit & loss on her voyages, as a continuous partnership or agency, as the case may be. The rule as to partnership accounts applies, & the accounts may be gone into without any limit as to time, & Stat. Limitations does not apply so long as the partnership or agency is continuous.—THE PONGOLA (1895), 73 L. T. 512.

1507. Agent receiving bribe.]—METROPOLITAN BANK *v.* HEIRON, No. 1621, *post.*

For full anns., *see* S. C. No. 1621, *post.*

B. Where Agency is fiduciary in Character.

1508. General rule.]—An agent, empowered to retain in his own hands his principal's money for the purpose of investment, is a trustee for his principal, & cannot set up Stat. Limitations as a bar to a suit for an account.—BURDICK *v.* GARRICK, No. 1459, *ante.*

Annotations:—**Follo.** Gray *v.* Bateman (1872), 21 W. R. 137. **Distd.** Boatwright *v.* Boatwright (1873), 43 L. J. Ch. 12. **Consd. & Expld.** Watson *v.* Woodman (1875), L. R. 20 Eq. 721. **Consd.** Banner *v.* Berridge (1881), 18 Ch. D. 254; *Re* Exchange Banking Co., Flitcroft's Case (1882), 21 Ch. D. 519, C. A. **Expld.** Dooby *v.* Watson (1888), 39 Ch. D. 178. **Apprvd.** Lyell *v.* Kennedy, Kennedy *v.* Lyell (1889), 14 App. Cas. 437, H. L.; Phillips *v.* Homfray (1890), 44 Ch. D. 694; Soar *v.* Ashwell, [1893] 2 Q. B. 390, C. A.; Friend *v.* Young, [1897] 2 Ch. 421; North American Land & Timber Co. *v.* Watkins, [1904] 1 Ch. 242; Reid-Newfoundland Co. *v.* Anglo-American Telegraph Co., [1912] A. C. 555, P. C.; Henry *v.* Hammond [1913] 2 K. B. 515; *Re* Allsop, Whittaker *v.* Bamford, [1914] 1 Ch. 1, C. A. **Refd.** *Re* Bell, Lake *v.* Bell (1886), 34 Ch. D. 462; *Re* Sharpe, *Re* Bennett, Masonic & General Life Assce. Co. *v.* Sharpe, [1892] 1 Ch. 154, C. A.; Silkstone & Haigh Moor Coal Co. *v.* Edey, [1900] 1 Ch. 167; Nocton *v.* Ashburton, [1914] A. C. 932, H. L.
For full anns., *see* S. C. No. 1459, *ante.*

1509. ——.]—An action by a principal against his agent, whether brought in the Q. B. Div. or in the Ch. Div., is one of those to which Stat. Limitations is applicable, unless the agent is something more than a mere agent to conduct business for his principal & remit to him goods or money received on his account. But the duties of an agent are often much wider; he is often more than an agent, & in such case an action against him is not barred by Stat. Limitations (LINDLEY, L.J.).—*Re* SHARPE, *Re* BENNETT, MASONIC & GENERAL LIFE ASSURANCE CO. *v.* SHARPE, [1892] 1 Ch. 154; 61 L. J. Ch. 193; 65 L. T. 806; 40 W. R. 241; 8 T. L. R. 194; 36 Sol. Jo. 151, C. A.

Annotations:—**Consd.** Soar *v.* Ashwell, [1893] 2 Q. B. 390, C. A. **Mentd.** Look *v.* Queensland Investment & Land Mortgage Co., [1896] 1 Ch. 397, C. A.; *Re* National Bank of Wales, [1899] 2 Ch. 629, C. A.; Brooks *v.* Muckleston, [1909] 2 Ch. 519.

1510. Agent intrusted to lay out money.]—Stat. Limitations does not apply to a question of account arising between a principal & his agent who is intrusted to place out money for him.—SMITH *v.* POCOCKE (1854), 2 Drew. 197; 2 Eq. Rep. 368; 23 L. J. Ch. 545; 18 Jur. 478; 2 W. R. 285; 61 E. R. 694.

Annotations:—**Distd.** Crawford *v.* Crawford (1867), 16 W. R. 411; Dooby *v.* Watson (1888), 39 Ch. D. 178. **Refd.** British Mutual Investment Co. *v.* Cobbold (1875), L. R. 19 Eq. 627.

1511. Confidential clerk collecting fees.]—B., confidential clerk of pltf., a barrister, having defrauded his employer of a considerable amount of fees he had received on his behalf, absconded in 1846, & was not heard of till after his death. B. died intestate, & his widow in 1854 instituted a suit for administration of his estate, under which the common decree was made. Pltf. put in his claim as a creditor for the amount due to him, which was disallowed by the chief clerk, on the ground that it was barred by Stat. Limitations. Pltf. afterwards filed a bill against the next of kin of B. to recover the amount of the fees of which he had been defrauded out of her distributive share of the assets

it was found the relation of agency existed between the parties. The evidence adduced made it impossible to decide how much of the principal's money was unaccounted for:—*Held:* (1) such suit was essentially one for an account, & a final decree ought not to be made, but an order that an account should be taken; (2) limitation ran from the date on which the agency ceased.—HURRONATH ROY *v.* KRISHNA COOMAR BUKSHI (1886), L. R. 13 Ind. App. 123; I. L. R. 14 Calc. 147.—**IND.**

c. *Acknowledgment by agent more than year after termination of agency.*] — Notwithstanding Limitation Act, 1877, s. 19, a suit cannot be brought upon an acknowledgment or account stated, signed by a person who has been an agent to collect rents, if his signature was not procured till more than a year after the determination of his agency.—PARBUTTINATH ROY *v.* TEJMOY BANERJI (1879), I. L. R. 5 Calc. 303.—**IND.**

d. *What statutory provisions applicable.*]—A suit by a principal against his agent for an account is a suit for movable property received by the agent on behalf of the principal & not accounted for, & is governed by Limitation Act (XV. of 1877), Sched. II., art. 89.—SHIB CHUNDRA ROY *v.* CHANDRA NARAIN MUKERJEE (1905), I. L. R. 32 Calc. 719.—**IND.**

e. —— *Cross-suit for account.*] — A cross-suit by a principal against his agent for an account is governed by Limitation Act, Sched. II., art. 89, & having been brought within three years of the termination of the agency:—*Held:* not barred.—ASGHAR ALI KHAN *v.* KHURSHED ALI KHAN (1901), I. L. R. 24 All. 27.—**IND.**

f. —— *Agent collecting movable property.*] — Limitation Act, Sched. II., art. 89, applies to suits by a principal against an agent for movable property received by the latter & not accounted for, & time begins to run when the account is, during the continuance of the agency, demanded & refused, or, when no such demand is made, when the agency terminates, *i.e.*, when the agent ceases to represent the principal, though his liability in respect of acts done by him as agent may continue.—VENKATACHALAM *v.* NARAYANAN (1916), I. L. R. 39 Mad. 376.—**IND.**

g. *Period over which accounts to be taken.*]—Pltfs. & defts. agreed that defts. were to be sole agents of pltfs.' carriers in the Dominion, & defts. were to manufacture the carriers at a stated price. There were further provisions as to the burden of expenses & as to quarterly reporting & accounting, & pltfs. were to appoint an auditor:—*Held:* the agreement did not constitute a partnership nor a fiduciary agency so as to prevent the operation of Stat. Limitations, & accounts should be taken for six years only before action. *The Pongola* (1895), 73 L. T. 512, distd.; *Knox* v. *Gye* (1871-2), L. R. 5 H. L. 656, consd.; *Noyes* v. *Crawley* (1878), 10 Ch. D. 31, refd.—HAMILTON BRASS MANUFACTURING CO. *v.* BARR CASH & PACKAGE CARRIER CO. (1906), 38 S. C. R. 216.—**CAN.**

PART VIII. SECT. 2, SUB-SECT. 9.—B.

h. *Agent to settle claims.*]—A ry. co., at various times in 1851 & 1852, deposited with C., their solr. & confidential agent, sums of money, with directions to apply them respectively in payment of each of several claims for compensation for lands taken by the co. A separate account was opened in C.'s books for each sum, showing the amount received by C. from the co., & the amount paid by him, on foot of each claim. The entire sum received by C. was not in all cases applied by him as directed, & in Jan., 1855, his books showed a balance of £428 8*s.* 5*d.* in favour of the co. on foot of balances unapplied. C. died in 1861 intestate. & his administrator settled an account with the co. whereby a sum of £6,243 8*s.* 6*d.* was admitted to be due to C. This account included a judgment recovered against the co. by C. in 1856; but there was no evidence that it included the sum of £428 8*s.* 5*d.* A petition for administration of C.'s personal estate having been filed, the co. filed a charge on April 23, 1866, claiming this sum:—*Held:* (1) C. was not a trustee of the sums deposited with him; (2) Stat. Limitations was a bar to the claim.—CRAWFORD *v.* CRAWFORD (1867), 16 W. R. 411.—**IR.**

i. *Agent investing money.*]—P. acted as general agent for M., & furnished her with accounts of his receipts & disbursements. While so acting P. invested £1,500 on mtge. to H. upon security which proved to be valueless. There was no evidence that P. was authorised to lend upon this or on any special security. Proceedings were taken & expenses were incurred by M. in endeavouring to realise the security which proved to be fruitless. P. having died, M. claimed as creditor the £1,500 & arrears of interest thereon, & the costs of the proceedings to realise the security:—*Held:* there was a fiduciary relation between P. & M., which precluded the personal representative of P. from relying on Stat. Limitations as an answer to M.'s claim, & M. was entitled to have an account taken of the dealings between herself & P. as between principal & agent.—POWER *v.* POWER, MULCAHY'S CLAIM (1884), 13 L. R. Ir. 281.—**IR.**

Sect. 2.—Principal's rights against agent: Sub-sect. 9, B.; sub-sect. 10.]

of the intestate:—*Held:* (1) in consequence of the confidential relation which existed between B. & pltf. the debt was not barred by Stat. Limitations; (2) pltf. was not precluded from enforcing his claim in a suit instituted by him for that purpose, by reason of the certificate of the chief clerk disallowing the claim made under the former suit.

The money was money of the employer in the hands of his confidential agent. There was possession by the agent; there was no adverse possession, & the bar arising from adverse possession could not occur (*per* CUR.).—TEED *v.* BEERE (1859), 28 L. J. Ch. 782; 33 L. T. O. S. 26; 5 Jur. N. S. 381; 7 W. R. 394.

Annotation:—*Re* Whitehead, *Ex p.* Burnand (1860), 2 L. T. 776.

1512. Agents as quasi-trustees.]—A. & B., agents of a co., conspired to conceal the true state of its affairs, whereby A., one of them, was enabled, in 1817, to buy shares of C. at a price much below their real value. The fraud was not discovered till 1860, soon after which C.'s representative filed one bill against the representatives of A. & B., praying a retransfer of the shares, & payment of the intermediate dividends. It was not pretended that B. derived any pecuniary benefit from the sale to A.:—*Held:* A. & B. being *quasi*-trustees the lapse of time was not material.—WALSHAM *v.* STAINTON (1863), 1 De G. J. & Sm. 678; 3 New Rep. 56; 33 L. J. Ch. 68; 9 L. T. 357; 9 Jur. N. S. 1261; 12 W. R. 63; 46 E. R. 268, L.JJ.

Annotation:—**Consd.** Peek *v.* Gurney (1873), L. R. 6 H. L. 377.

1513. Agent to collect & invest proceeds of sale.]—A., resident in America, by power of attorney authorised B. & C. in England, B. being a solr., to get in & sell his property here & reinvest the proceeds, & generally deal with it for his benefit. A. died intestate in 1859, whereupon B. & C. paid the moneys they had then received under the power, & which had not been reinvested, into a bank to the account of B.'s firm. In 1867 letters of administration were taken out to A. by his widow, who filed a bill against the agents for an account:—*Held:* the agents were trustees for their principal, & could not set up Stat. Limitations against his personal representative.—BURDICK *v.* GARRICK No. 1459, *ante*.

Annotations:—**Folld.** Gray *v.* Bateman (1872), 21 W. R. 137. **Distd.** Boatwright *v.* Boatwright (1873), 43 L. J. Ch. 12. **Consd.** Watson *v.* Woodman (1875), L. R. 20 Eq. 721. *Burdick* v. *Garrick*, I think, depended on the special nature of the deed under which moneys were to be received & invested (HALL, V.-C.); Banner *v.* Berridge (1881), 18 Ch. D. 254; *Re* Exchange Banking Co., Flitcroft's Case (1882), 21 Ch. D. 519, C. A. **Expld.** Dooby *v.* Watson (1888), 39 Ch. D. 178. **Apprvd.** Lyell *v.* Kennedy, Kennedy *v.* Lyell (1889), 14 App. Cas. 437, H. L.; Phillips *v.* Homfray (1890), 44 Ch. D. 694; Soar *v.* Ashwell, [1893] 2 Q. B. 390, C. A.; Friend *v.* Young, [1897] 2 Ch. 421; North American Land & Timber Co. *v.* Watkins, [1904] 1 Ch. 242; Reid-Newfoundland Co. *v.* Anglo-American Telegraph Co., [1912] A. C. 555, P. C.; Henry *v.* Hammond, [1913] 2 K. B. 515; *Re* Allsop, Whittaker *v.* Bamford, [1914] 1 Ch. 1, C. A. *Burdick* v. *Garrick* is a good illustration of the point:—an agent may be sued by his principal for an account & for payment of the balance & in some circumstances a plea of Stat. Limitations would have been perfectly good; if, however, the case was rested upon the ground of fiduciary relation, according to the old law, the Ct. of Ch. would not have allowed Stat. Limitations to be pleaded as a defence (COZENS-HARDY, M.R.). **Refd.** *Re* Bell, Lake *v.* Bell (1886), 34 Ch. D. 462; *Re* Sharpe, *Re* Bennett, Masonic & General Life Assce. Co. *v.* Sharpe, [1892] 1 Ch. 154, C. A.; Silkstone & Haigh Moor Coal Co. *v.* Edey, [1900] 1 Ch. 167; Nocton *v.* Ashburton, [1914] A. C. 932, H. L.

For full anns., *see* S. C. No. 1459, *ante*.

1514. Agent with full & unrestricted powers of management.]—Deft. B. had acted for testator during the latter's life, with full & unrestricted powers of management; the other deft., B.'s wife, was testator's daughter & sole extrix. Pltf., testator's widow, was entitled to a legacy of £1,500 under her husband's will, & also to the furniture, effects, etc., of testator. Testator's will was brief & informal, & pltf. on that ground filed her bill for administration of testator's estate, praying the usual account. Defts., in answer to an interrogatory of pltf., furnished an account of all dealings with testator's property up to the date of suit from a date 6 years prior to his death, & claimed the benefit of Stat. Limitations as to the period antecedent to these 6 years:—*Held:* deft. was a trustee, & could not avail himself of Stat. Limitations.—GRAY *v.* BATEMAN (1872) 21 W. R. 137.

Annotation:—**Refd.** Soar *v.* Ashwell, [1893] 2 Q. B. 390, C. A.

1515. Agent receiving surplus of sale of mortgaged property.]—In 1868 after the death of mtgor., who had died intestate & without leaving next of kin, the mtged. property was sold by A., the mtgee., under power of sale contained in the mtge. deed. The balance of the proceeds of sale after payment of the mtge. debt was retained by B., who had acted as solr. for both parties in effecting the mtge., & for mtgee. in the sale of the mtged. property. The mtge. deed contained the usual provision that the surplus, if any, arising from a sale of the mtged. property should be paid to mtgor. A. died in 1877, leaving all his property to his widow, who died in 1878, having appointed exors. of whom B. was one. B. afterwards died, & in an action to administer his estate, a claim for the balance of the proceeds of sale retained by him was raised by the surviving exor. of A.'s widow. B.'s exor. opposed the claim on the ground that it was barred by Stat. Limitations. Administration had not been taken out to mtgor.'s estate:—*Held:* (1) B. received the balance of the proceeds of sale in a fiduciary character & with the knowledge from his position that A. was an express trustee of such balance for mtgor. & liable to a claim by the Crown; (2) Stat. Limitations could not be set up as a bar to the claim.—*Re* BELL, LAKE *v.* BELL (1886), 34 Ch. D. 462; 56 L. J. Ch. 307; 55 L. T. 757; 35 W. R. 212.

Annotation:—**Apprvd.** Soar *v.* Ashwell, [1893] 2 Q. B. 390, C. A.

1516. Agent collecting rents.]—On the death of the owner of land intestate, deft., who had been the agent, continued to receive rents, stating to several

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1516 i. *Agent collecting rents—Principal not barred by laches.*]—Deft. received rents of property for twenty-five years without accounting to pltf. The agreement by deft. to hold the property for pltf. & to account to him had not terminated:—*Held:* lapse of time did not bar pltf.'s right to an account.—PICK *v.* EDWARDS (1906), 2 E. L. R. 232; 33 N. B. Eq. 410.—**CAN.**

k. *Gomasta.*]—The representatives of a gomasta, who had for the last four years of his life taken the moneys of his employers in advance for the purpose of the business, were sued for the balance of account of such moneys after giving credit for the amount of the gomasta's annual salary:—*Held:* the cause of action arose at the date of the gomasta's death, & the suit, having been brought within the period of limitation from that date, was not barred.—KALIKRISHNA PAUL CHOWDHRY *v.* JAGATTARA (1868), 2 B. L. R. A. C. 139; 11 W. R. 76.—**IND.**

l. *Mooktear.*]—An account having been demanded from a mooktear, he wrote a letter in which he promised to render full accounts during the ensuing vacation. This he neglected, though he did not refuse, to do:—*Held:* limitation for a suit to compel an adjustment of account ran from the time when deft.'s promise to render accounts was broken, & was governed by Act IX. of 1871, Sched. II., art. 90.—HORI NARAIN GHOSE *v.* ADMINISTRATOR-GENERAL OF BENGAL (1878), 3 C. L. R. 446.—**IND.**

See, now, Limitation Act (XV. of 1877), Sched. II., art. 89.

persons he was acting on behalf of the heir, whoever he might be. After expiration of 12 years from the owner's death, pltf., a purchaser from the heir, brought an action against deft. to recover the land & for an account of rents & profits:—*Held:* (1) deft. having assumed a fiduciary character & received rents in that capacity, Stat. Limitations did not run in his favour as against the true owner; (2) pltf. was entitled to ratify his acts as agent, & to recover the land & all accumulations of rent.—LYELL *v.* KENNEDY, KENNEDY *v.* LYELL (1889), 14 App. Cas. 437; 59 L. J. Q. B. 268; 62 L. T. 77; 38 W. R. 353, H. L.

Annotations:—**Distd.** Trevor *v.* Hutchins (1897), 76 L. T. 183; Henry *v.* Hammond, [1913] 2 K. B. 515. **Mentd.** Keighley, Maxted *v.* Durant, [1901] A. C. 240. H. L.; Reid-Newfoundland Co. *v.* Anglo-American Telegraph Co., [1912] A. C. 555, P. C.

1517. Agent entitled to rely on Trustee Act, 1888 (c. 59).]—An agent in a fiduciary position, being a trustee as to moneys of the principal coming to his hands within s. 1 (3) of the above Act, is entitled, under s. 8 of the Act, in absence of fraud or fraudulent concealment, to take advantage of Stat. Limitations in proceedings against him for misapplication of the money.—*Re* LANDS ALLOTMENT CO., [1894] 1 Ch. 416; 63 L. J. Ch. 291; 70 L. T. 286; 42 W. R. 404; 10 T. L. R. 234; 38 Sol. Jo. 235; 1 Mans. 107; 1 R. 115, C. A.

Annotation:—**Folld.** Whitwam *v.* Watkin (1898), 78 L. T. 188. **Mentd.** Mara *v.* Browne, [1895] 2 Ch. 69; *Re* Severn & Wye & Severn Bridge Ry. Co., [1896] 1 Ch. 559; *Re* National Bank of Wales, [1899] 2 Ch. 629; Percival *v.* Wright, [1902] 2 Ch. 421; Lucas *v.* Fitzgerald (1903), 20 T. L. R. 16; Young *v.* Naval, Military & Civil Service Co-op. Soc. of South Africa, [1905] 1 K. B. 687; *Re* Macfadyen. *Ex p.* Vizianagaram Mining Co., [1908] 2 K. B. 817, C. A.

1518. Mercantile agent.]—In the case of a mercantile agency, the existence of a fiduciary relation does not prevent the application of Stat. Limitations to a claim for an account.—FRIEND *v.* YOUNG, [1897] 2 Ch. 421; *sub nom. Re* FRIEND, FRIEND *v.* FRIEND (YOUNG), 66 L. J. Ch. 737; 77 L. T. 50; 46 W. R. 139; 41 Sol. Jo. 607.

Annotations:—**Expld.** North-American Land & Timber Co. *v.* Watkins, [1904] 1 Ch. 242. **Apld.** Henry *v.* Hammond, [1913] 2 K. B. 515. **Refd.** Bagel *v.* Miller, [1903] 2 K. B. 212; *Re* Boswell, Merritt *v.* Boswell, [1906] 2 Ch. 359.

1519. ——.]—Pltf. was surviving partner of a firm who carried on the business of average adjusters in Paris. In 1883 a vessel called the *International* became a total wreck near Ramsgate. The bill of lading was sent by pltf.'s firm, who were acting for the insurers, to deft., a shipping agent, with instructions to sell the cargo on behalf of the firm. It was sold by deft., &, after deducting salvage claims & other expenses, there remained in his hands a sum of £96 which appeared for several years in his books as owing in respect of the vessel. The entry ceased to appear after 1888, but the amount was not paid over to pltf.'s firm. In an action brought by pltf. in 1912 to recover the sum of £96, deft. pleaded that the claim was barred by Stat. Limitations:—*Held:* (1) as deft. had been employed to sell the cargo in the ordinary course of his business, he was not bound to keep the proceeds of sale as a separate fund to be paid over to pltf.'s firm; (2) deft. was not an express trustee of the amount, but only a debtor to pltf. in respect of the ultimate balance of account as between them; (3) the claim was barred by Stat. Limitations.—HENRY *v.* HAMMOND, [1913] 2 K. B. 515; 82 L. J. K. B. 575; 108 L. T. 729; 29 T. L. R. 340; 57 Sol. Jo. 358; 12 Asp. M. L. C. 332.

1520. Stockbroker selling his own shares to principal.]—Pltf. claimed to set aside certain transactions between himself & deft., relating to the purchase of shares in a mining co., & to recover moneys paid by him to deft. in respect thereof. The ground of the claim was the fraud of deft. in pretending to act as pltf.'s stockbroker while in fact selling to pltf. deft.'s own shares. The transactions took place in & before Aug., 1906. Pltf. did not discover the fraud until July, 1912. The action was commenced in Nov., 1912. Deft. used no means to conceal the cause of action. Pltf. was guilty of no laches or other default in failing to discover the fraud earlier:—*Held:* Stat. Limitations was no bar to the action.—OELKERS *v.* ELLIS, [1914] 2 K. B. 139; 83 L. J. K. B. 658; 110 L. T. 332.

Annotations—**Consd.** Osgood *v.* Sunderland (1914), 111 L. T. 529. **Refd.** Armstrong *v.* Jackson, [1917] 2 K. B. 822.

1521. Agent receiving money from principal for particular purpose.]—Stat. Limitations is no bar to an action by a principal against his agent in respect of moneys remitted to the agent for an express purpose & retained by him, where such agent is either in the position of an express trustee or guilty of fraudulent concealment in his accounts.—NORTH AMERICAN LAND & TIMBER CO. *v.* WATKINS, [1904] 2 Ch. 233; 73 L. J. Ch. 626; 91 L. T. 425; 20 T. L. R. 642; 48 Sol. Jo. 640, C. A.

SUB-SECT. 10.—WHERE AGENT SELLS HIS OWN PROPERTY TO PRINCIPAL.

1522. Agent cannot sell his own property.]—An agent employed to purchase cannot buy his own goods for his principal. The principal may either repudiate the transaction altogether, or adopt & take the benefit of it.—BENTLEY *v.* CRAVEN (1853), 18 Beav. 75; 52 E. R. 29.

Annotations:—**Apld.** Bank of London *v.* Tyrrell (1859), 5 Jur. N. S. 924. **Distd.** *Re* Cape Breton Co. (1885), 29 Ch. D. 795; Armstrong *v.* Jackson, [1917] 2 K. B. 822. **Refd.** Williams *v.* Tyte (1854), 18 Beav. 366; Ku lirz *v.* Lambert (1913), 108 L. T. 565.

1523. ——.]—A. employed B., a stockbroker, to purchase some canal shares. B. apparently bought them from C., the ostensible owner, who afterwards turned out to be a mere trustee for B. After a lapse of several years, without entering into the question of fairness of price:—*Held:* (1) the transaction was void on grounds of public policy; (2) it must be set aside with costs.—GILLETT *v.* PEPPERCORNE (1840), 3 Beav. 78; 49 E. R. 31.

Annotations:—**Apld.** Maturin *v.* Tredinnick (1863), 2 New Rep. 514. **Consd.** Armstrong *v.* Jackson, [1917] 2 K. B. 822. **Refd.** Bank of Bengal *v.* Macleod (1849), 3 Moo. Ind. App. 1.

1524. ——.]—An agent was employed to purchase a yacht for his principal:—*Held:* he was not entitled to purchase the yacht himself & resell it to his principal at a profit, but could only charge

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PART VIII. SECT. 2, SUB-SECT. 10.

1522 i. *Agent cannot sell his own property.*] — Where an agent is intrusted with the purchase of land for his principal, he must, before selling his own land to the principal, make the fullest disclosure.—LAYCOCK *v.* LEE & FRASER (1912), 17 B. C. R. 73; 19 W. L. R. 841; 1 D. L. R. 91.—**CAN.**

1522 ii. ——.]—BLACK *v.* GEDDES (1914), 20 R. L. N. S. 474.—**CAN.**

1522 iii. ——.]—Z., a broker, purchased six acres of land in the name of W. at $500 an acre, later advising R. that he could purchase the property from W. at $750 an acre net. The two purchased the property jointly at that price, R. paying Z. $60 in addition for his services. Later they divided the property, each taking three acres, & R. then exchanged his three acres for a motor-car before it was disclosed to him that W. held the property for Z. when they made their joint purchase:—*Held:* the relationship of principal & agent was established, & the difference in the prices paid for the land in the two sales could be recovered by R. as secret profit.—RICHES *v.* ZIMMERLI (1914), 19 B. C. R. 127.—**CAN.**

Sect. 2.—Principal's rights against agent: Subsect. 10.]

his principal the amount actually paid by him for the yacht & agreed commission.—LUCIFERO *v.* CASTEL (1887), 3 T. L. R. 371.

1525. ——.]—An agent instructed to buy cannot sell his own property, whether he is remunerated for the sale or not (COZENS-HARDY, M.R.).—KING, VIALL & BENSON *v.* HOWELL (1910), 27 T. L. R. 114, C. A.

1526. —— **Fairness of transaction immaterial.**]—A director of a ry. co., also a member of a mercantile firm, entered into a contract *quâ* director with the firm for the supply of certain iron chairs at a fixed price:—*Held:* (1) such a contract, although it might be enforced at law, was illegal in equity upon general equitable principles, & would be set aside; (2) no question could be raised as to the fairness or unfairness of a contract so entered into. In such a case the law of Scotland differs in no respect from the law of England.—ABERDEEN RY. CO. *v.* BLAIKIE BROTHERS (1854), 2 Eq. Rep. 1281; 23 L. T. O. S. 315; 1 Macq. 461, H. L.

Annotations:—**Apld.** Stears *v.* South Essex Gas Light & Coke Co. (1860), 7 Jur. N. S. 447. **Folld.** Flanagan *v.* G. W. Ry. Co. (1868), L. R. 14 Eq. 116; Imperial Mercantile Credit Assocn. *v.* Coleman (1870), 6 Ch. App. 562 n. **Distd.** Murray *v.* Epsom Local Board, [1897] 1 Ch. 35. **Consd.** Costa Rica Ry. Co. *v.* Forwood, [1901] 1 Ch. 746, C. A.; Transvaal Lands Co. *v.* New Belgium Transvaal Land & Development Co., [1914] 2 Ch. 488, C. A. **Refd.** Armstrong *v.* Jackson, [1917] 2 K. B. 822.

1527. —— **Notwithstanding any usage to the contrary.**]—A custom in a particular market that a broker who has purchased, & is purchasing, goods of a particular kind, in his own name, may take portions of those goods & supply them to principals who have employed him in his character of broker to buy such goods for them, is one of a peculiar nature, & cannot be supported as against a principal not proved to have been acquainted with it when he gave his order.—ROBINSON *v.* MOLLETT (1875), L. R. 7 H. L. 802; 44 L. J. C. P. 362; 33 L. T. 544, H. L.

Annotations:—**Expld.** *Re* Simpson, *Ex p.* Morgan (1876), 34 L. T. 329, C. A. **Expld. & Distd.** *Re* Rogers, *Ex p.* Rogers (1880), 15 Ch. D. 207, C. A. **Apld.** Perry *v.* Barnett (1885), 14 Q. B. D. 467. **Distd.** Sachs *v.* Spielmann (1889), 5 T. L. R. 487. **Consd. & Expld.** May & Hart *v.* Angeli (1898), 14 T. L. R. 551, H. L.; Beckhuson *v.* Gibbs & Hamblett, [1900] 2 Q. B. 18; Levitt *v.* Hamblet, [1901] 2 K. B. 53, C. A. **Distd.** Scott & Horton *v.* Godfrey, [1901] 2 K. B. 726. **Consd.** Matveieff *v.* Crossfield (1903), 51 W. R. 365; The Kronprinzessin Cecilie (1917), 33 T. L. R. 292, P. C. **Refd.** Anderson *v.* Beard (1900), 5 Com. Cas. 261; Johnson *v.* Kearley, [1908] 2 K. B. 514, C. A.

1528. ——.]—Defts. employed pltfs. as brokers to buy cotton, & received from them this note signed by them as brokers: "Bought by order & for account of Messrs. S. & Co., at etc., the following cotton 500 bales June &/or July shipment." Pltfs. had no principal, & in performance of their contract with defts. tendered cotton they were selling on their own account, of which defts. were ignorant, & this cotton, being of May shipment, was refused. Within a reasonable time pltfs. tendered other cotton (also on their own account) of June & July shipment, & this cotton also was refused by defts.:—*Held:* (1) assuming a contract of purchase & sale between pltfs. & defts., pltfs. were not, by declaring cotton of May shipment, estopped from declaring other cotton of June or July shipment in performance of their contract; (2) pltfs. could not by virtue of their employment as brokers, in absence of any custom, & without consent of defts., sell cotton to them on their own account; (3) there was no such contract of purchase & sale between them. *Semble:* a custom for a cotton broker so to sell cotton on his own account would be bad.—TETLEY *v.* SHAND (1871), 25 L. T. 658; 20 W. R. 206.

Annotation:—**Refd.** Borrowman *v.* Free (1878), 4 Q. B. D. 500, C. A.

1529. ——.]—WHITE *v.* BENCKENDORFF, No. 1916, *post.*

1530. —— **Remedies of principal—Principal may repudiate or adopt transaction.**]—BENTLEY *v.* CRAVEN, No. 1522, *ante.*

For full anns., *see* S. C. No. 1522, *ante.*

1531. ——.]—M. commissioned T., a broker, to buy certain shares for him. T. sold his own shares to M.:—*Held:* the transaction was voidable.

Some of the shares being alleged to have been forfeited by reason of non-payment of calls:—*Held:* (1) there must be an inquiry as to this; (2) the forfeiture would disentitle pltf. to relief, if he did not inform deft. the calls had been made.—MATURIN *v.* TREDINNICK (1863), 2 New Rep. 514; 9 L. T. 82. S. C. further consideration, 4 New Rep. 15.

Annotation:—**Consd.** *Re* Mount Morgan (West) Gold Mine, *Ex p.* West (1887), 56 L. T. 622.

1532. —— **Where thing sold has decreased in value.**]—Where a broker, pretending to execute a mandate to buy, sells his own property, the sale may be rescinded notwithstanding that the value of the thing sold has decreased between the date of the sale & the date of the action for rescission.—ARMSTRONG *v.* JACKSON, [1917] 2 K. B. 822; 86 L. J. K. B. 1375; 117 L. T. 479; 33 T. L. R. 444; 61 Sol. Jo. 631.

1533. —— **Effect of affirming transaction.**]—A co. was formed for the purpose of purchasing certain coal areas, the directors being empowered by the articles to purchase at a price not exceeding a sum therein mentioned. The co. purchased the coal areas, at the outside price named, from A., who was trustee for B. & others for some years prior to the formation of the co. B. was one of the directors of the co. & was assumed by the ct. to have taken part in the resolution of the board to purchase at the outside price, but the co. was not aware that he was beneficially interested in the property. The co. was afterwards wound up, & the majority of shareholders, with full knowledge of the above circumstances, passed a resolution (confirmed by the ct.) to sell the property. The sale realised a much smaller price than that given by the co.:—*Held:* even if the co. had a ground for rescinding the contract it had elected to affirm it, & it had no claim for relief against B.—*Re* CAPE BRETON CO. (1885), 29 Ch. D. 795; 54 L. J. Ch. 822; 53 L. T. 181; 33 W. R. 788; 1 T. L. R. 450, C. A.; *affd., sub nom.* CAVENDISH-BENTINCK *v.* FENN (1887), 12 App. Cas. 652, H. L.

Annotations:—**Distd.** Lydney & Wigpool Iron Ore Co. *v.* Bird (1886), 33 Ch. D. 85, C. A. **Folld.** Ladywell Mining Co. *v.* Brookes & Huggons (1887), 35 Ch. D. 400, C. A. **Expld. & Distd.** *Re* Olympia, [1898] 2 Ch. 153, C. A.; *Re* Lady Forrest (Murchison) Gold Mine, [1901] 1 Ch. 582. **Expld. & Folld.** *Re* Leeds & Hanley Theatres of Varieties, [1902] 2 Ch. 809, C. A. **Refd.** Burland *v.* Earle, [1902] A. C. 83, P. C.; North American Land & Timber Co. *v.* Watkins (1904), 91 L. T. 425, C. A.; Marler Estates *v.* Marler (1913), 85 L. J. P. C. 167 n.; Omnium Electric Palaces *v.* Baines, [1914] 1 Ch. 332. **Mentd.** *Re* Liverpool Household Stores Assocn. (1890), 59 L. J. Ch. 616; *Re* North Australian Territory Co., Archer's Case, [1892] 1 Ch. 322, C. A.; *Re* Liberator Permanent Bldg. Soc. (1894), 10 T. L. R. 537; *Re* Kingston Cotton Mill Co., [1896] 2 Ch. 279, C. A.; Grant *v.* Gold Exploration & Development

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1526 1. —— *Fairness of transaction immaterial.*]—Where an agent, authorised to invest in bank stock, appropriated to his principal some shares of his own, & rendered an account as if he had purchased so many shares for her:—*Held:* his principal years afterwards, on the fact coming to her knowledge, was entitled to repudiate the transaction without any inquiry as to the fairness of the rate which she had been charged for the shares.—HARRISON *v.* HARRISON (1868), 14 Gr. 586.—CAN.

Syndicate, [1900] 1 Q. B. 233, C. A.; *Re* Brazilian Rubber Plantations & Estates, [1911] 1 Ch. 425.

1534. —— —— ——.]—Equity treats all transactions between an agent & his principal, in matters in which it is the agent's duty to advise his principal, as voidable unless & until the principal, with full knowledge of the material facts & in circumstances which rebut any presumption of undue influence, ratifies & confirms the same. In such cases the interest of the agent is in conflict with his duty, & there can be no real bargain at all. If the transaction be one of sale by the agent to the principal the latter must, in order to avoid it, be able to restore the agent to his original condition. If he has resold the property, or cannot restore it in its original condition, the right to avoid the transaction will, as a general rule, have been lost. But even so he may be able to recover damages from the agent for negligence in the performance of his duties (LORD PARKER).—MARLER ESTATES, LTD. *v.* MARLER (1913), 85 L. J. P. C. 167 n.; 114 L. T. 640 n., P. C.

Annotation :—**Apprvd.** Cook *v.* Deeks (1916), 85 L. J. P. C. 161.

1535. —— —— **Agent liable to account.**]—An agent, who was to have no emolument beyond his salary :—*Held :* liable to account for profit made by a clandestine sale to his principal on his own account.—MASSEY *v.* DAVIES (1794), 2 Ves. 317; 30 E. R. 651.

Annotation :—**Refd.** Morison *v.* Thompson (1874), L. R. 9 Q. B. 480.

1536. —— —— ——.]—One of several partners was employed to purchase goods for the firm. He, unknown to his co-partners, purchased goods of his own at market price, but made a considerable profit thereby :—*Held :* (1) the transaction could not be sustained; (2) he was accountable to the firm for the profit thus made.—BENTLEY *v.* CRAVEN, No. 1522, *ante*.

Annotations :—**Apld.** Williams *v.* Trye (1854), 18 Beav. 366; Bank of London *v.* Tyrrell (1859), 5 Jur. N. S. 924. **Distd.** *Re* Cape Breton Co. (1885), 29 Ch. D. 795; Armstrong *v.* Jackson, [1917] 2 K. B. 822. **Refd.** Kuhlirz *v.* Lambert (1913), 108 L. T. 565.

1537. —— —— ——.]—T., a solr., had a private arrangement with R., by which he was to receive from R. a share in certain property belonging to R., & to share the profit obtained from the sale of that property. In his character of solr. T. acted for clients (a banking co.) in the purchase of the larger portion of that property, never communicating to his clients the fact of his having an interest in it :—*Held :* (1) T. was to be treated as a trustee for his clients in respect of his share of so much of the property as they had actually purchased; (2) the value of T.'s half of the unsold property must be taken into account in ascertaining what was due from him to his clients; (3) T., having made a large profit on the sale, must pay back the amount of such profit with the full amount of interest given in cases of breach of trust, namely, 5 per cent.—TYRRELL *v.* BANK OF LONDON (1862), 10 H. L. Cas. 26; 31 L. J. Ch. 369; 6 L. T. 1; 8 Jur. N. S. 849; 10 W. R. 359; 11 E. R. 934.

Annotations :—**Consd.** *Re* Mason's Hall Tavern Co., Orgill's Case (1869), 21 L. T. 221, C. A. **Apld.** Imperial Mercantile Credit Assocn. *v.* Coleman (1870), 6 Ch. App. 562 n.; *Re* Cape Breton Co. (1885), 29 Ch. D. 795, C. A. **Distd.** *Re* Haslam & Hier-Evans (1902), 71 L. J. Ch. 374. **Refd.** Kimber *v.* Barber (1872), 8 Ch. App. 56; Lindsay Petroleum Co. *v.* Hurd (1874), L. R. 5 P. C. 221; *Re* Western of Canada Oil, Lands, & Works, Carling's Case (1875), L. R. 20 Eq. 580; Albion Steel & Wire Co. *v.* Martin (1875), 24 W. R. 134; New Sombrero Phosphate Co. *v.* Erlanger (1877), 5 Ch. D. 73, C. A.; Omnium Electric Palaces *v.* Baines, [1914] 1 Ch. 332, C. A.

1538. —— —— ——.]—A., aware that B. wished to obtain shares in a certain co., represented to B. that he, A., could procure a certain number of shares at £3 a share. B. agreed to purchase at that price, & the shares were transferred in part to him & in part to his nominees, & he paid to A. £3 a share. He afterwards discovered that A. was in fact the owner of the shares, having just bought them for £2 a share :—*Held :* (1) on the facts A. was an agent for B.; (2) A. must pay back to B. the difference between the prices of the shares.—KIMBER *v.* BARBER (1872), 8 Ch. App. 56; 27 L. T. 526; 21 W. R. 65, C. A.

Annotation :—**Apld.** Morison *v.* Thompson (1874), L. R. 9 Q. B. 480.

1539. —— —— ——.]—In equity an agent cannot without the consent of his principal, given with full knowledge of the material facts & in circumstances which rebut any presumption of undue influence, retain any profit acquired by him in transactions within the scope of the agency. The principal can always in such a case treat the profit as acquired on his own behalf, & insist on its being accounted for to him. Thus an agent whose duty it is to acquire property on behalf of his principal cannot, without the like consent, acquire it on his own behalf & subsequently resell it to his principal at an enhanced price. In such a case the principal can treat the property as originally acquired for him & the resale as nugatory, & may recover from the agent the money paid on such resale less the original price & the expenses incurred by the agent in acquiring the property. This only applies where the relationship of principal & agent existed at the time when the agent acquired the property. If it did not then exist, the property acquired was, at the outset, the agent's own property for all purposes, & the subsequent constitution of the relationship of principal & agent cannot deprive him of property already his own (LORD PARKER).—MARLER ESTATES *v.* MARLER, No. 1534, *ante*.

Annotation :—**Apprvd.** Cook *v.* Deeks (1916), 85 L. J. P. C. 161.

1540. —— —— **Transaction set aside.**]—GILLETT *v.* PEPPERCORNE, No. 1523, *ante*.

For full anns., *see* S. C. No. 1523, *ante*.

1535 i. —— *Remedies of principal—Agent liable to account.*]—An agent to invest funds in lands bought land for £600 in his own name & conveyed it to the principal for £1,000. On discovery of the fraud :—*Held :* principal entitled to the land for £600, & reference ordered for an account to be taken.—ARTHURTON *v.* DALLEY (1850), 2 Gr. 1.—**CAN.**

1540 i. —— —— *Transaction set aside.*]—Pltf. approached deft. supposing that he was a real estate agent, & on his recommendation agreed to buy a lot of land for $2,500, & paid him a deposit. Deft. went to the owner of the land & bought it in his own name for $2,000, less $100 commission. Pltf. on discovering the facts sued to recover the profit made by deft., or alternatively for rescission of the agreement & return of his money :—*Held :* pltf. was entitled to a return of the money & a rescission of the agreement.—STEVENSON *v.* SANDARS (1912), 20 W. L. R. 787; 3 D. L. R. 790; 17 B. C. R. 158, C. A.—**CAN.**

1540 ii. —— —— ——.]—An agent for purchase of grain sold his own grain at a price higher than the market rate :—*Held :* (1) the principal was entitled to repudiate the transaction; (2) not knowing the agent was selling his own property & was charging excess of market rate, the principal could not be alleged to have ratified it.—DAMODAR DAS *v.* SHEORAM DAS (1907), I. L. R. 29 All. 730.—**IND.**

1540 iii. —— —— —— *Position of assignee.*]—Defts. having authorised S., member of a firm of estate agents, to sell land, & reinvest proceeds in the purchase of other land which S. had recommended as a good investment, S. sold land belonging to the firm of which he was a member to defts. In the agreement for sale the firm appeared as vendors, but defts. believed this was merely a measure of convenience & were unaware that the firm were the real owners. Before all the instalments of the purchase-money were paid the firm assigned their rights under the contract to pltfs. :—*Held :* (1) as the agents occupied a position of trust towards defts., their failure to disclose their interest gave defts. the right, notwithstanding the subsequent assignment to pltfs., to have the contract rescinded; (2) as defts. did not become aware of all the facts till after the action was brought, their failure to repudiate the contract earlier did not operate as a waiver of their right to do so. *Lagunas Nitrate Co.* v. *Lagunas Nitrate*

Sect. 2.—Principal's rights against [agent: Subsects. 10 & 11.]

1541. —— —— ——.]—Brokers in London, being directed to purchase iron, delivered to the buyer bought notes, purporting to be notes of the contract for the iron, not disclosing the seller's name, the brokers guaranteeing performance of the contract; & the buyer paid the brokers their commission, together with a deposit in part payment of the price of the iron. The buyer afterwards discovered there was no principal seller of the iron, other than one of the firm of brokers, who intended himself to perform the contract; & upon a bill filed by parties from whom the buyer of the iron had obtained money on security of the contracts, the deposits were ordered to be repaid, with interest.

If in such a case pltfs. had, before the bill was filed, abandoned all interest in the contracts for the iron, they could not afterwards sue for recovery of the deposits; but the cancellation of certain letters which gave pltfs. an interest in the contract as against the brokers, pltfs. being at the time of such cancellation ignorant, & the brokers knowing the truth, does not in equity protect the brokers from pltfs.' claim for recovery of the deposits. If pltfs. had known the brokers were also the sellers of the iron, or if pltfs. were otherwise not deceived by their representations, they would not have been entitled to relief in equity. There is a remedy in equity as well as at law, by a principal against his broker or agent, to recover a sum of money paid to the broker on his untrue representation that he had entered into a contract for his principal, which alleged contract had in fact no existence (*per* CUR.).—WILSON *v.* SHORT (1848), 6 Hare, 366; 17 L. J. Ch. 289; 10 L. T. O. S. 519; 12 Jur. 301; 67 E. R. 1207.

Annotation:—**Distd.** Overend, Gurney *v.* Gurney (1869), 17 W. R. 1115.

Measure of Damages.]—*See* No. 1651, *post.*

SUB-SECT. 11.—WHERE AGENT BUYS PRINCIPAL'S PROPERTY.

1542. Agent cannot buy principal's property.]—An agent employed to sell cannot buy his principal's goods for himself. The principal may either repudiate the transaction altogether or adopt & take the benefit of it.—BENTLEY *v.* CRAVEN, No. 1522, *ante.*

Annotations:—**Apld.** Williams *v.* Trye (1854), 18 Beav. 366; Bank of London *v.* Tyrrell (1859), 5 Jur. N. S. 924. **Distd.** *Re* Cape Breton Co. (1885), 29 Ch. D. 795; Armstrong *v.* Jackson, [1917] 2 K. B. 822. **Refd.** Kuhlirz *v.* Lambert (1913), 108 L. T. 565.

1543. ——.]—An agent to sell shall not convert himself into a purchaser unless he can make it perfectly clear that he furnished his employer with all the knowledge which he himself possessed.—LOWTHER *v.* LOWTHER (1806), 13 Ves. 95; 33 E. R. 230.

Annotations:—**Apld.** Dunne *v.* English (1874), L. R. 18 Eq. 524. **Mentd.** Bower *v.* Cooper (1843), 2 Hare, 408.

1544. ——.]—The agent of a trustee for sale of an estate, employed for sale of the estate, cannot purchase same.—WHITCOMB *v.* MINCHIN (1820), 5 Madd. 91; 56 E. R. 830.

Annotations:—**Apld.** *Re* Bloye's Trust (1849), 2 H. & Tw. 140. **Folld.** Martinson *v.* Clowes (1882), 21 Ch. D. 857. **Apprvd.** Farrar *v.* Farrars (1888), 40 Ch. D. 395. **Refd.** King *v.* Huderson (1874), 23 W. R. 196, C. A. **Mentd.** Cook *v.* Hathway (1869), L. R. 8 Eq. 612.

1545. ——.]—An agent employed to sell an estate secretly bought it himself, in the name of a trustee, whom he represented to his employer to be the real purchaser:—*Held:* he could not call for an execution of the trust until the transaction was confirmed by the vendor.—WOODHOUSE *v.* MEREDITH (1820), 1 Jac. & W. 204; 37 E. R. 353.

Annotations:—**Apprvd.** *Re* Bloye's Trust (1849), 1 Mac. & G. 488. **Mentd.** Gravenor *v.* Woodhouse (1822), 1 Bing. 38.

1546. ——.]—An auctioneer employed to sell cannot be permitted on equitable principles to purchase the property himself. If the person so employed has also been in other respects connected with the interests of the vendor, as by having been concerned in valuing the property, & purchases the estate the next day by private contract, where the property was not sold at the auction in consequence of no bidding having been made, & no satisfactory account of the proceedings of the day be given by the auctioneer in his answer to a bill filed against him as purchaser, in such circumstances the purchase will be set aside, for in such a case the ct. will consider that the duties of an agent so circum-

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Syndicate, [1899] 2 Ch. 392; *New Sombrero Phosphate Co.* v. *Erlanger* (1877), 5 Ch. D. 73; *Williams* v. *Scott,* [1900] A. C. 499, cited.—QUEBEC BANK *v.* GREENLEES' EXORS. (1917), 1 W. W. R. 746.—**CAN.**

PART VIII. SECT. 2, SUB-SECT. 11.

1542 i. *Agent cannot buy principal's property.*]—A mtgee. desiring to exercise his power of sale instructed an agent to sell the land. The latter sold to another but took an interest in the land himself:—*Held:* he acted outside his authority.—DANIEL *v.* GRIFFITHS (1883), L. R. 1 C. A. 340.—**N.Z.**

1542 ii. ——.]—A common agent in a ranking & sale cannot purchase the estates sold under the ranking for his own account, though at a public judicial auction, & the sale will be reduced though he has been in possession unchallenged for thirteen years.—YORK BUILDINGS CO. *v.* MACKENZIE (1795), 3 Pat. 378.—**SCOT.**

1542 iii. —— *Agent becoming member of syndicate making unsuccessful offer to buy—No duty to syndicate.*]—The D. Brewery was owned in England & F. came to T. as agent to effect a sale of it. He employed C. to find a purchaser. An agreement was come to whereby G. A. C., Ltd., as trustees for certain parties were to become purchasers, but they could not find the money. C. then tried to induce M. to buy, & about the same time a syndicate was formed composed of pltfs. & M. & G. A. C., Ltd., to purchase the brewery on the terms of the previous agreement with G. A. C., Ltd., as trustees. C. was not a party to the agreement & did not sign it except as manager of G. A. C., Ltd., but it provided he was to be paid a commission for purchasing the property. Shortly after this agreement was arrived at M. decided to purchase the property, & a sale was made by F. to L., who was trustee for M. Attempts were made to acquire an interest in the purchase for members of the syndicate, but the attempts failing, an action was instituted by pltfs. to set aside the sale to L. as fraudulent as against them, & in the alternative to recover damages against C. & G. A. C., Ltd., for breach of their duty in aiding & procuring the sale to L.:—*Held:* pltfs. had no right of action against C. personally; (2) the evidence clearly showed that the property was sold to M. & not on account of anything that was done or said by C. after he had entered into the syndicate agreement. C. was agent of F. to sell the property & his sole contribution to the sale to M. was his bringing the property to M.'s attention, which was done previous to the formation of the syndicate. G. A. C., Ltd., if liable to pltfs. at all, must be so under the agreement forming the syndicate, but that document contained no covenants or undertakings on its behalf except as to incorporation of a co. to acquire the brewery property, & nothing having been done by C. or G. A. C., Ltd., to bring about the sale to M. after the formation of the syndicate the action failed as against G. A. C., Ltd.—CLISDELL *v.* LOVELL (1910), 17 O. W. R. 583; 2 O. W. N. 315.—**CAN.**

1542 iv. —— *Construction of agreement transferring realty to agent or client.*]—A transfer of realty by the owner to a real estate agent "or to one of his clients" for a price stated & commission, with a further covenant for division of surplus over stated price, may be a sale to the agent or a power to sell to a third party at same price & take commission, & if possible for a price exceeding that stated, & to share surplus plus commission. It does not give the agent power to sell to a third party & stipulate for payment to himself.—GROSS REAL ESTATE AGENCY *v.* RACICOT (1910), Q. R. 20 K. B. 394.—**CAN.**

1542 v. —— *Both parties ignorant of real value.*]—V. agreed to sell part of his estate to his agent, X., but when he made the agreement neither V. nor X. was aware that that part included the only turf-bog on the estate:—*Held:* V.'s ignorance touching the turf-bog afforded sufficient ground for refusing to enforce specific performance.—CHAMBERS *v.* BETTY (1815), Beat. 488.—**IR.**

stanced were not concluded with the mere business of the day.—OLIVER *v.* COURT (1820), Dan. 301; 8 Price, 127; 146 E. R. 1152.

Annotation :—**Refd.** Armstrong *v.* Jackson, [1917] 2 K. B. 822.

1547. ——.]—A person who has acted as agent of mtgee., being the medium through which money is advanced, surveying the security, & receiving interest regularly for mtgee., is not a competent purchaser under a power of sale.—ORME *v.* WRIGHT (1839), 3 Jur. 19, 972.

Annotation :—**Distd.** Farrar *v.* Farrars (1888), 40 Ch. D. 395.

1548. —— **Agent to manage property.**]—D., being entitled to the reversion of an estate expectant on his wife's interest, but believing himself, & being believed by W., an agent employed by him to receive the rents, to have the fee in possession, sold it to W., for an annuity, payable during the lives of D. & his wife & the survivor. Upon the death of D., a year afterwards, his wife, who was his residuary devisee, filed a bill to set aside the sale. It was proved that the annuity was an inadequate price for the fee in possession, & that deft. had taken undue advantage of his position as agent :—*Held :* (1) on these grounds, the sale could not have stood if the vendor had had the whole fee; (2) deft. might have taken the reversion, subject to pltf.'s life interest, on payment of the annuity in full; (3) the ct. would not apportion or allow a deduction from the consideration, & deft. declining to take the reversion on these terms, the sale was set aside *in toto*.—DALLY *v.* WONHAM (1863), 33 Beav. 154; 32 L. J. Ch. 790; 9 L. T. 75; 9 Jur. N. S. 980; 11 W. R. 1090; 55 E. R. 326.

1549. —— **Agent in fiduciary position.**]—T., who was 23 & entitled to a moiety of a freehold estate, the entirety of which brought in about £440 a year, being pressed for payment of his college debts, amounting to about £1,000 & being estranged from his father, wrote to his great-uncle for advice & assistance as to payment of them. The uncle deputed deft., his nephew, to see T. on the subject. Deft. met T., by appointment, & at this interview T. refused to allow any attempt to compromise the debts, & said he would sell his moiety of the estate, upon which deft. offered him £7,000 for it, payable by instalments. T. next day accepted the offer. Before an agreement had been signed, deft. obtained a valuation by a surveyor estimating the value of the mines under the entirety at £20,000. The sale was completed without this valuation having ever been communicated to T. T.'s heir filed a bill to impeach the sale :—*Held :* (1) deft. had stood in a fiduciary relation to T., which made it his duty to communicate to T. all material information which he acquired affecting the value of the property; (2) as he had not communicated the valuation to T., the transaction must be set aside.—TATE *v.* WILLIAMSON (1866), 2 Ch. App. 55; 15 L. T. 549; 15 W. R. 321, C. A.

Annotations :—**Consd.** Plowright *v.* Lambert (1885), 52 L. T. 646. **Apld.** Moody *v.* Cox & Hatt, [1917] 2 Ch. 71, C. A. **Refd.** Baker *v.* Loades (1872), L. R. 16 Eq. 49. Silkstone & Haigh Moor Coal Co. *v.* Edey, [1900] 1 Ch. 167.

1550. —— **Agent not in fiduciary position.**]—Where pltf., a single woman, was informed by her brother's agent that on his death she had succeeded to a small estate of which she knew nothing, & on the agent's representations of its value, which were inaccurate, & without legal advice, she conveyed the estate for an inadequate sum to the agent's daughter :—*Held :* (1) the conveyance must be set aside; (2) the fact that the agent continued to receive the rents of the estate after the death of pltf.'s brother, but without pltf.'s knowledge up to the date of the conveyance, did not create a fiduciary relation between pltf. & the agent so as to incapacitate the agent from purchasing.—HAYGARTH *v.* WEARING (1871), L. R. 12 Eq. 320; 40 L. J. Ch. 577; 24 L. T. 825; 36 J. P. 132; 20 W. R. 11.

For full anns., *see* MISREPRESENTATION & FRAUD.

1551. —— **Land agent.**]—A land agent or steward is not incapacitated to purchase from his employer, & the sale, though beneficial to the purchaser, will not be set aside in equity if there was no imposition on the agent's part, & no concealment of information as to the value. A bill charging such agent & another deft., pltf.'s solr., with fraudulently combining to procure the estate for the agent at an undervalue was dismissed with costs, charges of fraud, etc., not being proved.—ANDREWS *v.* MOWBRAY & CASTLE (1807), Wils. Ex. 71; 159 E. R. 835.

Annotation :—**Consd.** Oliver *v.* Court (1820), 8 Price, 127.

1552. —— **Stockbroker.**]—A broker or agent employed by a customer to sell foreign stock on a day specified by him in a letter of instructions purchased the stock in the name of his partners, a firm in Paris, at the market price. Being also

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1549 i. —— *Agent in fiduciary position.*]—An agent or person in a fiduciary position towards the owner of property purchased by him is bound to prove that the sale was made for good & sufficient consideration, & must prove not only that the agent had authority to sell, & that the consideration alleged was in fact paid, but also that the consideration paid was a fair price for the property.—RUPTA BEBEE *v.* DUMREE LAL (1870), 2 N. W. 153.—**IND.**

1549 ii. —— ——.]—Defts., real estate agents, procured an option to purchase from pltf., knowing he would be willing to sell for a slight advance. Subsequently to acquiring the option the property, to defts.' knowledge, appreciated greatly in value, so that a two weeks' option would have been worth $500 :—*Held :* defts. could not exercise the option without disclosing to pltf. the true value of the property, & option set aside. *Davies* v. *London & Provincial Marine Insce. Co.* (1878), 8 Ch. D. at p. 474, & *De Bussche* v. *Alt* (1878), 8 Ch. D. at p. 313, apld.—LAYCOCK *v.* LEE & FRASER (1912), 19 W. L. R. 841; 1 D. L. R. 91; 17 B. C. R. 73.—**CAN.**

1550 i. —— *Agent not in fiduciary position.*]—In July, 1897, a real estate agent, on behalf of the owner, negotiated with a prospective purchaser, but the attempted sale fell through, & after that the agent & the owner ceased to have any dealings with each other. In Sept., 1898, the agent bought the property at a tax sale at a very low figure :—*Held :* at the time of the sale the agent was not in a fiduciary relation to the owner.—MCLEOD *v.* WATERMAN (No. 2) (1903), 10 B. C. R. 42.—**CAN.**

m. —— *Clerk purchasing in another's name.*]—H., a clerk in pltfs.' office, where all their business connected with sale of land was transacted, procured a contract to be executed by pltfs. for the sale of land to J. Defts. alleged that H. had acted as J.'s agent in the matter, but the ct. was satisfied that J.'s name had been used by H. for his own benefit, & that the contract was in breach of H.'s duty as such clerk as aforesaid, & ordered the contract to be rescinded with costs.—UPPER CANADA COLLEGE *v.* JACKSON (1852), 3 Gr. 171.—**CAN.**

n. —— *Squatter's agent.*]—*Semble :* an agent in the management of a squatting station is not as such disqualified from purchasing land on the station put up for sale by the Govt., although his agency might give him peculiar means of knowing its value.—LEMPIERE *v.* WARE, No. 1464 ii., *ante*.—**AUS.**

o. —— *Agent also judgment creditor.*]—An agent, acting at the time as such for the vendor, cannot buy for his own benefit, but, it being denied that he was employed in the sale by the client, & being urged that, being himself a judgment creditor, he had a right to be present & buy at the sale :—*Held :* he might throw off his character of agent & exercise the right which belonged to him in another character.—AUSTIN *v.* CHAMBERS (1842), 3 Dr. & War. 178; 6 Cl. & Fin. 1.—**IR.**

p. —— *Agent taking principal's property in exchange for his own.*]—In an action for specific performance of an agreement for the exchange of city property standing in the name of pltf. for a farm owned by deft. :—*Held :* two land brokers doing business in partnership, who were the real owners of the city property referred to, were upon the evidence deft.'s agents for the sale of the farm, & as such were bound to disclose their identity as the actual principals in the agreement made with pltf., & as they had not done so, but concealed the fact, the action should be dismissed.—WATTS *v.* ROBERTSON (1913), 23 W. L. R. 261; 3 W. W. R. 936; 9 D. L. R. 375.—**CAN.**

Sect. 2.—Principal's rights against agent: Subsect. 11.]

employed to purchase foreign stock & bonds for his customer, according to his, the agent's, recommendation, he transmitted accounts of the transactions to his employer, with broker's notes, etc., as if he had purchased the stock of third persons. In fact, no stock or bonds were purchased; no transfers were made; no broker's notes passed, but the sales were nominal of stock & bonds remaining in the hands of the agent & his partners, & not set apart nor appropriated to the customer. In order to effect these purchases, loans of money were made by the agent to the customers, upon agreement that the stock & bonds should remain as a deposit in the hands of the agent, to secure repayment of money advanced. The stock & bonds were afterwards sold at a loss under the agent's advice. In 1819 an account of these transactions was rendered & settled between customer & agent, & great loss having been incurred upon the transactions, a large balance was paid by the customer to the agent:—*Held:* (1) all the transactions must be set aside; (2) an account must be decreed against the agent.—ROTHSCHILD *v.* BROOKMAN (1831), 5 Bli. N. S. 165; 2 Dow & Cl. 188; 5 E. R. 273.

Annotations:—**Apld.** Maturin *v.* Tredinnick (1863), 2 New Rep. 514; Tetley *v.* Shand (1871), 25 L. T. 658. **Distd.** Waddell *v.* Blockey (1879), 4 Q. B. D. 678, C. A.; Ladywell Mining Co. *v.* Brookes, Ladywell Mining Co. *v.* Huggons (1887), 35 Ch. D. 400, C. A.; Guy *v.* Churchill & Sim (1889), 60 L. T. 740; Kuhlirz *v.* Lambert (1913), 108 L. T. 565. **Consd.** Armstrong *v.* Jackson, [1917] 2 K. B. 822. In *Rothschild* v. *Brookman* the contracts were executed, yet the House of Lords without hesitation set aside the transactions (MCCARDIE, J.). **Refd.** Bank of Bengal *v.* Macleod (1849), 5 Moo. Ind. App. 1; Grand Junction Canal Co. *v.* Dimes (1850), 2 H. & Tw. 92; *Re* Cape Breton Co. (1884), 26 Ch. D. 221; Guy *v.* Churchill & Sim (1886), 2 T. L. R. 855; Robinson *v.* Mollett (1875), L. R. 7 H. L. 802; Johnson *v.* Kearley, [1908] 2 K. B. 514, C. A.; King, Viall & Benson *v.* Howell (1910), 27 T. L. R. 114, C. A.

1553. ——— ———.]—ERSKINE, OXENFORD & CO. *v.* SACHS, [1901] 2 K. B. 504; 70 L. J. K. B. 978; 85 L. T. 385; 17 T. L. R. 636, C. A.

Annotation:—**Apld.** *Re* Finlay, Wilson *v.* Finlay, [1913] 1 Ch. 247.

1554. ———.]—Goods were sent to a broker for sale. According to the sold note, he sold them ostensibly to A. B., but secretly, & according to the bought note, to A. B. & himself. A. B. became insolvent & the broker bkpt. At the time of the bkpcy. the goods were still in the latter's possession:—*Held:* (1) the contract was void; (2) the owner might reclaim the goods specifically.—*Re* PEMBERTON, *Ex p.* HUTH (1840), 4 Deac. 294; Mont. & Ch. 667.

1555. —— Unless full disclosure.]—If an attorney is employed to sell, & chooses to deal for the estate to be sold, he must withdraw from the connection, or put himself completely at arm's length, & show, if the contract is questioned, he has given the same advice for the benefit of his client as he would have done if the sale had been to a third party. If employed as a general land agent, he is bound, if he purchases any of the estates in respect of which he is agent, to communicate to his principal all knowledge acquired by him as agent of the real value of the estate. The mere circumstance of his being attorney does not prevent his entering into a valid contract with his client.—CANE *v.* ALLEN (LORD) (1814), 2 Dow, 289; 3 E. R. 869.

Annotations:—**Apld.** Edwards *v.* Meyrick (1842), 2 Hare, 60; Gresley *v.* Mousley (1858), 1 Giff. 450. **Refd.** Morgan *v.* Lewes (1816), 4 Dow, 29; Holman *v.* Loynes (1854), 4 De G. M. & G. 270.

1556. —— ———.]—Though the law does not disallow a purchase by the agent of the vendor for himself or as agent for another, the transaction must be shown to have been conducted with the

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1555 i. —— *Unless full disclosure.*]—In a case of the sale of land by a woman whose agent in the matter had shortly before been in partnership with the husband of the purchaser, & who sold without other advice in the matter, the terms of the agreement being distinctly favourable to the purchaser, specific performance was decreed, the evidence showing that deft. was aware of the relation which had existed between her agent & plff.'s husband, & that deft. had not in fact acted under any undue pressure or upon any misrepresentation.—HINDLEY *v.* CAVE-BROWN-CAVE (1904), 24 N. Z. L. R. 6.—**N.Z.**

1555 ii. —— ———.]—An agent cannot buy property which he has been employed to sell. If, however, a principal expressly authorises his agent to buy, or if he, with full knowledge of the fact that his agent is the purchaser, adopts the sale, the transaction is binding upon him. An agent employed to sell property who purchases it himself, either alone or jointly with others, cannot, after adoption of the sale by his principal, both claim the property as purchaser & also claim commission as agent.—HARGREAVES *v.* ANDERSON, S. A. L. R. (1915), Appellate Division, 519.—**S. AF.**

1555 iii. —— ———.]—Plffs. were agents for the sale of C.'s property:—*Held:* plffs. were bound to disclose to C. that they were themselves the purchasers of the property; & they must establish by evidence that they did make the disclosure, not merely show a probability that C. knew or guessed who the purchaser was. *McPherson* v. *Watt* (1877), 3 App. Cas. 254, folld.—EDGAR *v.* CASKEY (1912), 22 W. L. R. 91; 2 W. W. R. 1036; 7 D. L. R. 450.—**CAN.**

1555 iv. —— ———.]—In order to set aside a conveyance by a principal to his agent, it is not necessary to prove that the property was sold at an undervalue; & though an agent may purchase from his principal, he must make a full disclosure of all the knowledge which he himself possesses with respect to the property. If there be any underhand dealing, *e.g.*, a purchase in the name of another person, however good the price or fair the transaction in other respects, it has no validity in a Ct. of Eq.—MURPHY *v.* O'SHEA (1845), 8 I. Eq. R. 329; 2 Jo. & Lat. 422.—**IR.**

q. —— *Even after agency ended.*]—Applt. had for a long time acted as the counsel & legal adviser of A., & during that employment acquired an intimate knowledge of A.'s property & liabilities, & had acted for him in compromising securities:—*Held:* a purchase by applt. of those securities after the relation of client & counsel had ceased to subsist, made without notice to A., & at a price less than their nominal amount, whilst the compromise was pending & feasible, was a trust for A.; & applt. was entitled only to the sum actually paid by him, with customary interest.—CARTER *v.* PALMER (1842), 8 Cl. & Fin. 657; 1 I. Eq. R. 289; 1 Dr. & Wal. 22.—**IR.**

r. ——*Unless relationship of agency ended.*]—*Semble:* where an agent for sale has effected a binding contract for sale, but the whole of the purchase-money has not been paid, or conveyance executed, all his discretionary powers, in which he would be warped by an intention to benefit himself are over, & he may become a sub, purchaser from the original purchaser without violating the rule that an agent for sale cannot himself purchase. *Parker* v. *M'Kenna* (1874), 10 Ch. App. 96, distd.—LEARMONTH *v.* BAILEY (1875), 1 V. L. R. 122.—**AUS.**

s. —— *Effect of agent having option to purchase.*]—A real estate agent who secures from the owner an option upon a piece of land & the promise of a commission of $500 if he effects the sale of it, cannot buy it upon the option & claim the commission.—LECOURS *v.* DAGENAIS (1914), Q. R. 47 S. C. 1.—**CAN.**

t. —— ———.]—Plff., a real estate agent, obtained an option for thirty days to buy or sell defts.' land at $200 an acre, & on such option entered into a contract for sale at $400 per acre. Defts. refused to convey on the ground of plff.'s non-disclosure of the rise in value:—*Held:* (1) plff. was an agent for sale when he procured the option; (2) there was a duty to disclose, & plff. was not entitled to specific performance. *Cane* v. *Allen* (*Lord*) (1814), 2 Dow, 289; *Edwards* v. *Merrick* (1842), 2 Hare, 60; *Macpherson* v. *Watt* (1877), 3 App. Cas. 254, refd.—BENTLEY *v.* NAISMITH, 46 S. C. R. 477.—**CAN.**

u. —— ———.]—Deft. gave D. at 4 p.m. a thirty days' option to purchase his property at L., during the currency of which he resold to plff. at an advance of $200, representing to deft. that it was at an advance of $400. In an action for specific performance:—*Held:* D. could not purchase till he had divested himself of his character as agent, &, to do so, he was bound to disclose all facts in relation to the resale.—BEER *v.* LEA (1913), 29 O. L. R. 259; 4 O. W. N. 1532.—**CAN.**

utmost good faith & openness.—HESSE *v.* BRIANT (1856), 6 De G. M. & G. 623; 28 L. T. O. S. 297; 5 W. R. 108; 43 E. R. 1375, C. A.

1557. —— ——.]—An agent for sale who takes an interest in a purchase negotiated by himself is bound to disclose to his principal the exact nature of his interest; & it is not enough merely to disclose that he has an interest, or to make statements such as would put the principal on inquiry. In such a case the burden of proving that full disclosure was made lies on the agent, & is not discharged merely by the agent swearing he did so if his evidence is contradicted by pltf. & not corroborated.—DUNNE *v.* ENGLISH (1874), L. R. 18 Eq. 524; 31 L. T. 75.

Annotations:—**Consd.** Panama & South Pacific Telegraph Co. *v.* India Rubber, Gutta Percha & Telegraph Works Co. (1875), 10 Ch. App. 520 n.; Guy *v.* Churchill & Sim (1889), 60 L. T. 740. **Apld.** Lagunas Nitrate Co. *v.* Lagunas Syndicate, [1899] 2 Ch. 392, C. A. **Consd.** Costa Rica Ry. Co. *v.* Forwood, [1901] 1 Ch. 746, C. A. **Apld.** Stubbs *v.* Slater, [1910] 1 Ch. 195. **Refd.** Battison *v.* Hobson, [1896] 2 Ch. 403.

1558. —— ——.]—Where a solr. purchased, nominally for his brother, but really for himself, certain houses, the property of two ladies for whom he was agent, concealing from them the fact that he was buying for himself:—*Held:* the purchase could not be enforced.

Assuming that in every respect this was a sale which might have been supported had the ladies been told that their agent was himself the purchaser, that fact not being disclosed, it cannot be supported (LORD CAIRNS, C.).—MCPHERSON *v.* WATT (1877), 3 App. Cas. 254, H. L.

Annotations:—**Apld.** Ward *v.* Sharp (1884), 53 L. J. Ch. 313. **Consd.** *Re* Cape Breton Co. (1884), 26 Ch. D. 221. **Apld.** Luddy's Trustee *v.* Peard (1886), 33 Ch. D. 500; Richards *v.* Whitham (1892), 66 L. T. 695, C. A. **Refd.** Moody *v.* Cox & Hatt, [1917] 2 Ch. 71, C. A.

1559. —— **Agent reselling at profit.**]—Where an agent purchased lands of his principal, having previously to the contract entered into a secret negotiation for a resale of part of the property at a profit:—*Held:* he was a trustee for his principal to the extent of the profit.—BARKER *v.* HARRISON (1846), 2 Coll. 546; 63 E. R. 854.

1560. —— ——.]—Pltf. having obtained an option to purchase a mine in America, entered into an agreement with deft. that deft. should endeavour to sell the mine in England, & that the profits & expenses should be shared equally between them. In July, 1871, deft. informed pltf. that several persons (not mentioning their names) were willing to give £60,000 for the mine. Pltf. accepted this offer, & on July 28 signed an agreement, by which he agreed to sell the mine to deft. on behalf of the purchasers, who were in fact deft. & F. On Aug. 3 deft. & F. resold the mine to a co. for £150,000 in cash, & £50,000 in fully paid-up shares. On a bill by pltf. for a decree declaring that he was entitled to one-half of profits made by deft. on sale of the mine, & for an account:—*Held:* (1) deft., as agent of the partnership adventure, had not made a sufficient disclosure; (2) pltf. was entitled to a decree.—DUNNE *v.* ENGLISH, No. 1557, *ante*.

Annotations:—**Consd.** Panama & South Pacific Telegraph Co. *v.* India Rubber, Gutta Percha & Telegraph Works Co. (1875), 10 Ch. App. 520 n. The case of *Dunne* v. *English* illustrated the same principle—a most valuable principle—& always acted upon by this ct., namely, that there should be no concealment, no contrivance by which one man was to be deprived of his right against another (MALINS, V.-C.); Guy *v.* Churchill & Sim (1889), 60 L. T. 740. **Apld.** Lagunas Nitrate Co. *v.* Lagunas Syndicate, [1899] 2 Ch. 392, C. A. **Consd.** Costa Rica Ry. Co. *v.* Forwood, [1901] 1 Ch. 746, C. A. **Apld.** Stubbs *v.* Slater, [1910] 1 Ch. 195. **Refd.** Battison *v.* Hobson, [1896] 2 Ch. 403.

1561. —— ——.]—Pltf., in 1868, consigned a ship to G. & Co. in China for sale, fixing a minimum price of £90,000, & requiring cash payment. G. & Co. employed deft. in Japan to sell the ship, with the same instructions. This was done with pltf.'s knowledge & consent. Deft., having vainly attempted to sell the ship on the terms mentioned, took her himself for £90,000, & about the same time resold her to a Japanese prince for £160,000, payable as to £75,000 in cash, & the rest on credit.

1559 i. —— *Agent reselling at profit.*]—Defts., land agents employed by pltf. to sell his land to the Crown, during the course of their employment acquired the knowledge that the Crown would in all probability give £5 per acre for the land. Before the agency was terminated one of defts. purchased the land on his own account for about £2 10s. per acre without disclosing to pltf. the fact that there was such a probability, & shortly afterwards sold it to the Crown for £5 per acre:—*Held:* such non-disclosure was a breach of defts.' duty, & pltf. was entitled to recover from them the difference between the price received by him & that paid by the Crown.—BLACKHAM *v.* HAYTHORPE (1917), 23 C. L. R. 156.—**AUS.**

1559 ii. —— ——.]—Pltf.'s agent, by a devious course of conduct, took from pltf. an agreement of sale to himself, resold it to G. at a price higher than that at which he represented to pltf. that he had sold it, paid over to pltf. a smaller sum, less the agreed commission, & divided the balance with his partner in the transaction:—*Held:* pltf. was entitled to recover, not only the profits made by the agent himself, including the commission, but the amount paid to his partner. *Morison* v. *Thompson*, L. R. 9 Q. B. 480; *Lister* v. *Stubbs*, 45 Ch. D. 1; & *Massey* v. *Davies*, 2 Ves. 317, distd.—MCLEOD *v.* HIGGINBOTHAM (1911), 18 W. L. R. 296, B. C. R.—**CAN.**

1559 iii. —— ——.]—B., being authorised by pltf. to sell land on commission, entered into an agreement for sale with C., which was confirmed by pltf. Before the final execution of this agreement B. entered into a contract with C. whereby he was to have a half-interest with C. in the land in question, & he also entered into an agreement with M. under which M. was to be entitled to a half-share in the interest obtained by B. as a result of the arrangement with C. B., C., & M. contributed towards the price in proportion to their respective shares in the land, & they all derived the benefit arising through the deduction from the price of the commission to which B. was entitled as pltf.'s agent. The land was subsequently sold to V. Pltf. then discovered the facts & sued B., C. & M. for the profits derived from this sale:—*Held:* (1) B. & C. were in fact partners, & C. was liable equally with B. to account to pltf. for the profits; (2) nothing was brought home to M. which should make him liable to pltf. *Lamb* v. *Evans*, [1893] 1 Ch. 226; *Lagunas Co.* v. *Lagunas Syndicate*, [1899] 2 Ch. 392; *Gibson* v. *Jeyes*, 6 Ves. 278; *Parker* v. *McKenna*, 10 Ch. App. 96; *Imperial Mercantile Credit Assocn.* v. *Coleman*, L. R. 6 H. L. 189; *Bagnell* v. *Carlton*, 6 Ch. D. 371; *Williams* v. *Scott*, [1900] A. C. 499; *Massey* v. *Davies*, 2 Ves. 317; *Kimber* v. *Barber*, 8 Ch. App. 56; *Morison* v. *Thompson*, L. R. 9 Q. B. 480; *Tyrrell* v. *Bank of London*, 10 H. L. C. 26; *Grant* v. *Gold Exploration Syndicate*, [1900] 1 Ex. B. 233; *De Bussche* v. *Alt*, 8 Ch. D. 286, cited.—POMMERENKE *v.* BATE (1910), 15 W. L. R. 542; 3 Sask. L. R. 417.—**CAN.**

1559 iv. —— ——.]—Deft., a real estate agent, was employed by pltf. to sell a property. He represented to pltf. that he had found M. ready to buy at $100 per foot frontage. The sale was carried out, & deft. received the usual commission. Deft. subsequently, in M.'s name, resold to S. at $160 a foot, M. having been merely a nominal purchaser:—*Held:* deft. was accountable for the difference, $60 a foot, less 2½ per cent. commission, which would have been due on an ordinary sale, on the amount of the resale.—MILLER *v.* NAND (1913), 24 O. W. R. 523; 40 W. N. 956; 10 D. L. R. 186.—**CAN.**

1559 v. —— ——.]—An agent for sale of land at a fixed price, having sold for more than double such price, informed his principal he had been unable to sell, but would purchase at the fixed price himself:—*Held:* the principal was entitled to the profit made by the agent on the sale.—GILBERT *v.* STORE (1914), 28 W. L. R. 106.—**CAN.**

1559 vi. —— ——.]—Pltf. employed deft. as his agent to sell timber. Deft., by understating the value of the timber, induced pltf. to sell it to him for $200,000. He resold it the following year to C. for $500,000:—*Held:* he must account to pltf. for the difference, viz., $300,000.—LUNT *v.* PERLEY (1916), 44 N. B. R. 439; 35 D. L. R. 214.—**CAN.**

1559 vii. —— ——.]—Defts., agents of pltf. in the purchase of land, were found not to have made a proper disclosure to pltf. of the value of the land, & to have induced him to relinquish his share for a small sum, & then sold at a large profit:—*Held:* pltf. entitled to a share of profit made by defts.—SIMPSON *v.* DAVIS (1914), 27 W. L. R. 632.—**CAN.**

Sect. 2.—Principal's rights against agent: Subsects. 11, 12 & 13.]

Pltf. was not informed that deft. had purchased the vessel himself, or that he had resold it, till June, 1869, after the transaction was completed. Deft. paid £90,000 to G. & Co., who remitted it to pltf., & eventually obtained the whole amount of £160,000 from the Japanese prince. In 1873 pltf. filed a bill in Ch. to compel deft. to account for profit made by him in resale of the ship:—*Held:* (1) the relation of agent & principal was established between deft. & pltf. & existed at the time of purchase & resale of the ship by deft.; (2) he was liable to account to pltf. for profit made by him in the transaction.—DE BUSSCHE *v.* ALT (1878), 8 Ch. D. 286; 47 L. J. Ch. 381; 38 L. T. 370; 3 Asp. M. L. C. 584, C. A.

Annotations:—**Distd.** Meyerstein *v.* Eastern Agency Co. (1885), 1 T. L. R. 595. **Folld.** Powell & Thomas *v.* Jones, [1905] 1 K. B. 11, C. A. **Mentd.** *Re* Pepperell, Pepperell *v.* Chamberlain (1879), 27 W. R. 410; The Fanny, The Matilda (1883), 48 L. T. 771, C. A.; Blake *v.* Gale (1885), 31 Ch. D. 196; Allcard *v.* Skinner (1887), 36 Ch. D. 145, C. A.; Northumberland *v.* Bowman (1887), 56 L. T. 773; Harris *v.* Fiat Motors (1906), 22 T. L. R. 556; *Re* Joicey, Joicey *v.* Elliot, [1915] 2 Ch. 115, C. A.

1562. —— Remedies of principal—Principal may repudiate or adopt transaction.]—Where an agent for sale of goods buys them himself, without assent & knowledge of the principal, the latter can affirm & adopt or reject & disavow the transaction as between those two; & where there have been two or more of such transactions distinct from each other, he can adopt or affirm one or more of them, & reject & disavow the rest.—REA *v.* BELL, BELL *v.* REA (1852), 18 L. T. O. S. 312, C. A.

1563. —— —— —— ——.]—BENTLEY *v.* CRAVEN, No. 1522, *ante*.

For full anns., *see* S. C. No. 1522, *ante*.

1564. —— —— —— ——.]—An agent, employed to sell estates, took them for himself under colour of a fictitious purchase, & sold part. After his death an inquiry was directed to ascertain the real value, according to which his estate was to be charged, the principal having an option to take what remained unsold; & the agent having fraudulently prevailed on his principal to execute a lease at a rent under the real value, the agent's estate was charged with the loss arising from that.—HARDWICKE *v.* VERNON, No. 1361, *ante*.

Annotations:—**Consd. & Folld.** Ormond *v.* Hutchinson (1809), 16 Ves. 94. **Refd.** *Re* Whitehead, *Ex p.* Burnand's Exor. (1860), 2 L. T. 776; Makepeace *v.* Rogers (1865) 13 W. R. 450; Turner *v.* Burkinshaw (1867), 15 W. R. 753, C. A.

For full anns., *see* S. C. No. 1361, *ante*.

1565. —— —— —— No confirmation without knowledge.]—An agent employed by a young man to sell a reversionary legacy is not permitted to be purchaser thereof himself at an undervalue. Nothing amounts to a confirmation of such a transaction until the vendor be fully apprised that he might be relieved against the original transaction, if he chose to impeach it.—CROWE *v.* BALLARD (1790), 2 Cox, Eq. Cas. 253; 3 Bro. C. C. 117; 1 Ves. 215; 30 E. R. 118.

Annotation:—**Refd.** Gowland *v.* De Faria (1811), 17 Ves. 20.

1566. —— —— —— ——.]—Where an agent employed to sell property purchases it himself, he is bound to show there was no concealment or unfair representation, & that in purchasing himself the same advantages were afforded to his principal as if the property had been sold to a stranger.

A steward & agent, being employed to sell an estate, purchased part of it himself at an undervalue & secretly, in the name of another person. All actions & matters of difference between the parties were afterwards submitted to arbn., an award was made, & mutual releases executed 47 years after the purchase, & 28 years after the award:—*Held:* (1) the principal, having been kept ignorant of the fraud, was not bound by lapse of time; (2) he was not bound by the award & release, on the grounds the deception had been continued, & the purchase & fraudulent circumstances relating to it had not been brought under the consideration of the arbitrator; (3) the purchase must be set aside. CHARTER *v.* TREVELYAN (1844), 11 Cl. & Fin. 714; 8 Jur. 1015; 8 E. R. 1273, H. L.; *sub nom.* TREVELYAN *v.* CHARTER (1846), 9 Beav. 140.

Annotations:—**Consd.** Manby *v.* Bewicke (1857), 3 K. & J. 342; Clanricarde *v.* Henning (1861), 5 L. T. 168.

1567. —— —— —— Transaction set aside.]—ROTHSCHILD *v.* BROOKMAN, No. 1552, *ante*.

For full anns., *see* S. C. No. 1552, *ante*.

1568. —— —— —— —— Position of sub-purchasers.]—A decree was made against A. B. setting aside as fraudulent a purchase by an agent from his principal; & a reconveyance & the usual accounts of rents & purchase-money were directed in which an allowance was to be made for substantial repairs & lasting improvements. A. B. sold & conveyed part of the property *pendente lite*, & died before the accounts were completed; a supplemental bill was filed against the purchasers & the heir & personal representatives of A. B.; the bill charged that purchasers, in case of eviction, claimed compensation out of the estate of A. B. The conveyances *pendente lite* being set aside:—*Held:* purchasers were entitled in this suit, as against their co-defts., the personal representatives of A. B., to an order for repayment of their purchase-money, & were entitled as against pltf. to an allowance for substantial repairs & lasting improvements, but no greater relief could be given them in this suit.—TREVELYAN *v.* WHITE (1839), 1 Beav. 588; 48 E. R. 1069.

1569. —— —— —— —— Unless laches.]—A bill to set aside a purchase of property by an agent was dismissed with costs, it being proved pltf. had distinct notice, at the time, that the agent was one of the beneficial purchasers, & the vendor not having instituted a suit for 6 years.—WENTWORTH *v.* LLOYD (1863), 32 Beav. 467; 55 E. R. 183.

1562 i. —— *Remedies of principal—Principal may repudiate or adopt transaction.*]—Where an agent appointed to sell his principal's goods for a fixed price buys them on his own account without the previous consent of the latter, it is competent for the principal either to repudiate the transaction in the circumstances mentioned in Indian Contract Act, s. 215, or to affirm it. If he elects to affirm, he will be liable to pay to the agent such charges only as are incidents of the transaction of purchase, but if those charges are annexed by the terms of the contract to the agency, so as to regulate the relation of principal & agent as distinguished from the relation of vendor & purchaser, the agent is not entitled to recover them. *Salomons* v. *Pender*, 3 H. & C. 639, & *Andrews* v. *Ramsay & Co.*, [1903] 2 K. B. 635, refd.—JOACHINSON *v.* MEGHJEE VALLABHDAS (1909), I. L. R. 34 Bom. 292.—**IND.**

1562 ii. —— —— —— *Agent held trustee for principal.*]—An agent being employed to sell or exchange lands was unable to do so. Shortly afterwards, on the property being offered for sale by auction under a power of sale in a mtge., the agent himself bid, & became the purchaser. In a suit impeaching the purchase:—*Held:* (1) the agent was a trustee for the principal; (2) as pltf. had made unfounded charges of fraud & misconduct, no costs should be allowed.—THOMPSON *v.* HOLMAN (1880), 28 Gr. 35.—**CAN.**

1567 i. —— —— —— *Transaction set aside.*]—An agent for sale of a farm & crop at a price of $6,000 offered the farm to M. at $6,500. Without disclosing this he offered the owner the price fixed, $6,000, & an agreement for sale at that price was signed. Shortly afterwards the agent made an agreement with M. to sell the farm & part of the crop for $6,000. The owner, when he became aware of this, brought an action to set aside his agreement:—*Held:* as the agent did not disclose to his principal the offer to M. for $6,500, the transaction between him & the owner could not stand.—NEWSTEAD *v.* ROWE (1911), 17 W. L. R. 171.—**CAN.**

SUB-SECT. 12.—WHERE AGENT TAKES GIFTS FROM PRINCIPAL.

1570. Gift by principal to agent—Conditions of valid gift.]—To support a gift made by an employer to an agent, equity requires (1) the employer should not only know he is making a gift but should be acquainted with the full measure & extent of it; (2) if there are any pecuniary transactions between employer & agent in respect of which the employer may consider himself indebted to his agent, it is of absolute necessity that the agent, before he accepts a gift, should make his principal acquainted with the state of accounts between them.—WINCHILSEA (EARL) *v.* GARETTY (1833), 1 My. & K. 253; 39 E. R. 677.

1571. —— ——.]—A testator bequeathed all his property to his widow, the chief portion of which consisted of certain leasehold premises & the business carried on there. Their son H. had for some time been manager of the business, & after his father's death he continued so to act on behalf of his mother. She assigned the lease of the premises, with the goodwill of the business, to H. by way of gift. She died, having by her will appointed H. & another son A. her exors. & trustees, & left all her real & personal property upon trust, after payment of certain legacies, to be divided between her three children, H., A., & a daughter, in equal shares. A. sought to set aside the assignment & claimed the lease & business as part of the residuary estate of his mother:—*Held:* the assignment was valid.—*Re* COOMBER, COOMBER *v.* COOMBER, [1911] 1 Ch. 723; 80 L. J. Ch. 399; 104 L. T. 517, C. A.

SUB-SECT. 13.—WHERE AGENT ACQUIRES SECRET PROFITS NOT BEING BRIBES.

1572. Agent may not acquire secret profit.]—A covenanted servant of the East India Co., a senior merchant, acting as agent of the co. (as resident or chief at one of their factories), was incapable of forming any contract in which the co. was interested, so as to derive profit to himself, or any otherwise than for the profit & advantage of the co. If any such contract were actually made between him, as a merchant dealing for himself, & the co.'s board of trade in India, in which contract undue advantage was taken by him, by means of his knowledge & influence as resident at the factory, he could not, to a bill in Ch. by the co. for discovery & relief, demur generally on the ground of want of equity.—HENCHMAN *v.* EAST INDIA CO. (1797), 8 Bro. Parl. Cas. 85; 3 E. R. 459.

1573. ——.]—Where a person receives commission money as agent he shall not be allowed to charge the principal any more than the sum actually paid for the article furnished.—A.-G. *v.* COCHRANE (1810), Wight. 10; 145 E. R. 1154.

1574. —— **Evidence of overcharging.**]—It is the duty of a sworn broker of London to charge his principal only the cost price of articles purchased for him, in addition to his commission, & the prin-

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PART VIII. SECT. 2, SUB-SECT. 12.

1570 i. *Gift by principal to agent.*]—Grants in reversion obtained by an agent from his employers by fraud & misrepresentation were afterwards assigned for valuable consideration to a purchaser having notice of the facts & nature of the title:—*Held:* (1) the grants must be set aside; (2) a conveyance taken after such grants, the fiduciary relations still existing & the grantor ignorant of his rights, was a continuation of the fraud, & not a confirmation.

It is doubtful whether equity ought to allow, in any circumstances, a dealing between an agent & his principal, there being such a conflict between interest & duty.—DUNBAR *v.* TREDENNICK (1813), 2 Ball & B. 304.—**IR.**

PART VIII. SECT. 2, SUB-SECT. 13.

1572 i. *Agent may not acquire secret profit.*]—The husband of A. left her by will a house he had contracted to purchase, & she appointed resp. her agent. In the bkpcy. of the vendor of the house, A. having been objected to as assignee, resp., according to the law of Jersey, subrogated S. as assignee on the terms he & S. should share the profit, if any, on the estate, & the house should be secured to A. There was a profit:—*Held:* resp. was only agent of A., & any profit he made as such belonged to A.—WILLIAMS *v.* STEVENS (1866), 12 Jur. N. S. 952, P. C.—**JERSEY.**

a. —— *Agent purchasing at lower price than stated to principal.*]—Applt., real estate broker, undertook to buy two lots for resp., commission to be payable by the vendors, at a quoted price. He purchased one lot from the vendors at a lower price, but received the full stipulated price from resp. He further falsely represented to resp. that another party had bought the second lot & he would have to buy it at an advance on the quoted price, & resp. paid this advance price, applt. purchasing it at the original price & retaining the difference:—*Held:* applt. liable to account for the secret profits & not entitled to any commission or brokerage in respect of the lots purchased.—HUTCHINSON *v.* FLEMING (1908), 40 S. C. R. 134.—**CAN.**

b. —— *Agent purchasing charge on principal's property.*]—An agent purchased at an undervalue a charge on the estate of his principal, & while in receipt of the rents charged his principal with interest on the face-value of the charge:—*Held:* as trustee for his principal, the extra interest retained should be applied towards the extinguishment of the charge; & lapse of time, even though it might possibly have caused the loss of material evidence, would not shift the burden of proof, originally resting on the agent, to the principal.—PATTEN *v.* HAMILTON, [1911] 1 I. R. 46.—**IR.**

c. —— *Agent receiving return commission from sub-agent — Profit from special arrangement with bank.*]—Pltfs. entered into an agreement with defts. that all consignments of produce, which defts. might make to Europe should be made through pltfs.' firm; that pltfs. should receive a commission of 1 per cent. for themselves & 2½ per cent. for their agents at the port of consignment; that pltfs. should make certain advances to defts. against the produce; & that the sums advanced should be repaid with interest "at such rates as may be fixed at the various dates of such loans, it being agreed that such interest is to be regulated by the then prevailing rate at the office of the Bank of Madras at Tellicherry." Defts. became indebted to pltfs., & pltfs., having furnished them with an account of the transactions between them, sued to recover the balance due. Defts. admitted the correctness of the debit side of the account, but denied in general terms that of the credit side. It appeared that in the account defts. were charged on account of local exchange at a rate higher than that actually paid to the bank, with which pltfs. had made a special arrangement without reference to the contract with defts. It also appeared that pltfs., under an arrangement made with their agents at the ports of consignment, had received from them about 1 per cent. on the various consignments by way of return commission, & that this arrangement had not been communicated to defts.:—*Held:* (1) defts. were not entitled to the benefit of the special arrangement between pltfs. & the bank; (2) pltfs. were liable to defts. for the amount received by them as return commission.—MAYEN *v.* ALSTON (1892), I. L. R. 16 Mad. 238.—**IND.**

d. —— *Agent to procure loan lending his own money.*]—Under an agreement, whereby an agent agrees to find a lender of so much money on mgte., it is not competent for the agent to lend his own money.—GREEN *v.* DALGETY & CO., LTD. (1916), 21 C. L. R. 509.—**AUS.**

e. —— *Agent taking lease of principal's property.*]—A lease obtained by an agent from his principal, who was strict tenant for life, with a limited power of leasing, at an under-value, & for a term longer than the power of the tenant for life authorised him to grant:—*Held:* fraudulent & void as against the successor of the grantor.—KER *v.* DUNGANNON (LORD) (1841), 1 Dr. & War. 541; 1 Con. & L. 335.—**IR.**

f. —— ——.]—Valuable leases & agreements for leases obtained by an agent from his principal, the principal reposing confidence in his agent, & the agent availing himself of the inexperience, negligence, & extravagance of the principal, will be set aside, or held as securities only for money advanced.—WATT *v.* GROVE (1805), 2 Sch. & L. 492.—**IR.**

g. —— ——.]—An agent may take a lease from his principal, but must always be prepared to prove that full information was imparted to the principal, & that the contract was entered into with perfect good faith.—MOLONY *v.* KERNAN (1842), 2 Dr. & War. 31.—**IR.**

h. —— *Real estate agent.*]—A real estate agent may not, with the sole view of increasing his emoluments, oblige his principal to pay a price higher than the one demanded by the seller.—LABRECQUE *v.* DOMBROWSKI (1916), Q. R. 49 S. C. 289.—**CAN.**

Sect. 2.—Principal's rights against agent: Subsect. 13.]

cipal having averred in an action of *assumpsit* that the broker had charged him more than cost price, which pltf. had paid:—*Held:* it was sufficient proof of such averment to produce a running unsettled account between the parties, by which it appeared the principal had paid more than the amount of the overcharges, although on the whole account, & when the balance at a subsequent period was struck, the principal was indebted to the broker in a sum far exceeding such overcharges.—PROCTOR *v.* BRAIN (1828), 3 C. & P. 536; 2 Moo. & P. 284; 7 L. J. O. S. C. P. 66.

1575. —— Master of ship.]—H., master of a ship, drew a bill on account of the ship at the Cape for £1,500. Owing to the state of the exchange, he received £134 premium, which his exors. claimed under a usage entitling masters to such benefits:—*Held:* the premium belonged to the owner.

This premium belonged to the owner & not to the captain. If a contrary usage has prevailed, it is a usage of fraud & plunder. What pretence can there be for an agent to make a profit by a bill upon his principal? (LORD ELLENBOROUGH, C.J.).—DIPLOCK *v.* BLACKBURN (1811), 3 Camp. 43.

Annotation:—**Apld.** Morison *v.* Thompson (1874), L. R. 9 Q. B. 480.

1576. —— ——.]—The master of a ship is bound to employ the whole of his time & attention in the service of his employers, &, *semble*, a custom allowing him to trade on his private account during the voyage, is bad.—GARDNER *v.* MCCUTCHEON (1842), 4 Beav. 534; 49 E. R. 446.

Annotation:—**Apld.** Dean *v.* Macdowell (1878), 8 Ch. D. 345, C. A.

1577. —— ——.]—A ship had, by agreement between the owners & master, gone several voyages to intermediate ports; the generality of these voyages were unprofitable. The master informed his owners that he should ship a cargo at Sydney to China on his own account, but this was not assented to by the owners:—*Held:* (1) the master not entitled to use the ship on his own account; (2) he stood in the position of trustee for the owners, & was bound to account for all profit made by the ship whilst under his command.—SHALLCROSS *v.* OLDHAM (1862), 2 John. & H. 609; 5 L. T. 824; 10 W. R. 291; 70 E. R. 1202.

1578. —— Agent to obtain lease.]—In an action for deceit, pltf. declared he had employed deft. to obtain a lease for him; that deft. fraudulently represented that a premium of £150 was to be paid for it, whereas only £100 was to be paid, by means of which fraudulent representation deft. obtained from him £50, & converted it to his own use:—*Held:* these allegations were sufficient without further stating that the £50 so obtained was over & above the £100 to be paid for the lease.—FEWTRESS *v.* AUSTIN (1816), 2 Marsh. 217.

1579. —— Co-owner as ship's husband.]—Deft., co-owner of a ship, supplied stores to it as ship's husband:—*Held:* he was only entitled to charge his co-owners, on a bill for account of ship's profits, the cost price of supplies.—RITCHIE *v.* COUPER (1860), 28 Beav. 344; 54 E. R. 398.

1580. —— Not entitled to commission.]—An agent, employed to sell land, sold it to a co. in which he was interested as a shareholder & director:—*Held:* he was entitled to no commission from his employer in respect of the sale.—SALOMONS (SALOMANS, SOLOMONS) *v.* PENDER (1865), 3 H. & C. 639; 6 New Rep. 43; 34 L. J. Ex. 95; 12 L. T. 267; 29 J. P. 295; 11 Jur. N. S. 432; 13 W. R. 637.

Annotations:—**Apld.** Robinson *v.* Mollett (1875), L. R. 7 H. L. 802; Andrews *v.* Ramsay, [1903] 2 K. B. 635. **Distd.** Hippisley *v.* Knee (1904), 74 L. J. K. B. 68. **Apld.** Stubbs *v.* Slater, [1910] 1 Ch. 195. **Refd.** Tetley *v.* Shand (1871), 25 L. T. 658; Mollett *v.* Robinson (1872), L. R. 7 C. P. 84, Ex. Ch.

1581. —— Transaction outside agency.]—Pltf., a merchant at Manchester, from time to time consigned, for shipment & sale abroad, goods to defts., a firm of traders at Manchester, who, with another person, were merchants in India. Defts. shipped their own & pltf.'s goods to India, where they were sold by the member of the firm there, who purchased with the proceeds of sale other goods, which he remitted to defts. at Manchester. He also sent defts. an account in which pltf.'s goods sold in India were placed to his credit, & certain bills of exchange for the amount of proceeds of sale, less commission, were debited. These bills in fact never existed, but defts. in their statements of account with pltf. placed the amount of the imaginary bills to his credit, debiting him with the cash advances on the goods & paying him the balance:—*Held:* pltf. was not entitled to an account of profits on the goods purchased in India with the proceeds of pltf.'s goods, defts. being commission agents only.—KIRKHAM *v.* PEEL (1880), 44 L. T. 195, C. A.

1582. —— Shipowner acting as shipbroker.]—A shipbroker, who is also managing owner of a ship & receiving a fixed sum as remuneration for his service as such, is not entitled to make an extra profit for himself by commission or brokerage for procuring charters & freights, it being one of the duties of a "managing owner" to procure charters & freights.—WILLIAMSON *v.* HINE BROTHERS, [1891] 1 Ch. 390; 60 L. J. Ch. 123; 63 L. T. 682; 39 W. R. 239; 7 T. L. R. 130; 6 Asp. M. L. C. 559.

1583. —— Stockbroker.]—A broker instructed by a customer to purchase shares at a price is not entitled to make a profit by purchasing at a lower price, & delivering to the customer at the original price.—THOMPSON *v.* MEADE (1891), 7 T. L. R. 698.

1584. —— —— Reasonable charges unknown to principal.]—Pltf. entered into an agreement with defts., London stockbrokers, for purchase of certain shares, it being understood the shares were not to be taken up by pltf., but carried over

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1580 i. —— *Not entitled to commission.*]—BRODEY *v.* LEFEUVRE, No. 1590 iv., *post.*

1581 i. —— *Transaction outside agency.*]—Pltf. employed deft. as his agent on separate & isolated occasions to pay taxes on pltf.'s land, but discontinued this practice & appointed another person to look after his land & pay taxes thereon. The land was then leased to H., &, taxes having fallen into arrear, was assessed & sold by the municipality, the land being purchased by deft. acting secretly through an agent:—*Held:* the conduct of deft. in purchasing secretly for himself, though dishonourable, was not such as to give pltf. any remedy, there having been no fiduciary relationship between the parties at the time of sale.—FLEMING *v.* MCNAB (1883), 8 A. R. 656.—**CAN.**

1581 ii. —— ——.]—H., an agent for sale, offered a property to M. at the price fixed by the principal, E., with an alternative offer that if he advanced the purchase-money M. should pay a higher price; the latter offer was accepted & a transfer made to the agent with the owner's consent at the price fixed by him & a lease made to M. with a compulsory purchasing clause at the higher price. The owner claiming the profit from the agent:—*Held:* the arrangement was an advance by the agent to M. & not a purchase by M. from the agent, who was not accountable for the profit.—ELL *v.* HARPER & HANMER (1886), L. R. 5 S. C. 66.—**N.Z.**

j. —— *Trade usage in Bombay.*]—According to the custom of trade in Bombay, when a merchant requests or authorises a firm to order & to buy & send goods to him from Europe, at a fixed price, net free go-down, including duty, or free Bombay harbour, & no rate of remuneration is specifically mentioned, the firm is not bound to account for the price at which the goods were sold to the firm by the manufacturer. And it does not make any difference that the firm receives commission or trade discount from the manufacturer, either with or without the knowledge of the merchant.—BEHER *v.* CHOTALAL (1904), I. L. R. 30 Bom. 1.—**IND.**

by defts. from one settling day to another, pltf. paying or receiving the difference. No arrangement was made with regard to defts.' remuneration. The accounts rendered to pltf. from time to time indicated, among other things, a certain percentage chargeable to him, followed by the word "net"; & it appeared from the evidence that, according to Stock Exchange usage, this "net" charge represented the "contango" payable on each carrying-over transaction to the jobbers with defts.' commission; but Neville, J. held on the evidence that pltf. was not in fact aware that commission was included in this charge. Pltf. also deposited with the brokers by way of cover a certificate for a block of 390 shares in a certain co. with a blank transfer of the whole block signed by him. At the end of 1905 & in Jan., 1906, the brokers gave notice to pltf. that they would sell the cover unless he at once paid the balance due from him, & eventually on Jan. 17, 1906, they closed the account with a balance of over £60 against him, & on the same day sold the whole block of shares deposited with them as cover for £162. In an action by pltf. claiming repayment of the commission alleged to have been improperly retained by the brokers under the net charge:—*Held:* (1) in absence of fraud or breach of duty the brokers were entitled to charge pltf. with reasonable remuneration in the nature of a *quantum meruit* for their services in carrying over the shares; (2) as the commission actually charged by them did not exceed such reasonable remuneration pltf. could not claim return of it as a secret charge made by an agent against his principal.—STUBBS *v.* SLATER, [1910] 1 Ch. 632; 79 L. J. Ch. 420; 102 L. T. 444, C. A.

Annotations:—**Consd.** Aston *v.* Kelsey, [1913] 3 K. B. 314, C. A. **Refd.** Blaker *v.* Hawes & Brown (1913), 109 L. T. 320.

See, further, STOCK EXCHANGE.

1585. —— Usual charges within principal's knowledge.]—Pltfs., fruit-brokers, who had acted as agents for the sale of defts.' fruit, rendered them accounts from time to time, which showed deductions, *inter alia*, for wharfage, porterage & warehouse rent. Defts. objected to these deductions on the ground that they were not disbursements, but profit charges. It appeared that, in accordance with practice in the fruit trade, pltfs. employed their own men at the wharf to handle the goods & warehoused the goods in their own warehouse, that the charges were the usual & customary charges made by fruit-brokers, & that defts. had been in the trade for many years & were fully aware of the nature of the charges:—*Held:* pltfs. entitled to make the deductions on the ground ot defts.' knowledge.—ISAACS & SONS, LTD. *v.* CAMPION & CO. (1901), 17 T. L. R. 321.

1586. —— Or benefit.]—The right of certain native chiefs in W. Africa to grant concessions to pltfs., being in dispute, deft. acted as confidential agent of pltfs. at the Govt. inquiry. As soon as the decision in favour of pltfs. was announced, deft. secured a concession from the native chiefs of lands adjoining pltfs.' concessions:—*Held:* (1) deft. had been enabled to obtain the concession by reason of his confidential position; (2) deft. held it upon trust for pltfs.; (3) deft. was entitled to be repaid the amount expended with interest & to be indemnified against all liabilities.—TARKWA MAIN REEF, LTD. *v.* MERTON (1903), 19 T. L. R. 367.

1587. —— Remedies of principal—Principal may repudiate transaction.]—Deft. employed stock-brokers, who were not members of the Stock Exchange, to buy shares on his account. The stockbrokers not only charged a commission, but added something to the price at which the shares had been bought:—*Held:* deft. entitled to repudiate the purchase.—STANGE & CO. *v.* LOWITZ (1898), 14 T. L. R. 468, C. A.

Annotations:—**Folld.** Nicholson *v.* Mansfield (1901), 17 T. L. R. 259. **Distd.** Johnson *v.* Kearley, [1908] 2 K. B. 82.

1588. —— —— ——.]—Pltf. employed defts., outside stockbrokers, to buy & sell & carry over stocks & shares on the London Stock Exchange. Defts. in the contract notes which they sent to pltf., besides charging commission, added something to the price at which the stocks were really bought or sold:—*Held:* pltf. entitled to repudiate the contracts.—NICHOLSON *v.* MANSFIELD & CO. (1901), 17 T. L. R. 259.

Annotation:—**Apld.** Johnson *v.* Kearley, [1908] 2 K. B. 82.

1589. —— —— —— Not after affirming transaction.]—Where a director makes a private advantage out of transactions with his co., such transactions cannot be repudiated by the co. after the co. has, with knowledge of them, put it out of its power to restore matters to their original position.—GREAT LUXEMBOURG RY. CO. *v.* MAGNAY (1858), 25 Beav. 586; 31 L. T. O. S. 293; 4 Jur. N. S. 839; 6 W. R. 711; 53 E. R. 761.

Annotations:—**Distd.** Bank of England *v.* Tyrrell (1859), 27 Beav. 273. **Folld.** Kimber *v.* Barber (1872), 20 W. R. 602. **Refd.** Ladywell Mining Co. *v.* Brookes, Ladywell Mining Co. *v.* Huggons (1886), 55 L. T. 284.

1590. —— —— Agent liable to account.]—A. appointed B. his deputy in the execution of an office, & by articles it was agreed that B. should account with A. for all fees, etc., according to the table of fees belonging to the office, & pay him three fourth parts thereof, & retain the fourth part for his trouble. Certain fees were received by B. which he insisted upon being solely entitled to, because they were not contained in the table:—*Held:* B. should account with A. for all fees ascertained by the table, according to the table, & for all fees not mentioned therein, according to his receipts, & pay over three-fourths of the whole to A.—MACHEN *v.* STANYON (1704), 1 Bro. Parl. Cas. 133; 1 E. R. 466.

1591. —— —— ——.]—Where a lease in which a confidential agent took an interest had been granted under his direction, & a reversionary lease had been granted to himself:—*Held:* inquiries must be directed into the circumstances of the leases.—ORMOND *v.* HUTCHINSON, No. 1324, *ante*.

Annotation:—**Refd.** Tomson *v.* Judge (1855), 3 Drew. 306.

1590 i. —— *Remedies of principal—Agent liable to account.*]—R., acting as agent for both buyer & seller, induced the latter to agree to sell for $3,500 & the former to offer $5,600, concealing the difference in price from each. R. having received $5,600 & paid over $3,500 to the vendor:—*Held:* he was liable to account to the seller for the balance with interest & costs.—WRIGHT *v.* RANKIN (1871), 18 Gr. 625.—**CAN.**

1590 ii. —— —— ——.]—An agent for sale of property obtained his principal's consent to sell for $75 a foot. He was subsequently introduced to a purchaser, to whom he represented that the owner wanted $90 a foot, which price was obtained:—*Held:* he acted as the purchaser's agent in the matter & the purchaser could recover the difference as secret profit.—FRY *v.* YATES (1914), 19 B. C. R. 355; 28 W. L. R. 23.—**CAN.**

1590 iii. —— —— ——.]—An action by the principal lies against an agent employed to effect an exchange of properties, who, by deceiving his principal as to the amount payable on the exchange, makes an unlawful profit on the transaction.—HUTCHINSON *v.* FLEMING, p. 475, *a*, *ante*.—**CAN.**

1590 iv. —— —— ——.]—Deft., while acting as pltf.'s agent, made profits by treating pltf.'s property as his own:—*Held:* he was not entitled to commission & was accountable for receipts beyond actual disbursements.—BRODEY *v.* LEFEUVRE (1914), 26 O. W. R. 194; 6 O. W. N. 175.—**CAN.**

1590 v. —— —— ——.]—An agent improperly applying the funds of his principal towards the purchase of property for himself is liable to account to the principal for all profits made out of such transaction.—CAPE OF GOOD HOPE BANK *v.* DE BEERS' MINES & DUNKELSBUHLER (1894), 11 S. C. 441; 4 C. T. R. 451.—**S. AF.**

Sect. 2.—Principal's rights against agent: Subsects. 13 & 14.]

1592. —— —— —— Notwithstanding transaction illegal.]—A principal is not estopped from obtaining relief in equity against his agent on the ground that he has a remedy at law. The illegality of a transaction between a principal & agent is not necessarily a bar to a suit in equity seeking an account of such transactions.

If a person employs an agent who in the course of his employment gains a personal advantage which is not included in the contract between them, the ct. would order its repayment although no action at law would lie (ROMILLY, M.R.).—WILLIAMS *v.* TRYE (1854), 18 Beav. 366; 2 Eq. Rep. 766; 23 L. J. Ch. 860; 18 Jur. 442; 2 W. R. 314; 52 E. R. 145.

1593. —— —— —— .]—An agent entered into an agreement with his principal to sell only the manufactured goods of the latter. In some cases he in fact sold these goods honestly; in others he made a fraudulent secret profit; in others he sold similar goods of rival manufacturers:—*Held:* in taking an account of the moneys due to the principal from the agent as a result of the agency, the agent was bound to account for the profits made by him in selling the goods of the rival manufacturers, as these sales had been made by him within scope of his agency.—NITEDALS TAENDSTIK-FABRIK *v.* BRUSTER, [1906] 2 Ch. 671; 75 L. J. Ch. 798; 22 T. L. R. 724.

SUB-SECT. 14.—AGENT'S DUTY TO DISCLOSE.

See, also, Nos. 1555-1558, *ante.*

1594. Agent's interest & duty must not conflict.]—An agent employed to settle a debt, which his principal is liable to discharge, must settle it on the best terms he can obtain, & he is precluded from taking the benefit of purchasing the debt, for this would be a violation of his duty to his principal, or at least would hold out a temptation to violate that duty (*per* LORD COTTENHAM, C.).—REED *v.* NORRIS (1837), 2 My. & Cr. 361, at p. 374; 40 E. R. 678.

1595. —.]—In 1804, A., tenant for life under a settlement with a power to grant leases for 21 years, concurred with B., the next tenant for life, in an agreement to grant to the steward & solr. of A. a lease of part of the lands, etc., in settlement for 21 years absolute at a rent fixed upon a valuation, which omitted to estimate certain rights of common annexed to the lands, on the alleged ground that those rights were disputed by copyholders of the manor. In 1809, B. having become tenant for life on the death of A., executed a lease, according to agreement. In 1810, under an Act for inclosure of waste lands, a large allotment of the waste was made in respect of the lands leased, the rights of common having been admitted. B. died in 1816, when the reversion of the lands, subject to the lease, vested in C., who accepted the rent reserved till 1821, when he filed a bill to set aside the lease:—*Held:* the relief was barred by acts of confirmation & acquiescence. *Semble:* considering the facts & relation of the parties, the lease might have been avoided on the ground of fraud (or mistake), if the persons interested had questioned the lease recently after the transaction.—SELSEY (LORD) *v.* RHOADES (1827), 1 Bli. N. S. 1; 4 E. R. 774.

Annotations:—**Distd.** Nicol *v.* Vaughan (1834), 7 Bli. N. S. 395. **Apld.** Rudd *v.* Sewell (1840), 4 Jur. 882. **Folld.** Baker *v.* Read (1854), 18 Beav. 398. **Refd.** Dunne *v.* English (1874), L. R. 18 Eq. 524.

1596. Agent taking bottomry bond.]—It is not universally true that an agent cannot, in any circumstances, take a bottomry bond from the master of a vessel consigned to his charge, though it does not follow that in all cases he has the same right to take a bond as a person wholly unconnected with the ship. An agent must not take advantage of his character of agent to take a bond which by discharge of his duty as agent would have been avoided.

PART VIII. SECT. 2, SUB-SECT. 14.

1594 i. *Agent's interest & duty must not conflict.*]—Pltf. went abroad in 1838, having appointed M. his agent, & returned in 1842, gave a confession of judgment to B., then went abroad again & did not return until 1855. M. obtained an assignment of the judgment & in 1852 issued execution. Under that execution the sheriff sold the land to M. Deft. had gone into possession under an agreement made by M. in 1846 to sell the land to deft. After a special verdict, a new trial was ordered to see if M. had, whilst acting as pltf.'s agent, purchased pltf.'s land.—SUTHERLAND *v.* WHIDDEN (1856), 2 Thom. 410.—**CAN.**

1594 ii. — .]—Unless in exceptional cases, where both parties are aware that a double commission is charged & agree to it, an agent is not entitled to commission from both vendor & purchaser, as he must not place himself in a position causing a conflict between duty & interest; & this principle applies to an exchange of lands. A custom by which a land broker would be entitled to commission from both parties to an exchange, such custom being in contravention of the general law, is bad.—BRADLEY *v.* COAFFEE (1914), 28 W. L. R. 530.—**CAN.**

k. —— *Landlord's agent taking conveyance from tenant.*]—A landlord's agent procured from a tenant a conveyance of his farm in suspicious circumstances. The ct., not being satisfied with the evidence, after a lapse of five years directed an issue to inquire whether the deed had been obtained by fraud, duress, or undue influence.—SMITH *v.* WARD (1834), Hayes & Jo. 705.—**IR.**

l. —— *Agent acting for both parties.*]—Defts., other than H., were engaged in a real estate brokerage business, & were acting for H. in connection with the sale of a farm belonging to him. Pltfs. approached deft. with a view to purchasing a property, & defts. introduced the farm belonging to H., but did not disclose the fact that they were authorised by H. to sell & that they were to receive a commission:—*Held:* (1) pltfs. were entitled to repayment of all moneys paid under the agreement; (2) evidence that it was a custom of the real estate brokerage business for the vendor to pay commission, or that pltfs. in previous transactions had bought property but paid their agents no commission, was not sufficient to charge pltfs. with knowledge of defts.' relationship with H., or their interest in the sale.—CLARK *v.* HEPWORTH (1915), 33 W. L. R. 175; 9 W. W. R. 802.—**CAN.**

m. —— ——.]—In an action to set aside a sale of land made by pltf. through O. Co., land agents, to defts:—*Held:* O. Co. led pltf. to confide in them as his agents to get the best price & to allow them to close the bargain on his behalf, without disclosing to him that they were simultaneously acting for & advising deft. in the purchase, & this was a fraud on pltf.: *McI'herson* v. *Watt,* 3 App. Cas. 254, & *Dunne* v. *English,* L. R. 18 Eq. 524, apld. & folld.—WOLFSON *v.* OLDFIELD (1911), 18 W. L. R. 449; 2 D. L. R. 110; *affd.* 20 W. L. R. 484.—**CAN.**

n. —— *Agent to sell subsequently becoming also agent of purchaser—Sole duty to seller.*]—The same person cannot be agent for both parties & act in one sense as an arbitrator between them, unless he acts as the common agent with the full knowledge & approval of the parties. If a party, being employed as agent of one party, undertakes, without the most complete knowledge & approval of that party, to act in any way for the other party in the same matter, that person is in no sense acting as agent for both parties. He is, at the instance of one party, betraying or neglecting the interest of the other party, to whom alone his full & complete duty is owing.

G. appointed H., the managing director of B., his agent to purchase deft.'s farm. The authority was "to offer on my behalf to the owners thereof, &, if accepted, to purchase for me at the sum of £12 per acre, or as much under as you can get the owners to accept," certain land. Prior to obtaining this authority H. had obtained from deft. an authority to sell the land at £12 an acre, but upon receipt of G.'s authority he approached deft. again & ultimately obtained from him a reduction of 10*s.* an acre in the price, & better terms as to the deposit & cash payment on completion. He did not acquaint deft. with the fact that G. would have given £12 an acre. Deft., on ascertaining the facts, refused to complete, & pltf. sued for specific performance:—*Held:* specific performance should be refused, H. having acted inconsistently with & in breach of his duty as agent of deft.—GALLOWAY *v.* PEDERSEN (1915), 34 N. Z. 513.—**N. Z.**

A British ship, the owner of which resided at New Brunswick, on leaving the harbour of New York for England, got upon the bar & was forced to return to New York to repair, & the master, being without funds to defray the charges, advertised for a loan on bottomry & gave a bond for the amount required to a party at New York who had acted for several years as agent for the owner, though not regularly appointed, & had refused to make advances on personal credit:—*Held:* although such party had the character of agent, he was not thereby in the circumstances prohibited from tendering & taking a bond.—THE ORIENTAL (1850), 3 Wm. Rob. 243; 7 Notes of Cases, 476; 14 Jur. 336.

1597. Agent carrying on separate business.]—A manager of a bank is not entitled to grant himself the same accommodation in respect of his separate trade which he might obtain from an independent banker; it would be necessary for him, in order to sustain any such transaction, to show that he had brought the whole circumstances fully & fairly before the directors. It is not enough to show merely he had not concealed anything. If he could show he had so brought the circumstances to their knowledge, or that the directors had sanctioned the proceeding subsequently, such a proceeding might be permitted to stand.

C. was appointed manager of a bank, with permission to carry on his separate trade as a merchant. In that character he dealt with the bank of which he was manager on the terms usual between banker & customer. Upon one transaction in his separate trading, being possessed of certain bills for his own benefit, drawn & accepted by two firms reputed to be in good credit, he deposited them with the bank (not indorsing them), & obtained an advance upon them. The transaction was not a discount, but a loan. The drawers & acceptors of the bills became bkpt.:—*Held:* C. liable to make good the loss.—GWATKIN *v.* CAMPBELL (1854), 1 Jur. N. S. 131.

1598. Broker underwriter.]—A broker employed to place an insurance cannot himself underwrite part of the risk unless he makes full disclosure to the principal who employs him.—GLASGOW ASSURANCE CORPN., LTD. *v.* SYMONDSON & CO. (1911), 104 L. T. 254; 27 T. L. R. 245; 11 Asp. M. L. C. 583; 16 Com. Cas. 109.

1599. Joint adventurers.]—In English law it is one of the clearest incidents of a joint adventure that one of the adventurers cannot supply his own goods to the adventure without making full disclosure of his interest to his co-adventurer. Any partner, co-adventurer, agent, or other person in any position of trust, must make no profit out of his position without his principal's knowledge; & in particular cannot sell his own goods to his principal without fully disclosing his own personal interest. This does not turn on knowledge or bad faith, or how soon the truth is discovered, or what has happened, or commercial damage to the principal.

Pltf., an Austrian merchant, & defts., English coal exporters, entered into an agreement to sell on joint account English coal to the Austrian Govt., & in 1910 they secured a contract to supply that Govt. with 20,000 tons of coal of certain named qualities, deliverable in 1911. During 1911 the price of coal rose considerably; pltf. & defts. foresaw a heavy loss in carrying out the Austrian contract; & they agreed in July, 1911, that completion of the contract should be left entirely in the hands of defts., who could act as they thought best, without taking pltf. into account in any way, & that pltf. should pay defts. £1,000 as his share of the loss, that sum to be reduced by any reductions in loss in the event of permission being received from the Austrian Govt. to supply coals of an inferior quality. In completing the Austrian contract permission was obtained to supply P. coal, which was not one of the named coals, but of somewhat inferior quality, & defts. supplied a certain quantity of that coal which they had purchased in 1910 at 14*s.* 6*d.* per ton; this was put by them into the joint account between them & pltf. at 17*s.* 3*d.* per ton, the current market price when the coal was shipped to Austria; they had, however, to purchase other coal at the market price to maintain their deliverable stocks. In a claim by pltf. for an account:—*Held:* (1) defts., although they acted in good faith, were not entitled without the fullest disclosure to pltf. to sell their own coal to the adventure; (2) they could not bring into the joint account the P. coal at a larger price than that at which they purchased it.—KUHLIRZ *v.* LAMBERT BROTHERS, LTD. (1913), 108 L. T. 565; 18 Com. Cas. 217.

1600. —— Transaction in ordinary course of business.]—In 1879 pltfs., timber merchants, purchased through defts., timber brokers, timber to the value of about £70,000 & placed it in the hands of defts. for sale on a *del credere* commission & received £2,000 as the net profit on the whole transaction. Defts. had sold the timber to M., their debtor for large sums, & pltfs. alleged M. was insolvent & the sale was made under an arrangement that he should purchase the timber, but that defts. should again sell the timber as for M., & receive all the proceeds thereof, & out of the profits realised by the transaction should repay themselves the debt due to them from M., & that defts. thereby recouped themselves to the amount of about £15,000. That sum pltfs. claimed as profit due to them under the agency contract existing between them & defts. M.'s name, as purchaser of the timber, was not disclosed by defts. Defts. alleged they had acted in the ordinary way of business; that pltfs. & M. both happened to be customers of theirs, & the comparatively large profit made on behalf of M. was due to accidental causes; that the £15,000 was, in the ordinary course of business, placed to the credit account of M., & subsequently, at his request, placed against his debit account, & they had never concealed M.'s name from pltfs., but (as they proved) that it was not according to the usual course of business to state the buyer's name in the sold note supplied to the purchaser. Pltfs. contended that the circumstance of M.'s indebtedness was calculated to bias defts.' judgment in fixing the price at which M. should buy; that the question in all such cases was whether the agent had a personal interest in the purchase being carried out, in which case the agent was bound, in discharge of his duty, to disclose such personal interest to his principal:—*Held:* (1) defts. had acted honestly throughout these transactions, & in good faith, & had given pltfs. the best advice in their power; (2) a mere expectation on the part of defts. that the timber would be dealt with according to the course of business with M. in former transactions was not such dealing on the part of defts. as the ct. considered unfair to pltfs.—GUY *v.* CHURCHILL (1889), 62 L. T. 132, C. A.

PART VIII. SECT. 2, SUB-SECT. 15.—A.

1601 i. *Agent may not receive secret commission.*]—LEMIEUX *v.* SEMINARY OF ST. SULPICE (1912), 18 R. L. N. S. 434.—**CAN.**

1603 i. —— *Agent not biassed immaterial.*]—A bribe is nevertheless a bribe because its payment is postponed. When a bribe has been given, it is immaterial to inquire what, if any, effect the bribe had on the mind of the receiver & whether he was influenced thereby to recommend to his principal an arrangement with the briber which he would not otherwise have recommended. *Harrington* v. *Victoria Graving Dock Co.* (1878), 3 Q. B. D. 549, & *Shipway* v. *Broadwood*, [1899] 1 Q. B. 369, refd.—INDRA NATH BANERJEE *v.* ROOKE (1909), I. L. R. 37 Calc. 81.—**IND.**

Sect. 2.—Principal's rights against agent: Subsect. 15, A. & B.]

SUB-SECT. 15.—WHERE AGENT ACCEPTS BRIBES.

A. Duty of Agent.

1601. Agent may not receive secret commission.]—A person employed on behalf of himself & his co-partners in negotiating the terms of a lease is not entitled to stipulate clandestinely with the lessors for any private advantage to himself. Where a sum of £12,000 was paid in pursuance of such a stipulation, the party receiving it was declared to hold it in trust for the partnership.—FAWCETT *v.* WHITEHOUSE (1829), 1 Russ. & M. 132; 8 L. J. O. S. Ch. 50; 39 E. R. 51.

Annotations:—**Apld.** Imperial Mercantile Credit Assocn. *v.* Coleman (1870), 6 Ch. App. 562 n.; *Re* Canadian Oil Works Corpn., Hay's Case (1875), 10 Ch. App. 593. In this ct., from the time when *Fawcett* v. *Whitehouse* was decided down to the present day, it has always been held that no agent can in the course of his agency derive any benefit whatever without the sanction or knowledge of his principal (JAMES, L.J.). **Refd.** Dunne *v.* English (1874), L. R. 18 Eq. 524; New Sombrero Phosphate Co. *v.* Erlanger (1877), 5 Ch. D. 73, C. A.

1602. ——.]—K., one of five parties to an agreement for the purchase of a mine, secretly agreed for a bonus of £20,000 for his trouble in effecting the sale. A co. having subsequently been formed for working the mine:—*Held:* the secret agreement was void as against it, notwithstanding the sale price was a cheap one.—BECK *v.* KANTOROWICZ, KANTOROWICZ *v.* CARTER, KALB *v.* KANTOROWICZ (1857), 3 Kay & J. 230; 69 E. R. 1093.

Annotations:—**Apld.** Imperial Mercantile Credit Assocn. *v.* Coleman (1870), 6 Ch. App. 562 n. **Refd.** Lydney & Wigpool Iron Ore Co. *v.* Bird (1886), 33 Ch. D. 85, C. A.

1603. —— **Agent not biassed immaterial.**]—Defts. contracted to pay pltf. a commission for superintending repairs on certain ships belonging to a ry. co. Pltf. at the time of such contract being made was in a position of trust in relation to the co., having been employed by them as engineer to advise as to repairs, & the contract between defts. & pltf. was made in part in consideration of a promise that pltf. would use his influence with the co. to induce them to accept defts.' tender for repairs of the ships. The jury found the contract, though calculated to bias the mind of pltf., had not, in fact, done so, & he had not in consequence thereof given less beneficial advice to the co. as to defts.' tender than he would otherwise have done:—*Held:* pltf. could not maintain an action for commission under the contract, on the ground that, even although pltf. had not been induced to act corruptly, the consideration for the contract was corrupt.—HARRINGTON *v.* VICTORIA GRAVING DOCK CO. (1878), 3 Q. B. D. 549; 47 L. J. Q. B. 594; 39 L. T. 120; 42 J. P. 744; 26 W. R. 740.

Annotations:—**Consd.** R. *v.* Great Yarmouth JJ. (1882), 8 Q. B. D. 525. **Apld.** Bartram *v.* Lloyd (1903), 88 L. T. 286. **Consd.** Kregor *v.* Hollins (1913), 109 L. T. 225, C. A. **Refd.** Grant *v.* Gold Exploration & Development Syndicate, [1900] 1 Q. B. 233, C. A.

1604. —— ——.]—SHIPWAY *v.* BROADWOOD, No. 1638, *post.*

For full anns., *see* S. C. No. 1638, *post.*

1605. —— ——.]—Where a secret commission was given at Christmas & Midsummer each year by a vendor to the buying agents of the purchaser:—*Held:* the ct. would not inquire into vendor's motive, & there was an irrebuttable presumption that the agents were influenced by the bribes.—HOVENDEN *v.* MILLHOFF, No. 1641, *post.*

Annotation:—**Refd.** Moody *v.* Cox & Hatt (1917), 116 L. T. 740, C. A.

1606. —— ——.]—COHEN *v.* KUSCHKE, No. 1624, *post.*

1607. —— **Notwithstanding any usage to the contrary.**]—If an agent conducts business in carrying out negotiations between his principal & a person whose interests are adverse to his principal, he cannot receive a commission from the person with whom he is negotiating without his principal's knowledge; & any custom wide enough to cover such a case will not be upheld by the ct. *Semble:* even in the case of a broker who merely introduces the vendor to the purchaser, such a custom could not be upheld.—BARTRAM & SONS *v.* LLOYD (1903), 88 L. T. 286; 19 T. L. R. 293; *revsd.* on other grounds, 90 L. T. 357, C. A.

1608. —— **Unless within principal's knowledge.**]—The owner of a patent gave a commission note to his solr. agreeing to pay him a commission out of the purchase-money if he introduced a purchaser. The solr. introduced another client as purchaser, to whom he showed the commission note, to which purchaser consented, & further agreed to pay a reasonable commission himself to the solr., if, owing to any defect in the commission note, the solr. could not recover it from the vendor. The purchase was completed & the solr. sued vendor for the commission, who paid £210 into ct., which the solr. accepted. On a summons to tax the solr.'s bill by purchaser's exors., the latter sought to surcharge the solr. with the £210:—*Held:* though in the circumstances vendor could have resisted payment of the commission, the solr., having received it with full knowledge on purchaser's part, was not bound to account to him for it.—*Re* HASLAM & HIER EVANS, [1902] 1 Ch. 765; 71 L. J. Ch. 374; 86 L. T. 663; 50 W. R. 444; 18 T. L. R. 461; 46 Sol. Jo. 381, C. A.

1609. Agent may receive usual commissions.]—Where colonial produce is sold, through the intervention of a broker, by the usage of trade in London (which is valid), he is entitled in all instances (if there be no express stipulation to the contrary) to ½ per cent. commission from the purchaser as well as from the seller.—EICKE *v.* MEYER (1813), 3 Camp. 412.

1610. ——.]—A., contractor for works on a ry., employed B., as agent, to get a sub-contractor to do a portion of the works. B., as agent, entered into contract with C. An allowance of £5 per cent. was made by C. to B. After the work had been finished A. filed a bill against B. & C. to recover back the commission:—*Held:* (1) the bill could not be sustained as against C.; (2) it must also be dismissed against B. without costs, on the ground that such an allowance was usual, & pltf. was proved to

1608 i. —— *Unless within principal's knowledge.*]—An agent for sale of land at a fixed price effected a sale, the purchaser giving land in part satisfaction of the purchase-money, & for such exchange the agent demanded a commission from the purchaser & received it:—*Held:* (1) whether a commission or a gratuity, it was a profit made in course of employment & belonged to his employers, the vendors; (2) the vendors being aware of it &, without making any objection, having negotiated for settlement of the agent's remuneration, could not in an action for such remuneration set off such sum.—CULVERWELL *v.* CAMPTON 1880), 31 C. P. 342.—**CAN.**

1608 ii. —— ——.]—GAREAU *v.* AUBERT (1917), 23 R. de J. 406 (Que.).—**CAN.**

1608 iii. —— ——.]—An agent acting for & representing the vendor of real estate is not entitled, in the absence of an agreement to that effect, to recover from the purchaser a commission on the value of a property belonging to the latter, which was accepted by & transferred to the vendor in part payment of the price.—BROWNE *v.* GAULT (1901), Q. R. 19 S. C. 523.—**CAN.**

1608 iv. ——.]—Applt. employed resp. as his agent for the sale of land. Resp. was also to the knowledge of applt. agent for P. for the sale of his land at a commission, but applt. did not inquire what the amount of that commission was. Resp. arranged an exchange of properties between applt. & P., & P. paid resp. the sum of £20 for commission. There was no concealment or misrepresentation on the part of resp.:—*Held:* applt. was not entitled to treat the commission paid to resp. by P. as a secret commission, but was bound to pay to resp. the agreed rate of commission. *Baring* v. *Stanton* (1876), 3 Ch. D. 502, folld.—OWEN *v.* TRICKETT (1908), 27 N. Z. L. R. 950.—**N. Z.**

have acted on it, & must have known what had occurred.—HOLDEN *v.* WEBBER (1860), 29 Beav. 117; 54 E. R. 571.

1611. —— Question for jury — Advertising Agent.]—It is a question for the jury whether an advertising agent is entitled to charge commission to his employer & to receive commission from the newspaper. *Qu.:* whether, if permitted, it would not be against policy, as an inducement to the agent to advertise where the largest commission was allowed.—DAWSON *v.* MOLYNEUX (1847), 8 L. T. O. S. 318.

1612. —— Insurance.]—The rule that an agent must account to his principal for any secret profit made in the course of his agency does not apply where the principal is aware that the agent is remunerated by some allowance from other parties, but is under a misapprehension (not misinformed) as to its actual extent.

A marine insurance co. in New York employed merchants in this country as its agents to settle claims & grant insurances & to effect reinsurances. A percentage was paid by the co. on the first two classes of business, but the agents were remunerated as to the reinsurances by brokerage allowed to them by the underwriters. They charged the co. the full amount of the premiums, but were allowed by the underwriters (1) 5 per cent. on the premiums, & (2) 12 per cent. on the balance (if any) payable by them to the underwriters on the account for the year, crediting the underwriters with the premiums (less the 5 per cent.), & debiting losses. This was according to the usual custom on the credit system as between brokers & underwriters, but the 12 per cent. allowance was for some time unknown to the co.:—*Held:* the agents entitled to both percentages.—GREAT WESTERN INSURANCE CO. OF NEW YORK *v.* CUNLIFFE (1874), 9 Ch. App. 525; 43 L. J. Ch. 741; 30 L. T. 661, C. A.

Annotations:—**Apld.** Baring *v.* Stanton (1876), 3 Ch. D. 502, C. A. **Distd.** Bartram *v.* Lloyd (1903), 19 T. L. R. 293. **Consd. & Distd.** Hippesley *v.* Knee (1904), 74 L. J. K. B. 68. A close examination of the judgment in *Great Western Insce. Co. of New York* v. *Cunliffe* will show that James, L.J., laid stress upon the fact that for nearly three years after what was complained of was brought to their knowledge no objection was raised by the parties; where there is knowledge, where there is conduct from which the receipt of profit of whatever kind may be taken to be known to the principal & acquiesced in by him, then of course there is neither immorality nor can there be in point of law a right to recover (KENNEDY, J.).

1613. —— ——.]—A shipowner had for several years an account with merchants who effected for him insurances on his ships. In their accounts they charged full premiums, but they had been allowed by the underwriters & retained out of the premiums 5 per cent. brokerage & a further 10 per cent. discount for ready money, as usual on insurances. On taking the accounts in a suit respecting a mtge. on some ships the shipowner objected to allow the merchants to retain the 10 per cent.:—*Held:* as these allowances were usual, & the shipowner had never inquired on what terms the merchants effected the insurances, & appeared to have accepted their terms, he could not now raise objection.—BARING *v.* STANTON (1876), 3 Ch. D. 502; 35 L. T. 652; 25 W. R. 237; 3 Asp. M. L. C. 294, C. A.

Annotations:—**Distd.** Bartram *v.* Lloyd (1903), 88 L. T. 286. **Refd.** Johnson *v.* Kearley, [1908] 2 K. B. 514, C. A.; Stubbs *v.* Slater, [1910] 1 Ch. 195.

1614. —— ——.]—Pltf. mtged. her life interest in a fund to defts., it being part of the agreement that a policy should be effected on her life & premiums be secured on the mtged. property. In an action for redemption the chief clerk found that £173 19*s.* 1*d.*, "premiums paid on policies," was due from pltf. to defts. L., a solr. & agent to all the parties, paid the premiums to the insurance offices, receiving from them 5 per cent. commission. On a summons to vary the chief clerk's certificate by the amount of the commission, on the ground the "premiums paid on policies" only amounted to £165 5*s.*:—*Held:* (1) after the premiums had been paid to the insurance offices, the mtgor. had no interest in them; (2) the insurance offices received the premiums, & paid the commission out of them to their own agent; (3) the variation must be refused.—LEETE *v.* WALLACE (1888), 58 L. T. 577.

1615. —— ——.]—Deft. acted as agent for pltf. in procuring a loan upon a reversionary interest, being paid by pltf. a commission on the amount of the loan. It was obtained from an insurance co., & part of the transaction was that pltf.'s life should be insured with the co. The co. paid deft. commission for introducing the insurance:—*Held:* pltf. not entitled to recover the commission on the policy from deft. on the ground that it was in respect of a separate transaction & pltf. was aware deft. would be paid commission by the co.—NORREYS (LORD) *v.* HODGSON (1897), 13 T. L. R. 421.

Acceptance by directors of gifts from company promoters.]—*See* COMPANIES.

B. Trade Discounts.

1616. Auctioneer—Incidental duty to account.]—Pltf. employed defts., auctioneers, to sell goods for him by auction upon the terms that they were to be paid a lump sum by way of commission, & were further to be paid "all out-of-pocket expenses," including the expenses of printing & advertising. Defts. in due course sold pltf.'s goods. In rendering their account of the out-of-pocket expenses to pltf. they debited him with the gross amounts of the printer's bill & cost of advertising in the newspapers, they having in fact received discounts both from the printers & newspaper proprietors—a fact of which pltf. had no knowledge. There was evidence of a general custom for printers & newspaper proprietors to deal with auctioneers as principals, & to allow them a trade discount off their retail charges, which they would not allow to the auctioneers' customers if they dealt with them directly; & defts. in omitting to disclose the fact of the discounts to pltf. did so in the honest belief that they were lawfully entitled under the custom to receive the discounts & retain them to their own use:—*Held:* (1) defts. not entitled to debit pltf. with the gross amounts of printing & advertising bills, as by the terms of employment they were only to be paid their actual out-of-pocket expenses; (2) as they received the discounts without fraud, & as the duty to account correctly for out-of-pocket expenses was merely incidental to & separable from their main duty connected with sale of goods, the omission to disclose receipt of the discounts to pltf. did not disentitle them to retain their commission.—HIPPISLEY (HIPPESLEY) *v.* KNEE BROTHERS, [1905] 1 K. B. 1; 74 L. J. K. B. 68; 92 L. T. 20; 21 T. L. R. 5; 49 Sol. Jo. 15.

Annotations:—**Consd.** Swale *v.* Ipswich Tannery (1906), 11 Com. Cas. 88. **Distd.** Stubbs *v.* Slater, [1910] 1 Ch. 195.

See, further, BUILDING CONTRACTS, ENGINEERS & ARCHITECTS.

1617. Agent bound to account.]—An agent em-

PART VIII. SECT. 2, SUB-SECT. 15.—B.

p. Agent to collect rents — Percentage deducted on paying tradesmen.]—A trust corpn. were engaged to collect rents for the purpose of paying off mtges. in their possession. They employed agents, who, without their knowledge, deducted 10 per cent. commission from all contractors doing repairs on the mtged. property:—*Held:* the commission was illegal, as tending to increase the cost of repairs by the amount of the commission & the corpn. must account to the owners of the property.—TORONTO GENERAL TRUSTS CO. *v.* ROBINS (1911), 19 O. W. R. 212; 2 O. W. N. 1023.—**CAN.**

Sect. 2.—Principal's rights against agent: Subsect. 15, B. & C. (a), (b) & (c).]

ployed to effect an insurance is bound, in absence of agreement to the contrary, to account to his principal for any discount allowed by the insurance office on the premium paid.—SPAIN (QUEEN) *v.* PARR (1869), 39 L. J. Ch. 73 ; 21 L. T. 555 ; 18 W. R. 110.

Annotations:—**Apld. & Distd.** Great Western Insce. Co. *v.* Cunliffe (1874), 9 Ch. App. 525 ; Baring *v.* Stanton (1876), 3 Ch. D. 502, C. A.

1618. —— .]—Pltf., residing in India, employed deft., an army agent & accoutrement maker, as her agent in England, & authorised him to provide her son, who was about to proceed to India as a cornet, with a reasonable outfit, & the articles composing such outfit were paid for through deft., but the tradesmen allowed him a discount off the invoiced price, having increased their prices with reference to such allowance, while deft. charged the full prices against pltf., & deft. alleged this was the universal practice as between tradesmen & army agents, but pltf. had no actual knowledge of such practice :—*Held :* deft. must account to pltf. for the discounts allowed him.—TURNBULL *v.* GARDEN (1869), 38 L. J. Ch. 331 ; 20 L. T. 218.

Annotations:—**Folld.** Spain *v.* Parr (1869), 39 L. J. Ch. 73. **Apld.** Morison *v.* Thompson (1874), L. R. 9 Q. B. 480. **Distd.** Baring *v.* Stanton (1876), 3 Ch. D. 502, C. A. **Refd.** Bartram *v.* Lloyd (1903), 88 L. T. 286.

1619. ——.]—ANDREWS *v.* RAMSAY, No. 1852, *post.*

For full anns., *see* S. C. No. 1852, *post.*

C. Principal's Remedies against Agent.

(a) Recovery of Amount.

1620. Agent liable for amount of bribe.]—Deft. having been authorised by pltf. to purchase on his behalf a particular ship as cheaply as possible, made an arrangement, without pltf.'s knowledge, with vendor's broker, who had a right to retain the excess purchase-money over £8,500, by which deft. purchased the ship for £9,250 & retained for his own use £225, part of the excess :—*Held :* (1) pltf. was entitled to the amount so retained by deft. as it was a profit acquired by an agent in connection with his agency, without his principal's sanction ; (2) it could be recovered in an action for money had & received.—MORISON (MORRISON) *v.* THOMPSON (1874), L. R. 9 Q. B. 480 ; 43 L. J. Q. B. 215 ; 30 L. T. 869 ; 38 J. P. 695 ; 22 W. R. 859.

Annotations:—**Distd.** Metropolitan Bank *v.* Heiron (1880), 5 Ex. D. 319, C. A. **Consd.** Lister *v.* Stubbs (1890), 45 Ch. D. 1, C. A. **Apld.** Bartram *v.* Lloyd (1903), 88 L. T. 286 ; Powell & Thomas *v.* Evan Jones, Evan Jones *v.* Powell & Thomas & Cowperthwaite (1904), 20 T. L. R. 329.

1621. —— **Principal's right barred by lapse of time.**]— H., a former director of the M. Bank, was alleged at a board meeting in 1872 to have corruptly received a bribe from D. The board concluded that the case was not made out. In 1879 the co. sued H. to recover the alleged bribe :—*Held :* (1) the claim was stat.-barred, as time ran from the first notice to the co. of the fraud ; (2) the money sought to be recovered was not money of the co.—METROPOLITAN BANK *v.* HEIRON (1880), 5 Ex. D. 319 ; 43 L. T. 676 ; 29 W. R. 370, C. A.

Annotations:—**Distd.** *Re* Fitzroy Bessemer Steel, etc., Co. (1884), 50 L. T. 144. **Apld.** Lister *v.* Stubbs (1890), 45 Ch. D. 1, C. A. **Distd.** *Re* Sharpe, *Re* Bennett, Masonic & General Life Assce. Co. *v.* Sharpe, [1892] 1 Ch. 154, C. A. **Apld.** *Re* Sale Hotel & Botanical Gardens Co., Hesketh's Case (1897), 77 L. T. 681. **Refd.** The Pongola (1895), 73 L. T. 512.

1622. ——.]—Deft., whilst acting as solr. for pltf. in connection with a proposed lease, received from the intending lessee a sum of money, agreeing to pay him a larger sum if pltf. did not execute the lease within a specified time :—*Held :* (1) this was a secret profit ; (2) pltf. was entitled to recover.—BURRELL *v.* MOSSOP (1888), 4 T. L. R. 270, C. A.

1623. —— **Bribe invested—Principal cannot follow.**]—Pltfs., a manufacturing co., employed deft. as their foreman to buy for them certain materials used in their business ; & deft. under a corrupt bargain took from one of the firms of whom he so bought large sums by way of commission, a portion whereof he invested. Pltfs. brought an action against deft. to recover moneys so paid to him, claiming to be entitled to follow such moneys into the investments thereof, & moved for an injunction to restrain deft. from dealing with the invest-

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PART VIII. SECT. 2, SUB-SECT. 15.—C. (a).

1620 i. *Agent liable for amount of bribe.*]—Where unlawful profit or commission has been received by the agent, the principal has an action against him for its recovery.—MARTEL *v.* PAGEAU, 9 S. 175.—**CAN.**

1620 ii. ——.]—Deft. being authorised by pltfs. to purchase land for them, did so & received from the vendor, as a gift for himself, a parcel of land, which he subsequently sold. Pltfs. on discovering the facts sued deft. for the price received by him :—*Held :* pltfs. entitled to recover the amount which was secret profit. *Morrison v. Thompson*, L. R. 9 Q. B. 480, cited.—MITCHELL *v.* SPARLING (1910), 14 W. L. R. 268 ; 3 Sask. L. R. 213.—**CAN.**

1620 iii. ——.] — Deft. agreed to find a mtgee. for pltf.'s land at a rate not exceeding 5 per cent. for a loan of £100,000, & found one, to whom he guaranteed payment of the loan, in consideration of receiving from the lender a commission of ½ per cent. to be retained out of the interest on the loan, but this was not disclosed to pltf. :—*Held :* this commission was secret profit for which deft. was accountable to pltf. *Boston Deep Sea Fishing & Ice Co.* v. *Ansell* (1888), 39 Ch. D. 339 ; *Grant* v. *Gold Exploration & Development Syndicate*, [1900] 1 Q. B. 233, cited.—KEOGH *v.* DALGETY & CO., LTD. (1917), V. L. R. 11.—**AUS.**

1620 iv. ——.]—The manager of an industrial co. who buys machines for the co. must account to the co. for sums paid to him by the sellers of the machines by way of commission on the price ; & the remedy by action is open to the co. to compel him to pay over the sums so received.—MÉTABETCHOUAN PULP CO. *v.* PAQUET (1906), Q. R. 29 S. C. 211.—**CAN.**

1620 v. ——.]—On a claim for an account from a Govt. employee of certain wines taken by him from suppliers of goods to his department as an inducement to him to influence orders on their behalf : —*Held :* the employee was liable to account, as an agent could not set up his own dishonesty to avoid rendering to his principal an account of illicit profits made in the execution of his agency, & the principal need not repudiate the contract for which the wine was given.—THOMPSON *v.* SENECAL (1894), 3 Q. R. Q. B. 455.—**CAN.**

1620 vi. ——.]—COMPLIN *v.* BEGGS (1913), 24 W. L. R. 871 ; 4 W. W. R. 1081.

1620 vii. ——.] — Pltf. co. agreed with I. Co. to allow the latter to store meat in one-half of the pltfs.' storage room at D. Deft. as manager of pltf. co. to look after the property & interests of that co. at D. arranged with I. Co. for remuneration to receive all their meat & supervise its conveyance into buildings for storage & used pltf. co.'s staff for this purpose but paid them for their extra work :—*Held :* deft. must account to pltfs. for profits resulting from such arrangement.—TRANSVAAL COLD STORAGE CO., LTD. *v.* PALMER (1904), T. S. 4.—**S. AF.**

1620 viii. —— *Pleading.*]—Where a principal claims that his agent be ordered to render an account of all commission which he has received or earned from third parties the declaration should allege that the commission arose out of, or by means of, or through, or in consequence of the agency.—UNION GOVT. (MINISTER OF DEFENCE) *v.* CHAPPELL (1917), S. A. L. R. —**S. AF.**

1620 ix. —— *Corruption must be proved in each transaction.*]—R. alleged that certain land belonged to a friend of his ; also that he could purchase it cheaper than any one else could do. At pltf.'s request, R. agreed to act as his agent in making the purchase. R. then purchased direct from the C. P. R., the owners, & made a secret profit. He also purchased another parcel for pltf. under similar misrepresentation & made a secret profit. Pltf. claimed from R.'s administrators the return of the secret profits. With regard to one parcel, R. executed an assignment to pltf. of the contract to purchase from the railway co., & also made a statutory declaration that he had purchased as pltf.'s agent : —*Held :* this was a sufficient corroboration as to this parcel, but the two transactions being distinct, & there being no corroboration as to the other parcel, pltf. could only succeed as to the parcel in respect of which there was corroboration.—DANDY *v.* NATIONAL TRUST CO. (1915), 30 W. L. R. 461.—**CAN.**

ments or for an order directing him to bring the moneys & the investments into ct. :—*Held :* (1) the relation between deft. & pltfs. was that of debtor & creditor, not of trustee & *cestui que trust ;* (2) pltfs. were not entitled to the order.—LISTER & Co. *v.* STUBBS (1890), 45 Ch. D. 1 ; 59 L. J. Ch. 570 ; 63 L. T. 75 ; 38 W. R. 548 ; 6 T. L. R. 317, C. A.

Annotations :—**Consd.** The Pongola (1895), 73 L. T. 512 **Distd.** *Re* Mouat, Kingston Cotton Mills Co. *v.* Mouat, [1899] 1 Ch. 831. **Consd.** Powell & Thomas *v.* Jones, [1905] 1 K. B. 11, C. A. ; Wilson's & Furness-Leyland Line *v.* British & Continental Shipping Co. (1907), 23 T. L. R. 397. **Refd.** Salford Corpn. *v.* Lever, [1891] 1 Q. B. 168, C. A. ; *Re* Thorpe, Vipont *v.* Radcliffe, [1891] 2 Ch. 360 ; *Re* North Australian Territory Co., Archer's Case, [1892] 1 Ch. 322, C. A. ; *Re* Sale Hotel & Botanical Gardens, *Ex p.* Hesketh (1898), 78 L. T. 368, C. A. ; Stearns *v.* Village Main Reef Gold Mining Co. (1905), 10 Com. Cas. 89, C. A.

1624. — Jointly with briber.]—B., vendor of goods, admitted paying to A., pltf.'s buyer, a sum of money, but contended it was a gratuity & had no relation to the contract by A. for the purchase of the goods. The jury found that B. paid the money to A. as a secret commission :—*Held :* (1) it did not matter whether a different price would have been obtained had there been no bargain for a commission ; (2) pltf. was entitled to recover the amount from either A. or B. or both of them.—COHEN *v.* KUSCHKE & Co. & KOENIG (1900), 83 L. T. 102 ; 16 T. L. R. 489.

1625. —— & for loss sustained by principal—Jointly with briber.]—Where an agent for sale of an estate colludes with a purchaser & in consideration of a bribe or honorarium allows him to obtain the estate at less than its value, with a view to a sale at a higher price to a sub-purchaser, & the transaction is concealed from the vendor, both agent & purchaser are jointly & severally liable to pay to vendor the increased amount obtained by the sub-sale (MALINS, V.-C.).—MORGAN *v.* ELFORD (1876), 4 Ch. D. 352 ; 25 W. R. 136, C. A.

Annotations :—**Folld.** Platt *v.* Rowe & Mitchell (1909), 26 T. L. R. 49. **Mentd.** Grant *v.* Banque Franco-Egyptienne (1878), 3 C. P. D. 202, C. A.

1626. —— —— ——.]—Where an agent, who has been bribed so to do, induces his principal to enter into contract with the person who has paid the bribe, & the contract is disadvantageous to the principal, the principal has two distinct & cumulative remedies : he may recover from the agent the amount of the bribe which he has received, & he may also recover from the agent & the person who has paid the bribe, jointly or severally, damages for any loss he has sustained by reason of his having entered into the contract, without allowing any deduction in respect of what he has recovered from the agent under the former head, & it is immaterial whether the principal sues the agent or the third person first.—SALFORD CORPN. *v.* LEVER, [1891] 1 Q. B. 168 ; 60 L. J. Q. B. 39 ; 63 L. T. 658 ; 55 J. P. 244 ; 39 W. R. 85 ; 7 T. L. R. 18, C. A.

Annotations :—**Consd.** *Re* North Australian Territory Co., *Ex p.* Archer (1891), 65 L. T. 800, C. A. In *Salford Corpn.* v. *Lever* there was not only no loss, but the co. actually got a profit by the fraud of their agent (LINDLEY, L.J.). *Re* Liberator Permanent Benefit Bldg. Soc. (1894), 10 T. L. R. 537. **Distd.** Lands Allotment Co. *v.* Broad (1895), 2 Mans. 470 ; Hovenden *v.* Millhoff (1900), 83 L. T. 41, C. A ; Grant *v.* Gold Exploration & Development Syndicate, [1900] 1 Q. B. 233, C. A.

—— Money received by directors from company promoters.]—*See* COMPANIES.

—— Shares received by directors from company promoters—Measure of damages.]—*See* COMPANIES.

1627. Sub-agent liable to principal for amount of bribe.]—A firm of shipowners employed stockbrokers as their agents to obtain an advance for them upon the security of certain vessels. The stockbrokers employed a sub-agent to negotiate the advance. The sub-agent knew that in so acting he was procuring the advance for the shipowners & for their benefit, & was acting in their interests. The sub-agent, without knowledge of either the shipowners or their agents, the stockbrokers, arranged with persons whom he procured to make the advance for payment to him of a commission upon the amount of the advance. Part of such secret commission was paid to the sub-agent :—*Held :* (1) a fiduciary relation existed between the shipowners & sub-agent which entitled them to recover from him so much of the secret commission as had actually been received by him ; (2) as regards so much of the secret commission as remained unpaid, the persons making the advance not being parties to the action, the shipowners were entitled to no further declaration than that the sub-agent should become indebted to them for any further sums as & when he should receive same. —POWELL & THOMAS *v.* JONES & Co., [1905] 1 K. B. 11 ; 74 L. J. K. B. 115 ; 92 L. T. 430 ; 53 W. R. 277 ; 21 T. L. R. 55 ; 10 Com. Cas. 36, C. A.

Annotation :—**Consd. & Distd.** Bath *v.* Standard Land Co., [1911] 1 Ch. 618, C. A.

(*b*) *Loss of Commission : see* Sect. 3, Sub-sect. 1, M. (c), (d), *post.*

(*c*) *Dismissal.*

1628. Agent liable to dismissal—Ship's husband.]—A., B., & C., joint owners in a vessel, agreed A. should act as ship's husband & broker, & be entitled to commission on "gross freight," & in case of gross negligence or fraud on A.'s part B. & C. might put an end to the agreement by notice & purchase of A.'s shares. A. effected a charterparty of the vessel, the charterer paying all expenses, & £130 per week for the ship, & £4 a week to A., who in the accounts rendered to B. & C. represented the amount paid as £130 a week only :—*Held :* (1) concealment of the receipt of the £4 a week was such a fraud on B. & C. that it entitled them to put an end to the agreement ; (2) the fraud could not be justified on the ground that, had the charterparty been effected on the usual terms of the owners of the vessel paying the usual expenses of the ship, A. would have been entitled to as large a sum by way of commission on gross freight.—THE PHŒBE (1853), 9 L. T. 119 ; 2 W. R. 138.

1629. —— Agent for sale.]—Deft. agreed to employ pltf. as agent in England for sale of his brandies for a term of 4 years. Before expiration of the 4 years deft. discovered pltf. had been making secret profits & had failed to account for certain discounts received by him. In an action for wrongful dismissal :—*Held :* (1) an agent is not entitled to anything more than his agreed com-

1624 a. —— *Jointly with briber.*]—M. having been authorised to sell a mine for $500,000 at a commission of $25,000, planned with J. & E., private secretary to pltfs., to sell the mine to pltfs. for $550,000 but that the owners of the mine should receive $500,000 only, the balance of $50,000 being retained by M. J. & E. in addition to the $25,000 commission promised to M. Pltfs., who were ignorant of this agreement & were told by E. that the price of the mine was $550,000, purchased it at that price & paid over the money to the vendors, but before the $50,000 was paid by the vendors to the agents, pltfs. discovered the facts & claimed it as money of which they had been defrauded. The money was also claimed by C. on the ground that M. was C.'s agent instructed by him to negotiate the sale :—*Held :* (1) as the purchase-money had been increased by a sum which without the knowledge of the purchasers was to have been paid to their agent, this sum was a bribe & could be recovered back from the agent or the vendors or both ; (2) C.'s right could not be put higher than as a principal or assignee of M., & so C.'s claim suffered from same infirmity as the claim of the agents. *Grant* v. *Gold Exploration & Development Syndicate,* [1900] 1 Q. B. 233 ; *Bagnall* v. *Carlton* (1877), 6 Ch. D. 371 ; *Imperial Mercantile Credit Assocn.* v. *Coleman* (1873), L. R. 6 H. L. 189 ; *Boston Deep Sea Fishing & Ice Co.* v. *Ansell,* 39 Ch. D. 339 ; *Salford Corpn.* v. *Lever,* [1891] 1 Q. B. 168, cited.—PEACOCK *v.* CRANE (1913), 29 O. L. R. 282 ; 4 O. W. N. 1240 ; 14 D. L. R. 217.—**CAN.**

Sect. 2.—Principal's rights against agent: Subsect. 15, C. (c) & (d) & D.]

mission, & the taking of a secret commission is dishonest & contrary to law; (2) pltf. was rightly dismissed.—BULFIELD *v.* FOURNIER (1894-5), 11 T. L. R. 62, 282.

1630. —— Manager of tannery.]—Pltf. entered into an agreement with defts., a tannery co., to act as manager, & undertook to give his whole time & attention to the business. As part of his duty he was consulted by defts., & advised them as to insurance of their premises. Without defts.' knowledge he accepted an agency from an insurance co. & received commissions from it in respect of insurances effected by defts. through pltf. upon their premises with the insurance co. The agreement expired, & he entered into a fresh agreement with defts. upon the same terms as to giving his whole time & attention to the business & advising defts. as to insurances upon their premises. At expiration of this agreement he remained in defts.' service without any fresh agreement. He continued during the whole time he acted as defts.' manager without their knowledge to act as agent for the insurance co. & to receive commissions from it upon insurances effected through him upon defts.' premises:—*Held:* the acceptance by pltf. of the agency & receipt by him of the secret commissions was misconduct which entitled defts. to dismiss pltf. without notice, although under his contract of service he would otherwise have been entitled to 6 months' notice of determination of his employment.—SWALE *v.* IPSWICH TANNERY, LTD. (1906), 11 Com. Cas. 88.

1631. —— Burden of proof.]—Where a master dismissed his servant on the ground of the servant's taking a secret commission, & established a *primâ facie* case:—*Held:* the burden of proof was shifted & lay on the servant to prove the innocence of the transaction.—FEDERAL SUPPLY & COLD STORAGE CO. OF SOUTH AFRICA *v.* ANGEHRN & PIEL (1910), 80 L. J. P. C. 1.; 103 L. T. 150; 26 T. L. R. 626, P. C.

1632. —— Though bribe not discovered until after dismissal.]—The promoter of pltf. co. agreed with deft. he should be employed as managing director of the intended co. for 5 years at a yearly salary. By articles of assocn. it was provided deft. should be managing director for 5 years at the yearly salary mentioned in the agreement, payable quarterly. Afterwards the co. by a written instrument adopted the agreement between the promoter & deft. Deft., on behalf of the co., contracted for construction of certain fishing-smacks, & unknown to the co. took a commission from the shipbuilders on the contract. Several months afterwards pltf. co. at an extraordinary meeting passed a resolution dismissing deft. from his office on the ground of other alleged acts of misconduct, which they were not able to substantiate in the action, being at that time ignorant of his receipt of commission from the shipbuilders. Deft. was a shareholder in an ice co., & a fish-carrying co. which paid, in addition to the ordinary dividends, bonuses to shareholders who were owners of fishing smacks & who employed the cos. in supplying ice & carrying for them. Deft. employed these cos. in respect of pltf. co.'s smacks, & received bonuses as if the smacks were his own. Pltf. co. brought an action against deft. for an account of commissions & bonuses received by him, & for damages for alleged breaches of duty; & deft. counter-claimed for wrongful dismissal & the salary for the quarter which expired before his dismissal:—*Held:* (1) the receipt of a commission from the shipbuilding co. was good ground for dismissal, although not discovered till after dismissal had taken place, & although it happened several months previously & might have been an isolated act; (2) deft. must account to pltf. co. for bonuses received from the ice & carrying cos. as they had been paid in respect of pltf. co.'s smacks, although pltf. co. could not itself have received the bonuses, not being a shareholder of the cos.; (3) the salary was payable yearly, & not quarterly, & deft. having been dismissed for misconduct, was not entitled to any part of the unpaid salary for the current year of service.—BOSTON DEEP SEA FISHING & ICE CO. *v.* ANSELL (1888), 39 Ch. D. 339; 59 L. T. 345, C. A.

Annotations:—**Apld.** Costa Rica Ry. Co. *v.* Forwood, [1901] 1 Ch. 746, C. A.; Erskine *v.* Sachs, [1901] 2 K. B. 504, C. A.; Swale *v.* Ipswich Tannery (1906), 11 Com. Cas. 88; General Bill-posting Co. *v.* Atkinson, [1908] 1 Ch. 537, C. A. **Distd.** Federal Supply & Cold Storage Co. of South Africa *v.* Angehrn & Piel (1910), 80 L. J. P. C. 1. **Refd.** *Re* Famatina Development Corpn., [1914] 2 Ch. 271, C. A.; Healey *v.* Société Anonyme Française Rubastic, [1917] 1 K. B. 946.

1633. —— Though principal had means of ascertaining bribe.]—Pltf. was employed by defts. as an architect to supervise erection of a building. Pltf. invited tenders for sub-contracts, asking for a commission from the persons tendering on the amount of the tender. After the tenders were accepted, defts. discovered that pltf. was to receive these commissions & at once dismissed him:—*Held:* (1) the dismissal was justifiable; (2) it was immaterial that existence of the commissions was not fraudulently concealed, & that officers of the co. had had the opportunity of discovering their existence.—TEMPERLEY *v.* BLACKROD MANUFACTURING CO., LTD. (1907), 71 J. P. Jo. 341.

[(*d*) *Criminal Prosecution.*

1634. Conspiracy to defraud.]—X., a member of a syndicate, was instructed to get the best charter he could of a steamer. He obtained from Y. (chairman) & Z. (director of the ss. co.) two contracts for the steamer dated the same day, one of which gave Y. a secret commission either as a bribe or for forcing the business through:—*Held:* X., Y. & Z. were guilty of conspiracy to defraud the syndicate.—R. *v.* BARBER (1887), 3 T. L. R. 491.

Under Prevention of Corruption Act, 1906 (c. 34), & Public Bodies Corrupt Practices Act, 1889 (c. 69).]—*See* CRIMINAL LAW & PROCEDURE.

D. Principal's Remedies against Third Party.

1635. Principal may repudiate contract.]—A telegraph works co. agreed with a telegraph cable co. to lay a cable, to be paid for by a sum payable when it

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PART VIII. SECT. 2, SUB-SECT. 15.—D.

1635 i. *Principal may repudiate contract—Purchase of land—Improvements by principal before repudiation of purchase.*]—SPARLING *v.* HOULIHAN (1902), 14 M. R. 124.—**CAN.**

1635 ii. ——.]—A contract for sale of goods was repudiated by defts. on the ground that the contract sued on was made with D., who had signed the contract in his own name. Pltfs.' brokers, who procured the contract from D., agreed to pay him personally half commission for effecting the sale:—*Held:* the offer of such payment to D. avoided the contract, whether pltfs. were aware of it or not. *Smith* v. *Sorby* (1875), 3 Q. B. D. 532 n.; *Harrington* v. *Victoria Graving Dock Co.* (1878), 3 Q. B. D. 549; *Clough* v. *L. & N. W. Ry.* (1871), L. R. 7 Exch. 26; *Panama, etc., Co.* v. *India Rubber, etc., Co.* (1875), 10 Ch. App. 515; *Parker* v. *McKenna* (1874), 10 Ch. App. 96; *Shipway* v. *Broadwood*, [1899] 1 Q. B. 369; *Lands Allotment Co.* v. *Broad* (1895), 2 Mans. 470; *Grant* v. *Gold Exploration & Development Syndicate*, [1900] 1 Q. B. 233; *Andrewes* v. *Ramsay*, [1903] 2 K. B. 635; *Hovenden & Sons* v. *Millhoff* (1900), 83 L. T. 41; *Hough* v. *Bolton* (1886), 2 T. L. R. 738; *Hippisley* v. *Knee*, [1905] 1 K. B. 1; *Great Western Insce. Co.* v. *Cunliffe* (1874), 9 Ch. App. 525; *Robinson* v. *Mollett* (1875), L. R. 7 H. L. 802; *Johnson* v. *Kearley*, [1908] 2 K. B. 514; *Turing* v. *Stanton* (1876), 3 Ch. D. 502; *De Busche* v. *Alt* (1878), 8 Ch. D. 286 at p. 314; *Bartram* v. *Lloyd* (1904), 90 L. T. 357; *Lloyd* v. *Grace Smith*, [1912] A. C. 716, cited.—BARRY *v.* STONEY POINT CANNING CO. (1917), 55 S. C. R. 51.—**CAN.**

was begun, & by twelve instalments payable on certificates by the cable co.'s engineer, who was named in the contract. Shortly afterwards the engineer, who was engaged to lay other cables for the works co., agreed with them to lay this cable also for a sum of money to be paid to him by instalments payable by the works co. when they received instalments from the cable co.:—*Held:* in the circumstances, the agreement between the engineer & the works co. was a fraud, which entitled the cable co. to have their contract rescinded, & to receive back money which they had paid under that contract.

Any surreptitious dealing between one principal to a contract & the agent of the other principal is a fraud in equity (JAMES, L.J.).—PANAMA & SOUTH PACIFIC TELEGRAPH CO. *v.* INDIA RUBBER, GUTTA PERCHA & TELEGRAPH WORKS CO. (1875), 10 Ch. App. 515; 45 L. J. Ch. 121; 32 L. T. 517; 23 W. R. 583, C. A.

Annotations:—**Distd.** Phosphate Sewage Co. *v.* Hartmont (1877), 5 Ch. D. 394, C. A. **Apld.** Bartram *v.* Lloyd (1903), 88 L. T. 286; Cummings *v.* Stewart (1912), 30 R. P. C. 1. **Refd.** Lagunas Nitrate Co. *v.* Lagunas Syndicate, [1899] 2 Ch. 392, C. A.; Rhymney Ry. Co. *v.* Brecon & Merthyr Tydfil Ry. Co. (1900), 83 L. T. 111, C. A.; Grant *v.* Gold Exploration & Development Syndicate, [1900] 1 Q. B. 233, C. A.; Keighley, Maxsted *v.* Durant (1901), 70 L. J. K. B. 662, H. L.; Rowland *v.* Chapman, Rowland *v.* Corrie, Rowland *v.* Brandreth (1901), 17 T. L. R. 669.

1636. ——.]—Deft.'s agent entered into contract with pltf. to supply 50 wagons for deft.'s use for 5 years, the hire to be paid in money or coals at the then rate of 6*s.* a ton. Pltf. then paid deft.'s agent a secret commission on the wagons. Before this contract came into operation the agent agreed with pltf. to alter the terms. The supply of wagons was transferred to a co., & deft.'s agent entered into a distinct & independent contract for deft. to supply pltf. with 12,000 tons of coals at 6*s.* 6*d.* a ton. When coal was £1 a ton pltf. called on deft. to supply coals at 6*s.* 6*d.* under the second contract. Deft. repudiated the contract on the ground that the secret commission was given to the agent to influence his mind in favour of pltf. & to the prejudice of deft. & that it did so influence the agent:—*Held:* if a party with whom an agent is negotiating on the part of another agrees to give, or does give, the agent a secret gratuity, & that gratuity does influence the mind of the agent directly or indirectly in assenting to anything prejudicial to his employer in making the contract, the contract is vitiated.—SMITH *v.* SORBY (1875), 3 Q. B. D. 552 n.; 30 J. P. Jo. 100.

1637. ——.]—Purchaser's agent received a secret commission of 10 per cent. from the seller, & this was added to the price to be paid by purchaser:—*Held:* (1) a surreptitious bargain between the seller & purchaser's agent to enhance the price is a fraud on purchaser; (2) if the seller gave a bribe to purchaser's agent that was in law a fraud that defeated the contract.—HOUGH *v.* BOLTON (1885), 1 T. L. R. 606.

1638. —— Although bribe only discovered in course of action.]—B. agreed to buy horses from S. provided they were passed as sound by B.'s veterinary surgeon. They were so certified, & B. sent a cheque to S. for the price. Subsequently the horses were found unsound & were returned & the cheque stopped. In the course of an action on the cheque it was found that B.'s veterinary surgeon had accepted a bribe from S.:—*Held:* (1) it was immaterial to inquire what effect the bribe had on deft.'s agent; (2) the offer & acceptance invalidated the certificate, & pltf. could not recover under the contract which depended on the validity of the certificate.—SHIPWAY *v.* BROADWOOD, [1899] 1 Q. B. 369; 68 L. J. Q. B. 360; 80 L. T. 11; 15 T. L. R. 145, C. A.

Annotations:—**Expld.** Rowland *v.* Chapman, Rowland *v.* Corrie, Rowland *v.* Brandreth (1901), 17 T. L. R. 669. **Refd.** Kregor *v.* Hollins (1913), 109 L. T. 225, C. A. **Mentd.** Hovenden *v.* Millhoff (1900), 83 L. T. 41, C. A.

1639. —— Unless agent's duty & interest not in conflict.]—The rule that a purchaser can rescind a contract of sale entered into by his agent on his behalf, on the ground that the agent has received a secret commission from the vendor, only applies where the agent has by reason of the receipt of the commission an interest conflicting with his duty to his principal.

Where one of the purchasers of land, who acted as agent for all the purchasers in negotiating the purchase, received a commission on the amount of the purchase-money from vendor, but his interest was to obtain the land as cheaply as possible:—*Held:* purchasers not entitled to rescind.—ROWLAND *v.* CHAPMAN, ROWLAND *v.* CORRIE, ROWLAND *v.* BRANDRETH (1901), 17 T. L. R. 669.

1640. —— Unless confirmation with full knowledge.]—Deft., through his agent, entered into a contract with pltfs., shipbuilders, for the building of a ship. Before the contract was arranged pltfs. secretly agreed to give a commission to deft.'s agent. At an interview which afterwards took place between pltfs. & deft. as to the payment by him of money due under this contract, pltfs. informed him they had agreed to pay commission to the agent, & deft., after being so informed, paid them a small sum on account. Pltfs. afterwards brought an action to recover the balance due to them:—*Held:* (1) pltfs. had not shown that there had been a full disclosure to deft. of all the circumstances in connection with pltfs.' agreement to pay commission to the agent; (2) there had been no such confirmation by deft. of his contract as debarred him from repudiating it.—BARTRAM *v.* LLOYD, No. 1607, *ante*.

1641. Principal may recover bribe.]—H. employed certain persons to buy cigars at best trade rates. They bought large quantities from M., who paid them a secret commission of 2½ per cent. at Christmas & Midsummer each year. When H. found this out he sued M. for the total amount of the bribes:—*Held:* the ascertained amount of bribes given by a vendor to the buying agent of purchaser could be recovered by purchaser from vendor as money had & received. *Semble:* as

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1638 i. —— *Although bribe only discovered in course of action.*]—Deft. was induced by his agent to agree to buy pltf.'s farm for $1,850, although pltf.'s price for it was only $1,800. On discovering a shortage of acreage he asked to have the agreement cancelled & his money returned, but this was refused. He then, on the advice of same agent, raised a crop on the farm & remained in possession for over a year, but refused to make the further payments agreed on. Pltf. then brought an action to have the agreement cancelled & the money he had received forfeited. At the trial it came out that pltf. had paid the agent $50 out of the money paid by deft., who asked to have the agreement cancelled & his money refunded to him:—*Held:* on account of the newly discovered secret payment by pltf. to deft.'s confidential agent, deft. had the right to ask for cancellation of the sale & repayment of the $250, with costs of action. *Panama, etc. Co.* v. *India Rubber, etc. Co.* (1875), 10 Ch. App. 515, folld. — MURRAY *v.* SMITH (1902), 14 M. R. 125.—CAN.

q. —— *Unless bribe received before agency established.*]—During A.'s absence B., without authority, sold lands of his to C. B. informed A. as to the transaction & A. replied accepting. Before A. wrote accepting B. & C., unknown to him, agreed that B. was to have a commission on the transaction from C. In a suit by C. for specific performance:—*Held:* the agreement between B. & C. as to commission being before B. was constituted A.'s agent did not avoid the contract & C. was entitled to a decree. *Hussey* v. *Horne-Payne* (1878), 4 App. Cas. 311; *Hack* v. *London Provident Assocn.* (1883), 23 Ch. D. 112, cited.—ANDREWS *v.* CALORI (1907), 38 S. C. R. 588. CAN

1641 i. *Principal may recover bribe—What facts principal must prove.*]—In an action for the recovery of a secret commission paid to his agent it is not sufficient for pltf. merely to prove the agency; he must also prove knowledge

Sect. 2.—Principal's rights against agent: Sub-sect. 15, D.; sub-sect. 16.]

between vendor & purchaser, the true price of the thing purchased was less than the amount charged by the amount of the bribe.—HOVENDEN & SONS *v.* MILLHOFF (1900), 83 L. T. 41; 16 T. L. R. 506, C. A.

Annotation:—**Refd.** Moody *v.* Cox & Hatt (1917), 116 L. T. 740, C. A.

1642. —— Amount recoverable.]—Pltf., owner of a mine, agreed with a person who was, though pltf did not then know it, a director of & agent for defts., a co., that the director should have an option of finding a purchaser for the property, & should, if successful, be paid as commission 10 per cent. of the price obtained. The director arranged a sale to defts.; before the contract was entered into, or the commission had become payable, pltf. became aware of the director's position with regard to defts.:—*Held:* pltf. having completed the contract without disclosing to defts., as purchasers, the agreement to pay commission to their agent, any part of the agreed commission remaining in pltf.'s hands could be recovered from him by defts. as money had & received to their use.

By a second agreement between pltf. & the director, made before commission became due, an immediate payment of a sum less than that originally agreed on was substituted. Defts. discovered the existence of the two agreements as to commission & payment to the director, & they demanded of & received from him, in satisfaction of all claims against him, the amount he had received from pltf.:—*Held:* (1) defts. were not bound by the agreement as to the reduction of amount of commission; (2) notwithstanding their receipt from the director of the reduced amount of commission, they were entitled to recover balance from pltf.—GRANT *v.* GOLD EXPLORATION & DEVELOPMENT SYNDICATE, LTD., [1900] 1 Q. B. 233; 69 L. J. Q. B. 150; 82 L. T. 5; 48 W. R. 280; 16 T. L. R. 86; 44 Sol. Jo. 100, C. A.

Annotations:—**Consd.** Hovenden *v.* Millhoff (1900), 83 L. T. 41, C. A. **Apld.** Bartram *v.* Lloyd (1903), 88 L. T. 286. **Refd.** Rowland *v.* Chapman, Rowland *v.* Corrie, Rowland *v.* Brandreth (1901), 17 T. L. R. 669.

1643. —— & damages for loss.]—A gas co., S., employed a manager, H., to examine tenders for coal & advise them thereon. H. arranged with contractors, L., to pay him 1*s.* a ton commission on all contracts recommended by H. to S., & for L. to increase the prices of their tenders by 1*s.* a ton in order to pay the 1*s.* a ton secret commission to H. When S. discovered the fraud they agreed with H. that he should give them information & evidence that would help them in actions they would take against L. & others to recover damages for loss sustained in consequence of the frauds, that H. should guarantee that S. should recover £10,000 in the actions, & that H. should deposit securities for £10,000 against this guarantee. S. sued L., who pleaded that this agreement between S. & H. made them joint tortfeasors & that the action was barred thereby:—*Held:* this was not so, & the facts relied on afforded no defence to the action.—SALFORD CORPN. *v.* LEVER, No. 1626, *ante*.

Annotations:—**Consd.** *Re* North Australian Territory Co., *Ex p.* Archer (1891), 65 L. T. 800, C. A.; *Re* Liberator Permanent Benefit Bldg. Soc. (1894), 10 T. L. R. 537; Grant *v.* Gold Exploration & Development Syndicate, [1900] 1 Q. B. 233, C. A. **Distd.** Lands Allotment Co. *v.* Broad (1895), 2 Mans. 470. **Apld.** Hovenden *v.* Millhoff (1900), 83 L. T. 41, C. A.

1644. —— —— What facts principal must prove.]—Deft. agreed to buy an estate for £16,000. On the following day A. offered to sell the estate within a week for £22,000 if deft. would give A. half the profit, & A. sold the estate for that sum to pltf. co. without disclosing the arrangement that had been made, & received £3,000 from deft. Deft. was not a director of & was in no fiduciary position with regard to the co., but knew that A. was a director. In an action against deft. to recover £6,000 or in the alternative £3,000:—*Held:* the action failed, as on the evidence the ct. could not find (1) that the agreement with A. was made in the expectation that he would be induced to persuade the co. to buy at an improper price; (2) that when deft. found that the co. was to be purchaser, or when the contract with the co. was entered into, or before it was carried out, deft. had reason to believe A. had concealed the arrangement with deft. from the co. & had thereby induced the co. to enter into an improper bargain.—LANDS ALLOTMENT CO. *v.* BROAD (1895), 2 Mans. 470; 13 R. 699.

Annotation:—**Dbtd.** Grant *v.* Gold Exploration & Development Syndicate, [1900] 1 Q. B. 233, C. A. The case of *Lands Allotment Co.* v. *Broad* is rather obscurely reported on the facts, & it seems possible that the learned judge may have inferred that the fact that their managing director was receiving a commission was known to pltf. co.; but if it does decide that a vendor, who pays a bonus to a person, whom he knows to be the agent of a purchaser, with a view to influence the sale & does not disclose the fact to the principal, can defend the transaction when impeached by averring that he thought the agent was so respectable a person that he would disclose it himself, I think it is contrary to principle (COLLINS, L.J.).

1645. —— —— Briber & agent jointly liable.]—MORGAN *v.* ELFORD, No. 1625, *ante*.

For full anns., *see* S. C. No. 1625, *ante*.

1646. —— —— ——.]—COHEN *v.* KUSCHKE, No. 1624, *ante*.

1647. Principal may prosecute briber & agent.]—R. *v.* BARBER, No. 1634, *ante*.

SUB-SECT. 16.—MEASURE OF DAMAGES.

See, generally, DAMAGES.

1648. Agent to buy—Buying wrong quality.]—A. having a commission from B. to ship tobacco, employed C. as his broker, & directed him to buy P. tobacco of the best quality. C. bought tobacco & shipped it to B., & delivered his bought note to A., in which it was described as P. tobacco only. B., finding it very bad, refused to accept it, & brought an action against A. & recovered:—*Held:*

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of such agency on the part of the party paying such commission.—LAUGHTON *v.* HOLMES, 36 Natal L. R. (1915), 419.—**S. AF.**

PART VIII. SECT. 2, SUB-SECT. 16.

r. Agent to invest — Taking insufficient security.]—Pltf. advanced $5,500 on mtge. to H., on the advice of S., a partner in deft. firm of financial brokers, that the land mtged. was worth $9,700 or $7,000 at a forced sale. The land proved less in value than the amount of the loan & H. abandoned it. S. led pltf. to believe that defts. were acting for him, but they were in fact employed by H. Defts. adopted S.'s valuation without inquiry:—*Held:* defts. liable to pltf., the measure of damages being the whole loss on the loan. *Metropolitan Ry. Co.* v. *Wright* (1886), 11 App. Cas. 153; *Brownlie* v. *Campbell* (1880), 5 App. Cas. 936; *Hammersley* v. *De Biel* (1845), 12 Cl. & Fin. 45; *Pulsford* v. *Richards* (1853), 17 Beav. 87, refd.; *Burrowes* v. *Lock* (1805), 10 Ves. 470; *Derry* v. *Peek* (1889), 14 App. Cas. 337; *Ry. Comrs.* v. *Brown* (1887), 13 App. Cas. 133, P. C.; *Jennings* v. *Broughton* (1853), 5 De G. M. & G. 126; *Gomes* v. *Bonnor* (1884), 33 W. R. 64; *Hussey* v. *Horne-Payne* (1878), 8 Ch. D. at pp. 677, 679; *Barley* v. *Walford* (1846), 9 Q. B. 197; *Lee* v. *Bonverie*, [1891] 3 Ch. 111, cited—WOLLEY *v.* LOWENBERG, HARRIS & CO. (1894), 3 B. C. R. 416; 25 S. C. R. 51. **CAN.**

s. —— Failure to exercise due care.]—PARKER & MCARA BROTHERS *v.* WALLACE, 10 D. L. R. 37; 23 W. L. R. 141.—**CAN.**

(1) an action lay by A. against C.; (2) A.'s acceptance of the bought note was not a waiver of directions as to quality; (3) the proper measure of damages was not the mere difference in price between the two kinds of tobacco, but the amount of damages & costs recovered in the action by B. against A.—MAINWARING *v.* BRANDON (1818), 8 Taunt. 202; 2 Moore, C. P. 125; 129 E. R. 361.

Annotation:—**Refd.** Exploring Land & Minerals Co. *v.* Kolckmann (1905), 94 L. T. 234, C. A.

1649. —— ——.]—Pltf., a merchant in London, gave orders to defts., commission agents in Hong Kong, to purchase for him a quantity of a certain kind of opium. No such opium could then be obtained at Hong Kong; but, instead of informing pltf. of this fact, defts. by mistake informed him they could procure it, & they purchased & shipped to pltf. opium which they erroneously supposed to be such as was ordered, but which was really of an inferior description:—*Held:* (1) the relation between pltf. & defts. was not that of vendor & purchaser, but principal & agent; (2) the true measure of damages, which pltf. was entitled to recover, was not the difference between the value of opium ordered & that shipped, but the loss actually sustained by pltf. in consequence of the opium not being of the description ordered.—CASSABOGLOU *v.* GIBB (1883), 11 Q. B. D. 797; 52 L. J. Q. B. 538; 48 L. T. 850; 32 W. R. 138, C. A.

Annotations:—**Apprvd.** Salvesen *v.* Rederi Akt. Nordstjernan, [1905] A. C. 302, H. L. **Consd.** Johnston *v.* Braham & Campbell, [1916] 2 K. B. 529. **Mentd.** The Kronprinzessin Cecile (1915), 32 T. L. R. 139.

1650. —— **Failure to buy.**]—If a man puts money into the hands of another to purchase goods, & he neglects to do so, the proper measure of damages is the value of the goods, not the value of the money originally put into deft.'s hands; the value of the goods may be much less than the value of the money which has been put into his hands for the purpose of purchasing goods (PARKE, B.).—EHRENSPERGER *v.* ANDERSON, No. 1406, *ante*.

For full anns., *see* S. C. No. 1406, *ante*

1651. —— **Selling his own property to principal without disclosure.**]—L. ordered deft. to buy for him rupee paper; deft. sold rupee paper of his own to L. whilst he fraudulently led L. to believe that it belonged to third persons. The value of rupee paper afterwards became considerably less, but L. held for many months what deft. had sold to him, & ultimately re-sold it at a loss of £43,000:—*Held:* the measure of damages was not the amount of the loss ultimately sustained by L., but the difference between the price which he paid for the rupee paper & that which he would have received if he had resold it in the market forthwith after purchasing it.—WADDELL *v.* BLOCKEY (1879), 4 Q. B. D. 678; 48 L. J. Q. B. 517; 41 L. T. 458; 27 W. R. 931, C. A.

For full anns., *see* MISREPRESENTATION & FRAUD.

1652. Agent to present bill for acceptance—Failure to present bill—Nominal damages where no loss.]—A party employing another to present a bill for acceptance is entitled to recover nominal damages against such agent if he fails to present it although no real damage is occasioned by the neglect, the bill & costs having been paid by other persons liable on it.—VAN WART *v.* WOOLLEY (1830), Mood. & M. 520.

1653. Agent to borrow—Concurring in sale of security & taking surplus price.]—A banking co., being mtgees. of certain Spanish bonds, employed deft. to raise money upon them by deposit in his own name. The person with whom deft. deposited them called on deft. for repayment, &, on default, sold the bonds, with the concurrence of deft., without the co.'s knowledge, & paid the balance of the proceeds to deft. The co. was compelled by the mtgor. to replace the bonds or their value:—*Held:* (1) deft. was answerable to the co. for the market price of the bonds at the time of actual sale; (2) he was not answerable for their value at any other time.—GORDON *v.* PYM (1843), 3 Hare, 223; 67 E. R. 364.

1654. Broker—Failure to make enforceable contract.]—Where, by reason of the broker's negligence, the contract made by him for his principal turns out to be unenforceable, the broker is liable for the damages occasioned to his principal by the invalidity of contract & the costs incurred by the principal in unsuccessfully endeavouring to enforce it.—SIVEWRIGHT *v.* RICHARDSON, No. 1254, *ante*.

1655. Agent making incorrect statements to principal.]—Deft., acting as agent, induced pltf. to purchase of C. the goodwill of a public-house upon a misrepresentation as to the daily "takings" of the house. Pltf., finding he had been deceived, sued C. for the deceit, without communicating with deft., but failed in his action, because he could not show C. had made, or authorised any one else to make, misrepresentation upon the subject. He then sued deft. & obtained a verdict, including the sum he had lost by resale of the goodwill, a sum for personal loss & inconvenience, & a further sum of £181, costs of the action against C. which failed:—*Held:* (1) he was not entitled to recover the money paid as costs of the action against C., the damage not being the natural & proximate result of deft.'s act; (2) the damages must be reduced by that amount.—RICHARDSON *v.* DUNN (1860), 8 C. B. N. S. 655; 30 L. J. C. P. 44; 2 L. T. 430; 8 W. R. 582; 141 E. R. 1323.

1656. ——.]—Where an agent employed to conduct negotiations for his principals makes an incorrect statement to them that he has concluded a contract on their behalf, the measure of damages for his breach of duty is the loss actually sustained by the principals in consequence of the misrepresentation, & does not include profits the principals might have made had it been true.

Resps. employed applts. to find freight at a certain rate per ton for one of resps.' ships. Applts. reported they had concluded a bargain for the charter of the vessel. In fact, no bargain had been concluded; differences applts. had hoped to get rid of existed & proved invincible. Three days after the report of the transaction resps. learned that the proposed charterers had refused to proceed with the charter. On receiving this information resps. made no effort to look for an equally advantageous freight, but used their ship under a current contract at a much lower rate per ton. Resps. brought an action against the alleged charterers, & then against applts., claiming in effect the difference between the two rates of freight as damages:—*Held:* (1) the main part of the claim was untenable; (2) resps. were entitled to damages for trouble they had incurred, outlays on telegrams, etc.; (3) they were also entitled to expenses of their action against the alleged charterers down to the closing of the record.—SALVESEN & CO. *v.* REDERI AKT. NORDSTJERNAN, [1905] A. C. 302; 74 L. J. P. C. 96; 92 L. T. 575, H. L.

Annotation:—**Distd.** Johnston *v.* Braham & Campbell, [1916] 2 K. B. 529.

1657. ——.]—A principal who is induced by an agent's negligence to enter into an adventure from which loss ensues is entitled to recover from the agent the amount he has actually lost, together with compensation for his loss of time. But the principal cannot add to that loss the profits he might have made if he had his time or money at his disposal instead of having embarked in the adventure which has miscarried.

Sect. 2.—*Principal's rights against agent: Sub-sect.* 16. *Sect.* 3: *Sub-sect.* 1, *A.*]

Defts., theatrical agents, obtained an engagement for pltf. at a music hall, negligently misrepresenting to her the amount of the weekly takings upon which her remuneration was based. The Cty. Ct. Judge awarded pltf. (*inter alia*) a sum of £20 as damages. The defts. appealed to the Div. Ct., contending that that sum had been awarded for loss of profits & not for loss of time, & was bad in law. The Div. Ct. dismissed the appeal:—*Held:* there was evidence upon which the Cty. Ct. Judge could award pltf. the £20 for her loss of time.—JOHNSTON *v.* BRAHAM & CAMPBELL, [1917] 1 K. B. 586; 86 L. J. K. B. 613; 116 L. T. 188; 61 Sol. Jo. 233, C. A.; *affg.* [1916] 2 K. B. 529.

1658. Agent to take charge of yacht—Negligence.]—Defts., agents at Southampton, where pltf.'s yacht lay, had written to pltf. inclosing their terms for taking charge of the yacht, viz., "1*d.* per ton per week, as the charge for taking entire charge of the vessel." Defts. also said they would undertake the duty of sending a man to look after the moorings, etc. A storm came on, in which the yacht broke from its moorings, & ran against another vessel, doing it damage. The yacht was libelled in the Admlty. Ct. & condemned, on the ground that it had not been properly secured. In an action to recover the amount which pltf. had been compelled to pay, the jury found defts. had been negligent:—*Held:* pltf. was entitled to recover.—HOLMES *v.* CLARK (1862), 3 F. & F. 336.

1659. Agent wrongfully transferring principal's shares to himself in payment of debt due by principal.]—Deft., the London agent of pltf., a merchant at Bombay, having a claim against him, partly for a debt, not disputed, & partly for a liquidated demand on a guarantee, which was disputed, wrongfully transferred to himself certain shares of pltf.'s, under a power of attorney, in satisfaction of his supposed claim. Pltf. sued him for the improper transfer:—*Held:* pltf. was entitled to recover the full value of the shares.—DANTRA *v.* STIEBEL (1863), 3 F. & F. 951.

1660. Agent to sell—Failure to collect price.]—Defts. being employed as agents for pltfs., a foreign co., to negotiate sales of candles for them in this country, conveyed to them an order from S. for 2,500 cases, to be delivered in London "f.o.b. export ship: 2½ per cent. discount against bill at 3 days' sight; goods, invoice, & draft for acceptance to be sent to us." Pltfs. did not in terms accept this proposal, but wrote to defts. instructing them not to part with the goods out of their possession or control until they had received the price thereof from S. Defts. informed S. that pltfs. accepted the order on condition that he handed them (defts.) a cheque in exchange for the bill of lading, & to this S. assented. On the arrival of the goods in London, defts. caused them to be transhipped on board a vessel called the *Laurel* (named by S.), bound for Melbourne, taking the mate's receipt in their own names. They afterwards tendered that document to S. & demanded payment, which he promised to make on the following Saturday. S. failed to pay according to his promise, & the *Laurel* sailed to Melbourne with the goods on board:—*Held:* the proper measure of damages was the value of the goods.—STEARINE KAARSEN FABRIEK GOUDA CO. *v.* HEINTZMANN (1864), 17 C. B. N. S. 56; 10 L. T. 872; 10 Jur. N. S. 881; 144 E. R. 22.

1661. Agent to distrain—Excessive distress.]—Deft. was employed by pltf. to levy a distress for rent on the goods of pltf.'s tenant for £15. Deft. realised £20 11*s.* & deducted £6 1*s.* for costs & charges of the distress, which was more than was allowed by Distress (Costs) Act, 1813 (c. 93). The tenant claimed damages from pltf. for excessive distress, & pltf. paid him £6 1*s.*:—*Held:* pltf. was entitled to recover from deft. the amount pltf. had paid the tenant in satisfaction of his claim for excessive distress.—MEGSON *v.* MAPLETON (1883), 49 L. T. 744; 32 W. R. 318.

1662. Agent to receive money—Taking cheque.]—PAPÈ *v.* WESTACOTT, No. 1186, *ante*.

For full anns., *see* S. C. No. 1186, *ante*.

1663. Agreed sum to be paid by agent on breach of covenant—Adjusted damages or penalty.]—An agreement between the East India Co. & one of its factors prohibited the factor from trading in certain goods on his own account & provided that the sum of £26,000 should be paid for breach of that restriction:—*Held:* having regard to the difficulty of proving damages in such a case, this was to be treated as adjusted damages agreed on beforehand, & not as a penalty.—EAST INDIA CO. *v.* BLAKE (1673), Cas. *temp.* Finch. 117; 23 E. R. 64.

SECT. 3.—AGENT'S RIGHTS AGAINST PRINCIPAL.

SUB-SECT. 1.—AGENT'S RIGHT TO REMUNERATION.

A. In General.

1664. Right to remuneration depends on contract.]—In order to found a legal claim for com-

1660 i. *Agent to sell—Sale below limit.*]—The measure of damages, where an agent has in breach of his duty sold goods of his principal below the limit placed upon them by the principal, is the loss which the principal has sustained, & if he has sustained no loss, he can only ask for nominal damages.—MANCHUBHAI NAVALCHAND *v.* TOD (1894), I. L. R. 20 Bom. 633.—**IND.**

1660 ii. —— *Failure to sell certain quantities within stated time limit.*]—Deft. agreed, at his own expense, to have M.'s quarter section of land subdivided into lots, a plan registered, & to sell not less than one hundred & fifty lots within three months & one hundred & fifty lots in each successive three months until all the lots, seven hundred & fifty in number, should be sold. Deft. failed to sell more than about two hundred of the lots, & pltfs. sued for damages:—*Held:* the measure of damages was the amount which M. would have realised out of the lots unsold or out of sales not carried out, if these had all been sold, less the actual value of the lots remaining on M.'s hands.—INLAND INVESTMENT CO. *v.* CAMPBELL (1914), 27 W. L. R. 740.—**CAN.**

1660 iii. —— *Failure to obtain best price—Collusion with purchaser.*]—C., pltf., employed deft. co. as his agent to effect a sale of certain property. In the course of negotiations with K. defts. took the following authority: "I hereby authorise you to offer on my account the sum of £4 7*s.* 6*d.* per acre or less if you think you can work business for C.'s property of 2,250 acres." Defts.' manager, in evidence, stated that K. had instructed him to offer £4 5*s.* per acre, & only to offer £4 7*s.* 6*d.* if business could not be effected at the lower price. In pursuance of these instructions defts.' manager submitted an offer of £4 5*s.* to pltf., withholding the offer of £4 7*s.* 6*d.*, & pltf. accepted the offer. Pltf. sued defts. for damages for the loss sustained owing to defts.' breach of duty:—*Held:* (1) the conclusion to be drawn from the authority was that K. was ready to pay £4 7*s.* 6*d.* for the property, & that if defts.' manager had not accepted & acted on instructions from K. he would have agreed to give that price; (2) pltf. was therefore entitled to succeed.—CHOLMONDELEY *v.* WRIGHT, STEPHENSON & CO. (1914), 33 N. Z. L. R. 659.—**N.Z.**

t. *Agent wrongfully abandoning agency.*]—In an action by a principal against his agent in a particular branch for abandoning his agency, the jury having given damages for losses sustained by the principal in collateral branches of his business, by reason of injury done to his credit by deft.'s abandonment of his agency:—*Held:* the damage was not too remote.—BOYD *v.* FITT (1864), 11 L. T. 280, Ex. Ch.—**IR.**

u. *Agent wrongfully retaining proceeds of sale of principal's property.*]—MCNEIL *v.* FULTZ, 38 S. C. C. 198.—**CAN.**

v. *Factor — Sale after revocation of authority to recoup advances.*]—If a factor, intrusted with goods & having authority to sell to recoup advances made by him equal in amount to the value of the goods, sells after a countermand of the authority, & before the sums advanced are repaid, the amount of damages in an action of trover will be only nominal.—OSBORNE *v.* SYNNOT (1876), 2 V. L. R. 209.—**AUS.**

PART VIII. SECT. 3, SUB-SECT. 1.—A.

1664 i. *Right to remuneration depends on contract.*]—A person appointed by a

mission on a sale, there must not only be a causal but also a contractual relation between the introduction of the purchaser & the ultimate transaction of sale.—TOULMIN *v.* MILLAR, No. 1739, *post.*

For full anns., *see* No. 1739, *post.*

1665. ——.]—To entitle a house agent to recover commission on the sale of a house he must prove a retainer by the owner.—WHITE *v.* LUCAS, No. 1695, *post.*

1666. ——.]—Where a person holding the control over an estate, & having power of selling it to secure repayment of liabilities which he had incurred on account of the owner, received the rents, sold the estate & then received the purchase money, for which while he retained it he was liable to interest:—*Held:* he was not on account of the acts thus done by him entitled, without any previous stipulation, to claim commission for the trouble which he had had in the matter, having acted for his own security & benefit thereby.—COURT *v.* ROBARTS (1837-8), 6 Cl. & Fin. 65; 7 E. R. 622.

1667. —— **Where agent acts gratuitously.**]—If a person agrees to serve another for nothing, the latter cannot compel the former to serve, because the agreement is without consideration; but if he does serve he cannot claim any compensation in respect of the service which he agreed to do for nothing (POLLOCK, C.B.).—WALKER *v.* HILL (1860), 5 H. & N. 419.

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number of subscribers for stock in a proposed joint stock co. to receive & remit their subscriptions to the head office of the co. is not the agent of the latter, & has no claim against the co. for his services.—QUEBEC & HALIFAX STEAM NAVIGATION CO. *v.* CUNARD (1835), Ber. 47.—**CAN.**

1664 ii. ——.]—The owner of real estate is not liable for a commission to a real estate agent of whose intervention he is not aware, the ground of the claim being simply that the real estate agent, without any authorisation from the owner, either express or tacit, called the attention of the purchaser to the property in question, & the sale resulted.—PLUMMER *v.* GILLESPIE (1896), Q. R. 10 S. C. 243.—**CAN.**

1664 iii. ——.]—In order to vest a real estate agent with the exclusive right of sale of an immovable, & entitle him to a commission, there must be a contract in writing, or at least an equivalent admission on the part of the owner of the existence of a contract. The mere statement of a price which the owner is willing to take, & of a commission which he is willing to pay, does not constitute such a contract.—MAINWARING *v.* CRANE (1902), Q. R. 22 S. C. 67.—**CAN.**

1664 iv. ——.] — The agency of a broker or agent charged with the sale of immovables upon a commission is a civil contract, & in proceedings by such agent for payment of his commission it is not necessary that the contract should be in writing. — LAFLAMME *v.* DANDURAND (1904), Q. R. 26 S. C. 499.—**CAN.**

1664 v. ——.]—Pltf., a land agent, introduced a purchaser to the owner, who himself sold the land to such purchaser. In the absence of evidence to show employment as agent & of ratification:—*Held:* pltf. not entitled to commission, as there was no contract of agency & no ratification or recognition of his voluntary agency.—HEFFNER *v.* NORTHERN TRUSTS CO. (1910), 14 W. L. R. 403.—**CAN.**

1664 vi. ——.]—LEMIEUX *v.* SEMINARY OF ST. SULPICE (1912), 18 R. L. N. S. 434. —**CAN.**

1664 vii. ——.]—In an action for an agent's commission on the sale of land, the memorandum or agreement in writing upon which pltf. based his claim was signed by deft., who alleged that it did not disclose the names of both parties to the contract, so as to satisfy Alberta Stat., c. 27, s. 1, substantially the same as Stat. Frauds, s. 4. The memorandum consisted of an offer signed by M. to exchange lands in B. C. for lands in Alberta, &, immediately below, an acceptance of the offer, signed by deft., with the words added, "the usual commission to be paid in the event of a sale being made." Opposite the signature of M. appeared the signature of pltf., apparently as a witness to M.'s signature, although not so stated in the memorandum:—*Held:* pltf.'s signature was only as witness; & there was no memorandum, to satisfy the stat., of a contract to pay him a commission, the person to whom "the usual commission" was to be paid not being named; & parol evidence was not, in the circumstances, admissible to show the employment of pltf. & the effecting of the exchange by his agency.—MCLEOD *v.* PETERSON (1911), 18 W. L. R. 162.—**CAN.**

1664 viii. ——.] — WESTERGARD *v.* WEYL (1912), 21 W. L. R. 403.—**CAN.**

1664 ix. ——.]—LANGLOIS *v.* BERTHIAUME (1913), 19 R. L. N. S. 367.—**CAN.**

1664 x. ——.]—Deft. authorised pltf. to find a purchaser for his land, but the land was eventually sold to a purchaser introduced by E., another agent of deft. During the negotiations for sale pltf. at the request of E. & the purchaser gave them considerable information about the land with which he was well acquainted. In an action by pltf. to recover from deft. either a commission or a *quantum meruit*:—*Held:* as pltf. had not given the information at the request or with the knowledge of deft., no promise on the part of deft. to pay for such services could be implied.—BROWNLEE *v.* MACINTOSH (1913), 23 W. L. R. 30; 3 W. W. R. 725; 9 D. L. R. 400; *affd.* 48 S. C. R. 588; 26 W. L. R. 906. —**CAN.**

1664 xi. ——.]—DUDEMAINE *v.* PELLETIER (1913), Q. R. 47 S. C. 154; 19 R. L. N. S. 380.—**CAN.**

1664 xii. ——.]— When authorising a broker to sell land for him, deft. declared positively that he would not take less than $100,000 net to him & that he would not pay any commission on that figure; in an action by the broker for commission on the sale of the land:—*Held:* the mere finding of a purchaser was not enough; there must be a contract to pay the commission claimed; to order payment of a commission in the circumstances would be to place it in the power of an agent to dictate to his employer at what price the latter should sell.—HUNT *v.* EMERSON (1914), 26 O. W. R. 789; 7 O. W. N. 15; 20 D. L. R. 381.—**CAN.**

1664 xiii. ——.]—Pltf., a land broker, found a purchaser for property owned by defts., with their authority; in the peculiar circumstances of the case:—*Held:* pltf. not entitled to commission, because there had been no agreement, express or implied, to pay same.—BOUTHILLIER *v.* DES GAGNES (1914), 28 W. L. R. 388.—**CAN.**

1664 xiv. ——.] — Under Alberta Stat., 1906, c. 27, a subsequent oral agreement to pay into a bank the amount claimed as commission on the sale of land pending the adjustment of the claim therefor is not admissible to establish a previous oral agreement to pay such commission.—SANDERS *v.* ANDERSON (1914), 29 W. L. R. 682; 18 D. L. R. 349; 7 W. W. R. 288; 7 Alta. L. R. 400.—**CAN.**

1664 xv. ——.]—A broker sued a shipbuilder for commission on the price of a ship built by defender, on the ground that the order had been obtained through pursuer's introduction & recommendation:—*Held:* pursuer had failed to prove any contract between him & defender for payment of the commission sued for, or to show that the order was the direct result of his intervention, & consequently he was not entitled to commission.—MOSS *v.* CUNLIFFE & DUNLOP (1875), 2 R. (Ct. of Sess.) 657.—**SCOT.**

1664 xvi. —— *Burden of proof.*] — DUDEMAINE *v.* PELLETIER (1914), Q. R. 47 S. C. 154; 21 R. de J. 306.—**CAN.**

1664 xvii. —— ——.]—A real estate agent cannot recover his commission on the sale of a grocery store unless he proves his authority. Any doubt thereupon should be decided against him. An agent who wished to be the agent of two contracting parties should obtain a formal authority from both parties.—CARON *v.* FAGNAN (1917), Q. R. 51 S. C. 543.—**CAN.**

1664 xviii. —— ——.] — LEMIEUX *v.* SEMINARY OF ST. SULPICE (1912), 18 R. L. N. S. 434, *ante.*—**CAN.**

1664 xix. —— ——.]—In an action for commission on sales of lots in a subdivision, whether effected through pltf. or through other agents of deft. or through deft. himself by virtue of an agreement alleged to have been made between pltf. & deft.:—*Held:* (1) pltf.'s evidence as to the alleged agreement was unsatisfactory, since at no time had he made demand upon deft. for commissions other than those actually received by him & entered as paid in the books of deft., & the claim had only been made after the relationship of principal & agent had been severed by deft. on account of pltf.'s conversion to his own use of moneys of deft.; (2) in the circumstances, there must be judgment for deft.—WRIGHT *v.* MACLACHLAN (1912), 20 W. L. R. 646; 4 D. L. R. 354.—**CAN.**

1664 xx. —— ——.]—Pltf., a land agent, claimed from deft. a commission for obtaining a purchaser of her land at the price named by her. Deft. had not carried out the sale & denied that she had authorised pltf. to sell at the price alleged by him. The evidence was conflicting:—*Held:* the action must be dismissed; to entitle pltf. to succeed, he must make out the stronger case & this he had not done.—GULLIVAN *v.* STREVEL (1912), 19 W. L. R. 778; 1 W. W. R. 450; 1 D. L. R. 44.—**CAN.**

1667 i. —— *Where agent acts gratuitously.*]—A special agent appointed for the Province at Ottawa was, by the Order in Council appointing him, to be paid expenses necessarily incurred & at Govt.'s request went as a delegate to London to support a petition. All expenses were paid:—*Held:* he was not entitled to payment for services, as the position was honorary & nothing was said as to remuneration in the contract.—DE COSMOS *v.* R. (1883), 1 B. C. R. 26.—**CAN.**

1667 ii. —— ——.]—In an action against deft., deft. claimed that he was entitled to set off sums due to him from pltf. for services rendered as financial agent, for commissions on sales of land, & for

Sect. 3.—Agent's rights against principal: Subsect. 1, A.]

1668. —— Express contract cannot be raised by custom.]—Where, on the construction of a written agreement, an agent is not entitled to commission, a claim for commission based on usage is not maintainable.—WORTHINGTON *v.* HARPER (1857), 30 L. T. O. S. 123.

1669. —— Contract may be express or implied.]—It is impossible to affirm, in general terms, that A. is entitled to commission if he can prove that he introduced to B. the person who afterwards purchased B.'s estate & that his introduction became the cause of the sale. If A. had no employment to sell, express or implied, he could have no claim to be remunerated (LORD WATSON).—TOULMIN *v.* MILLAR, No. 1739, *post.*

For full anns., *see* S. C. No. 1739, *post.*

1670. —— ——.]—A claim for remuneration on a *quantum meruit* can only arise on a promise to be implied from a request by the principal to the agent to perform services for him or upon the acceptance of services of the agent, so as to imply a promise by the principal to pay for those services (LOPES, L.J.).—BARNETT *v.* ISAACSON, No. 1718, *post.*

For full anns., *see* S. C. No. 1718, *post.*

1671. —— —— From custom.]—*Semble:* the broker's commission on the freight of a ship is 5 per cent., unless there be a special agreement or the ship be chartered upon a tender.—BROWN *v.* NAIRNE (1839), 9 C. & P. 204.

1672. —— —— ——.]—By the usage of trade in London, a broker who acts as such in chartering a ship to the Baltic is entitled to a commission of 5 per cent. upon the amount of the freight.—COHEN *v.* PAGET (1814), 4 Camp. 96.

1673. —— —— —— Custom must be proved.]—An insurance broker is not entitled, upon the ground of any usage of trade, to a commission of 12 per cent. on the balances which he pays over to the underwriters who employ him. Such allowance, however general it has been, is a gratuity merely, & not a demand of right. Nor can it be claimed, but upon the footing of contract, either express or implied, between the parties.—LEVI *v.* BARNES (1816), Holt, N. P. 412.

1674. —— —— —— Admissibility of evidence.]—Where A. employs a broker, B., to procure a charterparty on a commission of 5 per cent. to be paid whether the contract be executed or abandoned, A. cannot, under a plea of payment of a smaller sum *& non assumpsit ultrâ*, give evidence of a subsequent agreement to accept 2½ per cent. only, on account of the abandonment of the contract. Where the terms of the original contract are only inferred from the usage of the trade, a conversation in which B. agrees to take 2½ per cent. only, on account of the abandonment of the contract, is admissible to show that such reduction was as a contingent reduction part of the original contract.—BROAD *v.* M'CALMAR (M'AYLMER) (1835), 5 Nev. & M. K. B. 413; 1 Har. & W. 532; 5 L. J. K. B. 3.

1675. —— —— From professional position of agent.]—An auctioneer took an absolute assignment of chattels, etc., under a bill of sale by way of mtge., & afterwards conducted the sale of them by auction under an agreement with another incumbrancer:—*Held:* he was entitled to charge the usual commission on such sale, although no provision for a commission had been made either in the bill of sale or the agreement.—MILLER *v.* BEAL (1879), 27 W. R. 403.

1676. —— —— —— Even though work not done.]—Pltf. was employed by deft. to let a farm. The tenant agreed to purchase the farm stock upon deft.'s valuation. Pltf. claimed, *inter alia*, commission on the price of the stock, but deft. refused to pay it on the ground that he had made no valuation:—*Held:* (1) the charge was the customary charge, whether or not the valuation was done by the agent; (2) it was a reasonable charge, seeing pltf. might have been required to make the valuation.—TURNER *v.* REEVE (1901), 17 T. L. R. 592.

1677. —— —— From agent acting on principal's instructions.]—A., a supercargo, sailed to C. in charge of a ship called the *M.*, his commission being 5 per cent. Some time after his departure his principals despatched another ship called the *W.* to C., with instructions to A. to find a cargo for her & to consider her "in one turn" with the *M.*, & offering him in respect of this second ship a commission of 2½ per cent. A. wrote his principals

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travelling expenses:—*Held:* pltf. had extended to deft. the benefit of his wealth & financial standing & had enabled deft. to make profitable investments on his own account, & deft.'s services to pltf. had been rendered in return for these benefits, & there had been no contract for other remuneration.—BUREAU *v.* LAURENCELLE (1913), 24 W. L. R. 335; 11 D. L. R. 283.—**CAN.**

1671 i. —— *Contract may be express or implied—From custom.*]—A commission of 2½ per cent. is all that an agent is entitled to on the purchase & sale of property for his principal, in the absence of any express agreement between them on that point.—DUGGAN & WHITE *v.* TRIMMINGHAM & Co. (1819), 1 Nfld. L. R. 157.—**NFLD.**

1671 ii. —— —— ——.]—It is the custom in the Province of Quebec to pay a real estate agent a commission of 2½ per cent., payable by the vendor, in the absence of other agreement.—RAYMOND *v.* MARCOTTE (1912), Q. R. 46 S. C. 384.—**CAN.**

1671 iii. —— —— ——.]—Suppliant, an unregistered broker, acting under instructions from the Collector of Customs at Montreal, obtained a deed of certain property from the owners to the Crown. Before so doing the collector asked suppliant about his commission, who replied that 2½ per cent. was the regular commission but he would leave that to the collector to settle:—*Held:* the mandate was not gratuitous under Act 1702, C. C. P. Q., & suppliant entitled to 1½ per cent. commission.—WRIGHT *v.* R. (1914), 15 Ex. C. R. 203.—**CAN.**

1671 iv. —— —— ——.]—Pltf. claimed commission due to him as agent of defts. for the purchase of beans in the season of 1912-13. A fall in the price of beans having taken place, defts. sought to throw the goods purchased back on pltf. on the ground that he was their vendor & not their agent:—*Held:* defts. failed in their contention & pltf. was entitled to recover.—PETCH *v.* NEWMAN (1914), 26 O. W. R. 650; 6 O. W. N. 705.—**CAN.**

1671 v. —— —— ——.]—When a party employs a broker to sell pork, grain, stock, etc., for him on margin, he is bound to pay the broker the usual commission for his services.—DENTON *v.* ARPIN (1888), 29 L. C. J. 266.—**CAN.**

1671 vi. —— —— ——.]—A broker sued a shipbuilder for 2½ per cent. commission on the price of a ship built by defender, on the ground that the order having been the result of the introduction of the purchaser by pursuer, he was entitled to such commission by the custom of trade on the Clyde:—*Held:* by the custom of trade the broker was entitled, in the absence of special arrangement, to commission at the rate of 1 per cent., & defender had failed to prove that this right had been waived by pursuer.—WALKER, DONALD & Co. *v.* BIRRELL, STENHOUSE & Co. (1883), 21 Sc. L. R. 252.—**SCOT.**

1671 vii. —— —— ——.]—By a contract in writing for the sale of a hotel it was provided that, in case the transfer of the licence should be refused by the licensing bench owing to objections to purchaser, vendor should be entitled to deduct the agent's commission from the moneys paid under the contract, & that the balance should be refunded to purchaser by vendor. £500 was paid as part purchase-money. The sale having gone off owing to objections of purchaser he brought an action to recover the £500, & vendor paid £450 into ct., claiming to be entitled to retain £50 as agent's commission. Evidence was given on behalf of the purchaser by hotel brokers, who said their charge in such cases was £5 *5s.* or £10 *10s.*:—*Held:* there was evidence from which the jury might find what was a reasonable sum to be deducted as agent's commission.—RESCH'S, LTD. *v.* ALLAN (1911), 13 C. L. R. 194.—**AUS.**

rejecting the 2½ per cent. commission, but notwithstanding this proceeded to load the *W.*, that course being in his view the best for his principals: —*Held:* as he had acted on the instructions of his principals in loading the *W.* he was bound by their offer as to commission & could not recover more than 2½ per cent. in respect of the cargo of that ship.—MOORE *v.* MAXWELL (1843), 2 Car. & Kir. 554.

1678. —— —— **Broker employed by court—Broker acting as trustee.**]—A broker, having taken an assignment of several cargoes in trust to sell them on their arrival, & out of the proceeds to repay himself the amount of his advances, took possession of some of the cargoes, & sold them under the power in the deed, while the rest were sold under an order made in a suit instituted by him to enforce his security, by which it was directed that they should be sold by him in such manner & at such time as he & the receiver in the cause should agree, &, in the event of their differing, then as the master should direct:—*Held:* in the latter sales, he was entitled to the usual commission allowed to brokers employed by the ct.; but in the former, he was not entitled to any commission, having sold as trustee.—ARNOLD *v.* GARNER (1847), 2 Ph. 231; 16 L. J. Ch. 329; 9 L. T. O. S. 289; 11 Jur. 339; 41 E. R. 931.

Annotation:—**Apld.** The Benwell Tower (1895), 72 L. T. 664.

1679. Mode of remuneration — Difference between price & agreed-on figure.]—An agent, *e.g.*, a stockbroker, may be remunerated in such manner as he & the principal mutually agree. It is perfectly legal to employ a stockbroker to buy or sell stocks or shares at a fixed price & to give him as his remuneration any advantage he may obtain in the price, whether the price be less or more, according as he is employed to buy or sell.—PLATT *v.* ROWE (TRADING AS CHAPMAN & ROWE) & MITCHELL & CO. (1909), 26 T. L. R. 49.

1680. —— ——.]—A contract between a principal & an agent for sale of goods by the latter under which the agent is not only entitled to a commission, but also to retain any profits on the sales beyond an agreed price, requires the clearest possible evidence to support it, being inconsistent with the ordinary relation of principal & agent.—*Re* SIMPSON, *Ex p.* MORGAN (1876), 2 Ch. D. 72; 45 L. J. Bcy. 36; 34 L. T. 329, C. A.

For full anns., *see* ESTOPPEL.

1681. —— **Share of profits.**]—An agreement between A., a merchant, & B., a broker, that B. should purchase goods for A., & in lieu of brokerage, should receive a certain proportion of profits arising from sale, & bear a proportion of losses, does not vest in B. any share in the property so purchased, or in proceeds of it, although it may render him liable as a partner to third persons. —SMITH *v.* WATSON (1824), 2 B. & C. 401; 3 Dow. & Ry. K. B. 751; 2 L. J. O. S. K. B. 63; 107 E. R. 434.

Annotations:—**Distd.** Reid *v.* Hollinshead (1825), 4 B. & C. 867. **Consd. & Distd.** *Re* Starkey, *Ex p.* Jennings (1830), Mont. 45. **Consd.** Reynolds *v.* Bowley (1867), L. R. 2 Q. B. 41, 474. **Apld.** Alfaro *v.* De la Forre (1876), 34 L. T. 122. **Refd.** Potts *v.* Eyton & Jones (1846), 7 L. T. O. S. 281; Stocker *v.* Brockelbank (1851), 3 Mac. & G. 250.

1682. —— —— **Right to enforce sale to determine same.**]—A. & B., for whom land had been purchased by C. with a view to its being resold in building lots, on the land being conveyed to them signed a writing purporting to be a memorandum of an agreement between them relative to the land, by which it was agreed "that they should each advance half the purchase-money & receive interest on the same at 5 per cent., & that they were to have each one-third interest in the purchase & to reserve one-third of the profits arising therefrom for C., in lieu of his commission for purchasing, selling, surveying, valuing, & laying out the land in lots, or any other services that might be required of him; but it was clearly & distinctly understood that C. should have no power or authority whatsoever over the land, & he should not be entitled to receive any compensation therefrom until the whole was sold & paid for." The land having afterwards greatly increased in value, A. & B. refused to recognise C.'s interest in the speculation, & offered him a money compensation for his services. Thereupon C., who had objected from the first to the clause in the memorandum which excluded him from all control, as inconsistent with the original terms for which he had verbally stipulated, filed his bill for an immediate sale of the land:—*Held:* (1) defts., by repudiating the trust as to C.'s share, had devolved upon the ct. the discretion which they had by the memorandum reserved exclusively to themselves as to the time of sale; (2) C. was entitled to one-third; (3) it must be referred to the master to inquire whether it would be for the benefit of all parties that the land should be sold.—DALE *v.* HAMILTON (1847), 2 Ph. 266; 16 L. J. Ch. 397; 9 L. T. O. S. 309; 11 Jur. 574; 41 E. R. 945.

For full anns., *see* PARTNERSHIP.

1683. —— **Percentage on net profits — How calculated — Excess profits duty.**] — Pltf. was engaged as manager of four of the numerous branches of defts.' business, his remuneration being a commission of 15 per cent. of the net profits of those four branches treated as a whole. In computing the net profits of the four branches for the purpose of ascertaining the sum due to

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1679 i. *Mode of remuneration — On what sum commission payable.*]—In an action for commission upon the purchase of a mine, the question between the parties was one of fact (there being no contract in writing) as to whether pltf.'s commission of 10 per cent. was to be computed upon the price at which deft. bought the mine or upon the much higher price at which he sold, pltf. claiming that for his services he was given a share in the proceeds of the mine when sold & deft. alleging he was to pay 10 per cent. of the cost when the mine was sold:—*Held:* on the evidence pltf. had established his case.—ENDLEMAN *v.* ROTHSCHILD (1910), 16 O. W. R. 925; 2 O. W. N. 25.—**CAN.**

1679 ii. —— —— *Deduction of cash discount from commission—Effect of Statute of Limitations.*]—By an agreement made in 1891, A. became sole agent of B. for the sale of B.'s manufactures, A.'s remuneration being fixed at "a total commission of 7½ per cent. on the amount of such sales." On sales by A. purchasers were allowed (in addition to a trade discount) a discount which A. alleged was generally given on prompt payment. From 1891 to 1908, owing, as A. alleged, to a mistake in making up the accounts, these allowances to purchasers were deducted from the commission payable to A. In 1908, a further agreement was entered into whereby the prior agreement between A. & B. was continued & confirmed. After this agreement A. ceased to deduct from his commission any allowances for prompt payment made to purchasers. In 1909, A. brought an action claiming a declaration that, on the true construction of the agreement, he was not bound to deduct discount allowed to purchasers, & also an account & payment of what should be found due under this construction on the sales between 1891 & 1908. B. contended that A. was so bound to deduct, & pleaded the above stat., & claimed an account & payment of the amount payable by A. since 1908:—*Held:* (1) A. was not bound to deduct the allowances made to purchasers from the commission payable to him under the agreement; (2) A. was entitled to an account & payment of the amount found due on sales during the period of six years prior to the issue of the writ of summons.—KITCHEN & SONS, LTD. *v.* BRISBANE SOAP CO., LTD. (1910), S. R. Q. 301.—**AUS.**

1679 iii. —— —— *Principal conducting part of negotiations.*]—An agent is usually entitled to commission upon the whole of the purchase-money, whether paid in cash or secured by mtge.; but where the owner himself conducted part of the negotiations, a verdict calculated on the cash payment was not disturbed.—WOLF *v.* TAIT (1877), 4 M. R. 59.—**CAN.**

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pltf. for commission defts. claimed to deduct a proportionate amount of the "excess profits duty" payable in respect of the profits of their business:—*Held:* the "excess profits duty" could not be deducted in computing the net profits upon which pltf. was entitled to receive a commission.—THOMAS *v.* HAMLYN & Co., [1917] 1 K. B. 527; 86 L. J. K. B. 1009; 116 L. T. 475; 33 T. L. R. 129.

Annotation:—**Distd.** *Re* Condran, Condran *v.* Stark, [1917] 1 Ch. 639.

1684. Remuneration contract — Coupled with option to buy.]—Where a vendor has employed an agent to find substantial persons to purchase a property within a limited time upon specified terms, such agent to be paid a commission on the purchase-money after the completion of the sale, the agent cannot insist upon a conveyance to himself as purchaser.—LIVINGSTONE *v.* ROSS, [1901] A. C. 327; 70 L. J. P. C. 58; 85 L. T. 382, P. C.

Annotation:—**Distd.** Kelly *v.* Enderton, [1913] A. C. 191, P. C.

1685. —— ——.]—On Mar. 11, 1911, applts. agreed to give resps. an option to purchase on specified terms the properties in suit, & also agreed to pay them a commission on sale & to close the sale by deed & mtge. Resps. duly exercised this option in favour of S., to whom the deed & mtge. were executed. In a suit by applts. to set aside the transaction & recover the property sold on the ground that they had subsequently discovered that S. was a clerk in the office of resps., the latter being the real purchasers, but disqualified as being agents for sale:—*Held:* resps. were not merely agents to sell. An option to purchase was given to them in plain & unequivocal terms, & the subsequent clause as to a commission was not inconsistent therewith.—KELLY *v.* ENDERTON, [1913] A. C. 191; 82 L. J. P. C. 57; 107 L. T. 781, P. C.

1686. Agency continued after agreed period.]—B., a shipbroker in Liverpool, & C., a shipbroker in London, entered into a contract "exclusively to correspond" with each other in the ports of Liverpool & London respectively in the matter of freighting vessels with iron for the American market, denoting by the term "exclusive correspondence" that each party should have a reciprocal right of refusal of all ships to be engaged by either of them. The commissions received were to be divided in equal moieties between them. In Feb., 1851, B. & C. appointed D. their agent at Havre for chartering American ships in that port to carry cargoes of iron from South Wales to America. This agreement was to continue in force till Jan. 1, 1852, D. to receive half the usual commission, the other half to be divided between B. & C. This business was carried on till 1855, when the question arose as to the terms upon which it was carried on after Jan., 1852, B. contending that the old agreement still continued, in which case he was entitled to a moiety of the net commission, C. insisting that the agreement was at an end, & the usual mode must be adopted, & each receive the commission according to the number of ships he had influenced. B. also claimed, under an agreement dated Jan., 1852, half the net amount of commissions on all vessels chartered by C. to America from London or any other port in England:—*Held:* (1) the agreement entered into had been continued to be acted on by both parties; (2) B. was entitled to half the net amount of all commissions earned since Jan. 1, 1852.—PEARCE *v.* LINDSAY (1860), 1 L. T. 456, C. A.

See, further, Sub-sect. 1, L., *post.*

1687. To whom commission chargeable.]—Debt contracted in Jamaica made payable in London.

1684 i. *Remuneration contract — Coupled with option to buy.*]—BRESNER *v.* LEVESQUE (1912), 19 R. de J. 60.—**CAN.**

1684 ii. —— *Construction of.*] — Pltf. agreed to accept as his compensation for services in the sale of a mine "such further sum as H. shall consider right." A sale was effected, but H. declined to allow pltf. anything, & defts. refused to pay him anything for his services:—*Held:* the acceptance by pltf. constituted an agreement by him to abide by the decision of H. to the exclusion of any right of action for the subsequent services upon a *quantum meruit.*—CROASDAILE *v.* HALL (1895), 3 B. C. R. 384.—**CAN.**

1684 iii. —— ——.]— In an action by brokers for commission on the sale by defts. of mining properties (in which they had only an interest) to a purchaser introduced by pltfs.:—*Held:* upon the proper construction of the agreement made in regard to pltfs.' remuneration, they were not entitled to the full sum mentioned therein, but only to 10 per cent. upon the part of the purchase-money representing defts.' interest in the properties sold.—RUTHRAUFF *v.* BLACK (1911), 19 W. L. R. 437.—**CAN.**

1684 iv. ——————.]—Deft. gave to pltf. a signed memorandum "that in the event of your selling the property described on the opposite side of this card, I agree to pay a commission of 5 per cent." & also "in consideration of your advertising & pushing the sale I agree to list exclusively with you for a period of one month." The property was described as a section & a half, but only one section was sold. Pltf. brought the parties together, took part in the negotiations, & was the direct cause of the sale, & deft. consented to the sale going through for the section, leaving out the half section:—*Held:* the sale was a new contract in no way referable to the agreement as to commission on a sale for a price in money, &, as there had been no contract regarding remuneration to the broker in respect of the transaction which took place, he could not recover either by way of commission or *quantum meruit.*—COMO *v.* HERRON (1914), 49 S. C. R. 1 (leave to appeal to P. C. refused).—**CAN.**

1684 v. —— —— *With other documents.*]—Defts. agreed in writing with pltf. to sell to him a certain quantity of land. Pltf. only made one payment on account of this agreement. Defts. thereupon sought to cancel the agreement by reason of pltf.'s default in making the subsequent payments, but an arrangement was come to whereby pltf. agreed to complete the deal up to a certain number of acres, he being released from further obligations. There was evidence that pltf. in making the purchase originally acted not only for himself but for others, & as a matter of fact a letter was written to pltf. on behalf of defts. promising to pay pltf. a commission on each sale as made, the object being that pltf. should obtain something in the nature of a commission without the knowledge of the other persons interested in the purchase:—*Held:* the arrangement subsequently come to did not cancel the original agreement for sale, but was merely a substitution of a smaller for a larger quantity of land leaving such smaller quantity subject to the terms of the original agreement, & pltf. was entitled to his commission on selling the substituted quantity to a third party.—WILLOUGHBY *v.* SASKATCHEWAN VALLEY & MANITOBA LAND CO. (1910), 13 W. L. R. 526; 3 Sask. L. R. 130.—**CAN.**

1687 i. *To whom commission chargeable.*] — The pledgee of grain, pledged as collateral security for advances, is not responsible for commissions no sales made by an agent employed by the pledgor, & acting solely under his instructions as owner, although such sales were made only on such terms as were satisfactory to the pledgee.—HIRSCHFELDT *v.* UNION BANK OF CANADA (1895), Q. R. 7 S. C. 300.—**CAN.**

1687 ii. ——.]—An agent employed to buy land for his principal, to attend solely to that principal's interests, & to obtain for him the best bargain he can, is entitled to look to his principal for commission. A custom that he should look to the vendor for commission would, if it existed, be unreasonable.—TATE *v.* MUNRO (1891), 12 N. S. W. 71.—**AUS.**

1687 iii. ——.]—Pltf., a real estate agent, was charged with the duty of selling certain lands. Deft. promised him that if pltf. put him in communication with the owner, deft. would make it worth a good deal more to pltf. than a mere commission. Pltf. accordingly brought the parties together when it was agreed that at the price named the vendor was not to be responsible for the agent's commission which deft. must take care of. Deft. & pltf. then agreed for payment to the latter of 2½ per cent. on the optional price:—*Held:* deft.'s liability had been accepted in place of that of the vendor & deft. was liable.—CHAPMAN *v.* M'WHINNEY (1913), 24 O. W. R. 189; 4 O. W. N. 690; 9 D. L. R. 872.—**CAN.**

a. *Principal acting mala fide.*] — Deft., inventor of a carpet sweeper, employed pltf. as his agent to sell the patent rights. By an agreement in

The expense of commission to the agent remitting the money falls upon the debtor.—CASH *v.* KENNION (1805), 11 Ves. 314; 32 E. R. 1109.

Annotations:—**Refd.** Bertram *v.* Duhamel (1838), 2 Moo P. C. C. 212. **Mentd.** Manners *v.* Pearson, [1898] 1 Ch. 581, C. A.

1688. Principal cannot set off claim for unliquidated damages for negligence.]—BEST *v.* HILL, No. 1867, *post*.

For full anns., *see* S. C. No. 1867, *post*.

1689. Principal can set off previous overpayments.]—*Semble*: where an agent brings an action for his commission, etc., & has by collusion received more than he is entitled to, a ct. of law in some cases will allow a set-off, by treating him as having received so much money for the use of his employers; it must be a clear case.—NORRIS *v.* DAY (1841), 4 Y. & C. Ex. 475; 10 L. J. Ex. Eq. 43, Ex. Ch.

1690. Principal cannot interplead—Claims by two agents.]—Pltfs., a firm of auctioneers, sued deft. in a cty. ct. for commission in respect of a sale of a house. Another firm of auctioneers claimed from deft. a different sum for commission in respect of the sale of the same house:—*Held*: the two claims were not opposing or competing, & could not be made the subject of an interpleader order, either under the C. C. R. or under the R. S. C.—GREATOREX & Co. *v.* SHACKLE, [1895] 2 Q. B. 249; 64 L. J. Q. B. 634; 72 L. T. 897; 44 W. R. 47; 39 Sol. Jo. 602; 15 R. 501, D. C.

1691. Right to remuneration forfeited—Agent acquiring interest in subject-matter.]—A person who is employed as agent to sell land cannot, if he himself purchases it, charge his principal with commission on the sale, whether he purchases alone or jointly with others.

A. employed B. to sell building land. B., who was then one of the promoters of a building co., brought an offer from C. & D. for the purchase of the land, & the sale was completed. Subsequently B., C., & D. were registered as members of the co.:—*Held*: B. had no claim for commission on the sale of the land.—SALOMONS *v.* PENDER, No. 1580, *ante*.

Annotations:—**Consd.** Robinson *v.* Mollett (1875), L. R. 7 H. L. 802, H. L. **Apld.** Andrews *v.* Ramsay, [1903] 2 K. B. 635; Hippesley *v.* Knee (1904), 74 L. J. K. B. 68; Stubbs *v.* Slater, [1910] 1 Ch. 195. **Refd.** Tetley *v.* Shand (1871), 25 L. T. 658.

For full anns., *see* S. C. No. 1580, *ante*.

See, further, Sub-sect. 1, M. (c), (d), *post*

1692. Recovery of judgment for remuneration—Right to appointment of receiver.]—Pltf., having recovered judgment against a co. incorporated in Germany for an account of the commission due to him as sole agent of the co. in the United Kingdom, applied for the appointment of a receiver of the debts due & to become due to the co. from its customers in England. The co. had no place of business in this country & no assets or property which could be taken by any ordinary process of execution; the only assets which it had here were the debts due & to become due from the persons to whom the co. had supplied goods; the co.'s representative had since the judgment called upon them to obtain payment of their accounts, & the co. intended to collect all the moneys due to it in England & thus prevent pltf. from obtaining the fruits of his judgment. Though pltf. knew who the customers of the co. in this country were, he did not know whether any debts were due from them, or the amounts of the debts, if any:—*Held*: there were special circumstances in the case which rendered it just or convenient to appoint a receiver.—GOLDSCHMIDT *v.* OBERRHEINISCHE METALLWERKE, [1906] 1 K. B. 373; 75 L. J. K. B. 300; 94 L. T. 303; 54 W. R. 255; 22 T. L. R. 285; 50 Sol. Jo. 238, C. A.

B. When Transaction contemplated is completed.

(a) Through Principal himself.

1693. General rule.]—To enable a broker to recover a commission on the sale of a ship, the mere writing, pltf. was to be paid 25 per cent. of the amount received by deft. It was a term of the agreement that no other agent should have power to act without consent of pltf. Deft. himself effected a sale, as it appeared, with the intention & design *malâ fide* of preventing pltf. from making a commission:—*Held*: (1) the agency contemplated was not limited to the particular occasion; (2) while was nothing to prevent a principal himself selling in good faith, here deft. had committed a trick to defraud the agent & had rendered himself liable, not indeed for commission, but for damages. *Simpson v. Lamb* (1856), 17 C. B. N. S. 603; *Rhodes* v. *Forwood* (1876), 1 App. Cas. 256, cited.—WILSON *v.* DEACON (1911), 19 O. W. R. 433; 2 O. W. N. 1229; *affd.* 20 O. W. R. 348; 3 O. W. N. 163.—**CAN.**

b. —— *Principal using offer procured to sell to another.*]—Deft. employed pltfs., real estate agents, to sell his property at a stated price upon a commission of 2½ per cent. Pltfs. procured a purchaser able & willing to pay the price & submitted a written offer from him to deft. Deft. had given a written option to L. on the property. This was a mere offer to sell without consideration & in no way prevented deft. from selling to any one else. M., the purchaser procured by pltfs., signed an offer to buy, which offer one of pltfs. took to deft., who made no objection to it but said he wanted to look into the matter. Deft. desired to use M.'s offer as a lever to move L. to purchase in order to save paying commission. L. bought & deft. telephoned pltfs. that he had sold the property to another:—*Held*: pltfs. had done all they were called upon to do when they produced a purchaser able & willing to buy, & it was immaterial whether what they were entitled to was to be regarded as commission *quantum meruit* or damages, as however the case was put pltfs. were entitled to the commission claimed by them. *Topping* v. *Henley*, 3 F. & F. 325; *Prickett* v. *Badger*, 1 C. B. N. S. 296; *Bull* v. *Price*, 7 Bing. 237, cited.—MARRIOTT *v.* BRENNAN (1907), 10 O. W. R. 159; 14 O. L. R. 508.—**CAN.**

1689 i. *Principal can set off previous overpayments—In respect of orders not bonâ fide.*]—W. was engaged under a written agreement as canvasser for defts., & was to receive 15 per cent. commission on each order, of which 7½ per cent. was to be paid as an "advance commission" on the receipt by defts. of each *bona fide* order procured by pltf. The agreement provided that if pltf. should "receive payment in advance of the delivery for any orders which will afterwards fail to be paid for, he shall refund all such advance commission." While the goods were in course of delivery, & before the balance of the commission became due, a number of orders for which pltf. received 7½ per cent. were repudiated:—*Held*: defts. were entitled to a set-off in respect of orders not *bonâ fide*.—WAY *v.* PICTURESQUE ATLAS PUBLISHING CO. (1887), 8 N. S. W. 382.—**AUS.**

1690 i. *Principal cannot interplead—Claims by two agents.*]—On an application by the vendor of land for an interpleader order with a view to determining which of two claimants for a commission agreed to be paid in respect of the sale was entitled thereto, it appeared that appct. had made the agreement with W. & Co. but had also had some conversation with L. Co. in reference to a proposed buyer:—*Held*: appct. having admitted his promise to pay W. & Co. without taking an indemnity from them against any claim from L. Co., he was precluded from taking interpleader proceedings, & the motion must be dismissed with costs to W. & Co.—*Re* RANKIN & WINYARD (1913) 24 O. W. R 63; 4 O. W. N. 772.—**CAN.**

1690 ii. ——.]—By way of defence to a claim for commission on the sale of land defts. pleaded that pltf. who negotiated the sale practically did so while in their employ, & claimed that the commission belonged to them. It appeared that when pltf. was asked by T. to get the property for him at the lowest price he had left defts.' service & was doing business on his own account. It was not disputed that pltf. procured the actual signing of the offer. In an interpleader issue:—*Held*: though pltf. had acquired his knowledge of the matter while in defts.' service, defts. were not entitled as against pltf. to the commission earned as above stated, though they might possibly have a right or claim to commission other than that dealt with in the issue then before the ct.—RICE *v.* PROCTOR (1913), 24 O. W. R. 527; 4 O. W. N. 1242; 11 D. L. R. 603.—**CAN.**

1691 i. *Right to remuneration forfeited—Agent acquiring interest in subject-matter.*] An agent employed to sell certain property sold it ostensibly to B., but the agent had agreed with B. to take a half-share in the property in partnership with B. The property was sold upon terms previously fixed by the principal & the principal thereafter adopted the sale:—*Held*: the agent was not entitled to commission. *Salomons* v. *Pender* (1865), 3 H. & C. 639, folld.—HARGREAVES *v.* ANDERSON, S. A. L. R. (1915), Appellate Division, 519.—**S. AF.**

PART VIII. SECT. 3, SUB-SECT. 1.—B. (a).

1693 i. *General rule.*]—Under a written

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fact of his having introduced the purchaser to the seller will not be sufficient; but if it appears that such introduction was the foundation on which the negotiation proceeded, the parties cannot afterwards by agreement between themselves withdraw the matter from the broker's hands, & deprive him of his commission. He will be entitled to his commission if he was, up to a certain time, the agent or middle-man between the parties, although the contract be afterwards completed without his instrumentality or interference.—WILKINSON *v.* MARTIN (1837), 8 C. & P. 1.

1694. ——.]—Pltfs. being ordered to sell an estate, or to raise money upon it, & being unable to effect a sale, applied to A., by negotiation with whom money was obtained, but without any further interference on the part of pltfs.:—*Held:* they could not recover more than 5*s.* per cent. commission for procuring this money.—PRYCE *v.* WILKINSON (1825), 2 Bing. 470; 10 Moore, C. P. 177; 3 L. J. O. S. C. P. 103; 130 E. R. 388.

1695. ——.]—To entitle a house agent to recover commission on the sale of a house, he must prove the house was sold through his instrumentality.—WHITE *v.* LUCAS (1887), 3 T. L. R. 516.

1696. —— **Shipbroker introducing charterer.**]—If a broker mentions the name of the charterer to the shipowner, & he takes advantage of the information, & concludes the charter himself, without the further intervention of the broker, that does not deprive the broker of his right to his commission (MARTIN, B.).—COUSINS (COUSENS) *v.* MITCHESON (1862), 3 F. & F. 236; 1 New Rep. 240.

1697. Entry on books.]—Pltfs. were clerical agents, & on being employed to buy or sell livings charged a fee of 3 guineas for entering the particulars in their books & making inquiries, & £5 per cent. upon the purchase-money on a sale being effected. Deft. employed them to sell an advowson, &, as the value was large, they consented to forego the fee of 3 guineas. Deft. having afterwards himself sold the advowson, pltfs. brought an action, & in the first count of the declaration claimed the amount of the commission, etc., as damages for wrongful revocation of the authority to sell, & they also made a claim on a *quantum meruit*:—*Held:* they were not entitled to recover on the special count, nor upon the *quantum meruit*, as there was no evidence of anything done by them which was not ordinarily covered by the fee of 3 guineas.—SIMPSON *v.* LAMB (1856), 17 C. B. 603; 25 L. J. C. P. 113; 26 L. T. O. S. 203; 2 Jur. N. S. 91; 4 W. R. 323; 139 E. R. 1213.

Annotation:—**Reid.** Prickett *v.* Badger (1856), 1 C. B. N. S. 296.

1698. Third party taking another house first.]—Deft. placed a house in pltfs.' hands to sell or let. Pltfs. introduced a client to deft., who in the first instance took another house in the neighbourhood, but ultimately purchased deft.'s house from him direct:—*Held:* pltfs. were entitled to their commission upon the sale of the house.—STEERE *v.* SMITH (1885), 2 T. L. R. 131.

1699. Introductions made before contract between principal & agent.]—In the case of a contract to pay commission on introducing business, the contract applies to introductions made subsequent to the contract & introductions made simultaneously as being part of the same transaction as the contract even though the actual introduction was made a short time before, but it does not apply to an introduction made independently of & before the contract.—SAMUEL *v.* SANDERS BROTHERS (1886), 3 T. L. R. 145, C. A.

1700. Previous negotiations with third party before employing agent.]—Pltfs., being employed by deft. to find a purchaser for the W. estate, introduced A., who ultimately became the purchaser. Deft. refused to pay pltfs. commission on the purchase on the ground that before he had placed the matter

agreement pltf. was to procure a loan for deft. & receive a commission if the loan was obtained by him; he negotiated with W. who agreed to furnish the money on getting $40 commission. Meantime deft. borrowed elsewhere:—*Held:* pltf. had not earned commission in the proper sense.—HETU *v.* BRODEUR (1883), 6 L. N. 59.—**CAN.**

1693 ii. ——.]—An agent for purchase of lumber on commission entered into negotiations with P., which failed. P. & deft. then agreed on terms, & a purchase resulted:—*Held:* the agent not entitled to commission, the evidence not sustaining his right to it.—BOYDELL *v.* SNARR (1855), 6 C. P. 94.—**CAN.**

1693 iii. ——.]—Pltf. employed to sell timber by the *auteur* of deft. tried to effect a sale, & obtained an offer which his principal declined; later the principal wrote to him withdrawing the specifications for the purpose of raising advances on them but telling him he should not have his trouble for nothing, & that the specifications should be returned to him. Subsequently the principal died, & defts. themselves sold:—*Held:* pltf. not entitled to claim brokerage as he had not effected the sale.—STUBBS *v.* CONROY (1871), 2 Q. L. R. 53.—**CAN.**

1693 iv. ——.]—On a claim by defts., as pltf.'s agents in sale of property, for commission:—*Held:* as defts. could not show that they had brought about a sale, the claim must be dismissed.—SAM CHONG *v.* LEE (1909) 11 W. L. R. 200.—**CAN.**

1693 v. ——.]—A property agent is entitled to commission although the transaction has been taken out of his hands, & has been settled without his direct intervention, in regard to the final contract, if he introduced the parties as buyer & seller, & was in fact the *causa causans* of the sale. It is not required that it should be proved that the introduction by the house agent should have formed the purchaser's sole motive, but only that the agent as such materially contributed to the sale. *Green* v. *Bartlett* (1863), 32 L. J. C. P. 261; *Wilkinson* v. *Alston* (1879), 48 L. J. Q. B. 733, cited.—ROBERTSON *v.* BURRELL (1899), 6 S. L. T. 368.—**SCOT.**

1693 vi. ——.]—In 1899 pltfs. wrote to three engineering firms in Scotland suggesting their amalgamation & offering their services as intermediary. After some negotiations a contract providing *inter alia* for pltfs.' commission at 2½ per cent. on the price was proposed but never executed. Early in 1900 the firms informed pltfs. the amalgamation would not be proceeded with. In 1903 these three firms were amalgamated, but pltfs. were not employed & they claimed a commission of £34,000, being 2½ per cent. on the purchase price by a co. of the businesses, & alternatively on a *quantum meruit*:—*Held:* pltfs.' averments were irrelevant, there being no concluded contract & they had no valid claim for *quantum meruit*.—VAN LAUN & CO. *v.* NEILSON, REID & CO. (1904), 41 Sc. L. R. 569.—**SCOT.**

1700 i. *Previous negotiations with third party before employing agent.*]—T. & H. had had communications with deft. regarding the purchase of certain land belonging to him. About same time deft. received a letter from pltf. inquiring about same land, telling deft. that he had two purchasers in view, but admitted that T. & H. were not one of them. Eventually deft. signed a listing form for the sale, at a commission. Pltf. first heard of T. & H. as probable purchasers from deft. himself. Deft. then told pltf. that T. & H. were pressing for a close, but pltf. replied "Let them sweat; it will be easier to deal with them after a while." The intending purchasers then met deft. & closed the deal:—*Held:* because pltf. was not willing or not in a position to perform the entirety of his contract, deft. was not bound to abstain from dealing with a purchaser whom he himself had found, & pltf. not entitled to recover.—THOMPSON *v.* MILLING (1908), 8 W. L. R. 622; 1 Sask. L. R. 150.—**CAN.**

1700 ii. ——.]—Pltf. claimed a commission on the sale of land. The land was sold for a price satisfactory to deft., but deft. denied that the purchaser was found by pltf.:—*Held:* although pltf. did not obtain the purchaser, the latter having been in correspondence with deft. about the land before pltf. had anything to do with him, yet as pltf. assisted the sale, he was entitled to some remuneration for his services, especially as deft. recognised his assistance by asking him to bring the purchaser to him, & pltf. should have half the commission claimed.—MUNROE *v.* BEISCHEL (1907), 8 W. L. R. 63; 1 Sask. L. R. 238.—**CAN.**

1700 iii. ——.]—Agents for sale of land for an owner who was already in negotiation with K. to sell it, wrote to K. about the property, & K. asked them to let him know if any one else was likely to purchase. The agents, having found another probable purchaser, suggested to the owner he should let K. know of this. The owner informed K. & thereupon sold to him without communicating with the agents:—*Held:* the agents were not entitled to commission, the relation of buyer & seller not having been brought about by their act.—MOWLEM *v.* ENGELS (1898), 17 L. R. 477.—**N.Z.**

in their hands he had been negotiating with A. :—*Held :* (1) there was nothing in the agreement between pltfs. & deft. to prevent commission being payable on the introduction of A. ; (2) the jury was, in the circumstances, justified in inferring the original negotiations with A. had fallen through, & that the property was reintroduced to A.'s attention through the instrumentality of pltfs. ; (3) pltfs. were entitled to recover.—THOMPSON, RIPPON & Co. *v.* THOMAS (1895), 11 T. L. R. 304, C. A.

1701. *S. P.* CUNARD *v.* VAN OPPEN, No. 1707, *post.*

For full anns., *see* S. C. No. 1707, *post.*

1702. Agent efficient cause of transaction.]—In an action by applt. to recover an agreed commission

1702 i. *Agent efficient cause of transaction.*]—An agent to sell property of M. advertised & negotiated with several persons, one of whom, G., he sent to M., but, no sale resulting, M. notified the agent he wished to withdraw the property & occupy it himself. M. paid the agent his account for advertising & two days afterwards sold to G. :—*Held :* M. liable to the agent for commission claimed of 2½ per cent. on price.—THOMAS *v.* MERKLEY (1885), 32 L. C. J. 207.—**CAN.**

1702 ii. ——.]—A real estate agent introduced a purchaser who paid a deposit, but afterwards purchased from the principals direct. The agent was not expected to procure, & did not procure, the purchaser to sign any written contract at the time of deposit : —*Held :* the agent was not entitled to the full remuneration payable on a binding contract, but only to one-half that amount.—BOUGHTON *v.* HAMILTON PROVIDENT SOCIETY (1895), 10 M. R. 683.—**CAN.**

1702 iii. ——.]—Deft. listed his land with pltf. to effect a sale thereof, pltf. to receive 5 per cent. commission on sale of the land at $10 an acre or over & not to sell under that price without deft.'s consent. Pltf. introduced the agent of P. as a prospective purchaser & P. & his agent inspected the land. The sale was not effected then, but later the land was sold to P. by deft. at a price less than $10 an acre. P. gave evidence that "he was influenced to see the land by having the particulars & knowing the price from pltf." :—*Held :* pltf. entitled to recover what his services were reasonably worth, as the property was sold through his instrumentality. The fact that P. was aware, from other sources, that the land was for sale did not matter, as P. admitted that he approached deft. in consequence of the information from pltf. *Wilkinson* v. *Alston*, 48 L. J. Q. B. 733 ; *Green* v. *Bartlett*, 14 C. B. N. S. 681 ; 32 L. J. C. P. 261, follds. *Prickett* v. *Badger*, 1 C. B. N. S. 96 ; *Mansell* v. *Clements*, L. R. 9 C. P. 139, cited.—FITZSIMON *v.* WALKER (1904), 7 Ter. L. R. 204.—**CAN**

1702 iv. ——.]—A principal employed an agent to sell property at a fixed price, no commission being mentioned. After the agent had found a purchaser, who refused to give the price plus the commission, the principal sold the property direct to the purchaser at the fixed price :—*Held :* the agent entitled on a *quantum meruit* to full commission on the fixed price. *Wilkinson* v. *Martin* (1837), 8 C. & P. 1, folld.—AIKINS *v.* ALLAN (1904), 24 C. L. T. 154 ; 14 Man. L. R. 549.—**CAN.**

1702 v. ——.]—Deft. intrusted pltf. with the sale of property at the price of $65,000, & pltf. procured a purchaser at that price. At the last moment deft. refused to sign the deed of sale, & later, with pltf.'s consent, same purchaser entered into direct negotiations with deft. & bought the property for $75,000, it being specially stipulated in the deed that $3,750 was to be paid to the agent as commission in respect of the sale :—*Held :* pltf. was the procuring cause of the sale & was not to be deprived of his commission because with his consent the purchaser had continued the negotiations with deft.—CRUIKSHANE *v.* PRUDHOMME (1907) 3 E. L. R. 23 ; Q. R. 31 S. C. 313.—**CAN.**

1702 vi. ——.]—In an action by pltf. to recover commission upon sale of deft.'s ranch :—*Held :* (1) it was not necessary that pltf. should have personally introduced the purchasers to deft. ; (2) pltf. was entitled to recover, as it was through pltf.'s instrumentality that the sale was concluded, & the information given by pltf. at the time was such as should have put deft. upon inquiry as to whether the purchasers were those to whom pltf. had referred :—*Mansell* v. *Clements*, L. R. 9 C. P. 139, cited.—INGS *v.* ROSS (1907), 7 Terr. L. R. 70 ; 6 W. L. R. 612.—**CAN.**

1702 vii. ——.]—Pltfs. claimed commission on the purchase by deft. of a block of land. He had admittedly brought deft. into negotiation with the vendors & was to have been paid a commission of 2 per cent. if the sale was effected, but subsequently pltf. was notified that deft. elected that he would not pay the amount the vendors asked & "as far as he was concerned the deal was off." Later on deft. renewed the negotiations & purchased the property at the figure he had previously refused to pay :—*Held :* deft.'s letter having been written *bonâ fide*, it put an end to the contractual relation which was necessary to found a legal claim for the commission, & pltf. could not recover. *Toulmin* v. *Millar* (1887), 58 L. T. 96, folld.—PHILIP *v.* BAUER (1907), 5 W. L. R. 187.—**CAN.**

1702 viii. ——.]—Pltf. introduced some settlers to deft. as a result of which negotiations ensued, which terminated in the purchase by the settlers of several lots of land. In an action by pltf. to recover from deft. the commission which deft. had agreed to allow him :—*Held :* as the sales had been brought about by pltf.'s efforts he was entitled to recover.—SCHUCHARD *v.* DRINKLE (1908), 7 W. L. R. 844 ; 1 Sask. L. R. 16.—**CAN.**

1702 ix. ——.]—Deft. listed his property with pltfs., real estate agents, for sale at a price on named terms. Pltfs. mentioned the property to F., who thereafter negotiated with deft. & concealed from him that pltfs. had sent him. Deft. then sold to F. on terms less advantageous than those in the agreement between pltfs. & himself. Deft. was not put upon inquiry as to whether pltfs. had sent F. to him :—*Held :* pltfs. could recover neither a commission on sale nor anything for services by way of *quantum meruit*. *Mansell* v. *Clements* (1873), L. R. 9 C. P. 139, & *Green* v. *Bartlett* (1863), 14 C. B. N. S. 681, cited.—LOCATORS *v.* CLOUGH (1908), 17 Man. L. R. 659.—**CAN.**

1702 x. ——.]—Pltf. occupied a shop on property of deft., with whom he had discussed the terms & price of sale of the property, though no general agency to sell had been conferred on him. F. came into the shop & on his inquiring as to the purchase of the property, pltf. telephoned deft. that he had a prospective purchaser, & obtained from him the terms, asking whether deft. would pay him a commission ; deft. said he would. Pltf. then gave F. deft.'s name & address, & a few hours later F., without mentioning pltf.'s name, arranged with deft. to purchase. Deft. said he did not connect F. with pltf.'s prospective purchaser :—*Held :* deft. was put on inquiry whether F. was the person referred to by pltf., & pltf. was entitled to commission at the usual rate on $14,000.—ROBERTSON *v.* CARSTENS (1908), 18 Man. L. R. 227 ; 7 W. L. R. 742 ; 9 W. L. R. 397.—**CAN.**

1702 xi. ——.]—Deft. listed with pltfs. for sale or exchange ten acres of land. C. opened negotiations for an exchange. While the deal was being transacted deft. telephoned pltfs. asking if any disposition of his property had been effected, & was replied to in the negative. He then said that he withdrew the property, & at or about the same time consummated a deal for the property mentioned by C. to pltfs., C. having opened negotiations with him direct :—*Held :* the relationship of vendor & purchaser had been brought about by pltfs., & C. had endeavoured by approaching deft. to deprive them of their commission.—LALANDE & CLOUGH *v.* CARAVAN (1909), 14 B. C. R. 298 ; 11 W. L. R. 243.—**CAN.**

1702 xii. ——.]—Pltf., an estate agent, employed to sell a farm belonging to deft. on the terms of "no sale, no charge," without special instructions so to do, advertised the farm as for sale, & the advertisement was seen by J. acting as a friend of S. who ultimately purchased the farm directly from deft. J. obtained certain particulars regarding the farm from pltf., but S. was not known to pltf. even by name until after the sale was completed :—*Held :* as pltf. was wholly ignorant of S.'s existence until after the sale & had never obtained any binding contract from the intending purchaser, he could not successfully claim commission.—WILLIS *v.* COLVILLE (1909), 14 O. W. R. 1019 ; 1 O. W. N. 212.—**CAN.**

1702 xiii. ——.]—An agent for sale, whose principal afterwards sells to a purchaser in ignorance that such purchaser has been sent to him by the agent, will not necessarily be entitled to commission. But where a purchaser was sent by an agent & the circumstances were deemed to be such as to put his principals on inquiry, & their manager had failed to make sufficient inquiry :—*Held :* the agent entitled to commission on the sale.—HUGHES *v.* HOUGHTON LAND CO. (1909), 18 Man. L. R. 686 ; 9 W. L. R. 646.—**CAN.**

1702 xiv. ——.]—Pltfs. having obtained judgment for the amount claimed as commission on sale of a farm amounting to 5 per cent., the sale having been carried through by deft. :—*Held :* pltfs. did not effect a sale or do anything of advantage to deft. & 2½ per cent. was sufficient compensation.—WADDINGTON *v.* HUMBERSTONE (1910), 15 O. W. R. 824.—**CAN.**

1702 xv. ——.]—T., in 1904, having listed his property with pltf. at the selling price of $30,000, the latter introduced P., who obtained from T. a three months' option, upon which $100 was paid. This was renewed for $50, & the second option was allowed to lapse. A small portion of the property was sold to L. after the expiration of the second option, on which pltf. received a commission. In 1906 negotiations were revived between T. & P., which resulted in a sale to P. of the property for $26,000, but pltf. was unaware of either the negotiations or sale at the time. Pltf., on learning of the sale, claimed commission :—*Held :* pltf. entitled to recover.—LEE *v.* O'BRIEN & CAMERON (1910), 15 B. C. R. 326.—**CAN.**

1702 xvi. ——.]—Pltfs., agents for sale of land on commission, procured a purchaser of the land at the price & on the terms stipulated, although they did not obtain a deposit or a writing from the purchaser. The principal then ignored the agents who he was aware had pro-

Sect. 3.—Agent's rights against principal: Subsect. 1, B. (a).

on the proceeds of a sale of mining property by resp. co. the latter contended that he was not the efficient cause of the particular sale effected:—*Held:* as applt. had brought the co. into relation with the actual purchaser, he was entitled to recover, although the co. had sold behind his back on terms which he had advised them not to accept.

If an agent brings a person into relation with his

cured the purchaser, & sold direct to such purchaser at the price less commission: *Held:* pltfs. entitled to commission.—ROSS *v.* MATHESON (1910), 13 W. L. R. 490.—**CAN.**

1702 xvii. ——.]—Pltf. & one of defts. after a conversation arranged on the selling price of a piece of real estate at $6,000. There was a conflict in the evidence as to whether that was to be a net price, but on the occasion the parties next met, a few days later, deft. in question said "Property is gone up now, & I shall want $6,000 net." Pltf., on same day, but before the change in price, brought the property to the notice of a purchaser, & told deft. about him. Pltf. also changed his advertisement to read $6,500 as the selling price. The purchaser refused to pay more than the $6,000 & eventually bought direct from the owners at that price:—*Held:* pltf. not entitled to a commission.—HOLMES *v.* LEE HO & LOU POY (1911), 16 B. C. R. 66; 15 W. L. R. 226.—**CAN.**

1702 xviii. ——.]—An owner of land instructed an agent to sell his immovable property. The agent introduced a prospective purchaser, M., who was unable to buy himself, but who introduced two others who eventually bought the land from the owner at a reduced price:—*Held:* the agent was the *causa causans* of the sale & was entitled to a commission on the price for which the land was sold. *Burchell* v. *Gowrie & Blockhouse Collieries*, [1910] A. C. 614, folld.; *Wilkinson* v. *Martin*, 8 C. & P. 1; *Green* v. *Bartlett*, 14 C. B. N. S. 681; *Barnett* v. *Isaacson*, 4 T. L. R. 645, cited.—STRATTON *v.* VACHON (1911), 44 S. C. R. 395.—**CAN.**

1702 xix. ——.]—Deft. entered into an agreement with pltfs. under which they were to sell property at a certain price within a certain time. Pltfs. failed to effect a sale at the figure named within the time, & after the time had expired defts. arranged a sale, on less advantageous terms, with a purchaser introduced by pltfs.:—*Held:* pltfs. did not effect a sale, nor find a purchaser willing to purchase on the terms mentioned. Before an agent can recover on a *quantum meruit*, where a sale has been effected at a price less than that stipulated for by the principal, it must appear that the sale was made to a purchaser introduced by the agent, & that the contract between principal & agent was such that the agent was to be entitled to commission, although the price obtained was less than that specified to the agent. *Toulmin* v. *Millar*, 58 L. T. 96, cited.—BLACKSTOCK *v.* BELL (1911), 16 W. L. R. 363; 4 Sask. L. R. 458.—**CAN.**

1702 xx. ——.]—Deft. was offering his ranch for sale; pltf. first took an option, but, failing to promote a syndicate to purchase, he undertook to sell for $100,000 net with commission to himself of $5,000. He failed to sell on those terms, but introduced H., who subsequently bought at $100,000, & swore he was willing to pay $105,000 if demanded. Pltf. sued for $5,000 commission, & the jury found for pltf.:—*Held:* the jury might reasonably have inferred that deft. accepted pltf.'s activity as including the ultimate transaction with H., & have come to the conclusion that he was entitled to commission.—ROWLANDS *v.* LANGLEY (1911), 17 W. L. R. 443; 16 B. C. R. 72; *affd.* 46 S. C. R. 626.—**CAN.**

1702 xxi. ——.]—Defts. employed pltf. to sell at $12,000. This he failed to do, but he procured a purchaser to whom defts. sold at a lower price:—*Held:* pltf. entitled to commission upon a *quantum meruit* basis. *Toulmin* v. *Millar* (1887), 58 L. T. 96, apld.—CRONK *v.* CARMAN (1911), 19 O. W. R. 145; 2 O. W. N. 1027.—**CAN.**

1702 xxii. ——.]—Deft. listed a property for sale with pltfs., real estate brokers, who brought it to the notice of R., who ultimately became the purchaser. In the meantime, however, R. had got into communication with deft. through other parties & deft., when he closed the transaction was not aware that R. had been introduced to the property by pltfs. In an action for commission on the sale:—*Held:* as it was through the action of pltfs. that deft. got into communication with the purchaser, pltfs. were entitled to a commission, notwithstanding the actual negotiations were subsequently conducted exclusively by the parties & the sale was made by deft. without knowing at the time that the attention of the purchaser had been brought to the property by pltfs. *Green* v. *Bartlett* (1863), 14 C. B. N. S. 681; *Mansell* v. *Clement* (1874), L. R. 9 C. P. 139; *Wilkinson* v. *Alston* (1879), 48 L. J. Q. B. 733; *Street* v. *Smith* (1885), 2 T. L. R. 131, cited.—RICE *v.* GALBRAITH (1912), 21 O. W. R. 571; 3 O. W. N. 815; 26 O. L. R. 43; 2 D. L. R. 859.—**CAN.**

1702 xxiii. ——.]—A man, who knew that a farm belonging to deft. was for sale, asked pltf. to ascertain for him the price for which it could be bought. Pltf. ascertained the price & at the same time obtained from deft. an authority to sell the farm. Pltf. then communicated the price to the inquirer, but no other communication took place between them, & subsequently the inquirer purchased the farm from deft. without pltf.'s intervention. In an action for commission:—*Held:* pltf. could not recover, because the sale was not brought about by his efforts, the purchaser having come to pltf. knowing as much about the matter as pltf. did.—ST. GERMAIN *v.* L'OISEAU (1912), 22 W. L. R. 125; 6 D. L. R. 149; 2 W. W. R. 1007.—**CAN.**

1702 xxiv. ——.]—Pltf., knowing deft.'s land was for sale but without any previous authority from the latter, took P., a prospective purchaser, to see the land, & subsequently introduced him to deft. During the interview which followed, deft. agreed to pay a commission if pltf. sold the land & terms were discussed, but P. not agreeing to the price declined to buy. Pltf. on a subsequent occasion endeavoured to induce P. to buy. Later P. saw deft. privately & eventually deft. sold the land to P. directly without the intervention of pltf. Pltf. having claimed his commission, deft. did not dispute liability but paid a sum on account. In an action by pltf. for the balance:—*Held:* (1) the contract between the parties was that pltf. would be entitled to a commission if the person introduced by him bought the land on deft.'s terms, & pltf. had been an efficient cause of the sale; (2) deft. by paying a sum on account had admitted liability.—STRAYER *v.* HITCHCOCK (1912), 22 W. L. R. 469; 3 W. W. R. 196; 7 D. L. R. 689.—**CAN.**

1702 xxv. ——.]—Slight services in bringing together the parties so as to result in a sale are sufficient to entitle an agent to his commission on the sale of lands. It is for the jury (or a judge) to say whether a sale was or was not brought about by the introduction or intervention of the agent. The test is whether the sale has been brought about in consequence of the introduction & is traceable thereto. *Re Beale, Ex p. Durrant* (1888), 5 Morr. 37; *Burchell* v. *Gowrie & Blockhouse Collieries*, [1910] A. C. 614; *Lumley* v. *Nicholson*, 34 W. R. 716, cited.—SINGER *v.* RUSSELL (1912), 21 O. W. R. 24; 3 O. W. N. 588.—**CAN.**

1702 xxvi. ——.]—Deft., who only had an option from owners of property, gave to pltf., a real estate agent, an option in his own name accompanied by a letter whereby pltf. was to get a commission if the option was accepted. The option expired, & the property was subsequently sold under another option given to L. by the owners of the property & not by deft. Pltf. had had negotiations with L. during the life of his own option, but these failed owing to L. & deft. not being able to agree upon terms:—*Held:* pltf. was not entitled to a commission on the sale.—HUBBARD *v.* GAGE (1913), 24 O. W. R. 184; 4 O. W. N. 901.—**CAN.**

1702 xxvii. ——.]—M. on behalf of pltfs., real estate agents, obtained authority from deft., owner of a parcel of land, to sell part of the holding, & this part was duly sold through his agency, pltfs. being paid a commission in respect of the sale. M. assumed his authority to sell extended to the remainder of the property & he had a survey made of it & a sketch prepared which he submitted to N., who made an offer to deft. which was refused. At the interview M. was present in circumstances leading to the inference that he was an agent in the business. Some time afterwards N. bought the property:—*Held:* M. had been instrumental in bringing about the sale although not present at it nor concerned in the actual making of the contract of purchase; & pltfs. were entitled to the usual rate of commission. *Burchell* v. *Gowrie & Blockhouse Collieries*, [1910] A. C. 614, folld.—COPELAND *v.* WAGSTAFF (1913), 23 O. W. R. 679; 4 O. W. N. 567; 9 D. L. R. 13.—**CAN.**

1702 xxviii. ——.]—Deft. signed a memorandum agreeing to sell for $40,000, adding he would pay 5 per cent. commission on the purchase price. Deft. subsequently sold through pltf.'s introduction to A. for $34,000:—*Held:* "purchase price" meant any price at which a sale might be made, & pltf. entitled to 5 per cent. commission on the reduced price, the memorandum being sufficient to satisfy Alberta Stat., c. 27. *Toulmin* v. *Millar* (1887), 58 L. T. 96; *Burchell* v. *Gowrie & Blockhouse Collieries*, [1910] A. C. 614, cited.—HOWARD *v.* GEORGE (1913), 27 W. L. R. 425; 10 D. L. R. 498; *affd.* 49 S. C. R. 75.—**CAN.**

1702 xxix. ——.]—Defts. were holders of coal leases for which they authorised pltf. to find a purchaser. Pltf. brought the leases to D.'s attention, but said nothing to defts. about D. being a possible purchaser. Later pltf. received a written authority to sell the leases & went to T. to find a purchaser & afterwards notified defts. of his failure to find a purchaser. Subsequently defts. sold to D. In an action for commission:—*Held:* pltf. had failed to establish that he was instrumental in bringing about the sale, as defts. had no knowledge that pltf. had negotiated with D., & the action failed.—ASTLEY *v.* GARNETT & STIRLING (1914), 20 B. C. R. 528; 29 W. L. R. 796; 7 W. W. R. 538; 20 D. L. R. 457.—**CAN.**

1702 xxx. ——.]—Applt. sold to H. for $50,000 land at S. Resps. were real estate agents & in the ct. below had

principal as an intending purchaser, the agent has done the most effective, & possibly the most laborious & expensive, part of his work, & if the principal takes advantage of that work, &, behind the back of the agent & unknown to him, sells to the purchaser thus brought into touch with him on terms which the agent advised the principal not to accept, the agent's act may still well be the effective cause of the sale (LORD ATKINSON).—BURCHELL *v.* GOWRIE & BLOCKHOUSE COLLIERIES, LTD., [1910] A. C. 614; 80 L. J. P. C. 41; 103 L. T. 325, P. C.

recovered 2½ per cent. commission, namely $1,125 on the sale, as having been brought about through their instrumentality. Resps. had obtained an option from Oct. 24 to Oct. 29 at a price of $42,200, on the understanding that if they exercised it no commission was to be payable. After the option had expired applt. sold to H., who had been introduced by resps.:—*Held:* resps. were not entitled to commission.—PESANT *v.* GARRETT (1915), Q. R. 24 K. B. 335.—**CAN.**

1702 xxxi. ——.]—An agent for purchase for a municipality who induced a vendor to consent to the sale:—*Held:* entitled to commission even though the actual bargain was struck by the municipal comr., & it was immaterial to inquire what operated on the mind of the vendor to cause him to sell. In order to make the vendor liable for commission, the agent must prove that he was employed as such by the vendor & that the vendor agreed to pay brokerage.—BOMBAY MUNICIPAL CORPN. *v.* CUVERJI HIRJI, MOTLIBAI *v.* CUVERJI HIRJI (1895), I. L. R. 20 Bom. 124.—**IND.**

1702 xxxii. ——.]—An agent, in order to found a claim for his commission in selling or letting a house, must show such sale or lease was the direct result of his intervention & was obtained by means of his agency or some sub-agent of his; it is not sufficient for him to show that such lease or sale was obtained indirectly as a remote & casual consequence of his efforts. *Antrobus v. Wickens* (1865), 4 F. & F. 291; *Curtis* v. *Nixon* (1871), 24 L. T. 706; *Toulmin* v. *Millar* (1887), 58 L. T. 96; *Simpson* v. *Lamb* (1856), 17 C. B. 603; *Hamlyn* v. *Wood*, [1891] 2 Q. B. 488, folld.—JORDON *v.* RAM CHANDRA GUPTA (1904), 8 C. W. N. 831.—**IND.**

1702 xxxiii. ——.]—An agent to find a purchaser of property at a price, to be paid a stipulated sum for so doing, introduced a purchaser to whom the owner ultimately sold at a less price:—*Held:* the owner must be deemed to have revoked the special agreement with the agent, but was liable to him on a *quantum meruit*.—FRASER *v.* KENNEDY & GILMAN (1883), L. R. 2 S. C. 173.—**N.Z.**

1702 xxxiv. ——.]—An agent for sale of land at a fixed price on commission negotiated with a proposed purchaser, whose offer of a lower price was refused by the vendor. Subsequently the vendor sold to same person at less than the fixed price but above the original offer:—*Held:* the agent not entitled to the agreed amount of commission or on a *quantum meruit* for his services.—CHRISTIE *v.* MARTIN (1907), 26 N. Z. L. R. 908.—**N.Z.**

1702 xxxv. ——.]—Applt. appointed resp. his agent for the sale of an interest in land at a price of £550, the agreement being that if the property were sold at that price resp. was to retain £50 as his commission. Resp. found a purchaser, W., who was willing to give £500 for the property, & W. also put a property in resp.'s hands for sale, agreeing to pay him £15 as commission if he sold it. W. was under the impression that applt. was only asking £500 for his property, but applt. knew that it had been offered to W. at £550 Applt., however, without informing W. that the price resp. had been authorised to sell at was £550, sold the property to W. for £500, taking W.'s property, which was in resp.'s hands for sale, in exchange:—*Held:* (1) resp. had been deprived of the chance of earning his commission after applt. had benefited by his services; (2) resp. was entitled to recover £20 on a *quantum meruit;* (3) applt., having by his own act prevented resp. from earning a commission after deriving a benefit from resp.'s work, must pay for the benefit which he had derived.—SALMON *v.* ADAMS (1908), 27 N. Z. L. R. 610.—**N.Z.**

1702 xxxvi. ——.]—A. appointed B. his agent to sell his property for £460. B. found a purchaser, C., & after a meeting between A., B., & C. the price was reduced to £400. C. offered £375, but no bargain was then made. The place was subsequently withdrawn from the agent's hands, & later A. sold direct to C.:—*Held:* B. entitled to recover upon a *quantum meruit* for services rendered.—HORNBROOK *v.* ATKINSON (1911), 31 N. Z. L. R. 86.—**N.Z.**

1702 xxxvii. ——.]—Defts. in 1898 instructed pltfs. to sell land for £38,000, & pltfs. in 1903 negotiated with S., who refused to buy at that price. In 1906 & 1907 negotiations were resumed with S., who throughout insisted his name should not be disclosed to the seller, which was not done. In 1907 S. advertised for estates of the kind desired, to which defts. replied, & as a result S. bought for £31,000:—*Held:* pltfs. entitled to commission as having contributed in a material degree to the sale.—WALKER, FRASER & STEELE *v.* FRASER'S TRUSTEES (1909), 2 S. L. T. 453.—**SCOT.**

1702 xxxviii. ——.]—In order to entitle an agent for sale to his commission there must be both a contractual & a causal relation between him & the vendor. The introduction of a prospective purchaser is not sufficient if that introduction was not the efficient cause or *causa causans* of the sale which subsequently took place.—SCHOLLUM & Co. *v.* LLOYD, S. A. L. R. (1916), Trans. Prov. Div. 291.—**S. AF.**

m. *Agent entitled to commission on fixed sum—Sale effected by principal for less.*]—Deft. by a written agreement, employed pltf. as agent to sell goods for $1,000 at a commission of 10 per cent. & under the agreement pltf. was entitled to his commission on $1,000, even though deft. disposed of the goods without the assistance of pltf. Deft. sold the goods without the assistance of pltf. at a price of $350 & pltf. sued for commission:—*Held:* pltf. entitled to his commission.—PETRIE *v.* MACHAN (1887), 28 O. R. 642.—**CAN.**

n. *Principal stipulating that no commission payable on lands sold by him direct.*]—Pltf. accepted the agency for sale for defts. of several parcels of land, on the understanding that they might sell themselves, in which case he was to get no remuneration. Defts. sold one parcel, but did not notify pltf., & he afterwards found a purchaser for it:—*Held:* pltf. not entitled to commission, but entitled to commission on another parcel, he having found a purchaser willing to complete, & defts. not showing that they had already sold it.—HAMMANS *v.* MCDONALD (1911), 19 W. L. R. 741; 4 Sask. L. R. 320; 1 W. W. R. 317.—**CAN.**

o. *Sole agency.*]—Deft. gave pltfs., land agents, at their solicitation the right of exclusive sale of her land for the next thirty days at $20,000, on specified terms as to payment, commission $500. Before the expiration of that time, deft. herself sold for $19,500 cash. Pltfs. had done nothing beyond advertising the land:—*Held:* deft. was misled by pltf. into thinking that she reserved the right of selling herself & in that case she would not be liable for commission. *Semble:* if that conclusion was wrong, pltfs. could only recover a small sum on a *quantum meruit* basis.—CALDWELL & Co. *v.* STEPHENSON (1912), 21 W. L. R. 199; 2 W. W. R. 291; 3 D. L. R. 759.—**CAN.**

p. ——.]—Pltf., who entered into a contract with deft. by which the latter agreed to give him & no one else the whole & sole sale of certain lands & to allow him so much as commission per lot, brought an action for commission on lots sold by deft., he having sold none himself:—*Held:* pltf. was something more than a mandataire as he had an interest in the sale, & having been to some trouble & expense in having plans made, etc., was entitled to his commission.—DILLON & BORTHWICK (1880), 3 L. N. 202, Q. B.—**CAN.**

q. ——.]—Defts. intrusted pltf., a real estate agent, with the exclusive sale of their property by a written agreement for two months, undertaking to pay him in case of sale a 2½ per cent. commission. Just over a month afterwards defts. themselves sold to a party not introduced by pltf. Pltf. sued for 2½ per cent. commission on the agreed purchase price. He had had five interviews with a prospective purchaser who did not proceed:—*Held:* pltf. not entitled to the stipulated commission, as he had not brought about the sale, but entitled to recover on a *quantum meruit* basis which should be fixed at $10, with interest & costs.—ALLARD *v.* MEUNIER (1913), Q. R. 46 S. C. 193; 14 D. L. R. 399.—**CAN.**

r. *Agreement in unusual terms.*]—Deft. agreed with pltf., a real estate agent, as follows: "In consideration of your registering my real estate property for sale in your real estate register, I hereby agree to pay you a commission of 3 per cent. of the price obtained whenever a sale of the property or any part thereof takes place, such commission to be paid by me whether the real estate or property is sold either at the price mentioned above or at such other price that I may hereafter accept for the real estate or property. If, however, the property does not sell no commission will be charged." The lands were sold by deft. without the knowledge or intervention of pltf.:—*Held:* pltf. entitled to his commission, as the language used did not limit the payment of commission to a sale made by pltf.—MCCALLUM *v.* WILLIAMS (1910), 9 E. L. R. 141.—**CAN.**

s. *Principal & agent both finding purchaser—Onus of proof on principal to prove priority.*]—Deft. employed pltf. to sell certain property at a commission; but stipulated that if he made a sale before pltf. communicated a sale to him, then he would pay no commission. On Mar. 13 deft. called upon the manager of a co. & offered the property, & the manager stated that the co. would buy, but the sale would have to be approved by the directors, & that no money would be paid until such approval was obtained. On Mar. 14 the directors informally confirmed the sale, & on Mar. 18 formal consent was given at a board meeting. On Mar. 13 pltf. informed deft. that he had found a purchaser. This communication reached deft. after he had made his offer to the manager:—*Held:* the

Sect. 3.—Agent's rights against principal: Subsect. 1, B. (b).]

(b) Through other Parties.

1703. Several agents employed to dispose of same estate.]—A. & B., land agents, were severally employed to sell an estate for C. D. called on A. to inquire after another estate, & was told by A. that it was not in the market, but C.'s estate was to be sold. D. took from A. particulars of the estate, & afterwards meeting B., the other agent, negotiated with him the terms of the purchase, which was afterwards completed. A. brought an action against C. for commission on the sale, which was proved to be, according to usage, £2 per cent., & payable to the agent who found the purchaser:—*Held:* (1) the question for the jury was, whether they thought that in fact A. had found the purchaser; (2) if they thought he had, & gave their verdict for him, they were not bound to give him the full amount of the commission, though the fact of that commission being usually paid was some evidence to guide them in their decision.—MURRAY *v.* CURRIE (1836), 7 C. & P. 584.

1704. ——.]—Pltfs. had given purchaser of deft.'s leasehold house an order to view, but purchaser did not use the order until the house had been seen by purchaser's wife at the request of another agent, to whom a commission had been paid by deft.:—*Held:* (1) pltfs. had failed to prove they had done anything which could be considered to have materially caused purchaser to buy deft.'s house; (2) they were not entitled to commission.—LOFTS *v.* BOURKE (1884), 1 T. L. R. 58.

1705. ——.]—Pltf. & defts., who both carried on business as house agents, were employed by Q. to find a purchaser for his leasehold house. Pltf. introduced the house to T., who went over it on receiving an order to view from pltf. Later T. received from defts. orders to view several houses, including Q.'s house, which T. again inspected. Finally T. took another house through pltf., but had to leave it. T. then negotiated with defts. respecting Q.'s house. Certain communications also took place between pltf. & T., but these ceased, & the terms of the contract under which T. became the purchaser of Q.'s house were arranged with defts. On an interpleader issue between pltf. & defts.:—*Held:* defts. entitled to the commission, as pltf.'s introduction had resulted in nothing, whereas defts.' introduction had resulted in a sale.—BARNETT *v.* BROWN & Co. (1890), 6 T. L. R. 463.

Annotation:—**Distd.** Greatorex *v.* Shackle (1895), 64 L. J. Q. B. 634.

1706. Introduction by one agent—Contract made by another agent.]—A. claimed commission for letting certain houses. The evidence was that the

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informal acceptance of deft.'s offer, if sufficient, came too late, as pltf.'s offer had then been communicated to deft. & pltf. was entitled to judgment.—DOMINA *v.* GUILLEMAND (1913), 23 W. L. R. 41; 3 W. W. R. 787; 9 D. L. R. 622.—**CAN.**

PART VIII. SECT. 3, SUB-SECT. 1.—B. (b).

1703 i. *Several agents employed to dispose of same estate.*]—Deft. instructed two agents, pltf. & S., to sell land; pltf. found a purchaser & informed deft., who agreed to his offer, & asked pltf. to inform S., so as to avoid paying two commissions, which pltf. omitted to do; pltf. received a deposit from his purchaser, who was willing to complete. Meantime S. sold, & deft. elected to carry through that sale:—*Held:* pltf. entitled to his commission, having done everything necessary to earn it.—BELL *v.* ROKEBY (1905), 15 Man. L. R. 327; 1 W. L. R. 124, 531.—**CAN.**

1703 ii. ——.]—An agent for the sale or exchange of lands, whose commission was not stated, negotiated an exchange though not on the express terms named by his principals, who, though another agent appeared in the negotiations, knew that the first agent had brought the parties together:—*Held:* such agent entitled to remuneration *quantum meruit.*—BARTEAUX *v.* MCLEOD (1911), 19 W. L. R. 138.—**CAN.**

1703 iii. ——.]—Pltf. was for a limited time retained as exclusive agent for sale of certain property, & later on had, for limited periods, exclusive rights or options. All these rights, however, expired without a purchaser having been found. Deft. informed pltf. that his option had expired & that he was going to try & sell through other agents, & that he would entertain offers from anybody, & pltf. was willing to take his chances, same as any other agent. R., a real estate agent to whom deft. had made a similar proposition, brought an offer to deft. which he accepted. Pltf. contended that he had introduced this property to the purchaser at an earlier date than R.:—*Held:* under the contract, if there was one at all, the commission was not earned until an offer had been brought to deft. & accepted, & pltf.'s claim failed. *Wilkinson* v. *Alston*, 48 L. J. Q. B. 733; *Prickett* v. *Badger*, 1 C. B. N. S. 296; *Barnett* v. *Brown*, 6 T. L. R. 463, cited. *Semble:* there was no contract, but merely an offer which would be accepted by the first agent complying with its terms & bringing an acceptable purchaser. *Carlill* v. *Carbolic Smoke Ball Co.*, [1893] 1 Q. B. 256, cited.—ROBINS *v.* HEES (1911), 19 O. W. R. 277; 2 O. W. N. 1150.—**CAN.**

1703 iv. ——.]—A. desiring to let his house, entered it in the books of two agents, viz., B. & C. D. inspected the books of B., was acquainted by B. with the house of A., & thereupon entered into a negotiation with A., which ended in the letting of the house to D. During the negotiation, A. stated that C. was his house agent, & the agreement for the letting was prepared by C.:—*Held:* B. entitled to agency fees as against A.—M'CLEAN *v.* FITZSIMON (1845), 3 Craw. & D. 381.—**IR.**

1703 v. ——.]—Pltf. claimed for payment of services for sale of land of deft. He obtained an offer to purchase from G. which deft. declined, & some time afterwards G. purchased from deft. through other agents whom deft. employed on terms different from those of the offer obtained by pltf.:—*Held:* the relation of buyer & seller had really been brought about by the other agents, & pltf. was not entitled to payment.—EDWARDS *v.* WALTON (1891), 10 L. R. 426.—**N.Z.**

1703 vi. ——.]—Pltf. applied to M. to sell his lands. M. replied, "I will not put it in the hands of any one agent for sale, but if any agent brings along a purchaser & effects a sale a reasonable commission will be allowed." Pltf. saw C., & agreed to divide commission with him if he found a purchaser. C. saw G. & made a similar arrangement with him. G. gave the particulars to H., & at the latter's suggestion G. saw pltf., & made a special arrangement with him as to dividing commission. H. then bought the land, but all his negotiations as to purchase & completion were made directly with M. Pltf. had no communication with M. as to the sale to H.—*Held:* although pltf.'s connection was not too remote to entitle him to commission if the property had been placed in his hands on the ordinary conditions, yet, inasmuch as the terms of his employment were special, & he did not comply with those terms by personally bringing a purchaser to M. & concluding the arrangement for the purchase, he was not entitled to any commission.—WILSON *v.* LEARMOUTH (1898), 16 L. R. 682.—**N.Z.**

1703 vii. —— *Custom only to pay agent concluding transaction.*]—In an action by stock & station agents to recover commission on sale of station property defts. tendered evidence of a custom among stock & station agents in Sydney that, where several agents have been employed to sell same property, those only are entitled to commission who have concluded the contract of sale. This evidence having been rejected:—*Held:* the evidence rejected ought to have been received; & new trial ordered.—PITT *v.* JONES (1884), 5 N. S. W. 1.—**AUS.**

1703 viii. —— *Custom to pay first agent.*]—In an action for commission on sale of land where the agent claimed he was the first to give particulars of the land to the person who subsequently purchased it through another agent:—*Held:* evidence of a local custom that the agent who first gave particulars to the purchaser was entitled to the commission was inadmissible, such custom being contrary to the rule of law that the commission is not earned unless the agent introduces the buyer so that through his agency the sale is substantially effected.—WILLIAMS & KETTLE, LTD. *v.* MORICE BROTHERS (1908), 29 N. Z. L. R. 154.—**N.Z.**

1703 ix. —— *Judgment recovered by one agent no bar to action by another agent.*]—Pltf. sued for commission on sale of land for deft., who alleged another agent had recovered judgment against him for one-half the usual commission in respect of same sale:—*Held:* pltf. entitled, as the fact of recovery of commission by another agent was *res inter alios acta* & not in itself material.—DOUGLAS *v.* CROSS (1899), 12 M. R. 534.—**CAN.**

1706 i. *Introduction by one agent—Contract made by another agent.*]—In an action by an agent for commission on the sale of land, the sale being effected by another agent, the fact that the purchaser was originally introduced by pltf. is not by itself sufficient to entitle pltf. to recover.—MCCARTIN *v.* WILLIAMS (1896), 22 V. L. R. 103.—**AUS.**

1706 ii. —— ——.]—Deft., agent for sale of pltf.'s machines, introduced a purchaser, whom he had canvassed on two occasions, to pltf.'s manager at a place where the machines were exhibited, & the manager then informed deft. that he would send him the necessary papers in order to have the sale completed.

agreement for the letting was entered into with another agent, K., but that the tenants were introduced to K. by A. :—*Held :* under the terms of the agreement, A. was entitled to the commission.—BRAY *v.* CHANDLER, No. 1963, *post.*

1707. First introducer entitled to commission.]—Where several brokers, unknown to one another, negotiate with the same intending purchaser, he who first introduces the principals is entitled to the commission.—CUNARD *v.* VAN OPPEN (1859), 1 F. & F. 716.

Annotation :—**Refd.** Gibson *v.* Crick (1862), 1 H. & C. 142.

1708. Several shipbrokers negotiating on same principal's behalf.]—The usage is that, when a broker has introduced the captain of a ship & a merchant together, & they by his means enter into some negotiations as to the intended voyage, the broker is entitled to commission if a charterparty be effected between them for that voyage, even though they may employ another broker to prepare the charterparty, or may write the charterparty themselves. If a broker be authorised by both parties, &, acting as the agent of each, communicates to the merchant what the shipowner charges, &

Deft. being absent from his place of business for two weeks owing to illness, the sale was completed through another agent of pltfs. On a claim for commission on this sale :—*Held :* deft. entitled to recover, as pltfs. had stepped in & prevented him from completing a sale, the negotiations for which had been conducted by him. *Burchell* v. *Gowrie & Blockhouse Collieries*, [1910] A. C. 614, & *Inchbald* v. *Western Neilgherry Coffee, etc., Co.* (1864), 17 C. B. N. S. 733, cited.—NICHOLS & SHEPPARD *v.* CUMMING (1914), 28 W. L. R. 810 ; 8 Alta. L. R. 51 ; 6 W. W. R. 1325 ; 18 D. L. R. 234.—**CAN.**

1706 iii. ——— ———.]—P. employed C. to sell his hotel at a stated price on commission. C. introduced T., who offered to buy at a lower price which was refused by P., who, seeing that C. was unsuccessful, decided to endeavour to sell the property himself & informed C. of his intention of so doing. Later D. was employed by P. as another agent, who found a purchaser, R. R. bought the hotel & within a short time sold half the property to T., his brother-in-law. C. sued P. for commission :—*Held :* (1) a broker is not, as a general rule, entitled to commission, where the customer produced by hi fails or refuses to consum ate the sale, & an owner of property desiring to sell same may employ several different brokers for that purpose, & the broker through whose instrumentality the purchaser is produced, who is the procuring cause of the sale, is entitled to the entire commission to the exclusion of all others ; (2) C. was not the *causa causans* of the sale & was not entitled to any commission.—CHADBURN *v.* PIUZE (1914), 45 Q. L. R. 442 ; 20 D. L. R. 741.—**CAN.**

1706 iv. —— ——.]—Deft. verbally agreed with pltf., a real estate agent, to pay the usual commission if he found a purchaser of land at $500 an acre, $5,000 cash & balance on terms to be arranged. Pltf. advertised the property, without stating the exact location or name of owner. G. saw the advertisement, & obtained deft.'s name & address from pltf. & ultimately purchased from deft. through H., deft. being aware before completion of pltf.'s share in introducing G., & that he claimed commission :—*Held :* pltf. was the effective cause of the purchase, & he was entitled to commission. *Green* v. *Bartlett* (1863), 14 C. B. N. S. 681 ; *Mansell* v. *Clements* (1874), L. R. 9 C. P. 139 ; *Burchell* v. *Gowrie & Blockhouse Collieries*, (1910) A. C. 614 ; *Wilkinson* v. *Alston* (1879), 48 L. J. Q. B. 733 ; *Ewer* v. *Ambrose* (1825), 3 B. & C. at p. 751 ; *Tribe* v. *Taylor* (1876), 1 C. P. D. 505 ; *Wilkinson* v. *Martin* (1837), 8 C. & P. 1 ; *Barnett* v. *Isaacson* (1888), 4 T. L. R. 645, cited. — SPENARD *v.* RUTLEDGE (1913), 23 W. L. R. 623 ; 2 W. W. R. 900 : 10 D. L. R. 682, Man. C. A. – **CAN.**

1706 v. —— ——.]—Agents for sale of land at fixed price on commission, having shown the property to a prospective purchaser, introduced him to deft. & tried to effect a sale. The same person afterwards purchased the property at same price, but through another agent :—*Held :* the agents not entitled to full commission, & a verdict allowing half commission should not be disturbed.—GLINES *v.* CROSS (1899), 12 M. R. 442.—**CAN.**

1706 vi. —— ——.]—Pltf., agent for sale of a house & lot on commission, offered it to R., the tenant, who did not want to buy at the time. Deft. put the property in the hands of other agents, telling pltf. he was dissatisfied at his not selling but not withdrawing it from pltf., & that his price was $3,000, whoever sold over that to have excess as commission. Another agent sold to R. for $3,150 :—*Held :* pltf. not entitled to commission in respect of that sale.—JOHNSON *v.* APPLETON, (1905) 11 B. C. R. 128 ; 1 W. L. R. 14.—**CAN.**

1706 vii. —— ——.]—Deft. signed the following authority to pltfs. : "In case you find a purchaser or in case you bring the property, directly or indirectly, to the attention of anyone who becomes a purchaser on any terms whatsoever, you are to be paid by me a 5 per cent. commission." Pltfs. introduced D., who inspected the property & decided not to purchase, but ultimately purchased through C. :—*Held :* D. had not purchased through pltfs.' introduction & pltfs. not entitled to commission.—HERBERT *v.* BELL (1912), 22 W. L. R. 884 ; 3 W. W. R. 608 ; 8 D. L. R. 763.—**CAN.**

1706 viii. —— ——.]—Pltf. procured J. to enter into a verbal agreement for sale of deft.'s house, but J. refused to complete for no sufficient reason. Subsequently J. purchased the property at the price agreed on through another agent :—*Held :* pltf. was not the effective cause of the sale, & he could not recover commission on the sale. *Barnett* v. *Isaacson* (1888), 4 T. L. R. 645 ; *Wilkinson* v. *Martin* (1837), 1 C. & P. 1 ; *Lumley* v. *Nicholson* (1885), 2 T. L. R. 118 ; *Gillow* v. *Aberdare* (1892), 9 T. L. R. 12 ; *Taplin* v. *Barrett* (1889), 6 T. L. R. 30 ; *Wilkinson* v. *Alston* (1879), 41 L. T. 394, cited.—TRAVIS *v.* COATES (1912), 22 O. W. R. 917 ; 3 O. W. N. 1651 ; 27 O. L. R. 63 ; 5 D. L. R. 807.—**CAN.**

1706 ix. —— ——.]—Deft. employed pltfs., land brokers, to sell a section for $16,000, deft. to be at liberty to sell the land himself or by other agents. Pltfs. negotiated with C., who ultimately bought through H. at a lower sum, at a time when pltfs. were urging deft. to reduce the price :—*Held :* pltf. was the efficient cause of the sale & entitled to commission. *Toulmin* v. *Millar* (1887), 58 L. T. 96 : *Burchell* v. *Gowrie & Blockhouse Collieries.* [1910] A. C. 614, cited.—CHAPPELL *v.* PETERS (1913), 22 W. L. R. 960 ; 3 W. W. R. 738 : 9 D. L. R. 584.—**CAN.**

1706 x. —— ——.]—Pltfs., land brokers, were employed by deft. to sell a section at $11 an acre net, & to retain all received over that amount for expenses & commission. Pltfs. expended time & money & introduced a purchaser to whom deft. sold through another agent at $11 an acre :—*Held :* pltfs. entitled to $350 on a *quantum meruit.*—BALFOUR & BROADFOOT *v.* CALDERWOOD (1913), 22 W. L. R. 957 ; 3 W. W. R. 750.—**CAN.**

1706 xi. —— ——.]—An agent to find a purchaser for deft.'s hotel introduced the property to P., who subsequently arranged to purchase through other agents, in whose hands the hotel had also been placed :—*Held :* (1) pltf. entitled to commission ; (2) as amount was not fixed, pltf. was entitled to the rate usually paid on similar transactions in the district & could recover, although such claim was not included in the statement of claim.—RENNER *v.* FRASER (1911), 31 N. Z. L. R. 205.—**N.Z.**

1706 xii. —— ——.]—Certain lands were placed for sale in the hands of an agent, E., who was to get £20 commission if the land were sold at £11 an acre. E. introduced a buyer H., who agreed, after negotiations on different days, to give £11 an acre, but said that he was not just then in a position to go on with the sale, & would not sign a contract or pay a deposit. F., the vendor, thereupon said that he would take the property out of E.'s hands & place it in the hands of another agent M. M. a few days later sold to H. & obtained a deposit & H.'s signature to a sale note : —*Held :* (1) E. was entitled to the £20 commission, as he obtained a purchaser, induced him to offer the price asked, & was the effective cause of the sale ; (2) E.'s remedy was not for damages for breach of contract for preventing him from earning commission, as, when the vendor refused to allow him to proceed further, he had done his work in obtaining a purchaser at the agreed price.

It is not an essential part of a commission agent's duty to get a contract signed.—EDEBOHLS *v.* FOY (1917), V. L. R. 573.—**AUS.**

1707 i. ***First introducer entitled to commission.***]—Where pltf. first introduced the purchaser to the vendor :—*Held :* pltf. entitled to his commission, although the transaction was concluded through other agents. *Burchell* v. *Gowrie & Blockhouse Collieries*, [1910] A. C. 614, cited. —SAGER *v.* SHEFFER (1911) 18 O. W. R. 485 ; 2 O. W. N. 671.—**CAN.**

1708 i. ***Several shipbrokers negotiating on same principal's behalf.***]—In Aug., 1890, A. applied to B. & Co. & C. & Co. shipbrokers, asking them at what price they could get a vessel built. On Aug. 1 B. & Co. wrote to D. & Co., mentioning A. as having decided to purchase a vessel, & asking them to state the lowest cash price covering 2½ per cent. commission at which they could build the vessel. On Aug. 4 D. & Co. replied stating terms & reserving B. & Co.'s commission. On Aug. 1 C. & Co. also wrote to D. & Co. asking them to state at what price they would build the vessel, but not naming the prospective purchaser. On Aug. 4 D. & Co. replied to C. & Co. stating their price. D. & Co. heard no more till Oct., 1890, when they received a letter from C. & Co. referring to their letter of Aug. 4, stating that A. was again inquiring as to their lowest quotations for building the vessel described, & asking them to send it. D. & Co. sent their quotation, & after some correspondence between A. & C. & Co., & C. & Co. & D. & Co., a contract was entered into whereby D. & Co. agreed to build a ship for A. at a certain price, which the latter bound himself to pay :—*Held :*

Sect. 3.—Agent's rights against principal: Subsect. 1, B. (b).]

also communicates to the shipowner what the merchant will give, & he names the ship & the parties so as to identify the transaction, & a charterparty be ultimately effected for that voyage, this broker is entitled to his commission, but if he does not mention the names so as to identify the transaction, he does not get his commission to the exclusion of another broker, who afterwards introduces the parties personally to each other.

A., a broker, introduced a merchant & a shipowner together to treat for a charterparty, which they finally made through B., another broker. In an action by A. for his commission the particulars of demand were "for commission due to pltf. for procuring a charter for a vessel called the *W. & C.*"; —*Held:* sufficient.—BURNETT *v.* BOUCH (1840), 9 C. & P. 620.

Annotation:—Distd. Gibson *v.* Crick (1862), 6 L. T. 392.

1709. ——.]—There is nothing illegal in a shipowner employing two brokers at the same time, & whoever concludes the charter is entitled to the commission.—COUSINS *v.* MITCHESON, No. 1696, *ante*.

1710. ——.]—Pltf., a shipbroker, introduced one of defts. to another broker, B. B. was also a merchant & a shipowner, & through B. defts. were introduced to a third shipbroker, C., & through C. defts.' ship was chartered by S. & Co. Pltf. sued defts. for commission in respect of that charter; the question being left to the jury, the jury found a verdict for pltf. Upon the point reserved at the trial, whether there was any evidence which the judge should have submitted to the jury on the question of commission:—*Held:* it was a question upon evidence in the circumstances for the jury to decide; &, the judge at the trial being not dissatisfied with the verdict, the ct. refused to set it aside.—KYNASTON *v.* NICHOLSON (1863), 8 L. T. 671; 1 Mar. L. C. 350.

1711. ——.]—Deft. agreed that, if pltf. should be the means of introducing a person who should become purchaser of a ship of deft.'s, he should receive a commission on the purchase-money. In Feb., 1876, pltf. introduced T., who had been recommended by W. to buy, & it was agreed between pltf. & deft. that, if the sale was effected with T., W. shou'd share pltf.'s commission. No sale was effected. In Mar. W. mentioned the ship to X. Pltf. informed deft., & proposed that he should see X., but no steps were taken, & X. did not entertain W.'s proposal. Subsequently, on Mar. 13, deft. wrote to pltf. that it was no use doing any more until the ship returned home. Pltf. thereupon took no further steps. In May X. wrote, as broker, direct to deft. & introduced Z., who became purchaser. Pltf. thereupon claimed his commission. The jury having found (1) pltf. was authorised to find a purchaser; (2) X. was introduced to enter upon the negotiation by information received from W.:—*Held:* (1) X. being the agent of Z. & having acted upon information received from W., pltf. was entitled to receive his commission; (2) even if the letter of Mar. 13 amounted to a revocation of pltf.'s authority, it was then too late.—WILKINSON *v.* ALSTON (1879), 48 L. J. Q. B. 733; 41 L. T. 394; 44 J. P. 35; 4 Asp. M. L. C. 191, C. A.

Annotation:—Distd. Taplin *v.* Barrett (1889), 6 T. L. R. 30.

1712. —— **Broker's services too remote.**]—Pltfs., shipbrokers, were employed by defts., shipowners, to procure charterers for certain ships. Pltfs. introduced defts. to another firm of brokers, & negotiations were commenced at the office of the last-named firm with L. for the chartering of these ships. The negotiations with L. came to nothing, but L., from the knowledge thus acquired, informed M. that defts. had a ship in want of a charterer, & M. became the charterer of this ship of defts. In an action by pltfs. to recover broker's commission from defts. on the charter of this ship:—*Held:* (1) pltfs.' services in the transaction were too remote. *Semble:* any usage which would entitle them to claim commission in such circumstances would be an unreasonable usage & bad.

In order to prove such usage, it was proposed to ask a broker "What is the custom with regard to the payment of brokers' commissions when the broker introduces another broker to a shipowner, which shipowner subsequently negotiates with the broker introduced?":—*Held:* this question was rightly disallowed.—GIBSON *v.* CRICK (1862), 2 F. & F. 766; 1 H. & C. 142; 31 L. J. Ex. 304; 6 L. T. 392; 10 W. R. 525.

1713. Agent to procure loan—Introduction too remote.]—In an action to recover for commission for the procuring of a loan, it is not enough to prove that the loan has indirectly, as a remote & casual consequence, resulted from the intervention of the party who sues. It must be proved that the loan was obtained by means of his agency, or by means of some sub-agent of his, from the parties to whom he applied; & if all that appears is that the party to whom he introduced the subject, declining the proposal, mentioned it to a third party, who, not at his suggestion but of his own mere motion, knowing nothing of pltf., negotiated the loan on his own account with the party sued, the commission is not due.

Where defts., engaged in getting up a co. & requiring money to do so, were introduced by pltfs. to a bank, which declined the proposition & the money was obtained by defts. from parties who had heard of it through the bank:—*Held:* if they were not really agents for pltfs., the latter could not recover.—ANTROBUS *v.* WICKENS (1865), 4 F. & F. 291.

1714. Order to view—Evidence of purchaser admitted.]—Pltfs., house agents, were instructed by defts. to offer a leasehold house for sale, for which they were to receive a commission of 2½ per cent. on the amount of premium if they found a purchaser, but 1 guinea only for their trouble if the premises were sold "without their intervention." The particulars were entered on pltfs.' books, & they gave a few cards to view. U., who had observed on passing that the house was to be disposed of, but who had not then seen over it, called at pltfs.' office & obtained a card to view the premises in question, amongst others, the terms being written by pltfs.' clerk on the back of the card. U. went to the house a few days afterwards, but thought the price asked (£2,200) too high, &

B. & Co. were not entitled to any commission from D. & Co. in connection with this transaction.—JACOBS & Co. *v.* M'MILLAN & SON, LTD. (1894), 31 Sc. L. R. 523.—SCOT.

1712 i. —— *Broker's services too remote.*] M. & Co., of London, requiring a steamer for correspondents in China, put themselves in communication with a shipbroker, who brought under their notice the *E.*, & wrote to the owners mentioning that he had so done, & requesting that, in the event of a sale, they would reserve his commission. The *E.* was inspected on behalf of M. & Co., but the inspector's report proved unfavourable & the shipbroker communicated the result to the owners, saying that "his friends must decline her." Later B. arrived in England, commissioned by the persons in China, for whom M. & Co. had been acting, to buy a steamer "through the medium & with the assistance of M. & Co." B. went to D., who recommended the *E.*, & the result was that M. & Co. were induced by B. & D. to purchase the vessel for their correspondents in China. The shipbroker thereupon claimed commission from the sellers:—*Held:* the shipbroker was not entitled to commission, in respect that the sale effected was not in consequence of his introduction, or of anything done by him.—WHITE *v.* MUNRO (1876), 3 R. (Ct. of Sess.) 1011.—SCOT.

he went away. U. had no further communication with pltfs., but he subsequently renewed his negotiation with a friend of defts., & ultimately became the purchaser of the lease for £1,700 :—*Held :* (1) there was evidence for a jury that U. had become the purchaser of the premises "through pltfs.' intervention"; (2) pltfs. were entitled to the stipulated commission.

At the trial the judge put the following question to U. : "Would you, if you had not gone to pltfs.' office & got the card, have purchased the house?" &, overruling an objection by defts.' counsel, received his answer, which was, "I should think not" :—*Semble :* the answer was properly received.—MANSELL *v.* CLEMENTS (1874), L. R. 9 C. P. 139.

Annotation :—**Refd.** Bayley *v.* Chadwick (1877), 36 L. T. 740.

1715. Ship sold privately after being offered at auction—Auctioneer entitled to commission.]—Applts. were auctioneers. Besp. put a ship into their hands for sale, & it was agreed that if it were not sold by auction, but a subsequent sale were effected to any person led to make an offer "in consequence of applts.' mention or publication for auction purposes," they were to be entitled to a commission. The ship was not sold by auction, but afterwards P., having been present at a conversation which led him to believe that S. would purchase the ship, wrote to applts., "noting that they had the ship in their hands," to inquire the price, etc. P. then communicated with S., who ultimately became the purchaser, but not through the agency of P. :—*Held :* (1) there was evidence to go to the jury that the sale was effected in consequence of applts.' mention or publication within the agreement; (2) they were entitled to their commission.—BAYLEY *v.* CHADWICK (1878), 39 L. T. 429; 4 Asp. M. L. C. 59, H. L.; *revsg. S. C.* 37 L. T. 593, C. A.; *restg. S. C.* 36 L. T. 740, D. C.

1716. Introducing agent not carrying on subsequent negotiations.]—An agent to sell, in order to be entitled to recover his commission, must prove that he has been the means of bringing about the relation of buyer & seller between his principal & a third party, but he may earn it by doing nothing more than merely introducing the buyer, & though the whole of the negotiations resulting in the sale may have been carried on by another agent employed by his principal.—WHITE *v.* WALKER, DONALD & Co. (1885), 1 T. L. R. 603.

1717. ——.]—Where a house agent, with the consent of the vendor, introduces a purchaser, he is entitled to his commission, even though the sale be wholly effected through other agents, & it would have been brought about without his intervention.—BURTON *v.* HUGHES (1885), 1 T. L. R. 207.

1718. Agent introducing second agent—Agent becoming purchaser.]—Deft. agreed with pltf. to pay him a commission of £5,000 in the event of his introducing a purchaser of deft.'s business. Pltf. introduced C. as an agent to find a purchaser, & deft. agreed to pay C. £5,000 if he found a purchaser. C. subsequently purchased the business himself, deducting the £5,000 commission from the purchase-money :—*Held :* (1) pltf. did not introduce C. as a purchaser & was not entitled to £5,000 commission; (2) nothing was done to entitle pltf. to *quantum meruit*, as the introduction of C. did not take place in such circumstances that deft. ought to pay for it.—BARNETT *v.* ISAACSON (1888), 4 T. L. R. 645.

Annotation :—**Apld.** Brimson *v.* Davies (1911), 105 L. T. 134.

1716 i. *Introducing agent not carrying on subsequent negotiations.*]—Where a broker, on the instruction of the vendor, introduces a purchaser, he is entitled to his commission even though the sale be effected wholly through another agent.—OSLER *v.* MOORE (1901), 8 B. C. R. 115.—**CAN.**

1716 ii. ——.]—As a result of negotiations for the sale of certain land in Mar., 1911, deft., the owner, agreed to accept $100,000 in case pltfs. found a purchaser. No sale resulted from this arrangement, & in the month of Aug. following, pltfs. brought a prospective purchaser named M. to view the property, when deft., on account of certain improvements made in the meantime, raised the price to $105,000. M. looked over the land, but left without making any offer. In Jan., 1912, deft. sold to another broker for $90,000. It subsequently appeared that the broker was acting for M., the actual purchaser. Deft. denied any knowledge of M. in his dealings with the broker. Pltfs. sued for their commission on the sale of the property to M. :—*Held :* the charges of fraud, conspiracy & collusion not having been proved conclusively, pltfs. could not recover.—ERICSSON *v.* MARLATT (1913), 18 B. C. R. 120.—**CAN.**

1716 iii. ——.]—R. agreed with C. (who had influence with the Indians) that if they, working together, could bring about a sale to the Province of the rights of the Indians in their reserve, he would pay C. $20,000. Negotiations proceeded, C. arranging meetings with the Indians, at two of which R. & C. were present, but without results. After the first meeting, R., who had a meeting with the provincial representative, was induced by him to make A. a party to the transaction. Three days after the second meeting a third & final meeting was held with the Indians (an adjournment of the other meetings), at which R. & A. were present, but from which C. was excluded. The Indians came to terms at this meeting, & a form of option, which had been previously prepared by R. for use at the former meetings, was signed by the parties after A.'s name had been changed for R.'s :—*Held :* R. was bound to discharge his obligation to C. notwithstanding that A.'s influence might have been most potent in bringing about sale.—COLE *v.* READ (1914), 20 B. C. R. 365; *affd.* 52 S. C. R. 176.—**CAN.**

1716 iv. ——.]—Pltf., an agent for sale of defts.' land at $15,000, negotiated with R., who said he would think about it. Without knowing of this D., a land agent, obtained an option in writing to purchase for $15,000 from one of defts. who knew he was a land agent. D. then, without taking a conveyance, sold to R. for $14,750, of which he paid defts. $14,250, claiming that, after the option, they had promised a rebate of 5 per cent. :—*Held :* (1) D. was not an agent but a purchaser, & came in contact with R. not by reason of anything pltf. had done, & defts. understood D. was purchasing for himself, & the rebate was not by way of commission; (2) pltf. was not entitled to a commission.—WHITE *v.* MAYNARD & STOCKHAM (1910), 15 W. L. R. 388; 15 B. C. R. 340.—**CAN.**

1716 v. ——.]—An agent for selling a business with commission only if he found a purchaser introduced N., a purchaser, to deft., the owner, but no offer was made. Deft. after deciding not to sell with the agent's approval consulted a friend who knew N., through whom eventually he sold to N. :—*Held :* deft. not liable for commission.—BRANDON *v.* HANNA, [1907] 2 I. R. 212, 227.—**IR.**

1716 vi. ——.]—Pltf. as defts.' sales agent induced H. to see a machine of defts., giving H. a letter of introduction to another sales agent of defts. & telegraphing to that agent. There was no evidence that H. presented the letter or that the other agent received the telegram. A sale was effected by the other agent to H. Pltf.'s agency contract with defts. provided that the latter should not be liable for any trespass committed by one agent upon the rights of another & that the agent trespassing should make it good to the other :—*Held :* pltf. had no right of action against deft.; his remedy, if any, was against his fellow-agent.—MASON *v.* REEVES & Co. (1911), 18 W. L. R. 536; 4 Sask. L. R. 205.—**CAN.**

1718 i. *Agent introducing second agent—Transaction carried through by latter agent.*]—Pltf. made sales of shares for deft. at 5 cents a share. Deft. expressed his desire to increase the sales, & pltf. replied that he could not give more time to the business, but could get the assistance of M. Pltf. saw M. & arranged that he should sell the shares at a commission of 3 cents a share. Deft. was brought into contact with M., & a number of shares were sold, deft. paying M. 3 cents commission direct. In an action by pltf. for 2 cents commission on each share sold through M. :—*Held :* deft. knew of the relationship between pltf. & M., &, as pltf. had done his part in procuring M. as sub-agent, he was entitled to the 2 cents commission claimed. *Wilkinson v. Alston*, 48 L. J. Q. B. 733, apld.—ARONOVITCH *v.* LOPER (1912), 21 W. L. R. 262; 21 Man. L. R. 325; 2 W. W. R. 378; 3 D. L. R. 389.—**CAN.**

1718 ii. —— ——.]—Deft., a land broker, being interested in two properties, mentioned them to I. & G., also land brokers, promising them a commission of 2½ per cent. if they effected a sale. I. & G. not being able themselves to bring about a sale agreed with another land broker, S., to share the commission on his finding a purchaser. S. introduced as a probable purchaser K., who was acting for a syndicate. The syndicate not being willing to purchase & K. not being able himself to purchase, K. informed deft. that if he could get an offer he would submit it to him.

Sect. 3.—Agent's rights against principal: Subsect. 1, B. (b) & (c) & C, (a).]

1719. —— Agent forming company to purchase.] —Pltf. was employed by deft. to find a purchaser of a business upon commission. Pltf. expected to carry out the sale through S. & introduced S. to deft. Pltf. & S. then introduced deft. to certain persons, but the negotiations fell through. At a later date S. came into communication with F., & ultimately through F. a co. was formed to purchase the business:—*Held:* pltf. did not introduce deft. to the actual purchaser; (2) he had not earned his commission.—JEFFREY *v.* CRAWFORD (1891), 7 T. L. R. 618, C. A.

1720. Agent introducing subsequent purchaser by auction.]—Pltf. being instructed to sell a house for deft., failed, & the house was sold by auction to S. Prior to the auction S. had been introduced by pltf., but he did not complete. Pltf. sued for 2½ per cent. commission. The cty. ct. judge awarded him £5 by way of *quantum meruit*. Judgment affirmed.—TAPLIN *v.* BARRETT (1889), 6 T. L. R. 30.

1721. Commission payable on purchase by one company—Purchase by different company.]—Deft. agreed to pay pltf. commission on the sale of a mine "through the formation of a co. by R. A. & Co." The mine was subsequently sold through a co. formed by C.:—*Held:* pltf. not entitled to commission.—SEWELL *v.* PULIDO MINING CO., LTD. (1896), 12 T. L. R. 449.

(c) When Right to Commission accrues.

1722. Completion of entire contract.]—If A. appoint B. his collector, directing him "to take & receive to his own use £100 out of the first money he collects," this is an entire agreement, & B. cannot bring an action of debt on it for £75, as for three-quarters of a year's salary.—PLYMOUTH (COUNTESS) *v.* THROGMORTON (1688), 3 Mod. Rep. 153; 1 Salk. 65; 87 E. R. 99.

Annotations:—**Consd.** Cutter *v.* Powell (1795), 6 Term Rep. 320. **Refd.** Mills *v.* Funnell (1824), 4 Dow. & Ry. K. B. 561.

1723. Del credere agent—Commission due on entering into contract.]—*Indebitatus assumpsit* lies to recover *del credere* commissions for guaranteeing sums insured upon policies, such commissions being due upon entering into the contract of guarantee.—CARUTHERS *v.* GRAHAM (1811), 14 East, 578; 104 E. R. 723.

Annotation:—**Folld.** Solly *v.* Weiss (1818), 2 Moore, C. P. 420.

1724 ——. Commission accrues on sale.]—*Assumpsit* in K. B. that B. was indebted to A. in a certain sum for certain commission & reward due, & of right payable from B. to A. for & in respect of A. at B.'s request, having guaranteed the payment of divers goods by A. before then sold, as B.'s factor to third persons, & that, in consideration thereof, B. afterwards promised to pay A. the sum. Verdict for A., & judgment thereon. The ct. affirmed the judgment on error.—SOLLY *v.* WEISS (1818), 8 Taunt. 371; 2 Moore, C. P. 420; 129 E. R. 426.

Annotation:—**Refd.** Payne *v.* Ives (1823), 3 Dow. & Ry. K. B. 664.

1725. Commission not payable until contingency determined.]—A broker charters ships at a commission of 2½ per cent. on their outward freight, & the like on homeward freight; if the charterparty makes it contingent what the amount of freight shall be, the broker cannot sue for any sum till the contingency is determined.—WINTER *v.* MAIR (1811), 3 Taunt. 531; 128 E. R. 210.

K. did in fact find a purchaser, & in his letter transmitting the offer to deft. he stated the bargain was subject to his being paid 2½ per cent. commission:—*Held:* pltfs. could not succeed in their claim for a separate commission, since there was a distinct act between the introduction of K. & the sale which was the real *causa causans* of the purchase, a new transaction attributable to K.'s finding a purchaser & not to the original introduction, although that was the cause *sine qua non* which resulted in the sale. *Burchell v. Gowrie & Blockhouse Collieries*, [1910] A. C. 614, cited.—IMRIE *v.* WILSON (1912), 21 O. W. R. 964; 3 O. W. N. 1145; 3 D. L. R. 826.—**CAN.**

1718 iii. —— ——.]—Pltf. sued deft. for commission on sale of land, alleging he had introduced the property to another broker who in fact brought about the sale, & that deft. had promised to pay a commission to each of them:—*Held:* pltf. upon the evidence not entitled to a commission or remuneration upon a *quantum meruit* basis.—SCOTT *v.* MOACHON (1912), 21 W. L. R. 864.—**CAN.**

1718 iv. —— ——.]—A., employed by B. to effect an exchange of his land, found H., who was willing to effect an exchange, but was unable to make a good title. Eventually it was arranged between H. & B. that H. should find a purchaser, which H. did, & the sale was completed. In an action for commission by A.:—*Held:* his connection with the sale was too remote to entitle him either to commission or to a *quantum meruit*.—NOPS *v.* KELLY (1908), 28 N. Z. L. R. 567.—**N.Z.**

PART VIII. SECT. 3, SUB-SECT. 1.—B. (c).

t. General rule.]—Where the remuneration of an agent is payable on the performance by him of a definite undertaking he is entitled to be paid that remuneration as soon as he has substantially done all that he undertook to do, even if the principal acquires no benefit from his services & even if the transaction falls through, provided it does not fall through in consequence of any act or default of the agent.—KIS LAU POSED SINGHA *v.* PUMENDU NARAIN SINGHA (1911), 16 C. W. N. 753.—**IND.**

a. Agent to procure subscriptions for stock — Commission payable after call —Call not paid.]—The president of a projected bank employed A. to procure subscriptions of stock for a commission payable after the first call; a *post scriptum* to the agreement provided that this commission should be payable after the first payment. A call was made, but very few paid it:—*Held:* A. entitled to commission as soon as a call had been made.—HUBERT & BARTHE (1879), 2 L. N. 227, Q. B. 1879.—**CAN.**

b. Insurance agent — Commission not due until claims settled.]—RAWLINGS *v.* CITIZENS' INSURANCE & INVESTMENT CO. (1876), 8 R. L. 398, Q. B. 1876.—**CAN.**

c. Sale of land—Commission payable when buyer secured.]—A real estate broker to whom a proprietor confides his property to sell has but the obligation to secure a buyer at the price demanded. From that moment he has the right to receive his commission without being obliged to wait for the passing of the deeds or the payment of an instalment of the purchase price.—GIROUARD *v.* BEAUDOIN (1914), Q. R. 46 S. C. 57.—**CAN.**

d. —— Commission payable out of first instalment—Sale for stock of company to be formed.]—Deft. appointed pltf. his sole & exclusive agent to sell certain lands under an agreement which provided that deft. should pay to pltf. as commission 10 per cent. of the gross selling price of "all lands which are sold" during the continuance of the agreement, whether sold by pltf. or deft. or by any other person & that such payment should be due & payable & should be made "out of the first instalment of the purchase price when & as received" by deft. Pltf. sold portions of the land & claimed commission on a sale made by deft. of the remainder of the lands to a co.:—*Held:* a mere executory contract would come within the agreement because the commission was declared to be payable out of the first instalment of the purchase price.

Where the whole property was sold *en bloc* to a purchasing co., in which deft. acquired about four-fifths of the stock:—*Held:* (1) Pltf. could not succeed upon his claim for commission, because commission was payable "out of the first instalment of the purchase price when & as received" by deft., & when the action was begun no shares had been allotted to deft., & he had not yet received the sum of £15,000 in cash which he ultimately did receive before the trial. *Qu.:* whether such sale was a "sale" within the phrase "all lands which are sold." *Cargill* v. *Bower* (1878), 10 Ch. D. 508; *Burchell* v. *Gowrie & Blockhouse Collieries*, [1910] A. C. 614, cited. (2) Pltf. was not entitled to a declaratory judgment because he had not asked for that relief in his statement of claim.—KENNERLEY *v.* HEXTALL (1913), 23 W. L. R. 205; 5 Atla. L. R. 192; 9 D. L. R. 609; *affd.* S. C. of Canada, Nov. 2, 1915 (not reported).—**CAN.**

e. —— Commission payable when land resold—Resale by principal direct.]—Pltf. was to receive commission on the purchase price, for his services in purchasing land for deft.:—*Held:* commission not payable until deft. resold the land, & deft. having resold the land without the aid of pltf., pltf.'s right to the commission was complete.—MANCHESTER *v.* BROWN (1913), 25 W. L. R. 157.—**CAN.**

1726. —— Amount ascertainable.]—Pltf., a surveyor, was retained by deft. to negotiate with the Commrs. of Woods & Forests for the sale to them of certain premises of deft., for which he was to receive a commission of £2 per cent. "on the sum which might be obtained, either by private treaty, arbitration, or trial by jury." The value of the property was assessed at £4,000; but there being an annuity charged upon the premises, which the Commrs. required deft. to buy off (of which annuity pltf. had had no notice), the money was placed in the hands of the Accountant-General, to await the adjustment of the difference:—*Held:* pltf. was not entitled to his commission until the sum was ascertained & received by deft.—BULL *v.* PRICE (1831), 7 Bing. 237; 5 Moo. & P. 2; 9 L. J. O. S. C. P. 78; 131 E. R. 91.

1727. Sale of advowson—Special stipulation as to date of payment.]—A., a clerical agent, was employed to sell an advowson for B., upon the terms contained in a circular in which it was stipulated that the commission should become payable upon the adjustment of terms between the contracting parties in every instance in which any information had been arrived at, or any particulars had been given by, or any communication had been made from A.'s office, how & by whom the negotiation might have been conducted, & the business might have been subsequently taken off the books, or the negotiation might have been concluded in consequence of communications previously made from other agencies, or on information otherwise derived, or the principals might have made themselves liable to pay commission to other agents; & that no accommodation that might be afforded as to time of payment or advance should retard the payment of commission. A contract of sale having been arranged through A.'s agency, & duly executed, & a deposit paid on Oct. 14, 1862, the residue of the purchase-money being payable on Dec. 31:—*Held:* A. was entitled to his commission at all events on Dec. 31, although the full purchase-money had not, for some unexplained reason, then been paid.—LARA *v.* HILL (1863), 15 C. B. N. S. 45; 143 E. R. 699.

1728. Custom in building trade.]—Pltf., an estate agent, was employed by deft. to sell a piece of land for building purposes. Pltf. introduced W. as a purchaser. W. commenced to build but never finished the houses contemplated. Pltf. claimed commission, alleging it was payable as soon as the agreement was signed. Deft. relied upon a usage that in the case of building agreements commission was payable not when the agreement was signed but when the houses had been built & leases had been granted:—*Held:* (1) the usage was proved; (2) pltf. was not entitled to commission.—KIRK *v.* EVANS (1889), 6 T. L. R. 9.

C. Originally contemplated Transaction completed and followed by a subsequent Transaction between same Parties.

(a) Subsequent Transaction completed by Principal himself.

1729. Similar transaction—Further loan.]—Deft. being in want of additional capital in his business, on June 10, 1873, wrote to pltfs. (accountants in London with whom he had been in correspondence on the subject) as follows: "The premises of the B. works in this town are my property solely, but the business of it is carried on by myself & my partner. In case of your introducing a purchaser of all the premises or part of them of whom I shall approve, or in case of your introducing capital which I should accept, I could pay you a commission of 5 per cent. on the amount in either case, provided no one else is entitled to a commission in respect of the same introduction." Pltfs. succeeded in introducing W. to deft., who advanced him by way of loan a sum of £10,000, upon which pltfs. received the agreed commission. Some months afterwards deft. & W. entered into an agreement for a partnership, on which occasion W. made a further advance of £4,000 by way of capital to the concern. Pltfs. claimed commission upon this further advance; &, in an action brought to enforce their claim, admitted the advance of the £4,000 was not contemplated at the time of the advance of the £10,000, but that the £4,000 was advanced solely in consequence of the negotiation for the partnership between deft. & W.:—*Held:* pltfs. not entitled to commission on this second advance.—TRIBE *v.* TAYLOR (1876), 1 C. P. D. 505.

Annotations:—**Expld.** Steere *v.* Smith (1885), 2 T. L. R. 131. **Refd.** Millar *v.* Toulmin (1885), 2 T. L. R. 127; Burchell *v.* Gowrie & Blockhouse Collieries, [1910] A. C. 614. P. C.

1730. —— Purchase of further ships.]—A shipbroker introduced a purchaser to a shipbuilder who purchased a ship, & the broker received a commission. Purchaser afterwards purchased other ships. The broker claimed commission on the second sale also. It was a question of fact whether the broker was employed in the second sale; he alleged a usage by which he was entitled to commission whether he was employed or not:—*Held:* (1) there was no evidence to go to a jury that the broker was employed; (2) the usage was not proved.—*Re* HUMPHRYS & PEARSON, *Ex p.* CHATTERIS (1874), 22 W. R. 289, C. A.

1731. —— ——.]—Pltf., a shipbroker, was employed by defts., shipbuilders, to introduce business to them; he succeeded in finding a purchaser for two ships & received commission. A few months later defts. sold a third ship to the same purchaser without pltf.'s intervention. By the usage of the trade shipbrokers were entitled to commission on future sales resulting from the introduction, if effected within a reasonable time:—*Held:* (1) the jury were justified in finding that pltf. & deft. contemplated that the introduction would produce business in more than one ship; (2) pltf. was entitled to commission on the sale of the third ship.—WHITE *v.* BAXTER & CO. (1884), *Times*, July 2; *revsg. S. C.* 1 Cab. & El. 199.

1732. —— Sale of further lots.]—Pltfs. were employed by deft. to sell an estate for him upon the terms that they should be paid commission on the amount of such sale. The estate was divided into lots, some of which were purchased by A., & upon completion of that purchase pltfs. received their commission. Deft. withdrew his authority to sell from pltfs., & A. subsequently purchased the

PART VIII. SECT. 3, SUB-SECT. 1.—C. (a).

1729 i. *Similar transaction—Exercise of option under original contract—Right to commission on future sales.*]—Defts., wishing to introduce a certain ore in P., corresponded with pltf., through whose intervention a contract was made with B. & Co. for the sale of 15,000 tons with an option to order up to 30,000 tons within five years. Defts. agreed to pay pltf. 15 cents commission on the sale, & commission on sales during five years. The option was exercised & pltf. claimed commission thereon:—*Held:* he could not recover, as the agreement to give commission on sales during the five years referred to future sales & not to any amount ordered under the contract in question.—TAYLOR *v.* COBOURG, PETERBOROUGH & MARMORA RY. & MINING CO. (1874), 24 C. P. 200.—**CAN.**

1729 ii. —— *Renewal of contract on same terms.*]—M. Co. undertook in the event of B. & T. securing them a contract for asphalte works in J. in Roumania to pay them a 5 per cent. commission on the contract price as payments were made to them. B. & T. secured a contract with the commune of J. for five years, terminating Oct. 1, 1878. The commune of J. & the M. Co. subsequently concluded a fresh contract on same terms without B. & T.'s intervention:—*Held:* B. & T. were entitled to commission on the new contract, which was simply a continuation of the old contract.—BAINES & TAIT *v.* COMPAGNIE GÉNÉRALE DES MINES D'ASPHALTE (1879), 7 R. (Ct. of Sess.) 132.—**SCOT.**

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remainder from deft. by private contract:—*Held:* the jury were entitled to find that the ultimate sale was not due to any introduction of pltfs., & they could not recover their commission.—LUMLEY *v.* NICHOLSON (1886), 34 W. R. 716; 2 T. L. R. 711.

Annotation:—Expld. Steere *v.* Smith (1885), 2 T. L. R. 131.

1733. —— Further theatrical engagements—Whether re-engagements or new engagements.]—Pltf., a music-hall artist, agreed with D., a music-hall agent, who had procured him an engagement at a music-hall for the seasons 1894, 1895, to pay him commission on all re-engagements at the same music-hall. In 1895, pltf., without the assistance of D., entered into an engagement to perform at the same music-hall in 1896. In an action by pltf. against D.'s receivers for an injunction to restrain them from serving notices on managers to pay them a portion of pltf.'s salary in respect of the engagements procured by himself, defts. counter-claimed for commission on such engagements: *Semble:* it was a question for the jury whether the engagement of 1896 were a fresh engagement, or a re-engagement, within the contract.—ROBEY *v.* ARNOLD (1898), 14 T. L. R. 220, C. A.

1734. —— —— ——.]—Deft. agreed to pay D., a music-hall agent, commission on all engagements obtained through him & on all re-engagements with the same halls. D. carried through contracts for deft.'s appearance at three halls. While the contracts were still existing, deft., without an agent, entered into agreements to appear subsequently at the three halls. Pltfs., D.'s receivers, contended that these were re-engagements & claimed commission:—*Held:* (1) deft. having without D.'s instrumentality contracted to appear at the same three halls, but the salary & other terms being different, it was impossible as a matter of law to say that they were re-engagements as distinguished from fresh engagements; (2) where there were fresh terms it could not be laid down that the case in question was a re-engagement, & the proper thing to do was to give the jury instances of re-engagements & of fresh engagements, & ask them under which category they placed the case; (3) in view of the differences in the terms of the agreements the case represented a fresh engagement & not a re-engagement.—ARNOLD *v.* STRATTON (1898), 14 T. L. R. 537, C. A.

1735. —— —— Proprietorship of music-hall changed.]—Deft. having secured an engagement at the O. Music-hall, agreed in 1891 to pay pltf. a commission thereon & on all future engagements at that hall. The music-hall changed hands, was pulled down & rebuilt. Deft. entered into engagements after the rebuilding of the music-hall, & pltf. claimed commission thereon. The cty. ct. judge having held that the new building was not the establishment referred to in the agreement of 1891, & given judgment for deft.:—*Held:* (1) under the ordinary rule the agent must show that the engagement originally obtained was obtained through his introduction, & that subsequent engagements were so connected with the original engagement that they flowed from it; (2) the parties in this case by making an express agreement had intended to settle any question as to how far subsequent engagements were the result of the original introduction, by stipulating that all future engagements at the O. Music-hall should be treated as referable to the first engagement; (3) the new music-hall was identifiable with the old music-hall, notwithstanding the change of proprietorship & alteration in its outward form; (4) deft. was liable.—AUCKLAND & BRUNETTI *v.* COLLINS (1898), 14 T. L. R. 348.

1736. —— —— Firm of agents dissolved.]—Deft., in Aug., 1911, gave a commission note to S. & R., who were in partnership as theatrical agents, authorising them to act as her agents & business managers for 5 years with the option of a further 5 years, & agreeing to pay a commission of 10 per cent. on all salaried work undertaken by her. S. & R. dissolved partnership in July, 1912:—*Held:* the commission note did not entitle them to claim commission in respect of engagements on salaries obtained by deft. after the dissolution of their partnership.—SALES *v.* CRISPI (1913), 29 T. L. R. 491.

1737. Transaction not similar—Assignment of lease following sale.]—Deft., being possessed of a leasehold house, & also of certain building land likewise held on lease, the former of which was subject to an annual rent of 75 guineas, & the latter to a rent of £50, & also to a covenant to lay out a certain sum in building, employed pltf., an estate agent, to dispose of the whole for him, upon the terms of commission mentioned in a printed paper, as follows: "For the sale of property by private contract—On the first £100, £5 per cent. (& in no case less than £5); from £100 to £5,000, 2½ per cent.; from £5,000 to £10,000, 1½ per cent.; on the sum exceeding £10,000, 1 per cent. For letting, or disposal of the leases of, estates or houses—Unfurnished, £5 per cent. on one year's rent, & £5 per cent. on the premium or sum obtained for fixtures, furniture, etc.; on lease, £5 per cent. on the first year's rent, & 2½ per cent. on the second year's rent, & £5 per cent. on premium or sum obtained for fixtures, etc.—Furnished, £5 per cent. on the entire rental (not exceeding 12 months), but in no case (whether furnished or unfurnished) less than one guinea.—On letting building-land—one year's standing ground-rent. For large estates, one-half year's ground-rent." Pltf. having disposed of the premises to one M. for £1,300, the two leases were assigned to M. subject to the covenants for payment of the rents, etc.:—*Held:* pltf. was only entitled to a commission on the £1,300 under the first branch of the printed scale, viz., 5 per cent. on the first £100, & 2½ per cent. upon the remainder, & not to a further commission on the amount of the yearly rent, under the second branch of the scale.—BIGGS *v.* GORDON (1860), 8 C. B. N. S. 638; 141 E. R. 1316.

1738. —— Private sale following auction.]—An agreement contained a clause, "B. doth instruct A. to proceed to a sale by public auction or other-

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1737 i. *Transaction not similar—Charterparty differing from original one.*]—By charterparty negotiated by a firm of shipbrokers, it was stipulated that a vessel should be hired for six months at £330 per month, with options to the charterers (1) to cancel the charter on the expiration of the first month, & (2) to continue it for a further period of six months, & that commission of two-thirds of 5 per cent. on the estimated amount of freight should be payable to the shipbrokers. About six weeks before the expiration of the first six months the charterers intimated to the owners direct that they would not continue the vessel at same rate of hire, & ultimately after negotiations between the charterers & the owners, acting without the intervention of the shipbrokers, a new charterparty was executed. This charterparty was substantially the same as the first, with the exceptions (1) that the rate of hire for the first six months was £220 per month with an option to the charterers of continuing the charter for another six months at £225 per month; (2) that there was no option to cancel at the end of the first month; & (3) that there was no brokerage clause:—*Held:* (1) the second charterparty was not a renewal or continuation of the first, but was a separate & independent contract, & was not a contract which was within the contemplation of the parties when the first contract was entered into; & (2) the shipbrokers were not entitled to charge any commission in respect of it.—DAWSON BROTHERS *v.* FISHER & SONS (1900) 37 Sc. L. R. 878.—SCOT.

wise of " an estate, " & if the same shall be sold B. shall pay to A., 2½ per cent. on the amount of such sale, such commission to cover all expenses of every description. In case the said estate shall not be sold, B. shall pay to A. £25 as a compensation for his trouble & expense." A. advertised the estate for sale by auction & put it up for sale, but it was not sold then. B. wrote to A. to withdraw the sale of the estate for the present, as he had arranged a loan on it, being at the time himself in treaty with C. for the sale of it, who shortly afterwards bought it. C. found out about its being for sale through seeing the advertisements, & he attended the auction & learnt from A. that it was not sold :—*Held :* A. was entitled to his commission on the purchase-money as the relation between buyer & seller had been brought about through him.—GREEN *v.* BARTLETT (1863), 14 C. B. N. S. 681; 2 New Rep. 279; 32 L. J. C. P. 261; 8 L. T. 503; 10 Jur. N. S. 78; 11 W. R. 834.

Annotations :—**Consd.** Curtis *v.* Nixon (1871), 24 L. T. 706. **Folld.** Steere *v.* Smith (1885), 2 T. L. R. 131. **Apld.** Oetzmann *v.* Emmott (1887), 4 T. L. R. 10; Barnett *v.* Isaacson (1888), 4 T. L. R. 595; Burchell *v.* Gowrie & Blockhouse Collieries, [1910] A. C. 614, P. C. **Refd.** Inchbald *v.* Western Neilgherry Coffee, Tea & Cinchona Co. (1864), 13 W. R. 95; Green *v.* Lucas (1875), 31 L. T. 731.

1739. —— Sale following letting.]—In order to found a legal claim for commission on a sale, there must not only be a causal, but also a contractual relation between the introduction of the purchaser & the ultimate transaction of sale.

Deft. in 1880, being tenant for life of a settled estate, applied to pltf. to let it, & received from him a scale of charges for both selling & letting estates, which contained a note that when property was let to a tenant who afterwards became the purchaser, the commission on selling would be charged, less the amount of commission paid for letting. Deft. put the paper into his pocket without reading it. A tenant was found by pltf. who took the property on lease. In 1884 deft., who had acquired power to sell the estate under Settled Land Act, 1882 (c. 38), sold the estate to the tenant without the intervention of pltf. In an action by pltf. for commission as on a sale less the previous commission paid :—*Held :* (1) pltf. was simply employed to let; (2) he was not entitled to commission on the subsequent sale.—TOULMIN *v.* MILLAR (1887), 12 App. Cas. 746; 57 L. J. Q. B. 301; 58 L. T. 96; 3 T. L. R. 836, H. L.

Annotations :—**Apld.** Nightingale *v.* Parsons (1914), 110 L. T. 806. **Refd.** Giddy & Giddy *v.* Russell (1904), 48 Sol. Jo. 415, C. A.; Burchell *v.* Gowrie & Blockhouse Collieries, [1910] A. C. 614, P. C. **Mentd.** Barnett *v.* Isaacson (1888), 4 T. L. R. 595; Allcock *v.* Hall, [1891] 1 Q. B. 444, C. A.; Skeate *v.* Slaters (1914), 110 L. T. 604, C. A.

1740. —— ——.]—Pltfs. set up an oral contract that in respect of the letting of a property they should receive 5 per cent. commission on the rent, & in case of a sale, 5 per cent. on the first £1,000, 2½ per cent. up to £5,000, & 1½ per cent. on the residue. Pltfs. introduced C. to defts. & tried to bring about a purchase. C., instead, took a 7 years' lease on which defts. paid the commission, & after being 15 months in possession he bought the property from defts. :—*Held :* there was no evidence to leave to a jury that pltfs. procured the sale, so as to be entitled to commission on it.

The right to commission does not arise out of the mere fact that the agents have introduced a tenant or a purchaser. It is not sufficient to show that the introduction was a *causa sine quâ non*. It is necessary to show that the introduction was an efficient cause in bringing about the letting or the sale. Pltfs. have failed to establish what is a condition precedent to their right to commission,—viz., that they brought about the sale (COLLINS, M.R.).—MILLAR, SON & CO. *v.* RADFORD (1903), 19 T. L. R. 575, C. A.

Annotations :—**Apld.** Nightingale *v.* Parsons, [1914] 2 K. B. 621, C. A. **Refd.** Burchell *v.* Gowrie & Blockhouse Collieries, [1910] A. C. 614, P. C.

1741. —— ——.]—In 1908 pltf., a house agent, was employed by deft. to find a tenant for a house at a rent of £120 a year, or a purchaser for £2,500. Pltf. found a tenant who took the house for a term of 3 years with the option of continuing the tenancy for 5 or 7 years at the rent of £110 a year, & he was paid commission on the letting. At the end of the 3 years the tenant, as a condition of his continuing the tenancy for a further term, required deft. to build an addition to the house. Deft. refused to do so, & thereupon the question of purchasing the house arose, & deft. agreed to sell it to the tenant's wife for £1,900. Pltf. after the original letting had nothing to do with the negotiations which led up to the sale. Pltf. sued deft. in the cty. ct. to recover commission on the sale. The judge found that, though pltf. introduced the property to the tenant & his wife, that introduction was not the effective cause of the subsequent sale, & he gave judgment for deft. :—*Held :* the cty. ct. judge had applied the proper test, & had found against pltf.'s claim upon evidence which entitled him so to find, & his decision must be affirmed.—NIGHTINGALE *v.* PARSONS, [1914] 2 K. B. 621; 83 L. J. K. B. 742; 110 L. T. 806, C. A.

(b) Subsequent Transaction completed by another Agent.

1742. Transaction similar—Charter of further ships.]—L., a shipbroker, informed S. & Co., shipbrokers, of two steamships belonging to the G. Co., as available for the purposes of a foreign Govt. S. & Co. communicated this information to P., the authorised agent of the foreign Govt., & P. in the first instance chartered one of the ships for his Govt. for 6 months. This charter was continued for another 6 months without communication with L., at the expiration of which time a renewed charterparty was entered into for another 6 months, S. & Co. receiving their commission on these transactions, the original charterparty containing no provision as to renewal. P. subsequently, & without communication with L., chartered the other ship also on behalf of his Govt., S. & Co. receiving their commission, & they paid to L. his commission, according to agreement between them on the charter of the first ship for the first 6 months. In an action by the assignees of L. against S. & Co. for broker's commission on the charter of both these ships, L. gave evidence, written & verbal, of an agreement between himself & S. & Co., under which he claimed to be entitled to half of the commission to be received by S. & Co. on the charter of both ships, & tendered evidence of a custom among brokers by which he as " introducing broker " would be entitled to share commission on a renewal of the charter without any special agreement to that effect :—*Held :* (1) there was evidence for the jury that the agreement made respecting the first ship applied to the other also, & the question whether it did so apply ought to have been left to the jury; (2) the evidence as to the alleged custom was admissible.—ALLAN *v.* SUNDIUS (SUNDRIES) (1862), 1 H. & C. 123; 31 L. J. Ex. 307; 6 L. T. 359; 10 W. R. 648; 1 Mar. L. C. 222.

1743. —— Further lease.]—Pltf., a house agent, found a tenant for deft.'s furnished house, his terms being " Upon letting furnished houses on the rent for any period, £5 per cent." Deft. wrote to pltf. that he had agreed with the tenant, " From July 1, 1869, to Apr. 1, 1870, 300 guineas; or 350 guineas if taken on to May 1 "; the tenant " to have the option of taking the house on from Apr. 1 for

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another year for 470 guineas." In the agreement afterwards drawn up by pltf. there was no mention of the option to take on for another year at all. Before the end of the 9 months' tenancy deft. & the tenant, through the intervention of another house agent, & without any communication with pltf., agreed for another year's occupation from Apr. 1 for 450 guineas. The custom of the trade was proved to be that a house agent received commission upon the rent of a furnished house from year to year so long as the tenant to whom he let occupied the house. Pltf. was paid commission upon the rent of the following year:—*Held:* (1) a house agent can claim commission only on rent obtained as a proximate consequence of his act; (2) this is to be generally ascertained from the agreement he has himself prepared; (3) an option to take on a house is not exercised if the tenancy be continued upon an agreement for a different rent obtained through the intervention of another house agent; (4) a trade custom to pay commission in such circumstances was irrational & bad; (5) pltf. was rightly nonsuited.—CURTIS *v.* NIXON (1871), 24 L. T. 706.

1744. —— Further orders.]—Pltf. was employed to obtain orders for defts.' goods on the terms of receiving commission on all future business between defts. & the customers introduced. In 1877 pltf. obtained two orders from H., but H. gave no further orders to defts. till Nov., 1881. The later orders were given on the introduction of, & for the purpose of assisting, H.'s nephew. Pltf. claimed commission on these orders;—*Held:* (1) commission was only payable on future business which was the result of the introduction by pltf.; (2) the business with H., which was the result of the introduction by pltf., ceased in 1877; (3) pltf. was not entitled to commission on the later orders, which were not the result of pltf.'s prior introduction.—BOYD *v.* TOVIL PAPER CO., LTD. (1888), 4 T. L. R. 332, C. A.

1745. Transaction not similar—Sale following letting.]—Pltfs., who were instructed by deft. to sell or let a house, introduced T., who became tenant, & received commission on T.'s introduction. T. purchased the house through another firm of agents. T. had had some dispute with pltfs. & had refused to negotiate for the purchase of the house through them, but the price which he paid was the price at which pltfs. had been instructed to sell the house. Pltfs. claimed commission on the sale:—*Held:* pltfs. not entitled, as the sale had not been brought about by their introduction, but was the result of independent action on the part of T.—GILLOW & CO. *v.* ABERDARE (LORD) (1892), 9 T. L. R. 12, C. A.

D. Where Transaction completed differs from that contemplated.

1746. Agent to procure loan on special terms—Loan procured on different terms.]—If B. is employed to procure money for A. upon certain terms, & does not procure it upon those terms, but upon other & different terms, then A. will not be liable to him for commission, Nor can B., in such case, claim to recover a reasonable remuneration for trouble & labour, for he has not done what he was employed to do.—MASON *v.* CLIFTON (BART.) (1863), 3 F. & F. 899.

PART VIII. SECT. 3, SUB-SECT. 1.—D.

1. Agent to sell — Third party taking lease with option to buy.]—Deft. employed pltf. to sell his station property to S., an adjoining owner, for £5 an acre. Pltf. for fifteen months endeavoured so to do, but S. refused to offer more than £4 10*s.* an acre; pltf. continued to endeavour to induce S. to purchase; deft. then told pltf. he had decided to sell the property as a going concern. S. subsequently bought deft.'s stock & agreed to lease the land with an option of purchase at £5 5*s.* an acre, at which price he afterwards bought:—*Held:* pltf. entitled to commission.—RYAN *v.* HORTON (1911), 12 C. L. R. 197.—**AUS.**

g. —— ——.]—Deft. with knowledge of the fact that pltf. was a land agent placed his house & lot in pltf.'s hands. Pltf. introduced M. as a prospective purchaser & after some discussion M. took a lease of the house with an option to purchase within a year. M. elected to purchase within the year & pltf. brought an action for commission:—*Held:* the contractual relation between vendor & purchaser directly resulted from pltf.'s efforts & he was entitled to his commission. *Toulmin* v. *Millar* (1888), 58 L. T. 96, apld.; *Rimmer* v. *Knowles* (1874), 30 L. T. 496; *Green* v. *Bartlett* (1863), 14 C. B. N. S. 581; *Bayley* v. *Chadwick* (1879), 39 L. T. 429; *Mansell* v. *Clements* (1874), L. R. 9 C. P. 139; *Wilkinson* v. *Alston* (1879), 48 L. J. Q. B. 733, cited.—MORSON *v.* BURNSIDE (1900), 31 O. R. 438; 20 C. L. T. 169.—**CAN.**

h. —— ——.]—Where an agent is employed to sell land, his remuneration being a commission on the amount of purchase-money, he does not earn commission by introducing a person who does not become a purchaser, but takes a lease with a purchasing option.—TUTCHEN *v.* STUBBS (1888), 6 L. R. 322.—**N.Z.**

k. —— *Third party becoming monthly tenant.*]—In an action to recover commission, it appeared that pltf., an estate agent, introduced a purchaser who agreed to the terms upon which the agent was authorised to offer the property. The purchaser entered into possession under a verbal contract, paid a deposit of £50, but refused to sign a contract, & the sale fell through on grounds which did not clearly appear. The deposit was returned & the purchaser remained in possession as a monthly tenant:—*Held:* there was sufficient evidence to justify the ct. in finding for pltf.—VAUGHAN *v.* FOSTER & SON, LTD. (1917), 17 N. S. W. St. R. 281; 34 N. S. W. W. N. 103.—**AUS.**

l. —— *Procuring exchange of land.*]—Pltfs., real estate agents, listed deft.'s property for sale, & introduced to him a probable purchaser, who afterwards arranged an exchange of some of his lots for deft.'s property:—*Held:* pltfs. entitled to one-half the commission they would have earned if they had effected a sale of the property.—THORDARSON *v.* JONES, THORDARSON *v.* HŒLE (1907) 7 W. L. R. 106; 17 Man. L. R. 295.—**CAN.**

m. —— ——.]—Deft. gave instructions to pltf. in these words: "You are hereby authorised to sell my property as described below, & should a sale be effected by you or through your instrumentality I agree to pay you a commission of 2½ per cent. on £1,000 & 1½ on the balance of the purchase money." The instructions ended, "Exchange price to be arranged." At a later date the price was thus stated, "Price, £24 per acre for exchange, cash £22 per acre":—*Held:* (1) the authority given was to sell & not to exchange; (2) commission was not earned by effecting an exchange, but pltf. was entitled to recover, as upon a *quantum meruit*, for his work & labour in connection with the exchange.—LANE *v.* LOVELOCK (1914), 33 N. Z. L. R. 826.—**N.Z.**

n. —— *Selling other property not listed.*]—Deft. listed a coal-yard with pltf., a real estate agent, for sale. Pltf. introduced a prospective purchaser, but he declined the purchase & ultimately purchased another coal-yard from deft.:—*Held:* pltf. not entitled to commission.—MOODY *v.* KETTLE (1913), 24 O. W. R. 676; 4 O. W. N. 1410; 11 D. L. R. 844.—**CAN.**

o. Agent to sell by lots—Sale in bulk.]—Though a contract for sale was based upon lots, & the property was sold by the agent in bulk, the latter may recover the customary commission upon each lot.—BOUSQUET *v.* MIGNEAULT (1915), Q. R. 48 S. C. 5.—**CAN.**

p. Agent to sell on terms—Subsequent alteration of terms.]—Deft. placed his property in the hands of several estate agents for sale. Pltf., who was not known to deft. to be a real estate agent & had no office as such, asked the terms & subsequently brought a purchaser, to whom deft. said he would require a larger cash payment than pltf. had been told. Eventually the purchaser proposed to pay cash down half the amount required by deft. & the balance in six months, to which deft. agreed:—*Held:* pltf. entitled to commission.—WILKES *v.* MAXWELL (1901), 24 C. L. T. 150; 14 Man. L. R. 599.—**CAN.**

q. —— ——.]—Deft. agreed with pltf. "In the event of your making a sale of the M. hotel, I will agree to sell at $50,000 net to me, $20,000 cash, balance in one & two years, 6 per cent. interest. Anything over & above you may retain as commission." Pltf. introduced F., & an agreement was drawn up on different terms, deft. assenting to the alterations:—*Held:* the alterations did not deprive pltf. of his right to commission nor postpone the date of payment of the commission

1747. Transaction completed substantially same as that contemplated.]—JOHNSTON *v.* KERSHAW, No. 1190, *ante*.

For full anns., *see* S. C. No. 1190, *ante*.

1748. ——.]—Deft. instructed pltf., a surveyor, to sell an estate, & agreed to give him £50 if he obtained a purchaser at £2,000. Afterwards deft. raised his price to £3,000, & pltf. found for him a builder, who, in his evidence, said he & deft. agreed that he should purchase the land. He was to take it on interest at £3,000, £150 a year; & he signed a lease for 999 years, giving him occupation, & option to complete purchase during 20 years. Pltf. sued deft. in a cty. ct. for his commission, & upon evidence of these facts, the judge nonsuited him:—*Held:* (1) these facts substantially constituted a purchase; (2) pltf. was entitled to recover the agreed amount of commission.—RIMMER *v.* KNOWLES (1874), 30 L. T. 496; 22 W. R. 574.

1749. Transaction completed not within agent's authority.]—Pltfs., having been instructed to let deft.'s house on a 3 years' agreement, gave an order to view it to a person to whom deft. sold the lease. In an action brought by pltfs. to recover their commission on the purchase-money the cty. ct. judge left it to the jury to find if deft. authorised pltfs. to sell the lease, & the jury found he had not & judgment was given for deft. On a motion to set aside verdict & judgment:—*Held:* (1) the contract of sale was not brought about by pltfs.; (2) pltfs. set up an express authority to sell, which was found against them, & they could not insist that it should have been left to the jury to find an implied authority to sell.—GRIFFIN *v.* CHEESEWRIGHT (1885), 2 T. L. R. 99.

1750. Whether transaction completed was within contemplation of parties.]—Deft., being desirous of forming a syndicate to purchase certain patents, agreed with pltf. to pay him commission upon the introduction of any person willing to subscribe £1,000 at the rate of 10 per cent. in cash out of the proceeds of the syndicate as & when received, & 90 per cent. out of the proceeds of the purchase-money in shares or cash, as might be arranged after the allotment. By a subsequent agreement deft. agreed in the event of pltf. introducing anyone to complete the syndicate to hand to pltf. further shares representing £1,000. Pltf. introduced two persons, who each subscribed £500. With the object of keeping the capital of the syndicate as low as possible, the amount of individual subscriptions was limited to £500, & deft. made a supplemental agreement under which commission was to be paid as on a subscription of £1,000, but the commission payable out of the purchase-money was to be calculated *pro ratâ* to the amount eventually agreed upon &

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then earned, which was payable on the execution of the agreement & the payment of the cash instalment. *Green* v. *Bartlett* (1863), 14 C. B. N. S. 681; *Tribe* v. *Taylor* (1876), 1 C. P. D. 505; *Miller* v. *Radford* (1903), 19 T. L. R. 575; *Burchell* v. *Gowrie & Blockhouse Collieries*, [1910] A. C. 614, cited.—CHALMERS *v.* CAMPBELL (1915), 30 W. L. R. 836; 8 W. W. R. 27; 21 D. L. R. 635.—**CAN.**

r. —— ——.]—Where property is sold by an agent, but the conditions are varied as between seller & purchaser, the agent has a right to his commission, as of usage, but not to the sum agreed upon.—BAIKIE *v.* LATOURELLE (1915), Q. R. 24 K. B. 171.—**CAN.**

s. —— ——.]—Where a real estate agent undertakes the sale of land under certain conditions, which are subsequently varied with the approval of the vendor & such agent, the latter can only claim the customary commission, & not that originally agreed to. It is not necessary to be a real estate agent to have the right to recover such commission.—LANGELIER *v.* ROY (1915), Q. R. 24 K. B. 171; 22 R. L. N. S. 123. —**CAN.**

t. —— ——.]—Deft. authorised pltfs. to sell a threshing outfit for $2,000, $200 cash & balance by instalments over four years, commission $200. L. on pltfs.' introduction went down to W. where the outfit was, inspected it & refused as the price was too high, & pltfs. wrote deft. urging him to see L. soon, as he was likely to buy. Deft. went to L. & concluded a bargain with him for $1,825, L. paying $100 down:—*Held:* pltfs. had found a purchaser, though not quite on the terms authorised, & were entitled, on a *quantum meruit* basis, to 10 per cent. commission on $1,825.—MILESTONE LAND & LOAN AGENCY CO. *v.* LUCKSINGER (1908) 7 W. L. R. 497; 1 Sask. L. R. 61.—**CAN.**

u. —— ——.]—Agents to procure a purchaser of deft.'s land on commission on the terms that the purchaser should give security, if only $1,000 was paid in cash, sued to recover commission:—*Held:* they were not entitled as they had not procured a purchaser on the terms agreed.—MILLAR & ROSS *v.* NAPPER (1910), 14 W. L. R. 335.—**CAN.**

v. —— ——.]—An estate agent, employed to sell land at a defined price & on defined terms is not entitled to commission by procuring an offer to purchase at the price but on different terms.—CAIRNS *v.* BUFFET (1912), 22 W. L. R. 402; 3 W. W. R. 352; 8 D. L. R. 53.—**CAN.**

w. *Agent to sell at stated price — Sale at lower price.*] — Where an agent had been engaged to find a purchaser at a certain price & having failed to do so was not entitled to a commission on the sale subsequently made to the person originally introduced by him at a lower price, & where, *primâ facie*, the agreement was to pay a commission on a named price:—*Held:* it was for the agent to show in the clearest way that the intention of the parties was to pay a commission on any sum at which a sale might be effected.—BRIDGMAN *v.* HEPBURN (1908), 42 S. C. R. 228; 13 B. C. R. 389; 8 W. L. R. 28.—**CAN.**

x. —— ——.]—A real estate agent has only the right to recover his commission when he sells for the price fixed by his mandator or one in excess thereof.—JACQUES *v.* LEONARD (1914), Q. R. 47 S. C. 344.—**CAN.**

y. —— ——.]—A proprietor who promises to pay a commission of 2½ per cent. to a real estate agent if he sells his property for $8,500, is released from his agreement if the property is sold for $8,000 to a purchaser secured by the agent.—SCHLEIFER *v.* KAUFMAN 1914), Q. R. 47 S. C. 145.—**CAN.**

z. *Shipbroker — Variation in terms of charterparty.*]—A shipbroker, who brings parties together resulting in a charterparty, is entitled to his commission even though the negotiations between the parties result in better terms for the shipowner. A change in the terms does not justify the inference that the broker was not the efficient cause of the charterparty.—BACKMAN *v.* RITCEY (1916), 50 N. S. R. 80.—**CAN.**

1749 i. *Transaction completed not within agent's authority.*]—Pltf. had authority to sell certain shares, but after several unsuccessful attempts to sell pltf. & defts. agreed to sell to M. & I., & pltf.'s authority thus terminated. Immediately after this agreement pltf. called on one of defts., intimating that J., with whom pltf. had previously been in treaty, wanted the refusal of the shares, &, as a result, M. & I. suspended their agreement for fourteen days to enable pltf. to effect the sale, & defts. cabled to pltf. giving instructions as to terms of sale. Pltf. concluded a sale with J., but the arrangement was not within the terms prescribed by the cable:—*Held:* pltf. had not effected a sale in accordance with the terms of his authority as agent, & was not entitled to commission or remuneration for his services.—MERRITT *v.* CORBOULD (1913), 24 W. L. R. 68; 4 W. W. R. 148; 11 D. L. R. 143.—**CAN.**

1749 ii. —— *Sale on unauthorised terms—Transaction ratified.*]—Pltf., employed by deft. to sell lands upon certain terms, found a man willing to purchase upon less advantageous terms:—*Held:* deft., having accepted the purchaser & ratified the variation of the terms, was liable for pltf.'s commission.—WOLF *v.* TAIT (1877), 4 M. R. 59.—**CAN.**

1749 iii. —— —— ——.]—Pltf. having agreed for a commission of $200 to find a purchaser of deft.'s farm at $6,000, $1,000 to be paid in cash, found a purchaser at $6,000, who paid only $500 cash, but deft. accepted & sold to him, & after the sale promised to pay pltf. the $200:—*Held:* deft. having accepted & dealt with the purchaser found by pltf., though not such purchaser as the agreement called for, pltf. was entitled to recover.—WYCOTT *v.* CAMPBELL (1871), 31 U. C. R. 584.—**CAN.**

1750 i. *Whether transaction completed was within contemplation of parties.*]—S. was introduced by an agent to his principal as a prospective purchaser of land. S. was endeavouring to buy on behalf of a co. in the organisation of which he was interested. Later the co. purchased, & the principal had admitted the agent's right to commission "in the event of a sale made by or through him." In an action for commission:—*Held:* agent entitled to his commission. *Burchell v. Gowrie & Blockhouse Collieries*, [1910] A. C. 614, cited.—MCBRAYNE *v.* IMPERIAL LOAN CO. (1913) 28 O. C. R. 653; 4 O. W. N. 1311; 13 D. L. R. 448.—**CAN.**

1750 ii. ——.]—In an action by pltf., a special agent to secure advertising contracts for defts. for T. & the province of O., for commission in respect of an advertising contract entered into by E. Co. with defts., defts. contended that in order to entitle pltf. to commission, not only must the final contract order have been sent from a T. office, but the advertising must also have originated in pltf.'s territory:—*Held:* the final contract having been completed by E. Co. & delivered to defts. at T., pltf. entitled to commis-

Sect. 3.—Agents rights against principal: Subsect. 1, D. & E. (a).]

the original sum intended to be asked, say £60,000. The syndicate was about to fall through when W., who was not a member of the syndicate, found capital to float a new co. which proved successful. Pltf. claimed (1) commission at the rate of 10 per cent. on £1,500, the amount of subscriptions procured by him for the syndicate; (2) shares to the value of £1,000 in the new co.; (3) £472 10*s.*, being the *pro ratâ* calculation of the difference between £60,000 & £21,000, the price paid to deft. by the new co.:—*Held:* (1) the formation of the two cos. was within the contemplation of the parties; (2) plt. was entitled to recover.—WILLETT *v.* MCLEAN (1891), 8 T. L. R. 10.

1751. Transaction amounting to new contract.]—Pltfs. introduced R. to deft. as purchaser of his business. Deft. agreed to sell the business to R. for £17,000, a deposit of £5,000 was to be made, & the purchase was to be completed on Jan. 18, 1891. The agreement for purchase provided that if R. should resell to a co. R. might satisfy £3,000 of his purchase-money by giving deft. fully-paid shares in the co. to that amount. Pltfs. then received a commission in the following terms: "In consideration of your having introduced to me a purchaser of the above premises for £17,000, I hereby agree to pay the sum of £750 on the completion of the purchase." No deposit was ever paid, & it was waived & the time for completion extended. After the formation of the co. it was agreed between deft. & R. that £10,000 of the purchase-money should be paid by debentures & preference shares of the co. & that the balance should be paid in cash. Thereupon deft. conveyed his business to the co. Pltfs. claimed commission under the above commission note:—*Held:* (1) the subsequent agreement between deft. & R. amounted to a new contract; (2) pltfs. were not entitled to recover.

A particular purchase cannot be said to be completed when the vendor does not get the purchase-money agreed on (LINDLEY, L.J.).—BATTAMS *v.* TOMPKINS (1892), 8 T. L. R. 707, C. A.

1752. Transaction completed merely ancillary to that contemplated.]—Defts. desired to acquire some public-houses in a particular district & agreed to pay pltf. commission on all licensed property they might purchase through his introduction. Defts. abandoned that idea, & instead promoted a new co. which ultimately acquired certain licensed property originally brought to the notice of defts. by pltf.:—*Held:* as the new co. was merely ancillary to the old, the commission was payable by defts.—GUNN *v.* SHOWELL'S BREWERY CO., LTD. & CROSSWELL'S, LTD. (1902), 50 W. R. 659; 18 T. L. R. 659; 46 Sol. Jo. 584, C. A.

E. Where Transaction not completed.

(a) Act or Omission of Principal.

1753. Principal buying in—Sale of ship.]—A. commissioned B. to sell a ship for him. The ship when put up for sale having been bought in:—*Held:* B. not entitled to commission on the sale.—MESTAER *v.* ATKINS, No. 2027, *post.*

Annotation:—**Distd.** Wilson *v.* Heather (1814), 5 Taunt. 642.

See, further, AUCTION & AUCTIONEERS.

sion.—GLEDHILL *v.* TELEGRAM PRINT CO. (1900), 13 O. W. R. 1000; *affd.* 14 O. W. R. 957; 1 O. W. N. 161.—**CAN.**

1750 iii. ——.]—Pltf. claimed 10 per cent. commission on the sale price of an undivided half-interest in an English land co. Deft. agreed to pay pltf. 10 per cent. on all such sales as should be effected through parties introduced to deft. by pltf. Pltf. introduced F., who obtained an option & subsequently promoted a co. in England, which purchased the property:—*Held:* pltf. entitled to commission, notwithstanding the sale to the co. was not the kind of sale in contemplation when the agreement was made. *Burchell v. Gowrie & Blockhouse Collieries*, [1910] A. C. 614, cited. — TUCKER *v.* MASSEY (1913), 24 W. L. R. 296; 18 B. C. R. 250; 4 W. W. R. 755; 11 D. L. R. 309.—**CAN.**

1750 iv. ——.]—Deft. employed pltf. to sell lands on the terms of 10 per cent. on the gross selling price of all lands sold during continuance of the contract, whether sold by pltf., deft. or any other person, payment out of first instalment of purchase price when received by owner. Pltf. sold part of the lands & deft. sold the balance *en bloc* with other lands to a co. & was paid partly in cash & partly in fully paid-up shares:—*Held:* the sale to the co. was not such as was contemplated, & pltf. not entitled to commission but to damages for breach of implied obligation not to prevent him earning commission. *Semble:* damages would be the amount of the commission pltf. was prevented from earning. *Burchell v. Gowrie & Blockhouse Collieries*, [1910] A. C. 614; *Inchbald v. Western Neilgherry Coffee, etc., Co.* (1864), 34 L. J. C. P. 15; *Re Patent Floor Cloth Co., Dean & Gilbert's Claim* (1872), 41 L. J. Ch. 476, cited.—KENNERLEY *v.* HEXTALL (1915), 31 W. L. R. 558; 8 W. W. R. 922; 8 Alta. L. R. 500; 24 D. L. R. 418; *affd.* S. C. of Canada, Nov. 2, 1915 (not reported).—**CAN.**

1750 v. ——.]—Pltf., employed by deft. at a remuneration of £100 to find a purchaser for cash of certain head leases at a fixed price, found a person who covenanted to purchase, but who after six months effected an exchange with A. & B.: these having very little capital, it became necessary for deft. to finance them, & an arrangement was made by which the sub-leases were cancelled, & A. & B. purchased the head leases on terms:—*Held:* (1) pltf. not entitled to commission, the sale to A. & B. not being within the covenant contained in the sub-leases, which contemplated a sale for cash; (2) as deft. by his action had made it impossible for pltf. to earn his commission, he was entitled to remuneration on a *quantum meruit*, & £50 was a reasonable sum for his services.—WESTON *v.* MILLS (1912), 31 N. Z. L. R. 590.—**N.Z.**

1751 i. *Transaction amounting to new contract.*]—Appits., dealers in electrical supplies, having informed resps., manufacturers of electrical machinery, that an electrical station had been completely burned down & asking resps. to send quotations for new plant, resps. replied by telegram that they could furnish plant on certain terms "including commission for you," & this telegram was the only authority appits. had in connection with furnishing new plant for the station. A member of appit. firm endeavoured to effect a sale of the plant referred to in the telegram, but failed, & afterwards a travelling agent of resps. sold to the co. owning the station different plant. Appits. sued for commission:—*Held:* the right of appits. to commission depended solely upon whether they had sold the specific plant described in the telegram &, as they had not done so, their right to commission failed.—STARR, SON & CO. *v.* ROYAL ELECTRIC CO. (1900) 30 S. C. R. 384; 33 N. S. R. 156; 20 C. L. T. 323.—**CAN.**

1751 ii. ——.]—By agreement an agent's commission was to be paid only on receipt of instalments of purchase-money. He procured an option of purchase from C., by whom instalments were paid on which the agent received commission. C. threw up his option, but afterwards under a new agreement between the owners & A., C. agreed to pay $200,000, the price originally fixed, by shares, cash, & promissory notes credit being given for instalments already paid by him:—*Held:* the agent entitled only to commission already paid & not on $200,000, C.'s option being ended before the new arrangement was made, which was not a fraudulent one to defeat the agent's claim to commission.—BEVERIDGE *v.* AWAYA IKEDA & CO. (1911), 17 W. L. R. 674; 16 B. C. R. 474.—**CAN.**

1751 iii. ——.]—Defts. listed two quarter-sections of land with pltf. for sale at the price of $4,375 & $2,500 in cash & not later than thirty days from date of agreement. Before the expiration of thirty days, pltf. asked one of defts. to sign an agreement for the sale of the parcels to L. There was no mention or tender of money, but the agreement stated that $2,500 was to be placed in a bank, & the agreement to be null & void if payment was not forthcoming. There was no satisfactory evidence of the money being in the bank, & deft. did not sign the agreement. L. subsequently purchased one quarter section direct:—*Held:* pltf. not entitled to commission nor to recover on a *quantum meruit*.—SUTHERLAND *v.* RHINEHART (1912), 19 W. L. R. 819; *affd.* (1912) 20 W. L. R. 584; 1 W. W. R. 495, 1060; 2 D. L. R. 204.—**CAN.**

1752 i. *Transaction completed merely ancillary to that contemplated.*]—An agent for sale of land on commission introduced B., a purchaser, who entered into a contract for sale, & in consideration of B. paying off an incumbrance the sale price was reduced. B. borrowed the money to pay off the incumbrance on the security of the contract; the owner afterwards sold to the lenders of the money to B.:—*Held:* the agent entitled to commission on the full amount, & the sale was not a transaction independent of the contract with B., but was a continuance thereof.—GLENDINNING *v.* CAVANAGH (1908), 40 S. C. R. 414.—**CAN.**

PART VIII. SECT. 3, SUB-SECT. 1.—E. (a).

1753 i. *Principal buying in—Tax sale.*]—A tax sale bye-law provided that the

1754. Principal refusing to complete.]—Deft. employed pltf. to find a purchaser at a certain price for some land, at a commission of £1 10s. per cent. on the purchase-money if a sale were effected. Pltf. found a purchaser, but deft. refused to complete the sale:—*Held:* pltf. could sue on a *quantum meruit* for the work & labour done, as he had performed his part of the contract, & deft. prevented its completion.

The law implies in such circumstances as the above a promise on deft.'s part to remunerate pltf. for his services, although the contract was not completed; & there is no question for the jury whether or not such a promise was implied. Pltf.

collector should be entitled to a commission on all arrears of taxes collected:—*Held:* where lands were bid in by the municipality because the amount offered at the sale was less than the arrears of taxes & costs owing on the lands, the collector was not entitled to a commission on the price of lands so bid in.—NORTH VANCOUVER *v.* KEENE (1903), 24 C. L. T. 197; 10 B. C. R. 276.—**CAN.**

1754 i. *Principal refusing to complete.*]—Land not having been disposed of in consequence of deft.'s refusal to sell to a purchaser procured by pltf.:—*Held:* assuming the relationship of principal & agent, pltf. not entitled to recover commission *qua* commission, but could bring an action for a wrongful withdrawal of authority or on a *quantum meruit*.—ADAMSON *v.* YEAGER (1884), 10 A. R. 477.—**CAN.**

1754 ii. ——.] — Pltf. alleged an agreement by deft. to pay him, pltf., ½ per cent. commission if he obtained a loan for deft.; he further alleged that he had obtained the money, but that the loan had not been carried out through the act of deft. The latter by his plea denied that there had been an agreement in the form alleged, but, when examined as a witness, he admitted that there had been an agreement, but added that by the agreement it was stipulated that he was not to be bound to pay a commission if for any reason the loan was not carried out:—*Held:* (1) in the circumstances, as the answers of deft. contained facts foreign to the issue as joined, they might be divided; (2) the alleged rate of commission not being proved, pltf. was only entitled to the ordinary rate of compensation.—LEWIS *v.* LAMONTAGNE (1897), Q. R. 11 S. C. 441.—**CAN.**

1754 iii. ——.]—Pltf., a real estate broker, applied to the general manager of a trading corpn. & obtained from him a memorandum of the price required for certain property of the corpn., the terms of payment & the probable date when the premises would be vacated. The corpn. had not given its manager special authorisation to offer the property for sale. Pltf. introduced to the manager a purchaser who was willing to purchase at the stated price. A deposit was paid & certain modifications were proposed, but the transaction was not closed. Shortly afterwards the corpn. sold the property to another & the deposit paid by the purchaser found by pltf. was returned. Pltf. then sued the corpn. & its general manager for commission:—*Held:* the action failed, as the manager had no authority to bind the co. by an agreement to pay pltf. a commission for introducing a purchaser whom the co. might not accept & whose services might therefore be fruitless to them.—CALLOWAY *v.* STOBART, SONS & CO. (1904), 35 S. C. R. 301.—**CAN.**

1754 iv. ——.]—Pltfs. employed as agents to find a purchaser for certain land, procured a purchaser qualified & willing to buy substantially upon the terms which deft. intimated to pltfs., but the sale fell through because deft. refused to complete the sale:—*Held:* pltfs. were entitled to $500 by way of compensation. — BOYLE *v.* GRASSICK (1905), 6 Ter. L. R. 232; 2 W. L. R. 99, 284.—**CAN.**

1754 v. ——.]—An agent for sale producing a purchaser ready, willing, & able to purchase is entitled to a commission, if, the parties having agreed upon the terms, the vendor by his fault or default prevents the sale. *Grogan* v. *Smith* (1890), 7 T. L. R. 132, cited.—BAGSHAWE *v.* ROLAND (1907), 7 W. L. R. 158; 13 B. C. R. 262.—**CAN.**

1754 vi. ——.]—GARIEPY *v.* JOHNSON (1910), 17 R. L. N. S. 143.—**CAN.**

1754 vii. ——.]—Deft. agreed to sell his interest as lessee in a hotel to a purchaser willing & able to complete the purchase. Pltf. found a purchaser, but the lessor refused his assent to the sale on terms satisfactory to deft. & deft. refused to complete:—*Held:* pltf. entitled to commission.—HERBERT *v.* VIVIAN (1912-1913), 24 W. L. R. 803; 4 W. W. R. 891; 11 D. L. R. 839.—**CAN.**

1754 viii. ——.] — Defts. employed pltfs. to sell land at a specified price, but subsequently, in violation of an oral agreement, leased it & pltfs. were thus unable to complete a sale they were in course of effecting:—*Held:* pltfs. entitled to commission. *Inchbald* v. *Western Neilgherry Coffee, etc., Co.* (1864), 17 C. B. N. S. 733; *Burchell* v. *Gowrie & Blockhouse Collieries*, [1910] A. C. 614, cited.—DUMPHY & ROLP *v.* CARIBOO TRADING CO. (1914), 29 W. L. R. 735; 8 W. W. R. 716; 22 D. L. R. 658.—**CAN.**

1754 ix. ——.]—Deft., duly authorised by his wife, listed certain of her property with pltf., who introduced a purchaser, but deft.'s wife refused to sell. In an action by pltf. against the husband for commission:—*Held:* pltf. had performed his part of the contract, & was entitled to his commission although deft.'s wife refused to sell.—FRASER *v.* LAUDE (1914), 19 D. L. R. 886; Q. R. 46 S. C. 383.—**CAN.**

1754 x. ——.]—Pltf., knowing that D. had a property for sale, ascertained from him the price & conditions of sale, & then suggested to deft. that he should purchase it. Deft. agreed & in writing authorised pltf. to buy, & the offer was put forward by pltf. & accepted by D., but deft. eventually did not complete. Pltf. then found another purchaser & received his commission. In an action by pltf. for damages:—*Held:* (1) the agent had a recourse in damages against the prospective buyer for his refusal without cause to complete his purchase, after agreeing to purchase; (2) although pltf. had had his commission, he had to work anew to find another purchaser, & was entitled to be paid for his additional work.—MOSCOVITCH *v.* DE SAMBOR (1914), Q. R. 47 S. C. 337; 21 R. de J. 81; 18 D. L. R. 230.—**CAN.**

1754 xi. ——.]—When the seller is responsible for the non-performance of a contract of sale of real estate, he still must pay the agent's commission. If the transfer of a hypothecary claim is the consideration of the agent's service, & it is not effected, the seller will be ordered to pay the monetary value thereof.—ROCH *v.* JORON (1915), Q. R. 48 S. C. 39. —**CAN.**

1754 xii. ——.]—Real estate agents were to receive $1,000 commission from the purchaser of a property valued at $40,000. Through the purchaser's fault, the sale was not completed, but, through the agency of same agents, the purchaser succeeded in securing part of the property for $9,000. The agents claimed $300 as the value of services rendered:—*Held:* they had a right to that sum against the purchaser.—SHIPMAN *v.* PELOQUIN (1915), Q. R. 48 S. C. 492.—**CAN.**

1754 xiii. ——.]—An agent for sale of an estate having found a purchaser on terms on which it was agreed he should sell, & entered into a written contract with such purchaser receiving a deposit, the owner repudiated the contract & refused to pay commission:—*Held:* pltf. entitled to recover on a *quantum meruit*, the measure of damages being full amount of commission to which he would have been entitled if the contract had been completed.—CAPSTICK *v.* CHAPMAN, 4 J. R. N. S. S. C. 24.—**N.Z.**

1754 xiv. ——.]—An agent for sale or exchange of land was to receive commission, the balance of which was payable on execution of transfer. He arranged a binding contract for exchange with a purchaser subject to the owner giving a second mtge. to the purchaser, the term of which was not mentioned:—*Held:* the agent entitled to full commission, as the fact of no term being mentioned did not prevent it being a binding contract.—DAVIDGE *v.* MCQUEEN (1910), 29 N. Z. L. R. 828. —**N.Z.**

1754 xv. —— *Principal imposing new conditions on purchaser.*]—A declaration alleging that pltf. was authorised to sell for a commission certain shares of a mining co., that he found a purchaser therefor, but that the sale did not take place because defts. imposed new conditions on the purchaser, is sufficient in law to maintain an action for recovery of the commission which would have been obtained under the sale, especially where an acknowledgment to owe & a promise to pay are alleged to have been made by defts.—LEET *v.* MORRIS, LEET *v.* MONTREAL & OREGON GOLD MINES, LTD., 2 Que. P. R. 457.—**CAN.**

1754 xvi. —— ——.]—An agent for sale found a purchaser who was ready to buy, but after terms settled the vendor wished some of the terms varied, resulting in the purchaser backing out:—*Held:* as pltf. had done all he could, he was entitled to commission. —CUTHBERT *v.* CAMPBELL (1909), 12 W. L. R. 219.—**CAN.**

1754 xvii. —— ——.]—When a property owner gives an option thereon to a real estate agent, he may not, once the agent has completed the sale, have inserted in the deed of sale clauses which were not embodied in the option, &, in the event of refusal by the purchaser to sign the deed, the agent is entitled to recover his commission.—MERINEAU *v.* VIAU (1914) Q. R. 46 S. C. 197.—**CAN.**

1754 xviii. —— *Purchaser's name not mentioned.*]—Deft. listed certain property with pltfs. to be sold for $3,500 net to defts., & agreed that pltfs. should have anything beyond that figure for their services. Pltfs. found P., a purchaser willing & able to pay $3,650, which offer was communicated to & approved by deft. The name of the purchaser was not in the agreement when it was presented to deft. for signature, as pltfs. were not sure of P.'s christian names. Deft. refused to complete & would not sign the agreement. The trial judge found that pltfs. were entitled to $150 as upon a *quantum meruit*, & upon appeal, the ct. being equally divided, the judgment was affirmed. Deft. was justified in refusing to sign the agreement which did not contain the purchaser's name; & it was

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is entitled to the whole commission agreed on (WILLES, J.).—PRICKETT *v.* BADGER (1856), 1 C. B. N. S. 296 ; 26 L. J. C. P. 33 ; 3 Jur. N. S. 66 ; 5 W. R. 117 ; 140 E. R. 123.

Annotations :—**Distd.** Green *v.* Mules (1861), 30 L. J. C. P. 343. **Apld.** Rimmer *v.* Knowles (1874), 30 L. T. 496. **Foll.** Green *v.* Lucas (1875), 31 L. T. 731 ; Peacock *v.* Freeman (1888), 4 T. L. R. 541, C. A. **Apld.** Taplin *v.* Barrett (1889), 6 T. L. R. 30 ; M'Leod *v.* Artola (1889), 6 T. L. R. 68, N. P. ; *Re* Byrne, *Ex p.* Henry (1892), 9 Morr. 213. **Refd.** Lockwood *v.* Levick (1860), 8 C. B. N. S. 603 ; Harris *v.* Petherick (1878), 39 L. T. 543 ; Affleck *v.* Hammond, [1912] 3 K. B. 162, C. A.

1755. —— Approval of title.]—Pltf.'s claim was for commission on the sale of a piece of land by A. to deft., one term of pltf.'s contract being that A.'s title should be approved by deft.'s solr. Deft. broke off the sale of his own accord, so that A.'s title was never submitted to deft.'s solr. :—*Held :* pltf. could not succeed without proving that deft.'s solr. had approved A.'s title, or else that such a title was submitted to him as it was unreasonable for him to disapprove.—CLACK *v.* WOOD (1882), 9 Q. B. D. 276 ; 47 L. T. 144 ; 30 W. R. 931, C. A.

1756. Principal failing to deliver.]—A commission agent was employed by a manufacturer to procure orders for him upon the terms contained in a written proposal as follows : "We sell at your terms, & have no further interference with the account beyond forwarding the order & references. We give you all the information we possess, & you treat the order as coming direct from the buyer. We expect to receive our commission on all goods bought by houses whose accounts are opened through us" :—*Held :* the agent was entitled to his commission where an order had been given & accepted by the manufacturer, though, in consequence of his inability to supply the goods, they were not ultimately delivered to the buyer.—LOCKWOOD *v.* LEVICK (1860), 8 C. B. N. S. 603 ; 29 L. J. C. P. 340 ; 2 L. T. 357 ; 7 Jur. N. S. 102 ; 8 W. R. 583 ; 141 E. R. 1303.

1757. ——.]—By a contract between pltfs. & defts. it was provided that if pltfs. procured for defts. a contract to supply certain motor lorries to the French Govt., defts. were to pay pltfs. a commission immediately after defts. had received payment from the French Govt. The lorries were to be supplied from Turin, defts. not being the makers. The contract was procured by pltfs. for defts., but the latter were unable to get the lorries, & the French Govt. cancelled the contract & paid defts. nothing. In an action to recover the commission : —*Held :* as defts. had put themselves forward as being able to supply the lorries, the non-receipt of the money was caused by their default, & the commission was payable.—VULCAN CAR AGENCY, LTD. *v.* FIAT MOTORS, LTD. (1915), 32 T. L. R. 73.

1758. Principal failing to show satisfactory title.] —Pltf., on undertaking to negotiate for deft. a loan of money, received from him a memorandum to the effect that he agreed to accept through pltf. the loan of £7,000 on the security of his ship, on his handing, amongst other things, as security, a legal mtge. on the ship, & to pay for negotiating the same 5 per cent. commission on the amount. The loan was negotiated by pltf., but the lender refused to complete it on hearing that the ship was already mtged. for a sum far exceeding the amount of the proposed loan :—*Held :* (1) it was for the jury to say whether the parties must be taken to have meant a first mtge. ; (2) if so, & the lender on that ground declined to make the advance, pltf. was entitled to commission.—THOMPSON (THOMSON) *v.* CLARK (CLARKE, CLERK) (1862), 3 F. & F. 181 ; 1 New Rep. 19 ; 7 L. T. 269 ; 11 W. R. 23 ; 1 Mar. L. C. 256, N. P.

1759. ——.]—Deft. entered into the following contract with pltf. : "In the event of your procuring me the sum of £2,000 or such other as I shall accept, I agree to pay you a commission of 2½ per cent. on any money received." Pltf. procured a party willing to lend £1,625 if deft. showed a sufficient title to his security. Deft. accepted the offer, but failed to show a sufficient title. The negotiations consequently went off, & no money was in fact received by deft. :—*Held :* pltf. entitled to his commission on the £1,625, as it was owing to deft.'s own default that he never received the sum, & pltf. had performed all his part of the contract.

Those who bargain to receive commission for introductions have a right to their commission as soon as they have completed their portion of the bargain, irrespective of what may take place subsequently between the parties introduced (BRAMWELL, L.J.).—FISHER *v.* DREWETT (1878), 48 L. J. Q. B. 32 ; 39 L. T. 253 ; 27 W. R. 12, C. A.

Annotations :—**Distd.** Peacock *v.* Freeman (1888), 4 T. L. R. 541, C. A. ; *Re* Sovereign Life Assce. Co. Salter's Claim (1891), 7 T. L. R. 602. **Foll.** Fuller *v.* James

immaterial what his reasons for refusing were (LAMONT, J.).—WRENSHALL *v.* M'CAMMON (1912), 21 W. L. R. 842 ; 5 D. L. R. 608 ; 2 W. W. R. 767.—**CAN.**

1758 i. *Principal failing to show satisfactory title.*]—Pltf. was appointed by defts. as agent to sell their hotel & obtain the purchaser's signature to the contract for sale. He obtained a purchaser who signed the contract, but with a condition as to satisfactory title indorsed which defts. were unable to fulfil :—*Held :* there was no sale & no commission earned.—HENRY *v.* BUXTON (1904), 4 S. R. N. S. W. 264 ; 21 N. S. W. W. N. 92.—**AUS.**

1758 ii. ——.]—Where real estate agents effect a sale of the property placed in their hands, but the sale is not carried out owing to a defect in the title, they are nevertheless entitled to the usual commission.—BROWN *v.* MCDONALD (1894), Q. R. 6 S. C. 491.—**CAN.**

1758 iii. ——.]—Applts., real estate brokers, received verbal instructions from resps. to sell certain land at a stated price on certain terms which they did, & on the day of sale applts. paid C., one of resps., at his request the deposit received by them & took his receipt therefor. Later applts. received instructions from resps. to sell other land at a stated price & they sold to B. acting for the syndicate which had purchased the previous land, but the formal agreement was closed by B. with C., to whom B. paid a deposit receiving in return a receipt. Prior to the date by which the balance of the purchase-money on the first sale was to be paid the purchasers discovered resps. were without title as to part of the land & refused to complete, & applts. sued for & were awarded commission upon the entire purchase :—*Held :* the question was whether the sale went off by reason of the purchaser not being bound or by reason of resps.' inability or refusal to complete, & there must be a new trial unless applts. were willing to reduce the verdict in their favour to the amount of the commission on the deposit.—MACKENZIE *v.* CHAMPION (1884-5), 12 S. C. R. 649.—**CAN.**

1758 iv. ——.]—A broker to negotiate a loan on the property of A. introduced a person willing to advance the amount, who actually placed the money in the hands of the attorney, but the latter having found defects in title, the transaction fell through :—*Held :* the broker entitled to commission, & regard being had to the terms of agreement he was not bound to prove some real defect in the title in order to recover remuneration. — ELIAS *v.* GOVIND CHUNDER KHATICK (1902), I. L. R. 30 Calc. 202 ; 7 C. W. N. 297.—**IND.**

1758 v. ——.]—A stipulation by a house agent that his fees were to be paid when the property should be disposed of does not warrant him in charging fees when, after a proposal made & accepted, the treaty went off, by reason of a misrepresentation by the owner of the house of the state of the title.—CANNON *v.* KELLY (1834), Hayes & Jo. 655.—**IR.**

1758 vi. ——.]—Where a principal knew he had not, at the time of employing an agent for sale of land, power to give a title to the land, & took advantage of the work of the agent, & prevented the proposed buyer from completing the transaction :—*Held :* he was liable to pay the agent a reasonable sum for his work.—CANNON *v.* VENABLES (1906), 26 N. Z. L. R. 518.—**N.Z.**

1758 vii. ——.]—Pltfs., land agents, were employed to find a purchaser for deft.'s farm. They procured a binding contract, but deft. being unable to give a good title to all the leaseholds as described in the contract of purchase, the purchaser cancelled the contract :—*Held :* pltfs. entitled to their commission.—HINE & BOND *v.* BADDELEY (1912), 32 N. Z. L. R. 181, C. A.—**N.Z.**

(1892), 8 T. L. R. 278. **Distd.** Beale *v.* Bond (1901), 84 L. T. 313, C. A.

1760. —— Agent must first fulfil his part of bargain.]—Where an agent seeks to recover commission for procuring a loan upon mtge. he must prove he has obtained a person willing & able to lend the money, in the absence of which it is immaterial that the title is found to be defective or the property is not such as was described to the agent. —HORNBY *v.* EBERLE (1884), 1 T. L. R. 104.

1761. —— ——.]—Where an agent employed to borrow money upon leasehold security finds a person able & willing to lend, but the negotiations go off by reason of such person discovering unusual covenants which the agent was not informed of, the agent is entitled to the whole of the agreed commission for procuring the loan.

Deft. agreed to pay pltfs. a commission of 2 per cent. "for procuring him on loan the sum of £20,000 upon the security of certain leasehold property," having 3 days before such agreement furnished pltfs. with two valuations of the property, each of them stating the lease to be for a term of 99 years, & setting the value at about £37,000, & one of them assuming that the lease "contained no arbitrary or restrictive clauses, but only the usual covenants." Upon the strength of these valuations, pltfs. applied for a loan to a provident institution, the directors of which agreed to advance it, "subject to the title & all other questions proving to be satisfactory." Upon examination of the lease on behalf of the institution, it was discovered that the lease, instead of being a lease for 99 years absolutely, contained a proviso for re-entry under certain conditions, which constituted a substantial deterioration of its value, whereupon the directors refused to make the advance:—*Held:* pltfs. were entitled to the whole of the agreed commission.

If the directors were not justified in refusing to go on with the loan deft. ought to have proceeded against them; & if they were justified, then the failure of the loan was owing to deft.'s own default, or the failure of the security he had proposed. In either view pltfs.' title to their commission ought not to be interfered with (LORD CAIRNS, C.).—GREEN *v.* LUCAS (1875), 33 L. T. 584; 40 J. P. 390, C. A.

Annotations:—**Folld.** Fisher *v.* Drewett (1878), 48 L. J. Q. B. 32, C. A. **Distd.** *Re* Sovereign Life Assce. Co., Salter's Claim (1891), 7 T. L. R. 602. **Folld.** Fuller *v.* Eames (1892), 8 T. L. R. 278; White *v.* Turnbull Martin (1898), 78 L. T. 726, C. A.

1762. —— Sale of land.]—Defts. were instructed to sell by auction a freehold property, & the terms upon which they were to be paid commission were contained in two letters, dated June 7 & 8, 1909, respectively, as follows: "If the property should not be sold at the auction, but should be sold within, say, 2 months afterwards, to a purchaser who has been found by means of your advertisements or posters or through your introduction, then you are to receive half of the commission you would have received if the property had been sold at the auction"; &: "If a sale should take place either before the sale under the hammer or before Oct. 30, 1909, the usual commission of 2½ per cent. upon the first £5,000 & 1½ per cent. upon the balance is to be paid to us, such commission to include all out-of-pocket expenses. If the property remains unsold at Oct. 30, then no charge of any description, whether for out-of-pocket expenses or service, is to be made by us." At the auction the property was knocked down to a purchaser who signed a contract & paid a deposit, but subsequently the contract was rescinded by the vendor in consequence of a requisition being made by the purchaser with which the vendor could not comply:—*Held:* defts.' commission was payable on the property being knocked down to a purchaser at the auction, notwithstanding there was no completed sale.—SKINNER *v.* ANDREWS & HALL (1910), 26 T. L. R. 340; 54 Sol. Jo. 360, C. A.

1763. Principal declining to accept loan.]—If A. employs B. to raise money for him, & B. finds the money, A. cannot, merely by declining to accept it, deprive B. of his commission.—MASON *v.* CLIFTON, No. 1746, *ante*.

1764. Contract rescinded under reserved power.]—A. instructed B., an auctioneer, to sell certain property on commission. A special arrangement was made that if the property should not be sold, a specified fee should be charged, & out-of-pocket expenses. The property was sold to H., but subsequently A., acting under a condition in the contract of sale, rescinded the contract. B. claimed commission on the price agreed to be given by H.:—*Held:* (1) commission was only payable on a completed sale; (2) commission was not payable under the terms of the contract itself; (3) there was no default on A.'s part preventing the contract from being carried out.

Land can only be said to be sold when the conveyance is complete, not when there is a mere contract to sell. Pltfs. being entitled to rescind, there was no default on their part (LORD ESHER, M.R.).—PEACOCK *v.* FREEMAN (1888), 4 T. L. R. 541, C. A.

Annotation:—**Distd.** Skinner *v.* Andrews & Hall (1910), 26 T. L. R. 340, C. A.

1765. Principal unable to justify statements on which negotiations proceeded.]—Deft. employed pltf. to obtain for him an advance by way of mtge. on certain premises, commission to be paid, one half when the first instalment of the loan was paid, & the balance on payment of the second instalment. Pltf. negotiated with a building society on the basis of a statement furnished by deft. as to the tenancies of the premises, & the society agreed to make the advance, but subsequently withdrew on discovering serious inaccuracies in the statement:—*Held:* pltf. entitled to his commission.

The cases have long been settled that if the person proposing to negotiate a loan brings the principals together, & if nothing remains for him to do, he is entitled to his commission (A. L.

1760 i. —— *Agent must first fulfil his part of bargain—What amounts to fulfilment.*]—Defts. executed the following letter of authority in favour of pltfs.: "We authorise you to raise a loan of 11 lakhs (or less, if so required). We agree to pay you a commission of 5 per cent. on such amount as may be advanced by the capitalist to us. . . . ." Defts. did not state what the value of the security was, but pltfs. represented to the capitalist that the value of the property would be not less than 20 lakhs, & the capitalist insisted upon satisfactory proof before he would agree to make the advance. The negotiation with the capitalist having for this reason fallen through, pltfs. sued for recovery of the stipulated commission:—*Held:* (1) the stipulation was not merely to find a capitalist ready & willing to advance the money, but also to procure funds for the satisfaction of the debts of defts.; (2) even assuming that pltfs. undertook only to find a person ready & willing to advance the money, they had not done so, as the capitalist whom they found imposed a condition as to the margin of security never proposed or accepted by the borrowers, & at no stage of the negotiations was he ready to accept the estate as it stood as security for the loan, *i.e.*, to advance the funds on the terms prescribed by the principal. *Qu.*: whether the technical meaning ascribed to the expression "to raise a loan" in English cases, implying that the agent who is engaged "to raise a loan" discharges his duty as soon as he finds a creditor who is able & willing to advance money, should be imported in the interpretation of contracts in India.—KISHAN PROSAD SINGHA *v.* PURNENDU NARAIN SINGHA (1911), 16 C. W. N. 753.—**IND.**

1765 i. *Principal unable to justify statements on which negotiations proceeded.*]—A real estate agent has the right to be paid his commission, though no sale have resulted by reason of the fact that the object of the sale was not in the condition in which it was represented to be, as in the case of an hotel when transfer of the licence cannot be obtained. — LAMARRE *v.* CLAIRMONT (1915), Q. R. 48 S. C. 461.—**CAN.**

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SMITH, J.).—FULLER *v.* EAMES (1892), 8 T. L. R. 278.

Annotation :—**Distd.** White *v.* Turnbull Martin (1898), 78 L. T. 727, C. A.

1766. Principal releasing third party.]—Defts. were employed by pltf. to find a purchaser for his yacht. Defts. found a purchaser who paid a deposit & subsequently became insane. Pltf. released the purchaser's representative from the contract & directed defts. to return the deposit :—*Held :* defts. entitled to be paid the agreed commission on the purchase.—PLATT *v.* DEPREE (1893), 9 T. L. R. 194.

1767. Principal taking transaction out of agent's hands.]—Deft., owner of a public-house, instructed pltf., a public-house broker, to find a purchaser. Pltf. introduced B., who paid a deposit & signed a contract for the purchase, which he subsequently failed to complete. The contract provided for the payment of commission upon the purchase-money : —*Held :* (1) pltf. entitled to commission, as pltf. had found a purchaser, whom deft. was willing to accept & who would accept deft.'s terms ; (2) on the facts deft. had taken the negotiations out of the hands of the agent & waived his right to say that the commission had not been earned.—PASSINGHAM *v.* KING (1898), 14 T. L. R. 392, C. A.

Annotation :—**Refd.** Beale *v.* Bond (1901), 84 L. T. 313, C. A.

1768. Principal's failure to go out of possession—Reasonable time.]—When a person employs a house agent to sell the lease of a house of which he is in occupation, & nothing is said about going out of possession, there is an implied promise to do so within a reasonable time.

Pltf. was instructed by deft. to find a purchaser for his house for £4,000, & on Jan. 16 he found S., who required possession by Mar. 15, ready & willing to pay that sum. Deft. refused the offer on the ground that he could not give up possession on Mar. 15. The jury found that from Jan. 16 to Mar. 15 was a reasonable time :—*Held :* pltf. entitled to his commission.—NOSOTTI *v.* AUERBACH (1899), 15 T. L. R. 140, C. A. ; *affg.* 79 L. T. 410.

1769. Measure of damages.]—The measure of damages in an action by an agent against his principal for wrongfully preventing him from earning his commission, where nothing remains to be done by the agent to entitle him to his commission, is the full amount of the commission which he would have received if the transaction had been completed.—ROBERTS *v.* BARNARD (1884), 1 Cab. & El. 336.

Annotation :—**Refd.** Fuller *v.* Eames (1892), 8 T. L. R. 278.

(b) Third Party not completing.

1770. Substantial performance of agent's duty.]—Deft. promised to pay pltf. £5 " if he would provide a tenant for certain premises, & get him £350 for his lease." Pltf. procured S., with whom deft. entered into an agreement, & received £50 as a deposit. S. being unable to complete his engagement, deft. afterwards consented to release him from further performance of it, but retained the £50 :—*Held :* (1) this was a substantial performance of the condition on the part of pltf. ; (2) he was entitled to recover the £5 from deft.—HORFORD *v.* WILSON (1807), 1 Taunt. 12 ; 127 E. R. 733.

Annotations :—**Distd.** Beale *v.* Bond (1901), 84 L. T. 313, C. A. **Refd.** Bull *v.* Price (1831), 7 Bing. 237. **Mentd.** Nathan *v.* Buckland (1818), 2 Moore, C. P. 153 ; Doe d. Teynham *v.* Tyler (1830), 6 Bing. 561 ; Crease *v.* Barrett (1835), 5 Tyr. 458 ; Doe d. Welsh *v.* Langfield (1847), 16 M. & W. 497.

1766 i. *Principal releasing third party.*]—An agent for sale of property procured a purchaser willing to purchase on terms accepted by the owner ; the building on the property being defective & the owner unable or unwilling to make it good, the owner agreed with the purchaser that the agreement for sale should be cancelled :—*Held :* (1) the agent was entitled to compensation for services as on a *quantum meruit* or by way of damages ; (2) in these circumstances he should be awarded the amount of commission agreed on on an actual sale ; (3) he was entitled notwithstanding he had not procured a purchaser to execute a binding agreement. *Prickett* v. *Badger* (1856), 1 C. B. N. S. 296 ; *Roberts* v. *Barnard* (1884), 1 Cab. & El. 336 ; & *Fuller* v. *Eames* (1892), 8 T. L. R. 278, cited.—BRYDGES *v.* CLEMENT (1904) 24 C. L. T. 96 ; 14 Man. L. R. 588.—**CAN.**

1766 ii. ——.]—Pltfs. were agents for sale of land to be paid a fixed commission by instalments contemporaneous with payment of instalments of purchase-money. A purchaser was found, & one instalment of purchase-money & commission paid, & then the contract was cancelled by consent, with no intent to avoid payment of the commission. Subsequently the purchaser repurchased from the principal direct :—*Held :* pltfs. not entitled to commission.—HAMMER *v.* BULLOCK (1910), 14 W. L. R. 652.—**CAN.**

1766 iii. ——.]—A., an agent for sale, was instructed by the owner to sell his property at a fixed price, in a letter stating, " If you can sell, I will give you £100 commission." A. procured L. who was approved by the owner, & who entered into a binding contract to purchase at agreed price, & paid a deposit of £200. L. then refused to complete, & the owner, without A.'s knowledge, agreed to release L., in consideration of his forfeiting the deposit. On same day the owner sold to M., for £200 less than L. had agreed to pay :—*Held :* A. entitled to recover commission agreed on by the owner.—LATTER *v.* PARSONS (1906), 26 N. Z. L. R. 645.—**N.Z.**

1766 iv. ——.]—An agent to find a purchaser on commission found purchasers who entered into an agreement in writing for the purchase, but they could not comply with Land Act, 1908, & they agreed to find a sub-purchaser. The sub-purchaser refused to complete & the owner subsequently released the original purchasers from their contract :—*Held :* the agent entitled to commission, the owner having prevented completion of the contract by releasing the purchasers.—MCKEAN *v.* BRICE (1912), 31 N. Z. L. R. 759, C. A.—**N.Z.**

a. *Principal failing to obtain contract.*]—Pltf. by deed agreed to obtain security to enable deft. to procure a Govt. contract, & was to receive commission on the price of the contract payable semi-annually until completion. Deft. having failed to comply with the Act authorising the contract : —*Held :* pltf. entitled to commission, as he had carried out his agreement.—DEVLIN *v.* BEEMER (1880), 4 L. N. 59 ; 10 R. L. 681.—**CAN.**

b. *Principal failing to employ workmen.*]—Pltfs. entered into a contract with deft. to supply him with labourers who would receive $1.25 per day. Pltfs. went to N.Y. & brought back the men who agreed to pay pltfs. $1.00 commission per head & repay advances made by pltfs. for their railway fares. Pltfs. spent $25.00 for their own expenses & advanced $700.00 in part payment of their railway fares. Deft. refused to furnish work to the labourers when they arrived & pltfs. brought an action to recover damages for breach of contract :—*Held :* pltfs. were entitled to recover $750.—MANDIA *v.* MCMAHON (1889) 17 A. R. 34.—**CAN.**

c. *Principal failing to execute orders properly.*]—Defts. agreed in writing to pay pltfs. commission on sales. Pltfs. assisted in obtaining a contract for purchase of an engine made by defts. subject to the engine satisfying certain tests which when completed it failed to do :—*Held :* pltfs. entitled to their commission. — AUSTEN BROTHERS *v.* CANADIAN FIRE ENGINE CO. (1907), 42 N. S. R. 77 ; 3 E. L. R. 222 ; 4 E. L. R. 277.—**CAN.**

d. ——.]—Resps. agreed to pay applt. a commission of 5 per cent. on all accepted orders. Applt. procured a binding contract, duly executed between B. Co. & resps., whereby the co. bound themselves to purchase from resps. during a period of one year not less than $38,000 worth of paper at a named price & of a kind specified to be fully up to the standard of submitted samples :—*Held :* default in carrying out the agreement being wholly attributable to resps., applt. was entitled to his commission.—WHYTE *v.* NATIONAL PAPER CO. (1915), 51 S. C. R. 162.—**CAN.**

1769 i. *Measure of damages.*]—KENNERLEY *v.* HEXTALL, No. 1750 iv., *ante.*—**CAN.**

1769 ii. ——.]—BRYDGES *v.* CLEMENT, No. 1766 i., *ante.*—**CAN.**

1769 iii. ——.]—CAPSTICK *v.* CHAPMAN, No. 1754 xiii., *ante.*—**N.Z.**

PART VIII. SECT. 3, SUB-SECT. 1.—E. (b).

1770 i. *Substantial performance of agent's duty.*]—Where a broker or agent has negotiated a sale of property between his principal & a purchaser whom he has procured, & an agreement for carrying out the transaction is entered into between the parties, he is entitled to his commission, notwithstanding that the agreement may have fallen through by reason of bad faith in one

1771. Third party not delivering title.]—Upon a negotiation between A. & B. for an exchange of advowsons A. agreed to pay to the agent, C., £100, "one-third down, the remaining two-thirds when the abstract of conveyance was drawn out." The one-third was paid. A. delivered an abstract of his title, but no abstract was delivered on the part of B., & the negotiation dropped:—*Held:* C. could not maintain an action against A. for the remaining two-thirds of his commission, the event, on the happening of which his right to it was to arise, not having occurred.—ALDER *v.* BOYLE (1847), 4 C. B. 635; 16 L. J. C. P. 232; 9 L. T. O. S. 246; 11 Jur. 591; 136 E. R. 657.

1772. Orders cancelled by agreement between principal & customer—Measure of damages.]—Defts. agreed with pltf. to pay him commission on orders from certain customers introduced by him "during a term of 3 years, dating from the receipt of the first order in each individual instance." To the agreement was appended a list of customers, which included the names of B. & Sons. B. & Sons had agreed to buy from defts. 30 machines or pay a forfeit of £30 for each machine not taken. They only took 3 machines, & by agreement with defts. paid £600 instead of £810 by way of forfeit to cancel the contract. Pltf. claimed commission on the price of the 30 machines, or alternatively on the £600:—*Held:* (1) B. & Sons had given defts. "orders" for 30 machines within the contract; or other of the parties to the contract.—LIGHTHALL *v.* CAFFREY (1883), 6 L. N. 202.—**CAN.**

1770 ii. ——.]—Pltf. procured a contract in proper & intelligible terms signed by deft. & H. for sale by deft. to H. H. refused to carry it out, on the ground that its effect was different from what he thought:—*Held:* whether the contract was enforceable against H. or not, pltf. had done all that was needed in introducing him as a purchaser on the terms proposed, & was entitled to commission.—HUNT *v.* MOORE (1911), 19 O. W. R. 73; 2 O. W. N. 1017.—**CAN.**

1771 i. *Third party not delivering title.*]—Defts. agreed to pay commission to pltfs. on purchase of land on condition that if the vendor was unable to deliver title, there was to be no commission:—*Held:* pltfs. entitled to recover, defts. having failed to prove the contingency exonerating them; the evidence showing that the vendor was willing to complete, but that the parties ultimately agreed to abandon the contract.—CAMPBELL *v.* BOLAND (1917), 2 W. W. R. 819.—**CAN.**

1771 ii. ——.]—Applt. employed resp., a commission agent, under an agreement by which he was to receive a commission on selling or exchanging applt.'s land. Resp. was agent of P., whom he introduced as willing to exchange his land, but not being able to make a good title, the agreement to exchange entered into was abandoned:—*Held:* resp. not entitled to commission.—PAGE *v.* BAKER (1908), 28 N. Z. L. R. 149.—**N.Z.**

1771 iii. ——.]— Resp. authorised applts. to dispose of his property for him. The authority was in the following terms: "I hereby authorise you to sell on my account the property described on the back hereof. In the event of a sale or exchange being effected by you or through your instrumentality, or upon your introducing a *bonâ fide* purchaser, I will pay you a commission at the rate of 2½ per cent. on the purchase-money." Applts. found A. willing to exchange, but owing to A. not being able to make a good title to his property, the proposed exchange did not eventuate:—*Held:* applts. not entitled to commission.—BELLINGHAM *v.* BLY (1915), 34 N. Z. L. R. 538.—**N.Z.**

a. *Third party rescinding agreement on ground of mistake.*]—Where a purchaser obtains rescission of an agreement for sale of land, on the ground of mistake as to the land purchased, the agent of the vendor is not entitled to commission.—CARRUTHERS *v.* FISCHER (1906), 5 W. L. R. 42.—**CAN.**

b. *Third party refusing to complete.*]—Deft., owner of property, was desirous of selling it, & pltf., a real estate agent, called at deft.'s house & asked deft.'s wife, deft. being away, if she wanted to sell. She replied, "We wanted to sell. Of course if we got our price we would sell," & mentioned the price she wanted. Subsequently pltf. introduced a purchaser, & an agreement was signed & a deposit paid, & deft. signed an agreement to pay pltf. his commission "for selling my property." The purchaser afterwards thought he had paid too much for the property & refused to complete, whereupon pltf. sued for his commission:—*Held:* (1) a purchaser having been found, there remained nothing else for the agent to do; (2) what the parties meant by "selling" property was the successful effort of pltf. to procure a purchaser acceptable to the vendor, the purchaser signing a contract. *Peacock* v. *Freeman*, 4 T. L. R. 541, cited.—SMITH *v.* BARFF (1912), 27 O. L. R. 276; 4 O. W. N. 236; 8 D. L. R. 996.—**CAN.**

c. *Third party introducing unauthorised term.*]—To entitle himself to a commission for finding a purchaser of land for his principal, the agent must show that the purchaser found was not only in a situation & ready & able to carry out the purchase, but was also willing to carry it out on the terms authorised by the principal, so that, if the purchaser stipulates for an additional term not authorised nor agreed to by the vendor, the agent is not entitled to any commission.—EGAN *v.* SIMON (1909), 19 M. R. 131; 11 W. L. R. 319.—**CAN.**

d. *Third party failing to complete in time.*]—Deft. placed property in pltfs.' hands for sale at a fixed price. They obtained a purchaser who entered into an agreement to purchase at the price named. By the terms of the agreement for sale there were conditions as to title & the right to the vendor, if he was unable or unwilling to answer requisitions upon title, to rescind the contract. The purchaser assigned his interest in the contract to a third party, who asked for & received an extension of time for completion of the sale, & the day before that fixed for completion was notified that unless it were completed that day the vendor would no longer be bound. The third party did not complete. In an action by pltfs. against the vendor for their commission:—*Held:* pltfs. were authorised to find a purchaser for property at a price named, & had done so to their principal's satisfaction & procured a binding contract, & were entitled to commission, although the sale did not go through owing to the buyer's default. *Fuller* v. *Eames* (1892), 8 T. L. R. 278, cited.—COPELAND *v.* WEDLOCK (1905), 6 O. W. R. 539.—**CAN.**

e. *Third party unable to find money.*]—An action for commission on sale of hotel premises was dismissed, as the purchaser appeared willing & ready to pay, but was not able so to do.—COWARD *v.* LLOYD (1909), 12 W. L. R. 497.—**CAN.**

f. *Third party making default in paying instalment.*]—Where the agent's commission with a vendor was dependent upon whether or not a sale of land should "go through," & where a concluded agreement for sale in writing was signed by the vendor & vendee, but subsequently the vendor cancelled the agreement because the vendee had not paid the second instalment of the purchase-money:—*Held:* this did not deprive pltf. of his right to the full commission.—SCOTT *v.* BENJAMIN (1905), 2 W. L. R. 528.—**CAN.**

g. ——.]—An agent appointed to find purchasers for land, & to collect from them the instalments of purchase-money, is entitled to full commission where the agreements for sale are, upon default of payment of instalments, cancelled by the principal.—ROTHESAY PARK CO. *v.* MONTGOMERY BROTHERS (1915), 31 W. L. R. 8; 8 W. W. R. 205.—**CAN.**

h. *Third party failing to tender cash.*]—An agent cannot recover his commission, in any event, if he finds a purchaser, unless he tenders the amount of the price payable in cash.—LANGEVIN *v.* DUVAL (1915), Q. R. 47 S. C. 511.—**CAN.**

j. ——.]—Property was placed by deft. in pltf.'s hands for sale. The terms of sale to a purchaser were agreed upon, but on the day for completion he tendered a note in lieu of the cash deposit required. Deft. agreed to take the note at first, but later on, finding it impossible to get it discounted, refused to accept it, & the sale fell through:—*Held:* no commission had been earned, as sale of the property had not been completed.—MCCUISH *v.* COOK (1909), 10 W. L. R. 349.—**CAN.**

k. *Third party failing to make deposit.*]—Pltf. was employed by defts. to sell certain property, brokerage to be paid on receipt by the principal of the money, & the transaction to be completed within a fortnight. Pltf. negotiated with P. & his brother, who agreed to become purchasers on terms that Rs.10,000 should be paid immediately as earnest & the balance (Rs.27,000) of the purchase-money within four months. The purchasers were unable to pay the earnest-money, & handed defts. shares as security, which, with the exception of one, were afterwards returned to the purchasers' family, the one not returned having been sold to defray expenses incurred in connection with the transaction. Pltf. sued to recover Rs.1,500 as brokerage:—*Held:* pltf. was not entitled to recover more than a *quantum meruit*, & was only entitled to a percentage (5 per cent.) on the value of the shares which had been actually received by defts. Part of the business for which pltf. was employed was to find a solvent purchaser.—STOKES *v.* SOONDERNATH KHOTE (1898), I. L. R. 22 Bom. 540.—**IND.**

l. ——.]—Pltf., an agent, was employed to procure for deft.'s land a purchaser who would deposit a certain sum appropriated to the purchase with a named bank before a stated date pending the arrival of clear title. Pltf. procured a purchaser willing to buy, but he deposited the sum in the bank to his own credit. Deft. refused to sell & pltf. sued for commission:—*Held:* deposit was left at the bank at the disposal of the prospective purchaser without being appropriated to the sale as the terms of pltf.'s employment required, & pltf. was not entitled to his commission.—YATES *v.* RESER (1909), 41 S. C. R. 577.—**CAN.**

Sect. 3.—Agent's rights against principal: Subsect. 1, E. (b) & (c).]

(2) pltf. was not entitled to commission on the full market price of the 27 machines; (3) he was entitled to recover the commission claimed on the £600. *Semble:* he was entitled to commission on £810.—FIELD *v.* MANLOVE (1889), 5 T. L. R. 614, C. A.

1773. Building agreement—Third party failing to build.]—Pltf., an estate agent, was employed by deft. to sell a piece of land for building purposes. Pltf. introduced W. as a purchaser. W. commenced to build, but never finished the houses contemplated. Pltf. claimed commission, alleging it was payable as soon as the agreement was signed. Deft. relied upon a usage that in the case of building agreements commission was payable not when the agreement was signed but when the houses had been built & leases had been granted:—*Held:* (1) the usage was proved; (2) pltf. was not entitled to commission.—KIRK *v.* EVANS, No. 1728, *ante*.

1774. Underwriters' agreement not carried out.]—Pltf was employed by defts. on commission to procure the underwriting of certain debenture & preference stocks of the M. Ry. Co. Pltf. procured a number of persons to underwrite the stock, but such persons did not carry out their undertaking. It was not suggested that they were men of straw or that pltf. had acted fraudulently:—*Held:* pltf. entitled to his commission.—MOIR *v.* MARTEN (1891), 7 T. L. R. 330.

1775. Remuneration payable when purchase completed.]—Deft. agreed with an estate agent to pay him commission in the event of his finding a purchaser "on completion of the purchase." The purchaser introduced by the agent signed a contract for the purchase & paid a deposit, but ultimately, being unable to complete, the contract was rescinded:—*Held:* no commission was payable, as the purchase had not been completed & non-completion was not due to the fault of the vendor.—LOTT *v.* OUTHWAITE (1893), 10 T. L. R. 76, C. A.

Annotations:—**Foild.** Chapman *v.* Winson (1904), 91 L. T. 17, C. A.; Vulcan Car Agency *v.* Fiat Motors (1915), 32 T. L. R. 73.

1776. ——.]—Deft. gave to pltf. a commission note in these terms: "If your friend is named & introduced within one week, & becomes the purchaser of the above hotel, you shall be paid as & by way of commission a sum of £50 when & if the purchase is completed by private treaty." Pltf. introduced his friend, who signed a formal contract to purchase the hotel for £2,000, of which £200 was paid at once, & the balance was to be paid upon completion. Purchaser, being unable to find the balance of the purchase-money & carry out the contract, was released by deft., he retaining the £200 paid as deposit:—*Held:* upon the true construction of the contract pltf. was not entitled to the commission.—CHAPMAN *v.* WINSON (1904), 91 L. T. 17; 53 W. R. 19; 20 T. L. R. 663, C. A.

(c) *Other Cases.*

1777. Reserve price not reached.]—A spirit broker held entitled to commission of half-a-crown per puncheon for putting a quantity of rum up to sale, although the sale turned out to be ineffectual.—STEWART *v.* KAHLE (1822), 3 Stark. 161.

1778. House not let—Evidence of usage.]—Pltfs. had been employed by deft. to let a house, & a negotiation with a customer took place. Pltfs. were put to much trouble, but the negotiation broke off & the house was not let. To an action brought by pltfs. for their trouble in & about this negotiation, it was insisted on the part of deft. that, the house not being let, pltf. could not recover, such being the custom of the trade. At the trial the following questions were put to a witness: "Is it usual, according to the custom of the trade, to pay a commission when a house is let?" "Is it usual, according to the custom of the trade, to pay a commission when the house is not let?"—*Held:* these questions were properly allowed, the object being not to establish a general custom binding on the public, but merely to show what was the implied contract between the parties.—NUTTER *v.* GWENNAP (1842), 6 J. P. 732.

1779. No binding contract made.]—Where house agents were employed to sell houses upon the terms that their commission should be payable upon the treaty being concluded:—*Held:* (1) they could not recover their commission until a contract binding upon both parties had been entered into; (2) they were not entitled to recover it when they had introduced a purchaser who agreed to the vendor's terms, no contract in writing to satisfy Stat. Frauds having been entered into between them; (3) the terms of the contract were unambiguous; (4) no parol evidence of custom could be received.—COTTON *v.* SWANN (1848), 11 L. T. O. S. 63.

1780. Purchase not completed.]—In an action to recover commission for the sale of houses by pltf. as deft.'s agent, it appeared during the trial that, although the contract had been entered into, the purchase was not complete:—*Held:* pltf. must be nonsuited.—WADE *v.* TATTERSALL (1854), 23 L. T. O. S. 324.

1775 i. *Remuneration payable when purchase completed.*]—Pltf. claimed commission as on a sale of land. A deposit of $2,000 was paid, & then deft. wrote that commission would be paid "on completion of the deal." A formal agreement was executed, & a further $8,000 paid, but subsequently the purchaser made default in payment of further instalments of the purchase-money, & deft. took back the land, retaining all money paid, & released the purchaser from further liability:—*Held:* the words "completion of the deal" meant execution of a binding agreement of sale, & pltf. was entitled to commission.—HAFFNER *v.* CORDINGLY (1908), 7 W. L. R. 764; 8 W. L. R. 743; 18 Man. L. R. 1.—**CAN.**

1775 ii. ——.]—An agent instructed to lease an hotel & obtain a fixed sum for goodwill & furniture prepared an agreement, & the lessees paid a deposit. These instructions were silent as to commission. The lessees could not find the money & failed to complete:—*Held:* the agent not entitled to commission, as his implied right to charge commission could only arise on completion.—BAKER *v.* HOPKINS (1901), 20 N. Z. L. R. 518.—**N.Z.**

PART VIII. SECT. 3, SUB-SECT. 1.—E (c).

1777 i. *Reserve price not reached.*]—Where a document, under which an agent for sale is authorised to sell for a sum "clear," is the only evidence of the agent's employment, the use of the word "clear" shows that the right of the agent to commission was conditional, & arose only when the whole sum mentioned was received by the seller.—KINGS *v.* PRYOR (1896), 22 V. L. R. 106.—**AUS.**

1779 i. *No binding contract made.*]—Pltf., an hotel broker employed to sell the lease of an hotel with commission on introducing a purchaser, entered into a verbal agreement, received a deposit & gave a receipt signed by him & the vendor, but the purchaser failed to complete:—*Held:* pltf. not entitled to commission, his duty being to procure the execution of a binding contract, & the vendor by signing the receipt had not waived the obtaining by the broker of a binding contract.—DENNIS *v.* BOLLINGER (1877), 16 N. Z. L. R. 523.—**N.Z.**

1780 i. *Purchase not completed.*]—Where an agent brought his principal & a third party together & an agreement was signed, but the matter was not completed:—*Held:* the agent not entitled to commission.—BUSINESS BROKERS *v.* DINER (1915), 31 W. L. R. 455.—**CAN.**

1780 ii. ——.]—GUARANTEE INVESTMENT CO. *v.* VIPOND (1915), 22 R. L. N. S. 53.—**CAN.**

1780 iii. ——.]—To have the right to claim his commission upon the sale of real estate, the agent claiming to have found a purchaser must establish that the latter has signed the deed of sale, & has tendered the purchase price within the required delay. If nothing has been done by the contracting parties to fulfil the agreement & no sale has been perfected, the agent has no claim for commission.—HOFFMAN *v.* DESAULNIERS (1915), Q. R. 48 S. C. 15. —**CAN.**

1780 iv. —— *Want of consensus.*]—Pltf. secured a prospective purchaser

1781. Remuneration payable on contingency not arising.]—Pltf., a surveyor, agreed to survey A.'s lands without charge, in consideration, if any of the lands were sold for building purposes, of being appointed architect, & that the parties building should pay pltf. 1¼ per cent. on the outlay. If A. or his exors. wished to dispense with pltf.'s services at any time, they should be at liberty to do so on the understanding that they paid him for the surveys. No land was disposed of for building, & A.'s exors. dispensed with pltf.'s services:—*Held:* pltf. had no cause of action, as the event on the happening of which he was to be remunerated, viz., the disposal of the land for building purposes, had not happened.

I entertained some doubt during the course of the argument whether a contract might not be implied on the part of A. & his exors. that they would do no act to prevent the occurrence of the event on which pltf.'s remuneration was made to depend. But the declaration is not framed so as to entitle pltf. to claim damages from defts. for preventing him from acquiring the profit he is entitled to under the contract; but pltf. seeks to recover damages for improperly dispensing with his services (WILLIAMS, J.).—MOFFATT *v.* LAURIE (1855), 15 C. B. 583; 24 L. J. C. P. 56; 24 L. T. O. S. 259; 1 Jur. N. S. 283; 3 W. R. 252; 139 E. R. 553.

Annotations:—**Refd.** Inchbald *v.* Western Neilgherry Coffee, Tea & Cinchona Plantation Co. (1864), 17 C. B. N. S. 733.

1782. No partnership effected.]—Defts. agreed with pltf. to remunerate him "in the event of their taking into partnership" M., introduced by pltf. Defts. afterwards entered into a written agreement with M., by which it was agreed that they should enter into partnership as & from a specified future day, when a formal deed of partnership should be executed carrying out the terms of the agreement This agreement recognised & adopted the agreement between pltf. & defts. No partnership deed was ever executed, nor did M. ever in fact act as a partner of defts.:—*Held:* (1) the agreement between M. & defts. did not constitute a present partnership; (2) there was evidence of a "taking into partnership" within the agreement between pltf. & defts. so as to entitle pltf. to his commission.—HARRIS *v.* PETHERICK (1878), 39 L. T. 543.

1783. ——.]—Deft. agreed to pay to pltfs. a commission on the amount of capital brought into his business by any partner introduced by them. They introduced a person willing upon certain terms to bring money into his business, & partnership deeds were executed, but not exchanged.—*Held:* pltfs. not entitled to commission, as no partnership had been effected.—MARTIN *v.* TUCKER (1885), 1 T. L. R. 655.

1784. No purchaser found by agent.]—Pltf., a house agent, was employed by S. to find a purchaser. Pltf. introduced T., who for some time carried on negotiations; no binding contract was ever arrived at, T. putting forward a term to which S. would not assent:—*Held:* (1) pltf. had never introduced a person who was ready & willing to purchase; (2) he was not entitled to commission.—GROGAN *v.* SMITH (1890), 7 T. L. R. 132, C. A.

Annotations:—**Refd.** Nosatti *v.* Auerbach (1898), 79 L. T. 413.

for deft.'s farm, & an employee of pltf., the purchaser & deft. went out to look at the land. The purchaser then completed the agreement to purchase. Later it was discovered that the land inspected was not the property described in the agreement:—*Held:* the sale was conditional upon the land inspected being the land under treaty between the parties, & when it was not so there was no contract & pltf. was not entitled to any commission.—CARRUTHERS *v.* FISCHER (1906), 5 W. L. R. 42.—**CAN.**

1780 v. —— *Failure of agent to communicate third party's willingness to buy.*]—It is not enough for an agent to find a purchaser willing to buy on the principal's terms: he must also communicate the fact to his principal & give him the opportunity of effecting a sale. Pltf., being employed to find a purchaser, gave to G., an intending purchaser, a receipt, & subsequently sent him a telegram, containing terms he had no authority to make. G. gave evidence that he was always willing to buy on deft.'s terms:—*Held:* pltf. had failed to show he had found a purchaser able & willing to buy on deft.'s terms, & his action for commission must be dismissed.—HAFFNER *v.* GRUNDY (1912), 21 W. L. R. 460; 2 W. W. R. 451; 4 D. L. R. 529.—**CAN.**

1780 vi. —— *Confirmation refused—By licensing authorities declining to allow transfer of licence.*]—The commission of a salaried agent who closes a deal can only be recovered when an actual sale is consummated. Hence, if a sale of licensed property goes off on refusal of transfer of licence, he has no claim against the principal.—LE PAGE *v.* BOUCHARD (1912), Q. R. 43 S. C. 181.—**CAN.**

1780 vii. —— —— *By Land Board declining to allow transfer of lease.*]—The owner of a farm held under two leases in perpetuity, one being in his mother's name, only one lease being legal under Land Act, 1892, authorised resp. co. to find a purchaser. The local manager of the co. knowing the facts as to the title found a purchaser, who entered into a contract of sale with the owner, but, on the Land Board refusing to sanction transfer of both leases, rescinded:—*Held:* resp. co. had not earned commission.—TENNENT *v.* NEW ZEALAND LOAN & MERCANTILE AGENCY CO., LTD. (1907), 27 N. Z. L. R. 253.—**N.Z.**

1780 viii. —— —— *By magistrate declining to give certificate of fitness.*]—B., agent for sale, was employed by A. to sell a lease at a commission of £50. B. introduced a purchaser who entered into an agreement & paid a deposit, but, the magistrate refusing to give the purchaser a certificate of fitness, the sale was rescinded, the purchaser agreeing to forfeit his deposit. In an action for commission B. obtained judgment for £25. On appeal:—*Held:* B. entitled to the commission.—MCLHOLLAND *v.* MCCARTHY (1911), 31 N. Z. L. R. 358.—**N.Z.**

1781 i. *Remuneration payable on contingency not arising.*] — Pltf. sued for commission for services in securing defts. an option to purchase certain mining claims, which defts. failed to take up:—*Held:* pltf. not entitled to be paid unless the claims were sold, & this defts. were unable to do, as vendors refused to extend the time for payment, & the transaction failed without default or bad faith of defts.—CAHILL *v.* TIMMINS (1910), 16 O. W. R. 980; 2 O. W. N. 73.—**CAN.**

1781 ii. ——.]—An agent was paid $5,000 for his services, but sued to recover more in relation to a purchase of coal lands:—*Held:* (1) he was not entitled to a *quantum meruit*, & if he was, $5,000 was ample; (2) the remuneration to be paid under a letter was upon a condition which failed through the lands proving practically valueless as coal lands, & the contract was discharged by the non-existence of the particular state of things which was the basis of it, on the principle of *Taylor* v. *Caldwall* (1863), 3 B. & S. 833.—GRANT *v.* VON ALVENSLEBEN (1913), 25 W. L. R. 108; 13 D. L. R. 381; 18 B. C. R. 334.—**CAN.**

1784 i. *No purchaser found by agent.*]—A city property was placed in an agent's hands for sale. The agent submitted the property to the governor of the Commonwealth Bank. Whilst negotiations were proceeding the Commonwealth Govt. resumed the property for the bank site:—*Held:* no sale was effected by the agent or otherwise, & he was not entitled to any commission.—DALY *v.* PERKS (1914), 14 S. R. N. S. W. 461; 31 N. S. W. W. N. 169.—**AUS.**

1784 ii. ——.]—Deft. agreed with pltf. to pay him 25 per cent. commission on the purchase price of his land, if within a fixed time he produced a purchaser willing to enter into an agreement at a price & who had signed an offer in writing therefor. An offer was obtained in writing by pltf. on the terms mentioned, coupled, however, with a condition that, if not accepted within a time named on the second day from the offer, such offer would be withdrawn. Pltf. wrote & telegraphed this offer to deft., informing him fully of the terms of the offer, but not giving the name of the purchaser, which he did not then know himself, as the offer had been made to an agent of his. Subsequently pltf. gave the name of the purchaser, but through mischance he was not informed of acceptance in time to allow him to notify the purchaser in time, & he purchaser withdrew his offer:—*Held:* pltf. could not recover commission. An offer which had to be accepted in less than two days after deft. received it was not an offer contemplated by the agreement, & the name of the purchaser was not produced within a reasonable time.—ROGERS *v.* BRAUN (1906), 16 M. R. 580: 4 W. L. R. 40.—**CAN.**

1784 iii. —— *Proposed purchaser merely man of straw.*]—A real estate agent is entitled to his commission or any other form of compensation agreed upon when he brings his principal, the seller & a prospective buyer into agreement, but the latter must be possessed of the means to carry out his obligations. Hence a young man of twenty-four years of age, whose whole means are his wages of $1,000, is not an acceptable

Sect. 3.—Agent's rights against principal: Subsect. 1, E. (c) & (d).]

1785. Ship chartered—Found to be unfit.]—Pltf., acting as broker for defts., obtained a time charterparty for their ship upon terms of being paid a commission on all hire earned. During the currency of the charterparty litigation arose between defts. & the charterers as to the fitness of the ship for the purpose for which she was chartered, which resulted in the cancellation of the charterparty, there being no wilful act or default on the part of defts. in bringing about this result:—*Held:* upon the true construction of the contract, the intention of the parties was that pltf. should not be entitled to commission, if the earning of hire was prevented by reason of causes such as had in fact put an end to the charterparty.—WHITE *v.* TURNBULL, MARTIN & CO. (1898), 78 L. T. 726; 14 T. L. R. 401; 8 Asp. M. L. C. 406; 3 Com. Cas. 183, C. A.

1786. —— Lost before coming on hire.]—In the shipping trade there is an established custom that chartering brokers' commission is only payable in respect of hire actually earned.—HARLEY & CO. *v.* NAGATA (1917), 34 T. L. R. 124.

(*d*) *Right to Quantum Meruit.*

1787. General rule.]—Whether, on an employment to obtain a loan of money for commission, commission is payable if the loan, *i.e.*, the power of obtaining it, is procured, whether the money is actually received or not, provided that it does not fail through any default of the agent employed, but goes off through defect of title or insufficiency of security, is a question which depends in every case on the nature & effect of the contract of employment. *Semble:* if nothing is said about the event of failure the agent is entitled to recover on a *quantum meruit* if he procures the loan & it fails on the title.—GREEN *v.* REED (READ) (1862), 3 F. & F. 226; 8 L. T. 83, N. P.

Annotation:—Refd. Fuller *v.* Eames (1892), 8 T. L. R. 278.

1788. ——.]—The London agent (who was also a member) of a firm, who were commissioned to sell goods on behalf of the local govt. of a Spanish colony, was held to be justified in refusing to give them up to the Spanish Consul-General in England till he had communicated, through his immediate principals, with the local govt.

An agent, who has the business taken out of his hands before completion, is by the custom of merchants entitled to half the commission which he would have earned by completing it.

The 10 per cent. discount usually allowed by insurance cos. on punctual payment of the premiums belongs, in the absence of agreement to the contrary, not to the insurance agent, but to his principal.—SPAIN (QUEEN) *v.* PARR, No. 1617, *ante.*

For full anns., *see* S. C. No. 1617, *ante.*

1789. No right where express contract.]—Pltf. was employed by defts. to procure a loan on the terms of receiving commission for the loan so procured:—*Held:* (1) pltf. had not complied with the terms of the special contract & was not entitled to commission; (2) pltf. was not entitled to recover on a *quantum meruit* because defts. had not revoked the original contract & the parties were still bound by special terms.—M'LEOD *v.* ARTOLA BROTHERS (1889), 6 T. L. R. 68.

1790. ——.]—A. agreed to allow B. 2½ per cent. commission "on completion of the purchase" of an estate. The purchaser introduced by B. failed to complete, & eventually A. rescinded the contract. The assignee of B.'s interest sued A.'s exors. on a *quantum meruit*:—*Held:* as there was an express contract, no implied contract to pay a *quantum meruit* arose.—LOTT *v.* OUTHWAITE, No. 1775, *ante.*

Annotations:—Refd. Chapman *v.* Winson (1904), 91 L. T. 17, C. A.; Vulcan Car Agency *v.* Fiat Motors (1915), 32 T. L. R. 73.

1791. ——.]—Deft. agreed to pay pltfs. commission in the event of their introducing a partner, the commission to be payable according to the amount of capital that the new partner introduced, nothing to be payable if no capital secured. Pltfs. introduced N., but negotiations between deft. & N. were ultimately broken off. Pltfs. alleged that they were broken off on the ground that deft. had misrepresented the amount of capital in the business:—*Held:* (1) deft. had not been guilty of misrepresentation causing the negotiations to be broken off; (2) pltfs. were not entitled either to commission or to a *quantum meruit.*—SPIERS & BEVAN *v.* GLUCK (1901), 17 T. L. R. 236.

1792. —— Substitution of new implied contract—Question of fact.]—Deft., being about to erect seats for viewing a public funeral, entered into an agreement with pltf., a foreign agent, to make the scheme known abroad, & dispose of tickets for the seats. Pltf. was to be paid for his work & expenses by a percentage on the tickets which he sold. After pltf. had incurred certain expenses, but before he sold any tickets, deft. desired him not to dispose of them, as he would sell them himself. Pltf. sent all applicants for tickets to him, & after the funeral delivered to deft. a bill for work done & expenses incurred. Deft. paid the expenses, but refused to pay for the work:—*Held:* it was a question for the jury whether the original contract was not rescinded by mutual consent, & whether there was not a new implied contract that pltf. should be paid for the work actually done as upon

buyer of real estate for a price of $20,000, payable $6,000 cash, & the balance yearly instalments of $1,000, in addition to shouldering mtges. to the amount of $8,000.—GROSS REAL ESTATE AGENCY *v.* RACICOT (1910), Q. R. 20 K. B. 394.—**CAN.**

m. *Abandonment of contract by parties.*]—An agent obtained a purchaser, an agreement was signed, a deposit paid, & the purchaser went into possession. Pltf. agreed to wait for his commission until a loan should be made or the property sold again. The purchaser subsequently abandoned the property, & deft. cancelled the agreement:—*Held:* deft. liable to pay the commission, although no loan or sale had been made.—MCCALLUM *v.* RUSSELL (1909), 12 W. L. R. 267.—**CAN.**

n. ——.]—Where pltf. sold property for deft., & there was offer & acceptance:—*Held:* he was entitled to his commission notwithstanding the purchase afterwards fell through.—BROTMAN *v.* MEYER (1912), Q. R. 41 S. C. 433; 1 D. L. R. 371.—**CAN.**

o. ——.]—Deft. authorised pltf. in writing to effect an exchange of lands on certain terms, & stated in writing his commission should be £250 on effecting an exchange on terms agreed; subsequently terms were altered, & pltf. brought about a binding contract on the altered terms, which was abandoned:—*Held:* pltf. entitled to commission, as abandonment was not due to any breach of duty by pltf.—MACKAY *v.* REEVES (1909), 28 N. Z. L. R. 1114.—**N.Z.**

PART VIII. SECT. 3, SUB-SECT. 1.—E (*d*).

1787 i. *General rule.*]—Pltf., an experienced man in the towage business, refused an offer of deft.'s agent of 5 per cent. commission, but offered to work for $800 the season. Without any agreement he performed services for defts., some of which were unproductive:—*Held:* pltf. entitled to a *quantum meruit* for all services performed & not merely those that were productive.—LEMAY *v.* ST. LAWRENCE STEAM NAVIGATION CO. (1884), Q. S. C. 1884.—**CAN.**

1792 i. *No right where express contract—Substitution of new implied contract.*]—C. authorised H. to sell a section & a half of 960 acres, at $35 an acre, for 5 per cent. commission. H. introduced T. to C., & T. agreed to buy the section alone at $40 an acre, if certain other property were taken in part payment:—*Held:* an entirely new contract, as to which there was no memorandum in writing within Alberta Stat., c. 27, & H. not entitled to commission or to recover on a *quantum meruit. Toulmin* v. *Millar* (1887), 58 L. T. 96; *Dahl* v. *Nelson Donkin* (1881), 6 App. Cas. 38; *Inchbald* v. *Western Neilgherry Coffee, etc., Co.* (1864), 17 C. B. N. S. 733; *Burchell* v. *Gowrie & Blockhouse Col-*

a *quantum meruit*.—DE BERNARDY *v.* HARDING (1853), 8 Exch. 822 ; 22 L. J. Ex. 340 ; 21 L. T. O. S. 158 ; 1 W. R. 415 ; 1 C. L. R. 884.

Annotations:—Reid. Prickett *v.* Badger (1856), 1 C. B. N. S. 296 ; M'Leod *v.* Artola (1889), 6 T. L. R. 68.

1793. Introduction by agent must be effective cause.]—Deft. employed pltfs. to find a purchaser or mtgee. of an estate. Pltfs. went down to the estate, valued it, put it on their books, advertised it in their circulars & in newspapers, & took some journeys, had communications about it, & ultimately, while negotiating with N. upon the matter, pltfs. & deft. agreed that a letter should be written by pltfs. to N., & if such letter induced N. to become purchaser or mtgee. pltfs. should be paid £100. N. ultimately became mtgee., but denied that he was influenced in any way by the letter :—*Held :* pltfs. could not recover on a *quantum meruit* on the common counts for work & labour, etc., with particulars claiming commission as agreed. *Semble :* they could not recover at all.—GREEN *v.* MULES (1861), 30 L. J. C. P. 343.

1794. Parties found by agent must remain willing to complete.]—A co. employed mtge. brokers to obtain a loan, agreeing to pay a certain commission per cent. The brokers introduced persons willing to lend, but, a petition to wind up the co. having been presented, the intending mtgees. refused to complete :—*Held :* the brokers could neither rank as creditors for the commission in the winding up of the co. nor recover damages on a *quantum meruit*.

The procuring a person willing to negotiate about the matter is not sufficient. The readiness & willingness required must be a continued readiness & willingness to go on with the loan according to the usual course of business in such a transaction. Where a broker obtains a contract from his principal, the matter stands on a different footing. If the appcts. in the present case had obtained a contract from the intending mtgees. to advance the money, & the matter had afterwards not been completed by reason of defects in the title of the co. to the property, it may well be that the commission would have been earned (CHITTY, J.).—*Re* SOVEREIGN LIFE ASSURANCE CO., SALTER'S CLAIM (1891), 7 T. L. R. 602.

1795. Shipbroker not entitled—Unless contract completed.]—*Semble :* by the usage of trade, a shipbroker is not entitled to charge a shipowner for his trouble in procuring a charterer for the ship, where the contract is not completed, though it be broken off by the owner.—BROAD *v.* THOMAS (1830), 7 Bing. 99 ; 4 C. & P. 338 ; 4 Moo. & P. 732 ; 9 L. J. O. S. C. P. 32 ; 131 E. R. 38.

1796. —— ——.]—A broker who is employed by a shipowner to procure the effecting of a charterparty, & who procures a person to treat, but with whom ultimately no charterparty is effected, is not entitled to his commission, although the treaty has gone off in consequence of the unusual & unreasonable demands made by the shipowner upon the proposed charter. *Semble :* he is not entitled to any compensation for his work & labour on a *quantum meruit*, the usage of the trade being against it.—READ *v.* RANN (1830), 10 B. & C. 438 ; L. & Welsb. 121 ; 8 L. J. O. S. K. B. 144 ; 109 E. R. 513.

1797. —— ——.]—A broker cannot recover on a *quantum meruit* for the sale of a ship unless the contract be signed by vendor & purchaser & the sale in all other respects be complete.—MEESON *v.* OLIVER (1854), 23 L. T. O. S. 271.

1798. —— ——.]—A shipbroker is only entitled to commission upon a charterparty where he has substantially procured the charter ; & he cannot recover commission as upon a *quantum meruit* for his endeavours to procure the charter.—COUSINS *v.* MITCHESON, No. 1696, *ante*.

1799. —— ——.]—DALTON *v.* IRVIN, No. 1926, *post*.

1800. Gross sum payable under charter—Part contingent on arrival home of ship.]—A broker who procures a charterparty for a vessel to Rio Janeiro, where a gross sum is to be paid for the voyage out & home, is entitled on a *quantum meruit* to 5 per cent. on the gross sum, although the payment of part be contingent on the arrival of the vessel home.—ROBERTS *v.* JACKSON (1817), 2 Stark. 225.

1801. Compensation not contingent on freight being earned.]—The actual earning of freight under a charterparty is not a condition precedent to the right of the shipbroker to his commission for procuring the execution of the charter. A., a shipbroker, procured a charterparty to be made between B., a shipowner, & C., under which the owner contracted to bring home a cargo of guano & the merchant agreed to pay freight at the rate of £4 15*s.* per ton,

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lieries, [1910] A. C. 614, cited.—COMO *v.* HERRON (1913), 49 S. C. R. 1 (leave to appeal to P. C. refused).—**CAN.**

1792 ii. —— ——.]—Pltfs. claimed from deft. their expenses & compensation for endeavouring to sell a coal mine for the latter. Pltfs. failed to effect a sale, but their action was based on an alleged collateral & verbal agreement to pay expenses in case of no sale. The jury found, "In view of concessions made subsequently, we believe there was a promise of fair treatment in case of no sale," & judgment was entered for pltfs. :—*Held :* the real issue, whether there was a collateral agreement or not, was plain & square, & the jury were bound to find one way or the other, & there must be a new trial.—LOWENBERG, HARRIS & CO. *v.* DUNSMUIR (1903), 34 S. C. R. 228 ; 9 B. C. R. 303.—**CAN.**

1792 iii. —— ——.]—Pltf. being employed by deft. to procure offers for the purchase or exchange of certain property, introduced R., who made an offer of exchange which included lands of which S. was the owner. Deft. made a counter-offer, to which pltf. signed a conditional acceptance on behalf of R. Deft. being pressed for money, however, arranged with S. to exchange some of his lands for those of S. included in R.'s offer. Later R. ratified pltf.'s conditional acceptance of deft.'s counter-proposal, but by arrangement between the parties this proposal was abandoned, & the agreement between deft. & S. carried through. Later deft. & R. exchanged some of the properties under a separate agreement. In an action by pltf. for commission :—*Held :* (1) R. was never in a position to convey to deft. the lands of S. included in his offer, & the negotiations between R. & deft. never amounted to a binding contract, deft.'s offer to S. having put an end to deft.'s counter-offer to R., & the subsequent exchange which took place between deft. & R. was not promoted by pltf. ; (2) pltf. was not entitled to commission nor to a *quantum meruit*. *Benningfield* v. *Kynaston*, 3 T. L. R. 279 ; *Green* v. *Bartlett*, 14 C. B. N. S. 681 ; *Prickett* v. *Badger*, 1 C. B. N. S. 296 ; *Simpson* v. *Lamb*, 17 C. B. 603, cited.—CULVERWELL *v.* BIRNEY (1887), 14 A. R. 266.—**CAN.**

1793 i. *Introduction by agent must be effective cause.*]—Defts. employed pltf. to sell their concern on certain terms. Pltf. prepared an agreement on those terms, which defts. & the purchasers executed, & a memorandum was drawn up fixing pltf.'s commission. The purchasers ultimately refused to complete on the ground of misrepresentation as to deft.'s assets, & defts., were advised they could not enforce the agreement :—*Held :* pltf. entitled to $5,000 on a *quantum meruit*.—STRONG *v.* LONDON MACHINE TOOL CO. (1913), 24 O. W. R. 365 ; 4 O. W. N. 1062 ; 10 D. L. R. 510.—**CAN.**

p. *Part performance by agent.*]—Pltfs., real estate agents, made an agreement with deft. by which they undertook to subdivide certain land for him & to sell it, pltfs. to have a commission for making sales, drawing agreements, making all collections, & generally looking after the property. Pltfs. made no sales nor collections, but they drew agreements, & had a survey & plan of the property made, which met with the approval of deft. :—*Held :* pltfs. were not entitled to the commission of 15 per cent., but were entitled to be paid for their services as upon a *quantum meruit*.—MCMILLAN *v.* BARRATT (1911), 16 W. L. R. 209.—**CAN.**

q. *Principal rendering earning of commission impossible.*]—WESTON *v.* MILLS, No. 1750 v., *ante*.—**N.Z.**

r. *Authority revoked during currency of agreement.*]—ALDOUS *v.* GRUNDY, p. 521, o, *post*.—**CAN.**

s. *How ascertained.*]—Where the claim of a person, as an agent, for instance, is not the subject of stipulation, a jury, & not the master, is to determine the *quantum meruit*.—DOWNSHIRE *v.* POLLOCK (1809), 2 Moll. 317.—**IR.**

Sect. 3.—Agent's rights against principal: Subsect. 1, E. (d), F. & G.]

to be reduced to £4 12*s.* 6*d.* if the ship did not arrive off Cork or Falmouth on or before a given day. There was no express engagement on the part of C. to ship a cargo:—*Held:* (1) A. was entitled to recover from B. upon a *quantum meruit* for his work & labour in procuring the charter to be executed, without showing the arrival of the vessel on or before the day mentioned, & notwithstanding only a very small quantity of guano had been shipped, & a small amount of freight actually earned, the amount of compensation due to him was a question for the jury; (2) in estimating such compensation, they were properly guided by evidence of what was customary in similar cases.—HILL *v.* KITCHING (1846), 3 C. B. 299; 15 L. J. C. P. 251; 9 L. T. O. S, 257; 136 E. R. 120.

F. Remuneration payable out of Proceeds of Transaction.

1802. Purchaser's failure to complete—Contract rescinded by vendor.]—Pltf., an auctioneer, was employed by deft., owner of an estate, to find a purchaser on the terms of receiving "the usual commission out of the purchase-money." Pltf. introduced a purchaser who signed the contract & paid a deposit. Ultimately the purchaser failed to complete & the contract was rescinded, the deposit being forfeited. Deft. offered to pay commission on the deposit:—*Held:* pltf. was not entitled to any further commission, since by the express terms of the contract he was only to receive commission out of the purchase-money, & no purchase-money had been received.—BENINGFIELD *v.* KYNASTON (1887), 3 T. L. R. 279, C. A.

1803. —— ——.]—The owner of certain houses, who was desirous of selling, made an agreement with an agent in the following terms: "I agree to accept £1,150 for the above property, & you are to be at liberty to receive anything over & above that as a commission, it being understood that I am to receive the full sum of £1,150 without deduction." The agent found a purchaser who entered into a contract to purchase for £1,250, but the purchase was never completed owing to default of the purchaser:—*Held:* the agent not entitled to recover commission under the agreement.

This is a very special contract, by which pltf. made a special bargain with deft. & not a bargain to pay commission in the ordinary way. Pltf. did not intend to pay anything; deft. was not to be paid by pltf. at all, but was to take any difference above £1,150 which might be actually received by pltf. (A. L. SMITH, M.R.).—BEALE *v.* BOND (1901), 84 L. T. 313; 17 T. L. R. 286, C. A.; *revsg.* S. C. (1900), 16 T. L. R. 311.

1804. Theatrical agent—No money received through default of principal.]—Where pltf. procured for defts. engagements at certain music-halls on the terms of being paid 10 per cent. commission on all money received thereon, but defts. failed to appear, in consequence of which no money was ever received by defts. on such engagements:—*Held:* (1) the commission was not payable on the procuring of engagements by pltf.; (2) the commission was only payable when money became due under the engagements.—DIDCOTT *v.* FRIESNER (1895), 11 T. L. R. 187, C. A.

1805. —— ——.]—An agreement was made in Aug., 1914, between pltfs. & deft., by which deft., a music-hall artist, in consideration of pltfs. having procured for her an engagement with a co. in Australia, agreed to pay pltfs. a commission on the salary accruing from the engagement. The agreement provided that should the engagement not be fulfilled owing to default on deft.'s part other than certified illness the commission should be payable as if the engagement had been fulfilled. Deft. became unwilling to undertake the voyage to Australia owing to the risk of danger from enemy

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PART VIII. SECT. 3, SUB-SECT. 1.—F.

1802 i. *Purchaser's failure to complete.*]—Pltf. procured F. to make an offer for deft.'s property, which offer deft. accepted. The offer contained the stipulation "agent's commission to be paid out of & form part of the purchase-money at 2½ per cent." Later F. refused to complete:—*Held:* as no purchase-money had been paid, pltf. could not recover any commission.—ROBINSON *v.* REYNOLDS (1912), 23 O. W. R. 144; 4 O. W. N. 112; 6 D. L. R. 855.—**CAN.**

t. *Agent to sell at net price.*]—Where an owner lists land for sale with an agent at a price net to him, he does not thereby agree to pay any commission to the agent except out of the excess of the purchase-money over & above the stipulated net price.—CHAPPELL *v.* PETERS, No. 1706 ix., *ante*.

u. ——.]—MCKENZIE *v.* PICHE (1913), 19 R. de J. 361; 20 R. L. N. S. 32.—**CAN.**

v. *Commission payable out of surplus price.*]—When it is agreed between an owner of land & a real estate agent that the latter's commission will be the surplus above a determined sale price, payable from out of the first moneys received thereon, the agent has no claim upon the owner if the purchaser fails to discharge the conditions of the sale.—PETIT *v.* LUSSIER (1913), Q. R. 46 S. C. 195.—**CAN.**

w. ——.] — A., owner of a leasehold interest in an hotel, gave pltf. a letter agreeing, in the event of pltf. selling his interest, to sell for $50,000 net, $20,000 cash, balance in one & two years, & 6 per cent. interest, anything over & above to be pltf.'s commission:—*Held:* A. entitled to his $50,000 first out of the purchase-money & without any deduction, & pltf. only entitled to the last of the purchase-money after A. had received his $50,000 out of it. *Mangles* v. *Dixon* (1852), 5 H. L. Cas. 702; *Tailby* v. *Official Receiver* (1880), 13 App. Cas. 4; *Saffron Walden Second Benefit Bldg. Soc.* v. *Raynes* (1880), 14 Ch. D. 406, cited.—CHALMERS *v.* MACHRAY (1916), 33 W. L. R. 656; 9 W. W. R. 1435; 26 D. L. R. 529; 26 Man. L. R. 105.—**CAN.**

x. ——.]—A real estate agent cannot claim a commission for selling lots under a contract whereby his commission was to be paid if there was a surplus over & above a certain sum, unless he proves the existence of such surplus.—SIMARD *v.* DUBORD (1916), Q. R. 26 K. B. 81.—**CAN.**

y. *Commission payable out of money actually received—Form of payment.*]—Deft. entered into a commission agreement with pltf. whereby, if deft. closed a contract with M. for the sale of deft.'s secret process for manufacture of steel, pltf. was to be paid 10 per cent. as & when the consideration for the sale was received by deft. Negotiations with M. fell through, but ultimately deft. sold the process to W., an associate of M., for $5,000,000, to be paid partly in cash & partly in stock, & pltf. claimed 10 per cent. upon that sum:—*Held:* (1) pltf. entitled to 10 per cent. on the amount paid on account of the purchase-money & the delivery of 10 per cent. of the amount of shares issued to deft. in part payment; (2) the case was not one for a declaratory judgment, &, the question as to pltf.'s right to commission being established, the matter would be *res judicata* in any action pltf. might thereafter bring for recovery of any further commission payable to him. *Bright* v. *Tyndall* (1876), 4 Ch. D. 189; *Kevan* v. *Crawford* (1877), 6 Ch. D. 29; *Honour* v. *Equitable Life Assce. Soc. of U.S.*, [1900] 1 Ch. 852, cited.—STEWART *v.* HENDERSON (1914), 30 O. L. R. 447; 19 D. L. R. 387; 5 O. W. N. 737.—**CAN.**

z. *Commission payable out of gross receipts — Further commission out of net profits—Mode of calculation.*]—Pltfs. agreed with defts. for a sole agency in the United States in these terms: "D. Brothers to receive as compensation 25 per cent. of the gross premiums received by them, less return premiums & rebates, & an additional 15 per cent. on the annual net profits arrived at by deducting from the gross premiums all return premiums, rebates, losses & loss expenses paid, & all commission (including profit commission), & any other allowances paid to D. Brothers":—*Held:* the parties contemplated an annual adjustment of pltfs.' remuneration & an annual ascertainment of the net profits upon which the 15 per cent. was to be allowed, *i.e.*, the amount of the net profits upon which the 15 per cent. was to be paid should be ascertained by deducting from the gross premiums the rebates & losses paid during the year.—DOUGLAS BROTHERS *v.* ACADIA FIRE INSURANCE CO. (1913), 13 E. L. R. 157; 12 D. L. R. 419.—**CAN.**

a. *Commission payable out of net profits—Mode of calculation.*]—Where an agent was entitled to "50 per cent. of the net profits of all sales":—*Held:* in ascertaining what the "net profits" were a just proportion of overhead charges of the business should be allocated to the *quantum* of business done in which the agent was to participate.—WHYTE *v.* MCTAGGART (1915), 31 W. L. R. 654; 22 D. L. R. 8.—**CAN.**

submarines, & arranged with the co. in Australia that her engagement should be postponed, pltfs. not being parties to this arrangement. In an action to recover (*inter alia*) commission :—*Held :* the agreement to postpone the engagement was not a default on deft.'s part ; but even if there was default on her part, pltfs. could not recover commission, as at the time the action was brought no salary had accrued.—FOSTER'S AGENCY, LTD. *v.* ROMAINE (1916), 32 T. L. R. 545, C. A.

G. Where Time Limit has been placed for Completion of Transaction.

1806. Agent for sale "at any future date"—Commission on valuation—Purchaser not found within reasonable time.]—Deft. agreed in Feb., 1883, to pay pltf. a commission on the valuation to be made on the stock-in-trade of his public-house upon his sub-letting it "at any future date." Pltf. advertised the business, but failed to find a purchaser for it. In Sept., 1884, deft. offered to pay pltf. for the advertisements, & instructed him to discontinue them. In Nov., 1884, deft. sold his business but did not employ pltf. to make the valuation. In an action by pltf. for the amount of his commission the cty. ct. judge held that by Nov., 1884, a reasonable time during which pltf. would have been entitled to his commission had elapsed, & gave judgment for deft. On a motion for a new trial :—*Held :* (1) the question of such reasonable time was one of fact ; (2) the decision of the cty. ct. judge upon it was final.—HOUGHTON *v.* ORGAR (1885), 1 T. L. R. 653.

1807. Option reserved by principal.]—Pltfs. were employed to find a tenant or purchaser of deft.'s premises, & deft. agreed to pay them £400 if they found a suitable tenant or purchaser or if deft. decided to rebuild himself. The agreement further provided that deft. was to decide whether to sell or rebuild within 3 months. Deft. did not sell the premises, & did not begin to rebuild them until after the 3 months had expired :—*Held :* pltfs. were entitled to recover the agreed commission.—DEBENHAM *v.* CHAMBERS (1895), 12 T. L. R. 24.

1808. Property not sold by specified date.]—Pltfs. were employed by deft. to find a purchaser of his leasehold interest in a house, deft. offering to pay them double commission if they found him a purchaser by the following May. Pltfs. introduced A. who made an offer in Mar., which deft. refused. In Apr. the house was mentioned by another firm of agents to A., who did not inform them of the previous negotiations, & this firm submitted a second offer from A. to deft. This offer was repeated in June, when it was accepted. Pltfs. claimed to be entitled to double commission on the sale :—*Held :* (1) pltfs. were entitled to ordinary commission on the sale, as they had introduced the person who ultimately became the purchaser ; (2) pltfs. were not entitled to double commission since they had not performed the terms of the special offer under which it was payable.—GIDDY & GIDDY *v.* RUSSELL (EARL) (1904), 48 Sol. Jo. 415, C. A.

1809. Offer & acceptance not made by specified date.]—Defts., mtgees. of an estate, agreed to pay to pltf. a commission of 3 per cent. on the pur-

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PART VIII. SECT. 3, SUB-SECT. 1.—G.

1808 i. *Property not sold by specified date.*]—An agent to effect a sale of property at a price by a fixed date on certain terms negotiated with the co-operation of his principal with an organisation in course of formation, which, however, never came into being, & without his assistance after the date the principal sold to another institution :—*Held :* the agent was not a general but a special agent, *i.e.*, to make a sale at a price by a fixed date, & after that date, the agent not having performed his part of the contract, the principal was not liable to him.—COUNSELL *v.* DEVINE (1911), 16 W. L. R. 675, Man. L. R.—**CAN.**

1808 ii. ——.]—Defts. placed their property for sale with pltfs., real estate agents, upon an exclusive agency limited in time. Pltfs. failed to find a purchaser within the stipulated time, but a party who had been negotiating with them subsequently induced a third party to go in with him & become purchaser jointly with him :—*Held :* no purchaser having been found by the stipulated time, pltfs. were not entitled to commission.—SIBBITT *v.* CARSON (1912), 27 O. L. R. 237 ; 4 O. W. N. 114 ; 8 D. L. R. 791.—**CAN.**

1808 iii. ——.]—Where property is not sold within the time stipulated in a contract between the owner & a real estate agent, but is eventually sold, the agent has the right to recover the customary commission. It would have been otherwise if the property had been sold by another agent, though to a purchaser with whom the first agent had had dealings.—HOUSE OF BROWNE, LTD. *v.* MAJOR MANUFACTURING CO. (1915), Q. R. 24 K. B. 270.—**CAN.**

1808 iv. ——.]—An agent who has an authority from his principal to find a buyer for a property at a specified price, & within a certain time, for an agreed remuneration, is not entitled to general commission, as upon a *quantum meruit*, upon a subsequent sale by the principal at a lower price, although to a buyer introduced by the agent in the first instance.—CHAPPLE *v.* FAGAN (1909), 11 W. A. R. 78.—**AUS.**

1808 v. —— *Purchaser found within time — Transaction completed later.*]—In an agreement between the owner & an agent for the sale of a business for a commission to be paid out of the first money received after completion of the bargain, a covenant that "the right (exclusive) is given for eight days "does not mean that the sale must be effected, but that a purchaser must be found, within that time. So if the agent within two or three days finds the purchaser who afterwards buys, he is entitled to his commission, though the principal parties only meet & perfect the transaction after the expiration of the delay.—MASSICOTTE *v.* LAVVIE (1911), Q. R. 40 S. C. 258.—**CAN.**

1808 vi. —— *Sold by principal after period but before required notice given to agent.*]—A. engaged B., a real estate broker, to sell his property at a fixed price in consideration of a commission of 2½ per cent. within three months, or afterwards "as long as he is not notified to the contrary in writing," & was brought into contact with a purchaser through the efforts of B. within such time. A. sold his property to such purchaser for a price less than that he had agreed upon with B., & after the expiry of the three months, but without notification in writing to B. :—*Held :* A. indebted to B. for his commission upon the price of the sale at the rate contracted for.—LECLERC *v.* FISSIAULT (1914), Q. R. 45 S. C. 182.—**CAN.**

1808 vii. —— —— *Correspondence amounting to new contract.*]—Deft. appointed pltfs. his sole agents for the sale of his land, & agreed that "this sole right of sale shall extend for a period of four months from this date, or until such time thereafter as this contract is terminated." Pltfs. did not sell the property nor find a purchaser, but deft. sold it himself ten months after the date of the writing, & pltfs. claimed commission on this sale. After the four months had expired, but before the sale made by deft., letters passed between pltfs. & deft., in which pltfs. were authorised to sell the place at a higher price, if they had a buyer, but they did not produce one :—*Held :* the contract under which pltfs. claimed, if it could be considered as continued after the four months, was terminated by the new contract made by the correspondence ; & pltfs. were not entitled to recover anything.—NAFFZENGER & BROCKDORF *v.* HAHN (1913), 25 W. L. R. 155 ; 13 D. L. R. 130.—**CAN.**

b. *Option to purchase — Purchaser found within time.*]—Deft., in consideration of $1, gave pltf. an option on land at a price & on terms named, & to pay him $1,000, "to be taken out of second payment as commission, provided sale is made not later than Jan. 25, 1912, on which date this option expires at 1 o'clock." Pltf. sold on Jan. 25 on the terms named, & deft. received a wire to that effect at 1 p.m. : —*Held :* the option expired at 6 p.m. on that day, & pltf. entitled to commission, $1,000, as he sold within the time limit to a person able & willing to buy.—BOOKER *v.* O'BRIEN (1913), 24 W. L. R. 899 ; 4 W. W. R. 79 ; 9 D. L. R. 801.—**CAN.**

c. —— ——.]—Pltf., a real estate agent, sued to recover commission for securing a purchaser. He secured a prospective purchaser within the time limit, but the option was not exercised within the limit :—*Held :* pltf. entitled to recover. *Keen v. Priest* (1858), 1 F. & F. 314 ; *Richards v. Gellatly* (1872), L. R. 7 C. P. 127 ; *Weidman v. Walpole*, [1891] 2 Q. B. 534, cited.—MEIKLE *v.* MCRAE (1911), 20 O. W. R. 308 ; 3 O. W. N. 206.—**CAN.**

d. *Debentures not placed by specified date.*]—Where a broker was employed to float a loan for a co. by debentures being placed in his hands "for disposal for three months from this date, . . . your commission . . . to be 1½ per cent. by whomsoever sold, . . . but it is also understood that, should the whole of the debentures, viz., £30,000, not be disposed of at this time by tender, no commission to accrue until they are sold," & he obtained within the time tenders for only £6,000, which were not accepted by the co., & the loan was withdrawn :—*Held :* the broker was not entitled to any commission.—WERE *v.* SOUTH MELBOURNE GAS CO. (1877), 3 V. L. R. L. 352.—**AUS.**

Sect. 3.—Agent's rights against principal: Subsect. 1, G. H. K. & L (a).]

chase-money of the estate, with an additional 2 per cent. in the event of the purchase being completed by a certain date. It was agreed that the purchase would be considered completed if a definite offer & acceptance were made. Before the specified date a memorandum of agreement between the intending purchaser & defts. was signed, by which the former undertook to send professional persons to verify the particulars of the property, &, provided he received a satisfactory report, he undertook to enter into a formal contract for the purchase of the estate for a named sum. The contract for the purchase was not signed until some time after the specified date. In an action to recover the 2 per cent. commission :—*Held :* as the memorandum of agreement contemplated a formal contract, the terms of which would require settlement, there was no definite offer & acceptance made on or before the specified date ; (2) the 2 per cent. commission was not payable.—HENRY *v.* GREGORY (1905), 22 T. L. R. 53.

H. Right to Extra Remuneration.

1810. Whether acts done were included in duties as agent.]—A. acted under a written agreement as the commission agent of B. in the sale of goods, & was paid a commission. B. was a contractor with the Admlty. for the supply of a variety of articles, on the sale of which A. was paid commission, & A. attended on a number of occasions at Somerset House, where the patterns of these articles were inspected by Govt. officers. A. sought to charge B. for these attendances in addition to his commission :—*Held :* (1) if, in giving these attendances, A. was only acting in the discharge of his business as an agent, he was not entitled to charge for the attendances ; (2) if these attendances were matter beyond his duty as an agent, he was entitled to be paid for them separately ; (3) this was a question for the jury.—MARSHALL *v.* PARSONS (1841), 9 C. & P. 656.

Annotation :—**Refd.** Young *v.* Naval, Military & Civil Service Co-op. Soc. of South Africa, [1905] 1 K. B. 687.

1811. ——.]—A paid agent is bound to discharge all those duties, multifarious or otherwise, & onerous or otherwise, which the terms of that agency cover. He must make his own bargain with his principal, & it is his duty to do all that that bargain entails & to be content with his remuneration. If he is called upon to do anything outside the terms of his agency, he is entitled to make a special bargain, or he can decline to do it unless he is remunerated on a special footing ; or he may do the work, &, provided everything is fair & above board, he probably would be allowed a fair remuneration according to some recognised measurement of the value. But if he does anything within the terms of his agency, however uncompensated it may seem to him personally, he can neither charge for it in his account nor can he secretly take any commission for it (KEKEWICH, J.).—WILLIAMSON *v.* HINE, No. 1582, *ante*.

K. Remuneration in Case of Revocation of Authority.

1812. House agent—Principal's right to revoke authority.]—Where a house agent is employed to find a purchaser, the principal may revoke the agent's authority at any time before the agent has found a purchaser, & in that case the agent is not entitled to remuneration for his endeavours to find a purchaser (WILLIAMS & CROWDER, JJ.).—PRICKETT *v.* BADGER, No. 1754, *ante*.

Annotations :—**Apld.** M'Leod *v.* Artola (1889), 6 T. L. R. 68 ; Taplin *v.* Barrett (1889), 6 T. L. R. 30.
For full anns., *see* S. C. No. 1754, *ante*.

PART VIII. SECT. 3, SUB-SECT. 1.—H.

1810 i. *Whether acts done were included in duties as agent.*]—Pltf. was employed by defts. as their agent to purchase upon his own credit, but for them, an electric crane. Pltf. made the purchase upon certain terms, & defts. agreed to the terms & paid over to pltf., for transmission by him to the vendors, one-third of the price. The crane was delivered, ready for shipment, when the vendors demanded the other two-thirds before delivery of the bill of lading. Pltf. asked defts. for this sum, but they did not send it, & pltf. paid it out of his own funds. There was a great deal of correspondence, pltf. asking for a refund of the moneys he had paid, interest, commission, disbursements, etc., & defts. objecting to some of the items of pltf.'s account. In an action by pltf., defts. paid into ct. a sum sufficient to cover what pltf. had paid for the crane & a commission of 2½ per cent. on the purchase price, but no more :—*Held :* pltf. was entitled to 2½ per cent. commission only, the rate at which pltf.'s claim was at first made, but which he changed to 10 per cent. shortly before action because he felt that he had extra trouble for which he should be compensated.—JOHNSTON *v.* CANADIAN KLONDIKE MINING CO., 19 W. L. R. 60. —**CAN.**

1810 ii. ——.]—A factor received a fixed salary named in his factory, & for thirty years included in his accounts such salary without any other claim being made. On a claim for remuneration for services unconnected with his factory :—*Held :* he had no legal claim to such remuneration.—ROSE *v.* FIFE (EARL) (1806), 5 Pat. 115.—**SCOT.**

1810 iii. ——.]—A factor claimed payment on a *quantum meruit* for services performed by him which he averred did not fall within his contract of employment as factor :—*Held :* there was no cause of action, pltf. having failed to make such definite averment of his duties as would exclude from scope of those duties the extra services for which remuneration was claimed.—MACKENZIE *v.* BAIRD'S TRUSTEES, [1907] S. C. 838. —**SCOT.**

e. *Customary extra remuneration excluded by terms of agreement.*]—An agent appointed to carry out a business for his principal under a written agreement, which provides for his remuneration by the payment of a stated sum & commission on sales, is not entitled to commission on the acceptance & payment of drafts, usually charged by agents, but not mentioned in the agreement. — MCPHERSON *v.* BRICE (1907), Q. R. 31 S. C. 218.—**CAN.**

PART VIII. SECT. 3, SUB-SECT. 1.—K.

f. *Agent to sell property — Principal's right to revoke authority.*]—A. authorised B. to find a purchaser for his property. B. tried to induce G. to buy, but the negotiations fell through, & A. revoked B.'s authority to sell before G.'s name was mentioned to him. A. afterwards entered into an agreement to sell to F., not knowing at the time that F. was buying for G. ; afterwards F. assigned his right to G., & thereupon A. conveyed the property to G. :—*Held :* in the absence of any scheme to deprive B. of his commission, he was not entitled to any.—HUNTER *v.* BUNNELL (1906), 3 W. L. R. 229. —**CAN.**

h. —— ——.]—Pltf. was agent to procure a purchaser for deft.'s land at $6,000, anything over to be his commission. A few days after the property was listed deft. said he must have $6,000 net ; on that day pltf. was negotiating with a purchaser, to whom deft. eventually sold for $6,000, pltf. meantime having altered his listed price to $6,500 :—*Held :* pltf. not entitled to commission or remuneration, his authority being withdrawn before he found a purchaser.—HOLMES *v.* LEE HO & LON POY (1911), 17 W. L. R. 428 ; 16 B. C. R. 66.—**CAN.**

k. —— ——.]—In an action by real estate agents for commission :—*Held :* the agency had come to an end before they introduced a purchaser to deft., & sufficient weight had not been given to the insertion of an advertisement in a newspaper in which pltfs. claimed to be exclusive agents one day previous to the time they claimed their agency to have commenced.—CURRIE & STERRY *v.* HOSKIN (1912), 23 O. W. R. 676 ; 4 O. W. N. 492 ; 9 D. L. R. 514.—**CAN.**

l. —— ——.]—Deft. requested pltf. to sell for him a plot at any rate exceeding the price at which deft. himself had purchased it, & agreed to give him as remuneration half of the net profit realised on the sale. Deft. subsequently revoked this authority, & pltf. shortly afterwards found a purchaser, whose offer deft. did not accept : —*Held :* pltf. could not recover on the agreement, which had not been performed on his part, & there was no ground for holding that pltf. & deft. were partners in the transaction as between themselves. — HURST *v.* WATSON (1866), 2 Bom. 423 (2nd ed. 400). **IND.**

m. —— —— *Measure of damages.*] —Where the owner of property has authorised an agent to sell same on commission within a specified period, &, before the expiration of the term, the owner leases the property with option of purchase, such agreement is equivalent to a revocation of the agent's authority, but the latter is only

1813. —— Principal's implied right to sell himself.]—Where the owner of property puts it in the hands of a house agent for sale upon commission, there is, in default of stipulations to the contrary in the contract between the parties, an implied term that the owner shall be at liberty to sell the house himself or to employ other agents, & if a sale takes place by such means pltf. is not entitled to commission, although he has found a person prepared to purchase.—BRINSON *v.* DAVIES (1911), 105 L. T. 134; 27 T. L. R. 442; 55 Sol. Jo. 501.

1814. General agent—Revocation of authority—No remuneration for subsequent services.]—In Aug., 1853, deft. purchased certain mtge. debts & legacies charged on an estate in Jamaica, & on the 16th executed a power of attorney authorising pltf., a merchant in Jamaica, to act for him in all matters, & wrote to him, directing him to foreclose the mtge. & take possession. The extrix. of B., who had been manager for the parties whose interest deft. had purchased, was then in possession of the estate, & claimed a large sum as salary due to & advances made by her husband. After some negotiation pltf. agreed to pay her a sum of £844, & then got possession of the estate. On receiving information of this deft. at once repudiated the transaction, & on Feb. 16, 1854, wrote to pltf., removing him from the agency, & on the same day executed a revocation of the power of attorney, which reached pltf. on Mar. 8. Pltf. continued in possession, & expended money for the purposes of the estate up to Aug. 15, 1854, when he surrendered possession to C., to whom deft. had sold his interest. Pltf. claimed to be entitled to recover for his services between Mar. 9 & Aug. 14:—*Held:* (1) pltf. had no right to interfere after Mar. 8, when his power was revoked; (2) pltf. not entitled to recover.—KITCHEN *v.* QUILTER (1859), 32 L. T. O. S. 261, Ex. Ch.

1815. Agent to procure loan—Variation of authority—Acquiescence by agent—Lender procured on original terms.]—Deft. employed pltf. to negotiate a loan on some of deft.'s property, pltf. to be paid commission if he procured the loan, but none if he did not. Before pltf. had done anything in the matter deft. wrote to him, varying the terms on which he would accept the loan. Pltf. endeavoured to obtain it on the latter terms, but failing to do so obtained an offer for a loan on the terms of the first authority, which deft. refused to accept:—*Held:* (1) as the first authority had been revoked, pltf. was not entitled to commission for what he had done; (2) pltf. was not entitled to claim for his services in endeavouring to procure the loan under the substituted terms, inasmuch as he did not obtain it under those terms; (3) pltf. might have treated the revocation of the first terms of his employment as a breach of contract & have had his action thereon against deft.—TOPPIN *v.* HEALEY (1863), 1 New Rep. 326; 11 W. R. 466.

Annotation:—**Distd.** *Re* Hannan's Empress Gold Mining & Development Co. (1896), 74 L. T. 550.

1816. Sale after death of principal.]—A. agreed with B. that he would endeavour to sell a picture belonging to B., & if he succeeded in selling same, B. should pay him £100. B. died before the picture was sold. In an action against the administratrix of B., upon the above agreement, the court alleged that in pursuance of the agreement A. did, before & after the death of B., endeavour to sell, & after the death of B. he did succeed in selling, the picture, "which sale was confirmed by deft. as administratrix as aforesaid" & she refused to pay the £100:—*Held:* the count disclosed no cause of action, as the authority from B. to A. to sell the picture was revoked by B.'s death, & deft.'s confirmation of the sale, in the absence of an allegation that she was aware of the existence of the contract between A. & B., was no adoption of the contract by her so as to make her liable to pay the £100.—CAMPANARI *v.* WOODBURN (1854), 15 C. B. 400; 24 L. J. C. P. 13; 24 L. T. O. S. 95; 1 Jur. N. S. 17; 3 W. R. 59; 3 C. L. R. 140; 139 E. R. 480.

1817. Sale after bankruptcy of principal.]—A debtor had employed an estate agent to sell certain property, & on Jan. 7 the agent introduced to debtor a person willing to purchase. No agreement was arrived at between debtor & the person introduced. The debtor filed his petition, after which negotiations were resumed between debtor's trustee in bkpcy. & the person introduced by the agent, which resulted on Jan. 24 in a sale. The agent's proof for his commission having been rejected by the trustee:—*Held:* (1) the sale was attributable to the introduction by the agent; (2) the proof for commission must be allowed.—*Re* BEALE, *Ex p.* DURRANT (1885), 5 Morr. 37.

L. Continuing Commission.

(*a*) *Agency terminated by Dismissal of Agent.*

1818. Insurance agent—Commission payable on accounting—Not payable when duty to account ceased.]—Deft., a local agent of an insurance co., entitled to actual damages; & where the agent had taken no steps whatever to procure a purchaser, & the term of his agency had nearly expired when his agency was revoked, & the lessee did not in fact become a purchaser:—*Held:* no damages were proved, & his action for commission could not be maintained.—BLONDIN *v.* DUFF (1892), 1 S. 256.—**CAN.**

n. *Purchaser found before authority revoked.*]—An agent employed to effect a sale has no claim on his principal in consequence of revocation of the agent's authority before a sale is effected unless he has, before the revocation, found a person ready & willing to purchase on the terms fixed by the principal.—HINCHEY *v.* KEAM (1901), 20 N. Z. R. 478.—**N.Z.**

o. —— *Contract signed after revocation.*]—Deft. agreed with pltfs., land agents, that they should procure a purchaser of land for $45,000 before the end of Sept. & to leave it in their hands for that time & pay them the regular commission. Pltfs. spent time & money in advertising, but on Sept. 27 deft. revoked the authority, after pltfs. had found M. ready & willing to purchase, but M. had not at that time definitely agreed to buy. M. subsequently, on the day of revocation, definitely agreed to buy & paid pltfs. a deposit:—*Held:* pltfs. entitled to half-commission by way of *quantum meruit*.—ALDOUS *v.* GRUNDY (1911), 20 W. L. R. 550; 21 Man. L. R. 559.—**CAN.**

p. —— ——.]—An agent to find a purchaser of an hotel on commission introduced one ready & willing to purchase; subsequently the vendor instructed the agent not to deal further with that person, & after this the agent induced that person to sign a contract of sale which he signed as agent of the vendor:—*Held:* the agent entitled to remuneration for services up to the full amount of commission or to damages.—MACNAMARA *v.* MARTIN (1908), 7 C. L. R. 699; 25 N. S. W. W. N. 35.—**AUS.**

q. *Work done after revocation of authority on orders previously obtained.*]—A contract for agency terminable on notice provided that commission should be paid for work done on amount of orders, & on termination the agent to receive such commission as should have been earned:—*Held:* the agent not entitled to commission for work for which he had obtained the order, but which was not done until after the agency had been determined.—HILTON *v.* HELLIWELL, [1894] 2 I. R. 94.—**IR.**

r. *Authority revoked by agent's misstatement — Subsequent purchase of shares.*]—A broker, employed by his principal to purchase shares, informed him, contrary to the fact, that he had purchased such shares in accordance with his instructions. He did not buy till two days later, & then purchased for forward delivery. In an action by the broker to recover commission:—*Held:* the representation that he had bought put an end to his authority, & the principal was not bound by the subsequent purchase.—SAMPER *v.* HADE (1889), 10 N. S. W. 270.—**AUS.**

s. *Where authority irrevocable.*]—RICHARDSON *v.* MCCLARY (1906), 3 W. L. R. 141.—**CAN.**

PART VIII. SECT. 3, SUB-SECT. 1.—L. (a).

t. *Land agent—No commission to be payable after termination of agency — Sales completed before termination.*]—Pltf. was appointed by defts. one of their agents for the sale of land on commission, one of the terms being that on all sales the right to commission would

Sect. 3.—Agent's rights against principal: Subsect. 1, L. (a), (b), (c) & (d) & M. (a).]

having been dismissed from his employment, claimed to be entitled to a percentage on the premiums paid on insurances obtained by him, notwithstanding his dismissal, & to a percentage on similar premiums obtained by local agents whom he had appointed :—*Held :* as deft. was entitled to receive his percentage when he accounted, when the duty to account ceased the right to the percentage ceased also.—TIMES LIFE ASSURANCE & GUARANTEE CO. *v.* SWANN (1854), 23 L. T. O. S. 114.

1819. No commission on subsequent orders—Unless so provided.]—On a contract to pay a traveller by commission, there is not, in the absence of an express & clear stipulation, any obligation to pay the commission on orders from customers originally obtained by the agent, but sent after he has ceased to be so.—NAYLER *v.* YEARSLEY (1860), 2 F. & F. 41.

1820. Orders by customers "arising from your introduction."]—Pltf. was employed by defts. on the terms of receiving commission "upon all orders executed by us & paid for by customers arising from your introduction." Pltf. having been dismissed :—*Held :* pltf.'s right to commission continued, notwithstanding his dismissal.—BILBEE *v.* HASSE & CO. (1889), 5 T. L. R. 677.

Annotations :—**Apld.** Morris *v.* Hunt & Co. (1896), 12 T. L. R. 187. **Expld. & Distd.** Nordman *v.* Raynor & Sturges (1916), 33 T. L. R. 87 **Consd.** Levy *v.* Goldhill, [1917] 2 Ch. 297 ; Marshall *v.* Glanvill, [1917] 2 K. B. 87.

1821. Advertising Agent — Renewals—Construction of contract.]—By a contract with an advertising agent contained in letters, the agent was to be paid commission both on initial orders & on renewals. Pltf. having been dismissed :—*Held :* pltf. not entitled to commission on renewals subsequent to his dismissal.—BOYD *v.* MATHERS & SOUTH AFRICA, LTD. (1893), 9 T. L. R. 443, C. A.

1822. —— —— Continuing advertisements—Alleged usage.]—The engagement of an advertising agent, who received a commission on all advertisements obtained by him, having been terminated, the agent claimed, by usage, commission on all advertisements obtained by him which were inserted, after his engagement had terminated, "until countermanded," & on all advertisements obtained by him which were renewed with less than a break of 12 months :—*Held :* the usage had not been proved.—BETTANY *v.* EASTERN MORNING & HULL NEWS CO. (1900), 16 T. L. R. 401.

1823. —— ——.]—Pltf. was employed by defts. to obtain advertisements for their newspapers, commission being payable on all advertisements ordered by advertisers introduced by him, & on all renewal orders of such advertisements within two years of the previous order, whether sent through pltf. or direct. Defts., having dismissed pltf., claimed that their liability to pay commission came to an end, & relied *inter alia* upon an alleged usage of the newspaper trade :—*Held :* (1) no usage as to the payment of commission on renewals was established ; (2) the terms relating to the payment of commission applied only to the period during which pltf. was employed by deft. ; (3) on the termination of employment his right to commission ceased.—GERAHTY *v.* BAINES & CO. (1903), 19 T. L. R. 554.

1824. Implied right to future commission question of fact.]—Pltf. was employed as commercial traveller by defts. on the terms contained in a letter that he was to be allowed commission on all orders received from certain named firms, & "on any fresh ones you can introduce." It was left to the jury to say if it was an implied term in the contract that pltf.'s right to commission should continue after dismissal on all orders accepted from customers introduced by him, whether named in the list or not.—MORRIS *v.* HUNT & CO. (1896), 12 T. L. R. 187.

Annotation :—**Consd. & Distd.** Levy *v.* Goldhill, [1917] 2 Ch. 297.

1825. Duration of agency not fixed.]—Pltf., a commercial traveller, was to receive 7½ per cent. on the net amount of cash payments on orders obtained through him & 7½ per cent. on all orders from customers introduced by him, whether such orders were obtained by him or not. In Feb., 1895, he received three months' notice of dismissal :—*Held :* no time limit being fixed for the duration of the commission, pltf. was entitled to commission on orders of customers introduced by him, given after his dismissal.—SALOMON *v.* BROWNFIELD & BROWNFIELD GUILD POTTERY SOCIETY, LTD. (1896), 12 T. L. R. 239.

Annotations :—**Folld.** Faulkner *v.* Cooper (1899), 4 Com. Cas. 213. **Consd.** Levy *v.* Goldhill, [1917] 2 Ch. 297.

1826. —— Commission payable on custom, not on customers.]—An agreement between pltf. & defts., that defts. should pay pltf. a commission on all business done by defts. through orders obtained by pltf., was silent as to duration of employment & notice of termination :—*Held :* pltf. not entitled to be paid commission on business done by defts. after the engagement had been terminated.

By the terms of the agreement the commission is payable, not on customers, but on custom (PHILLIMORE, J.).—BARRETT *v.* GILMOUR & CO. (1901), 17 T. L. R. 292; 6 Com. Cas. 72.

Annotations :—**Consd.** Levy *v.* Goldhill, [1917] 2 Ch. 297. **Refd.** Wilson *v.* Harper (1908), 77 L. J. Ch. 607.

1827. Agency terminable by mutual consent.]—Pltf. was appointed sole agent in London for sale of defts.' goods, defts. agreeing to pay him a commission upon the value of all goods sold in London or to his customers. The agreement was terminable by mutual consent. The agreement having been determined by defts. :—*Held :* pltf. not entitled to commission on orders received & executed by defts. after the termination of the agreement from persons introduced by pltf.—KELLY *v.* CROFT (1898), 14 T. L. R. 543, C. A.

1828. Commission on orders direct or indirect—Orders subsequent to dismissal.]—Pltf. was appointed agent of defts. for 12 months for the sale of lead manufactured by them upon the terms that he was to receive a commission of 2½ per cent. upon all sales, direct or indirect, effected to customers introduced by him. Pltf. continued to act after the 12 months, until dismissed. After the termination of pltf.'s employment he brought an action to

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terminate with the termination of the agency :—*Held :* this did not deprive pltf. of his commission on sales which had been completed before his agency was terminated, but only applied to pending or incompleted sales.—BUCKWORTH *v.* NELSON & FORT SHEPPARD RY. CO. (1908), 9 W. L. R. 490.—**CAN.**

u. *Agent to sell — Commission on orders taking "definite shape."*]—Defts. employed pltf. as sales agent by a written agreement, by which the agent was to receive "50 per cent. of the net profits of all sales" of a certain apparatus. The agreement also contained the following clause : "This agreement to be perpetual until either you or ourselves are dissatisfied, when all that will be necessary will be four weeks' notice to terminate same. All business in these lines that has assumed definite shape during the time you are with us & is eventually closed after you have left, you are to get credit for. By 'definite shape' we mean on what we have quoted definite prices." Pltf. had done a great deal of work to procure a large contract for defts., & prepared part of the figures upon which a tender for the contract was made by defts., to do the work at a certain definite price. In an action by pltf. for a share of the profits derived or to be derived from the contract entered into following defts.' tender, the trial judge having found as a fact that the hiring agreement was not terminated until a day later than the day the tender was made : *Held :* pltf. was, under the agreement, entitled to share in the profits derivable from the contract.—WHYTE *v.* MCTAGGART (1915), 34 W. L. R. 651 ; 22 D. L. R. 8.—**CAN.**

recover commission alleged to be due to him upon further orders given by customers originally introduced by him whilst in defts.' service :—*Held :* not entitled to such commission.—WEARE *v.* BRIMSDOWN LEAD CO. (1910), 103 L. T. 429.

Annotation :—**Consd. & Expld.** Levy *v.* Goldhill, [1917] 2 Ch. 297.

1829. Repeat orders by introduced customers—Express proviso.]—Pltf. in the course of travelling for his own business obtained orders for other traders on terms of commission. Deft. agreed with pltf. as follows : " I agree to pay you half profits on receipt of orders (provided the customer is good). Same applies to repeats on any accounts introduced by you." Deft. subsequently terminated the relation constituted by the agreement without giving any notice :—*Held :* (1) there was no employment of pltf. by deft. in the strict sense, & deft. was entitled to terminate their relations without notice ; (2) notwithstanding the termination of the relation, pltf. was entitled to commission on orders whenever received if they came from customers introduced by him. The measure of damages discussed.—LEVY *v.* GOLDHILL & CO., [1917] 2 Ch. 297 ; 86 L. J. Ch. 693 ; 117 L. T. 442 ; 33 T. L. R. 479 ; 61 Sol. Jo. 630.

(b) Agency terminated by Death of Agent.

1830. Commission on orders from customers introduced by agent—Principal continuing to do business with customers after agent's death.]—Although a contract to introduce customers to a firm in consideration of the firm paying a commission on the orders obtained from such customers so long as the firm do business with them is determined on the death of the introducer, yet, if the firm continues to do business with these customers, they must still pay the commission in the same way as they would have to pay the commission if, after the determination of the contract in the lifetime of the introducer, they continued to do business with his customers.

Pltfs. were the exors. of W., deceased, who had agreed to introduce customers to defts. on the consideration that defts. should pay him a 5 per cent. commission on the moneys they received from such customers so long as defts. did business with them. After having introduced from time to time for a period of 16 years customers to defts. who duly paid him the commission agreed, W. died, &, although defts. continued to execute orders from the customers he had introduced, they refused to pay to his estate the commission on such orders, on the ground that W.'s death had put an end to the agreement :—*Held :* (1) the contract was determined by the death of W., as the introduction of fresh customers under that agreement became impossible ; (2) defts. must still pay the commission so long as they continued to do business with the customers the deceased had introduced, in the same way as they would have had to pay the commission if, after having determined the contract in the lifetime of W., they continued to do business with his customers.—WILSON *v.* HARPER, SON & CO., [1908] 2 Ch. 370 ; 77 L. J. Ch. 607.

(c) Agency terminated by Expiration of Time.

1831. Commission payable on orders attributable to agent's introduction.]—Pltf. was employed to sell pianos for defts. on the terms of receiving commission on all orders accepted from new customers introduced by him. The employment was for a fixed period, after the expiration of which defts. refused to pay commission on further orders received from customers introduced by pltf. during the period of his employment :—*Held :* pltf. entitled to commission on orders received & executed after the termination of the agency, if properly attributable to his introduction.—HATZFELD *v.* LIPP & SOHN (1905), 49 Sol. Jo. 283.

(d) Agency terminated by its Performance becoming impossible.

See, generally, CONTRACT.

1832. Outbreak of war—Agent interned as alien enemy.]—NORDMAN *v.* RAYNER & STURGES (1916), 33 T. L. R. 87.

Annotation : **Expld. & Distd.** Marshall *v.* Glanvill, [1917] 2 K. B. 87.

1833. —— Principal becoming alien enemy.]—STEVENSON & SONS, LTD. *v.* ACT. FÜR CARTONNAGEN-INDUSTRIE, [1917] 1 K. B. 842 ; 86 L. J. K. B. 516 ; 115 L. T. 594 ; 33 T. L. R. 84 ; 61 Sol. Jo. 146, C. A.

Annotation : **Distd.** Tingley *v.* Müller, [1917] 2 Ch. 144, C. A.

1834. —— Agent joining army.]—Defts., a firm of drapers, appointed pltf. their representative for the Midlands, North of England, & Scotland. He was to have " a commission of 7½ per cent. on the net amount of trade done on these grounds direct or indirect." All accounts opened by him on the above grounds were to be retained by him as long as he continued to represent defts., but " should any alteration be made in representation on part of these grounds " pltf.'s consent in writing was to be obtained before relinquishing any particular accounts. The agreement was terminable by six months' notice on either side. On July 12 pltf. joined the army. Four days later he would have been compelled to join it by virtue of Military Service Act, 1916 (c. 104) :—*Held :* (1) the agreement was subject to the implied term that it should cease to be binding if future performance became unlawful, &, performance having become unlawful by virtue of Military Service Act, 1916, on July 12, or four days later, the agreement was then finally determined & not merely suspended ; (2) pltf. was not entitled to commission upon trade done after the termination of his employment.—MARSHALL *v.* GLANVILL (GLANVILLE, GRANVILLE), [1917] 2 K. B. 87 ; 86 L. J. K. B. 767 ; 116 L. T. 560 ; 33 T. L. R. 301.

M. When no Right to Remuneration.

(a) Lack of Qualification of Agent.

1835. London broker.]—A broker cannot maintain an action for work & labour, & commission for buying & selling stock, etc., unless duly licensed by

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PART VIII. SECT. 3, SUB-SECT. 1.—L. (b).

v. *Insurance agent—Commission payable on renewals during lifetime of policy.*]—An agreement with an insurance co. provided for commission to its agent on renewals of premiums during the whole lifetime of the policy, & that, if the contract should be terminated after being in force not less than two years, he was to be entitled to the commissions he would have received had the contract remained in force. The agent died when the agreement had been in force over two years :—*Held :* his representative entitled to commission on renewals after his death, during the lifetime of the policy.—SKINNER *v.* CROWN LIFE INSURANCE CO. (1911), 18 O. W. R. 455 ; 2 O. W. N. 647.—**CAN.**

PART VIII. SECT. 3, SUB-SECT. 1.—M. (a).

w. *Broker.*]—Where a person, not a professional broker, had acted as broker in bringing about a contract of sale :—*Held :* he was entitled to commission as remuneration *quantum meruit* from the person who had taken advantage of his services.—KENNEDY *v.* GLASS (1890), 17 R. 1085.—**SCOT.**

x. *Real estate agent.*]—Pltf., a fruit farm labourer, was asked by deft. to find a purchaser for his fruit farm, & deft. agreed to pay him the usual commission. Deft. named his price, $6,500, but did not enter on the matter of terms. Pltf. introduced F., with whom deft exchanged his farm for property worth about $6,000 :—*Held :* pltf. entitled to commission, & not debarred from recovering from failure to take out a real estate agent's licence pursuant to a bye-law under Trades Licence Act, s. 8, the object of the Act being to recover penalties for non-compliance. *Rimmer* v. *Knowles* (1874),

Sect. 3.—*Agent's rights against principal: Subsect.* 1, *M.* (*a*), (*b*) & (*c*).]

the corpn. of London, pursuant to 6 Anne, c. 16.—COPE *v.* ROWLANDS (1836), 2 M. & W. 149; 2 Gale, 231; 6 L. J. Ex. 63.

Annotations:—**Apld.** Fergusson *v.* Norman (1838), 5 Bing. N. C. 76. **Distd.** Pidgeon *v.* Burslem (1849), 3 Exch. 465. Taylor *v.* Crowland Gas & Coke Co. (1854), 10 Exch. 293. Melliss *v.* Shirley & Freemantle Local Board of Health (1885), 16 Q. B. D. 446, C. A. **Consd.** Victorian Daylesford Syndicate *v.* Dott, [1905] 2 Ch. 624; Whiteman *v.* Sadler, [1910] A. C. 514. **Refd.** Cundell *v.* Dawson (1847), 4 C. B. 376; Palk *v.* Force (1848), 17 L. J. Q. B. 299; D'Allax *v.* Jones (1854), 26 L. J. Ex. 79; Smith *v.* Lindo (1858), 31 L. T. O. S. 132; Turner *v.* Reynall (1863), 14 C. B. N. S. 328; Bateman *v.* Ball (1887), 56 L. J. Q. B. 291; Lougher *v.* Molyneux, [1916] 1 K. B. 718; Finegold *v.* Cornelius, [1916] 2 K. B. 719, C. A. **Mentd.** Bennett *v.* Bull (1847), 1 Exch. 593.

1836. —— Person hiring others for work.]—A party who hires persons for work & labour is not a broker within 6 Anne, c. 16, & can recover for work done without a licence from the corpn.—MILFORD *v.* HUGHES (1846), 16 M. & W. 174; 16 L. J. Ex. 40; 8 L. T. O. S. 194; 10 Jur. 990; 10 J. P. Jo. 788.

Annotation: **Refd.** Pidgeon *v.* Burslem (1849), 3 Exch. 465.

See LONDON BROKERS RELIEF ACTS, 1870 (c. 60) & 1884 (c. 3) (now repealed).

(*b*) *Illegal Nature of Contract.*

1837. Purchase of office.]—*Assumpsit* to pay pltf. £2 per cent. to procure a purchaser of pltf.'s place of surveyor of the baggage of the Port of London is bad & contrary to the Act against sale of offices.—STACKPOLE *v.* EARLE (1761), 2 Wils. K. B. 133; 95 E. R. 727.

For full anns., *see* CONTRACT.

1838. Charterparty — Contemplated violation of navigation laws.]—A. commissioned B. to get a charterparty effected on his ship, Russian-built & British-owned. She was chartered to go to America, & take in there a cargo of permitted goods, rice & cotton being specified, & to sail therewith to Cadiz, Lisbon, or Gottenburg, as directed. By a previous agreement, it appeared to have been in the contemplation of the parties to carry the goods to some port in the United Kingdom, & that the ship should carry no licence:—*Held:* not an illegal contract to deprive B. of his right to his commission for procuring the charterparty to be effected.—HAINES *v.* BUSK (1814), 5 Taunt. 521; 1 Marsh. 191; 128 E. R. 793.

Annotations:—**Distd.** Hammond *v.* Holliday (1824), 1 C. & P. 384. **Apld.** Norwich Corpn. *v.* Norfolk Ry. Co. (1855), 4 E. & B. 397. **Distd.** Gray *v.* Oxford (1905), 21 T. L. R. 664.

1839. London broker buying in his own name.]—Petitioner, a London broker, sought to prove in the bkpcy. of a customer for £20,000 commission. The stats. of the corpn. provided that no person should act as broker without the licence of the Mayor & Aldermen, & that no broker, under a penalty, should act by fraud & collusion nor buy & sell for his own use. Petitioner entered into a bond on these terms:—*Held:* petitioner had not forfeited his right to prove by acting in contravention of the stats. & his bond; but he could not recover in respect of any transactions in which he had acted as broker & principal, that being contrary to common law.—*Re* MOLINE, *Ex p.* DYSTER (1816), 1 Mer. 155; 2 Rose, 349; 35 E. R. 632.

Annotations:—**Consd.** Green *v.* Weaver (1827), 1 Sim. 404. **Distd.** Cope *v.* Rowlands (1836), 2 M. & W. 149. **Consd.** Bank of Bengal *v.* Macleod (1849), 5 Moo. Ind. App. 1. **Refd.** Armstrong *v.* Jackson, [1917] 2 K. B. 822. **Mentd.** *Re* Pemberton, *Ex p.* Huth (1840), Mont. & Ch. 667; Robinson *v.* Kitchin (1856), 2 Jur. N. S. 294.

1840. Time bargains in foreign funds.]—Time bargains in foreign funds are not illegal or void at common law. If they were so, *semble:* the broker employed in effecting them would still be entitled to sue for his commission in respect thereof.—WELLS *v.* PORTER (1836), 2 Bing. N. C. 722; 2 Hodg. 78; 3 Scott, 141; 5 L. J. C. P. 250; 132 E. R. 278.

Annotations:—**Consd. & Foll.** Oakley *v.* Rigby (1836), 2 Bing. N. C. 732. **Foll.** Elsworth *v.* Cole (1836), 2 M. & W. 31. **Consd. & Expld.** Hibblewhite *v.* M'Morine (1839), 5 M. & W. 462, Exch. **Expld.** Hewitt *v.* Price (1842), 4 Man. & G. 355; *Re* Wade, *Ex p.* Wade (1856), 25 L. J. Bcy. 7 n., C. A. **Refd.** Salkeld *v.* Johnston (1842), 1 Hare, 196; *Re* Hill, Fettes *v.* Hill (1914), 58 Sol. Jo. 399.

(*c*) *Breach of Duty.*

Breach of duty generally, *see* Sect. 2, *ante*.

1841. Agent's interest in conflict with principal's.]—A co., having spent all its money, applied to deft. to supply additional capital by taking shares. Deft. agreed to do so on terms, one of which was that he should have representatives on the board.

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30 L. T. 304; *Victorian Daylesford Syndicate* v. *Dott*, [1905] 2 Ch. 624; *Cope* v. *Rowlands* (1836), 2 M. & W. 149; *Fergusson* v. *Norman* (1838), 8 L. J. C. P. 3; *Bonnard* v. *Dott* (1906), 75 L. J. Ch. 446, C. A.; *Whiteman* v. *Sadler*, [1910] A. C. 514, cited.—IMPETT *v.* IVES (1913), 24 W. L. R. 345; 11 D. L. R. 857.—**CAN.**

PART VIII. SECT. 3, SUB-SECT. 1.—M. (b).

z. *Sale of land—Violation of statutory provisions respecting disposal of Crown lands.*]—Pltf., who had laid out & inspected Crown lands as a Govt. surveyor, furnished information to deft. & G., which enabled them to secure choice locations of over 7,000 acres in the names of a number of persons nominated by them & employed as "stakers." Subsequently pltf. assisted in the disposal of the lands thus secured to innocent purchasers under an arrangement with deft. & G. for participation of profits:—*Held:* the transaction was a violation of British Columbia Land Act (c. 30), & pltf. not entitled to recover.—BROWNLEE *v.* MACINTOSH (1913), 26 W. L. R. 906; 18 S. C. R. 588.—**CAN.**

PART VIII. SECT. 3, SUB-SECT. 1.—M. (c).

1841 i. *Agent's interest in conflict with principal's.*]—In an action for commission for finding a purchaser for deft.'s orchard, evidence showed an agreement between pltf. & the purchaser for pltf.'s employment as agent to sell the fruit:—*Held:* this was not a ground for a non-suit, but it should have been left to the jury whether pltf.'s interest conflicted with his duty.—HOWARD *v.* BLACK (1916), 16 S. R. N. S. W. 169; 33 N. S. W. W. N. 44.—**AUS.**

1841 ii. ——.]—Deft. desired to sell his interest in certain lands & contracts, & having met R., a real estate agent, was introduced by him to pltf. Deft. signed a document, agreeing to pay 5 per cent. commission to R. or to pltf. Some months later an exchange was effected between R. & deft., & in respect of this exchange pltf. claimed his commission:—*Held:* R. could not have taken a commission, he having acquired the property, & pltf., who was a partner, or at least had interests in common with R. in the transaction, could not recover commission, having placed himself in a position incompatible with his duty as agent, he rather serving the interests of R. than those of deft. *Salomons* v. *Pender* (1865), 34 L. J. Ex. 95, cited.—ONSUM *v.* HUNT (1910), 12 W. L. R. 680.—**CAN.**

1841 iii. —— *Agent purchasing principal's property.*]—Deft. employed pltfs. as his agents to sell land. Pltfs. called deft. to their office & paid him a sum on account of purchase-money, for which he gave a receipt. Deft. alleged that at the time he was led by pltfs. to believe that the purchaser was a client of theirs; & pltfs. admitted that they never told deft. that it was their intention to buy for themselves. As a matter of fact pltfs. were themselves the purchasers:—*Held:* an agent employed by the owner to sell land at a commission & himself becoming the purchaser was not entitled to remuneration, & pltfs., having as a fact represented to deft. that they were making the sale to another person, failed in their claim for commission. *Salomons* v. *Pender* (1865), 34 L. J. Ex. 95, cited.—CALGARY REALTY CO. *v.* REID (1911), 19 W. L. R. 649; 1 W. W. R. 218.—**CAN.**

1841 iv. —— ——.]—WESTUGARD *v.* WEYL (1912), 21 W. L. R. 403.—**CAN.**

1841 v. —— *Secret agreement to share commission with co-agent.*]—The agent of a co. for sale of land for commission agreed with the manager of the co. to divide the commission with the latter, & this agreement was kept from the knowledge of the co.:—*Held:* (1) there was no bar to the agent's right to recover commission, as the interests of the agent or manager were not thereby placed in conflict with their duty; (2) the co. could recover the half commission if it had been paid to their

The co. having approved this agreement in general meeting, deft. appointed pltf. to act as his representative to look after his (deft.'s) interests, for which deft. was to pay pltf. £200 a year out of his own pocket so long as pltf. remained a director. In an action brought by pltf. to recover remuneration calculated at the rate of £200 a year, the jury found that deft. had agreed to pay pltf. £200 a year so long as he remained a director, & they further found that the agreement did not contemplate that pltf. should promote the interests of deft. even though such interests were not identical with those of the whole body of shareholders:—*Held:* (1) the bargain was not corrupt, the co.'s assent to & approval of the agreement between pltf. & deft. being sufficient to divest the transaction between the parties of any character of illegality; (2) pltf. was entitled to recover his remuneration.—KREGOR *v.* HOLLINS (1913), 109 L. T. 225, C. A.

1842. Failure to keep accounts.]—WHITE *v.* LINCOLN, NEWCASTLE *v.* KINDERLEY, No. 1276, *ante*.

For full anns., *see* S. C. No. 1276, *ante*.

1843. Agent wrongly delegating his duty.]—Deft. having agreed to sell for pltf. certain bank shares by auction or otherwise, advertised them for sale, & received a reply from the bank, offering to find a purchaser. Deft., without pltf.'s knowledge, instructed the bank to sell the shares, & received from the bank the purchase-money, which he paid over to pltf., after deducting his commission:—*Held:* (1) deft. was not entitled to commission, as he had voluntarily divested himself of his authority, & the bank was not interested in getting the highest price; (2) the amount retained must be paid over to pltf.—BEABLE *v.* DICKERSON (1885), 1 T. L. R. 654.

1844. Delay in delivery.]—HURST *v.* HOLDING, No. 1936, *post*.

1845. Negligence.]—If an auctioneer employed to sell an estate is guilty of negligence, whereby the sale becomes nugatory, he is not entitled to recover any compensation for his services from the vendor.—DENEW *v.* DAVERELL (1813), 3 Camp. 451.

For full anns., *see* AUCTION & AUCTIONEERS.

Negligence of solicitor.]—*See* SOLICITORS.

1846. Lack of skill.]—Where a party undertakes a work of skill & labour, & fails in his object, so that his employer derives no benefit from the work, the former is not entitled to recover anything.—DUNCAN *v.* BLUNDELL (1820), 3 Stark. 6.

Annotation:—**Refd.** Hill *v.* Featherstonhaugh (1831), 7 Bing. 569.

1847. —— Broker.]—If the duties of a sworn broker are executed in such a manner that no benefit results from them, he is not entitled to recover either his commission or even a compensation for his trouble.

Pltf., a ship's broker, drew up a memorandum for a charterparty so unintelligible that no charter could have been made out from it:—*Held:* he was entitled to no commission.—HAMOND *v.* HOLIDAY (1824), 1 C. & P. 384.

1848. Non-disclosure of material facts.]—A house agent is not entitled to commission on the sale of property where he has kept a material fact from the principal's knowledge & made a secret profit.

Pltf. concealed from defts., who had commissioned him to sell a property, the fact of a sale from the purchaser to a public authority at a profit of £15 to himself & also the fact that the public authority was desirous to acquire part of the property in question.—*Held:* he could not recover the agreed commission.—PRICE *v.* METROPOLITAN HOUSE INVESTMENT AGENCY CO., LTD. (1907), 23 T. L. R. 630.

1849. Agent not acting personally & on the spot.]—An agent is not entitled to commission unless he remains upon the spot, & attends to the management of the estate.—CHAMBERS *v.* GOLDWIN (1804), 1 Smith, K. B. 252; 9 Ves. 254; 32 E. R. 254.

Annotations:—**Expld.** Forrest *v.* Elwes (1816), 2 Mer. 68. **Apprvd.** Denton *v.* Davy (1836), 1 Moo. P. C. C. 15. **Mentd.** Sayers *v.* Whitfield (1829), 1 Knapp, 133, P. C.; Leith *v.* Irvine (1833), 1 My. & K. 277; Faulkner *v.* Daniel (1843), 3 Hare, 199; Robertson *v.* Norris (1857), 30 L. T. O. S. 253; Eyre *v.* Hughes (1876), 2 Ch. D. 148; Warner *v.* Jacob (1882), 46 L. T. 656; Ward *v.* Sharp (1884), 53 L. J. Ch. 313; Mainland *v.* Upjohn (1889), 41 Ch. D. 126; Biggs *v.* Hoddinott, Hoddinott *v.* Biggs, [1898] 2 Ch. 307, C. A.; British South Africa Co. *v.* De Beers Consolidated Mines (1910), 80 L. J. Ch. 65, C. A.; Kreglinger *v.* New Patagonia Meat & Cold Storage Co., [1914] A. C. 25, H. L.

1850. Misconduct—Factor.]—A factor who has been guilty of gross misconduct in selling the goods of his principal is not entitled to deduct for commission in an action for money had & received to the use of his principal.—WHITE *v.* CHAPMAN (1815), 1 Stark. 113.

manager, & then the agent could only obtain judgment for half the commission. *Rowland* v. *Chapman* (1901), 17 T. L. R. 669, cited.—MINER *v.* MOYLE (1910), 19 Man. L. R. 707; 10 W. L. R. 242.—**CAN.**

1845 i. *Negligence.*]—If an agent does not perform his appropriate duty, or is guilty of gross negligence or gross misconduct or gross unskilfulness in the business of his agency, he is not only liable to his principal for damages sustained thereby, but also forfeits all his commission.—UNITED AGENCY & TRUST CO. *v.* AMM BROTHERS, S. A. L. R. Trans. Prov. Div. (1917), 439.—**S. AF.**

1845 ii. —— *Failure to make reasonable inquiries.*]—A commission agent had induced his principal to enter into a contract for the sale of land by the representation that the purchaser was able to complete the purchase. The representation was made without fraud, but it was false, & reasonable inquiry would have proved it to be false. Owing to the purchaser's inability the purchase was not completed:—*Held:* the agent not entitled to commission. *Nocton* v. *Ashburton*, [1914] A. C. 932, & *Low* v. *Bouverie*, [1891] 3 Ch. 82, cited. *Semble:* the commission agent was also liable to the principal to make good to him any loss to which he had been put by the agent's breach of duty.—FITZGERALD *v.* METCALFE (1917), N. Z. L. R. 486.—**N.Z.**

1845 iii. —— *Principal's right of equitable set-off.*]—Pltfs., as brokers for the sale of indigo seed, sued defts. to recover the amount alleged to be due to them by defts. as commission on account of certain sales of indigo seed made by them on behalf of defts.:—*Held:* the ct. might properly take into consideration by way of an equitable set-off the loss occasioned by pltfs. to defts. through pltfs.' negligence in not carrying out defts.' instruction respecting the selling of the seed.—NAND RAM *v.* RAM PRASAD (1905), I. L. R. 27 All. 145.—**IND.**

1848 i. *Non-disclosure of material facts.*]—Deft. placed his land in the hands of pltfs., land agents, for sale at a named price, promising them a commission of $500 if they sold at that price. Pltfs. professed to have made a sale at the price named to A. "subject to owner's confirmation." A. was a clerk or salesman in pltfs.' employ, of which fact deft. was not informed; deft. also was not informed by pltfs., who did business at the place where the land was situated, of the value of the land:—*Held:* pltfs. had failed in their duty as agents & were not entitled to commission.—ARNOLD *v.* DREW (1913), 24 W. L. R. 51; 4 W. W. R. 435; 11 D. L. R. 72.—**CAN.**

1848 ii. ——.]—Pltf. alleged an oral agreement by deft. to pay commission on the sale of certain land. The evidence showed that pltf. had taken an option in his own name to purchase, but he alleged that this was to enable him to show to an intending purchaser, who lived some distance away, that the property could be delivered:—*Held:* even if deft. had agreed at first to pay pltf. a commission if he made a sale, the taking of the option in pltf.'s name imposed on pltf. the *onus* of proving that, although he appeared as purchaser, deft. had again agreed that pltf. should receive a commission; this pltf. had failed to do.—NIXON *v.* DOWDLE (1912), 20 W. L. R. 749; 2 D. L. R. 397.—**CAN.**

1850 i. *Misconduct—Agent to sell colluding with purchaser.*]—Deft. intrusted his property to pltfs. for sale, & the listing was done by S., a clerk in pltfs.' office. This clerk introduced deft. to another clerk in pltfs.' employ as an intending purchaser, but did not disclose his real position. Deft. asked a certain price, but the clerk holding himself out as a purchaser, who had been informed by S. that the property could be bought for less, refused to give the figure asked, & eventually deft. agreed to accept the lower figure:—*Held:* if an agent colludes, directly or indirectly, with the other side, & so acts in opposition to the interests of his principal, he is not entitled to any commission. *Kettlewell* v. *Refuge Assce. Co.*, [1908] 1 K. B. 545; *Salomons* v. *Pender*, 3

Sect. 3.—*Agent's rights against principal: Subsect.* 1, *M.* (*c*) & (*d*).]

1851. Agent taking trade discounts boná fide.]—HIPPESLEY *v.* KNEE, No. 1616, *ante.*

For full anns., *see* S. C. No. 1616, *ante.*

1852. Agent making secret profits.]—When a person who purports to act as an agent is not in a position to say to his principal, "I have been acting as your agent, & I have done my duty by you," he is not entitled to recover any commission from that principal. A principal is entitled to have an honest agent, & it is only the honest agent who is entitled to any commission. If an agent directly or indirectly colludes with the other side, & so acts in opposition to the interest of his principal, he is not entitled to any commission (LORD ALVERSTONE, C.J.).—ANDREWS (ANDREW) *v.* RAMSAY & Co., [1903] 2 K. B. 635; 72 L. J. K. B. 865; 89 L. T. 450; 52 W. R. 126; 19 T. L. R. 620; 47 Sol. Jo. 728.

Annotations:—**Distd.** Hippisley *v.* Knee, [1905] 1 K. B. 1; Nitedal's Taendstikfabrik *v.* Bruster, [1906] 2 Ch. 671; Stubbs *v.* Slater [1910] 1 Ch. 632, C. A. **Apld.** Stubbs *v.* Slater, [1910] 1 Ch. 195.

1853. Transactions severable—Some honest.]—Where the transactions between a principal & his agent are severable, & the agent has been honest in some of them & dishonest in others, he is entitled to his commission in all the instances in which he has been honest, but not in all the instances in which he has been dishonest.—NITEDALS TAENDSTIKFABRIK *v.* BRUSTER, No. 1593, *ante.*

(*d*) *Other Causes.*

1854. No commission on goods not sold.]—A. by will devised all his estates to his eldest son in tail male, with remainders over; part of the property consisted of an estate in Jamaica, & therefore testator added the following clause: "& I recommend to my executors, that all sugars, rum, & other plantation produce that is sent to the port of London be consigned to the house of C. & Co. until such time as any of my sons shall set up business of a sugar factor; then my desire is, that the consignments may pass through his or their hands." C., a natural son of testator's, set up the business of a sugar factor during the minority of the devisee, & accordingly got the consignments.

H. & C. 639; *Andrews* v. *Ramsay*, [1903] 2 K. B. 635; *Hodson* v. *Deans*, [1903] 2 Ch. 647, cited.—CANADIAN FINANCIERS, LTD. *v.* HONG WO (1912), 19 W. L. R. 843; 1 D. L. R. 38; 17 B. C. R. 8; 1 W. W. R. 677.—**CAN.**

1850 ii. —— *Agent to sell inducing purchaser to abandon contracts.*]—Pltfs., having rendered services in connection with the selling of defts.' property, left defts.' employ, & taking advantage of the information they had obtained whilst in defts.' employ, deliberately set out to induce the purchasers to break their contracts & enter into fresh ones with another co. which they then formed:—*Held:* pltfs. were not entitled to recover for the services they had rendered by reason of their after-conduct. — MILLARD *v.* DOMINION TOWNSITE CO., LTD. (1913), 25 W. L. R. 695; 14 D. L. R. 294.—**CAN.**

1850 iii. —— *Agent misleading principal.*]—Pltf., as agent of defts., made arrangements to exchange a hotel belonging to defts. for certain land belonging to G., & to induce defts. to enter into a contract he grossly misrepresented the value of the land. Pltf. had previously been the agent of G. in acquiring this particular land, & had arranged with him to bring it in for the purpose of the exchange, at a certain figure, but none of this was disclosed to defts. Defts. inspected the property she was to receive in exchange for her hotel, & on discovering its real nature, informed pltf. that the deal was off, & instructed him to take the hotel off his list & revoked his authority. Later on, defts. came to an arrangement with G. to exchange the hotel for certain land which was acceptable to her:—*Held:* (1) the misconduct of pltf. was of such character as to disentitle him to commission for his services, & defts. was justified in revoking the authority; (2) the subsequent exchange was not due to pltf.'s intervention.—NORTHERN COLONISATION AGENCY *v.* MCINTYRE (1911), 4 Sask. L. R. 340; 17 W. L. R. 270.—**CAN.**

1850 iv. —— *Land agent.*]—A land agent misconducting himself in the management of property, although he receives & accounts for the rents, may be disallowed his fees on the sums received.—PALMER *v.* GOODWIN (1862), 13 I. Ch. R. 171.—**IR.**

1850 v —— *Agent acting in excess of authority.*]—Resp., a commission agent, was authorised in writing by applt. to sell a certain parcel of land. He sold the land, & at same time sold certain chattels on the land which he was not authorised to sell. He then claimed commission on the sale, &, applt. refusing to pay, sued him for commission:—*Held:* resp., having exceeded his authority, had not earned any commission.—GALLIEN *v.* GURR (1906), 26 N. Z. L. R. 588.—**N.Z.**

1850 vi. —— *Estate agent taking note for deposit.*]—*Semble:* the taking by an estate agent of a note of a purchaser for a deposit in a proposed sale is not in itself misconduct disentitling him to commission. — HERBERT *v.* VIVIAN (1913), 24 W. L. R. 803; 8 D. L. R. 340; *affd.* 11 D. L. R. 839; 4 W. W. R. 891.—**CAN.**

1852 i. *Agent making secret profits.*]—The M. Corpn. through its manager gave D. the exclusive right to sell a block of land until Feb. 6. D. negotiated with G., who asked for time to provide the funds, & D. on Jan. 24 in consideration of $500 gave him till Jan. 31, & G. eventually purchased at the agreed price. In an action by D. for commission:—*Held:* his acceptance was a breach of duty to his principals, & disentitled him to recover. *Boston Deep Sea Fishing & Ice Co.* v. *Ansell* (1888), 39 Ch. D. 339; *Andrews* v. *Ramsay* (1903), 19 T. L. R. 620, cited.—MANITOBA & NORTH-WESTLAND CORPN. *v.* DAVIDSON (1903), 34 S. C. R. 255.—**CAN.**

1852 ii. ——.]—Pltf., interested in seventy-five acres at W., represented on May 6 to defts. that he was the holder of an option for the purchase of this land at $400 an acre, expiring at 6 p.m. that day, & the owners would then raise the price to $500; whereon defts. consented to buy the property for $30,000, represented as the vendors' lowest price. Defts. subsequently discovered that pltf. had received a secret commission of $1,000. Defts. resold the land at a profit to B., & before discovery of the secret commission agreed to pay pltf. one-third of the profit on the resale:—*Held:* pltf. could not recover one-third of the profit on the resale.—MARCON *v.* COLERIDGE (1914), 26 O. W. R. 507.—**CAN.**

1852 iii. ——.]—KERSTEMAN *v.* KING, 15 C. L. J. 140.—**CAN.**

1852 iv. ——.]—Pltfs., real estate agents, were employed by defts. to find a purchaser for property at $22 an acre net to defts., pltfs. to have as commission anything over that price up to $1 an acre that purchaser would pay. To an action for breach of this undertaking, defts. pleaded that pltfs. had corruptly agreed with purchasers to accept a commission from them. The ct. found that such commission was in respect of pltfs.' services in enabling purchasers to resell at advanced prices:—*Held:* (1) if pltfs. had received the commission from the purchasers they would have had to account to defts. for it; (2) the agreement of pltfs. with purchasers was not corrupt & pltfs. were entitled to commission. *Morison* v. *Thompson* (1874), L. R. 9 Q. B. 480; *Boston Deep Sea Fishing & Ice Co.* v. *Ansell* (1888), 39 Ch. D. 339; *Andrews* v. *Ramsay*, [1903] 2 K. B. 635; *Hippisley* v. *Knee*, [1905] 1 K. B. 1; *Nitedals, etc.* v. *Bruster*, [1906] 2 Ch. 671; *Re International Pulp & Paper Co.* (1877), 6 Ch. D. 556, cited.—COMPLIN *v.* BEGGS (1913), 24 Man. R. 596; 24 W. L. R. 871; 4 W. W. R. 1081; 13 D. L. R. 27; 49 C. L. J. 622.—**CAN.**

1852 v. ——.]—If a vendor appoints an agent for sale, not knowing that the person appointed is agent for a purchaser of the goods which the vendor desires to sell, then the commission which the vendor agrees, in ignorance of the true position, to pay his agent cannot be recovered by the agent. The *onus* of showing that the vendor knew when he agreed to pay the commission that the agent was also acting as agent for the purchaser rests on the agent.—BARR & LAERY & CO. *v.* HALL (1906), 26 N. Z. L. R. 222.—**N.Z.**

1852 vi. —— *No breach of duty.*]—Pltf. was appointed commission agent, at a stated remuneration, to dispose of timber on behalf of defts. He performed his duty, & disposed of £4,200 worth of timber, which was to be paid for partly in land & partly in cash. The defence to his claim was that whilst he was agent for defts. he obtained a commission from the purchasers of the timber, so far as the land given for the timber was concerned. At the time when he made the sale for defts. he was not agent for the purchasers, nor was there any agreement between him & the purchasers that he was to be paid any commission. His evidence was—& it was not contradicted—that the first idea of charging a commission for the land sold was suggested to him by W., one of defts. It was clear that pltf. did not get a commission from the purchasers on the whole transaction, but only on a part of it—namely, the sale of the land:—*Held:* pltf. was entitled to his commission, on the grounds (1) at the time of the sale there was no agreement between him & the purchasers as to any commission, nor was he in any sense acting as agent for the purchasers; (2) the commission he got was not a commission on the whole transaction; pltf. was, however, bound to account for the profit he made, as the conversation with W. did not show an agreement by defts. to waive any rights they had to claim any profit that he might have made as their agent.—COHEN *v.* PEDERSEN (1912), 31 N. Z. L. R. 1050.—**N.Z.**

Upon the devisee's coming of age C. accounted with him, but insisted on being entitled to his commission, not only upon the produce which he had actually sold, but also upon the produce which had been consigned to him, but was not then arrived in the port of London :—*Held :* (1) the words of the above clause were not imperative, or amounted to words of bequest in favour of C., but were recommendatory only ; (2) C. was entitled to a commission only upon what he had actually sold, & not upon what was only consigned but not delivered to him.—BECKFORD *v.* BECKFORD (1783), 4 Bro. Parl. Cas. 38 ; 2 E. R. 26.

Annotation :—**Refd.** Hovey *v.* Blakeman (1799), 4 Ves. 596.

1855. No commission on bad debts.]—The following letter was addressed to an African captain & supercargo by his employers : " Your commissions are £6 per cent. on the net proceeds of your homeward cargo, after deducting the usual charges as arranged by the African Assocn., viz. £4 per ton from the gross sales of the oil when taken from the quay, & £4 15*s.* when warehoused " :—*Held :* the commission was payable only on the sums actually realised after deducting bad debts as well as other charges.—CAINE *v.* HORSFALL (1847), 1 Exch. 519 ; 2 Car & Kir. 349 ; 17 L. J. Ex. 25 ; 10 L. T. O. S. 169.

1856. —— Except by agreement.]—By agreement T., an agent, was to have a commission on all sales effected or orders executed by him, the principal to be responsible for bad debts, & the agent to draw his commission monthly. By the usage of the trade, commission was not allowed on sales which produced bad debts :—*Held :* notwithstanding this usage, under the terms of this agreement T. was entitled to commission on bad debts.—BOWER *v.* JONES (1831), 8 Bing. 65 ; 1 Moo. & S. 140 ; 1 L. J. C. P. 31 ; 135 E. R 325.

1857. No commission on goods not answering required description.]—A. entered into a contract with B. to proceed to the coast of Africa & there procure & ship for B. in England palm-oil & other produce, A. to receive as remuneration for his services a commission of £6 per cent. on the net proceeds of the dry merchantable palm-oil received by B. ; the agreement further provided that A. should not be entitled to any commission on " any wet, dirty, or unmerchantable palm-oil " that might be received :—*Held :* A. was entitled to no commission in respect of palm-oil which was in the understanding of the trade " wet " oil, though such wetness did not render the oil unmerchantable, but was compensated for by an allowance to the purchasers of from 1½ to 2 per cent. on the price.—WARDE (WARD) *v.* STUART (1856), 1 C. B. N. S. 88 ; 28 L. T. O. S. 85 ; 5 W. R. 6 ; 140 E. R. 36.

1858. Factor acquiring interest as executor.]—S. from time to time consigned goods from India to T. in London. S. having died & T. being his exor., a claim was made, on the accounts being taken, for factor's commission on the consignments :—*Held :* (1) T. was not entitled, in so far as he acted as exor., to commission ; (2) T. was entitled to commission on goods consigned to him by S. in his lifetime, though they came to his hands after S.'s death.—SCATTERGOOD *v.* HARRISON (1729), Mos. 128 ; 25 E. R. 310.

Annotation :—**Refd.** Moore *v.* Frowd (1837), 3 My. & Cr. 45.

1859. *S. P.* HOVEY *v.* BLAKEMAN (1799), 4 Ves. 596 ; 31 E. R. 306.

Annotations :—**Consd.** Campbell *v.* Campbell (1842), 3 Sim. 168. **Refd.** Denton *v.* Davy (1836), 1 Moo. P. C. C. 15. **Mentd.** Chambers *v.* Minchin (1802), Ves. 186. Crosse *v.* Smith (1806), 7 East, 246 ; Terrell *v.* Matthews (1841), 1 Mac. & G. 433 n. ; Styles *v.* Guy (1849), 1 Mac. & G. 422.

1860. No commission on shares not allotted.]—The N. Ry. Co. issued certain shares, the proceeds of which were to be used in paying defts., ry. contractors, for work done. Pltfs. were employed to

PART VIII. SECT. 3, SUB-SECT. 1.—M. (d.).

1855 i. *No commission on bad debts.*]—Where a commission agent is to be paid for sales ratified by his principal, the goods delivered & the price paid, the principal has the right to cancel sales to customers who have not paid former debts ; upon such sales the agent cannot recover his commission nor upon sales to customers who have become insolvent, though it be subsequent to time extensions allowed by the principal, unless he prove that it be due to the gross negligence or fault of the principal that the latter has not been paid.—DROLET CO., LTD. *v.* TOUSIGNANT (1917), Q. R. 52 S. C. 320. —**CAN.**

a. *No commission where agent acting as principal.*]—Upon a sale of hides :—*Held :* upon the evidence, defts. were acting as principals, not as agents of the purchasers, & could not charge commission.—MACKLEM *v.* THORNE (1870), 30 U. C. R. 464.—**CAN.**

b. *Member of agent's firm also in principal's employ.*]—Pltf. co. claimed from defts. half of the commission received by the latter for the sale of property to M., owner of a newspaper. The newspaper had recently published that M. had bought the newspaper & that G., a member of pltf. co., was to act as manager. G. then saw defts., representing himself as acting for M., saying that M. wanted to look over certain properties suitable for a site for the newspaper offices, nothing being said about G.'s getting any commission in case a sale should be effected, & there being no suggestion that G. was acting for pltf. co. or in any other capacity than as agent for M. Defts. got from the owner of the property in question the right to sell, included it in their list, & eventually the property was sold through defts. to M., G. taking no further part in the business. Defts. admitted that when the deal was about complete, G. suggested that he should receive half the commission :—*Held :* the statement of defts. that, had G. not been an employee of M., G. would be entitled to a share of the commission, did not advance G.'s claim, since, although the custom of sharing commission with another agent would then doubtless have been recognised, what was done in the case then before the ct. was done by G. on the representation that he was acting as manager for M., & pltf. co. was not entitled to any share of the commission.—GLOBE REALTY CO. *v.* MARTINDALE & BATE (1913), 18 B. C. R. 220.—**CAN.**

c. *Transaction proving unprofitable — Agent accepting payment in full settlement.*]—Pltf., the manager of a coal co., of which deft. was vice-president, suggested to him the advisability of purchasing certain coal properties consisting of two separate areas & including the surface rights of one of them. It was arranged that pltf. should buy the properties for deft. for $65,150. Deft. commenced prospecting on the properties for coal with drills. While the work was in progress he wrote pltf., stating he would protect him for 11,000 shares in a coal co., to which it was his intention to sell, provided the sale netted him a profit of 22,000 shares, & that he would protect him for $25,000 as the sale of the surface rights progressed. This was the first reference as between the parties to remuneration for pltf.'s services. Later developments from the prospecting showed that there was little coal value in the properties, & a sale of the properties was made on a smaller basis. The parties came together & deft. paid pltf. $5,000 in promissory notes, which deft. alleged were taken by pltf. as settlement in full, pltf. denying this & saying it was made in part payment of the amount due to him :—*Held :* pltf.'s claim was settled in full when the promissory notes for $5,000 were given to him by deft., & he was not entitled to anything on a *quantum meruit*.—GRANT *v.* VON ALVENSLEBEN (1913), 18 B. C. R. 334.—**CAN.**

d. *Abandonment of claim for remuneration.*]—Pltf.'s father had been employed by defts. to manage their business in Canada, under an agreement whereby he was to be entitled to commission not on the amount of sales, but on actual receipts, *i.e.*, on cash & bills, etc., received. Pltf. was appointed in his father's place after the latter's retirement, but was later dismissed, & defts. then made the father a yearly allowance, with the alleged object of thereby getting rid of any opposition to defts.' business, which the father might feel disposed to make. After his dismissal pltf. claimed from defts. a sum on account of commissions on sales made while he was in their employ, but the amount of which had been received after he left. On defts.' threatening to stop the allowance to his father, pltf. dropped the claim & raised it again after his father's death :—*Held :* (1) pltf. was in equity estopped from asserting this claim, defts. having paid money to his father in the belief induced by pltf. that he had abandoned such claim ; (2) under the contract between pltf. & defts. as disclosed in the correspondence between the parties, pltf. was only entitled to commission on moneys received during his employment & not afterwards. *Re Collie, Ex p. Adamson* (1878), 8 Ch. D. 807 ; *Pickard* v. *Sears* (1837), 6 Ad. & El. 469 ; *Freeman* v. *Cooke* (1848), 2 Exch. 654 ; *Gregg* v. *Wells* (1839), 10 Ad. & El. 90, cited.—PALMER *v.* MILLER (1887), 13 O. R. 567.—**CAN.**

Sect. 3.—*Agent's rights against principal: Sub-sect.* 1, *M.* (*d*); *sub-sect.* 2, *A. B. & C* (*a*).]

place the shares, defts. agreeing to pay them commission "on allotment on the amount of the issue." Pltfs. were to pay all expenses, such as "clerical labour & postage & receipt stamps on allotment letters." Pltfs. claimed commission on the whole amount of the issue:—*Held:* pltfs. were only entitled to a *pro ratâ* commission calculated on the number of shares actually issued.—BROWNE & WINGROVE *v.* PICKERING & CO. (1888), 4 T. L. R. 726, C. A.

1861. No commission on profit not realised.]—Pltf., as manager of deft. co. in Argentine, was entitled to receive 10 per cent. of the realised profit on sales of the co.'s land, the value of the land being taken as a basis of calculation at £300 a square league. Lands had been sold on instalments, the lands remaining in the hands of the co. till the last instalments had been paid, & the co. had received in instalments sums amounting to £300 a square league. Pltf. claimed to be entitled to 10 per cent. of the difference between the contract prices, less discount & £300 a square league:—*Held:* (1) no profits were realised unless the co. received a sum in excess of £300 per square league; (2) the value of the transactions was to be calculated on the basis of the gold dollar, the State standard of value, & not on the amount of paper dollars actually received; (3) any allowance for depreciation must be based upon the actual depreciation, if any, which had taken place, & not upon the percentage which the co. allowed in its books.—O'MEARA *v.* SANTA FÉ LAND CO. (1894), 11 T. L. R. 24.

SUB-SECT. 2.—REIMBURSEMENT AND INDEMNITY BY PRINCIPAL.

A. In General.

1862. When right arises.]—An action is maintainable in every case in which the agent has paid money to a third party at the request, express or implied, of the principal, with an undertaking, express or implied, to repay it; & it is not necessary that the principal should have been relieved from a liability by the payment.—BRITTAIN *v.* LLOYD (1845), 14 M. & W. 762; 15 L. J. Ex. 43; 153 E. R. 683.

Annotations:—**Consd.** Westropp *v.* Solomon (1849), 8 C. B. 345. **Refd.** Bayliffe *v.* Butterworth (1847), 1 Ex. Ch. 425; Lewis *v.* Campbell (1849), 8 C. B. 541; Hutchinson *v.* Sydney (1854), 10 Ex. Ch. 438; Mallett *v.* Robinson (1872), L. R. 7 C. P. 84. **Mentd.** Bailey *v.* Macaulay, Bailey *v.* Haines, Bailey *v.* Bracebridge, Dawson *v.* Hay, Wilson *v.* Holden (1849), 19 L. J. Q. B. 73.

1863. —— In equity.]—In equity the liability of a principal to indemnify his agent is not confined to actual losses, but extends to all liabilities of the agent.—LACEY *v.* HILL, CROWLEY'S CLAIM, No. 1942, *post.*

Annotations:—**Apld.** *Re* Blundell, Blundell *v.* Blundell (1888), 40 Ch. D. 370. **Consd.** Wolmerhausen *v.* Gullick, [1893], 2 Ch. 514; Ellis *v.* Pond, [1898] 1 Q. B. 426, C. A.; *Re* Richardson, *Ex p.* St. Thomas's Hospital, Governors, [1911] 2 K. B. 705, C. A. **Refd.** Thacker *v.* Hardy (1878), 39 L. T. 595, C. A.; Williams Torrey *v.* Knight, The Lord of the Isles, [1894] P. 342; *Re* Paine, *Ex p.* Read (1896), 75 L. T. 316; St. Thomas's Hospital, Governors *v.* Richardson, [1910] 1 K. B. 271, C. A.; *Re* Law Guarantee Trusts Accident Soc., Liverpool Mortgage Insce. Co.'s Case, [1914] 2 Ch. 617, C. A.; British Union & National Insce. Co. *v.* Rawson, [1916] 2 Ch. 476, C. A.

1864. Acts not amounting to payment by principal.]—Pltf., as broker, insured deft.'s ship & advanced the premiums. The ship was lost, & £450 claimed from the underwriters, who paid £400, withholding £50, on account of stores which had been saved. Pltf. told deft. he (pltf.) had deducted the premiums from the £450, & if deft. would give him a written authority to receive the stores pltf. would pay him the balance, which would amount to £16. Deft. gave the authority; but pltf. did not pay the balance, & brought an action for the premiums. Deft. pleaded payment:—*Held:* the above facts did not support the plea.—PALMER *v.* COSTERTON (1843), 4 Q. B. 525; 114 E. R. 996.

1865. Loss paid on behalf of insolvent underwriter not recoverable from assured.]—An insurance broker, who, when a loss happens upon a policy which he has effected, pays the assured the full amount of the money subscribed, cannot recover back any part of it, upon the ground that he was not aware of the insolvency of one of the underwriters before the loss happened, when he paid the money.—EDGAR *v.* BUMSTEAD (1808), 1 Camp. 411.

Annotations:—**Distd.** Benson *v.* Maitland (1820), Gow, 205. **Refd.** Universe Insce. Co. of Milan *v.* Merchants Marine Insce. Co., [1897] 2 Q. B. 93, C. A.

1866. ——.]—An insurance broker living at a distance from his principal, who, upon a loss happening, gives him credit in account for the money due from the underwriters, cannot, a considerable time after, make a demand upon him for the amount of the sums subscribed by several of the underwriters who have become insolvent without paying.—JAMESON *v.* SWAINSTONE (1809), 2 Camp. 546 n.

1867. Principal cannot set off claim for unliquidated damages for negligence.]—To a declaration for money lent & paid & commission deft. pleaded for a defence on equitable grounds that it was agreed between pltfs. & himself on the following terms, viz., that he should consign certain rice to pltfs.' firm at Buenos Ayres & Monte Video for sale by pltfs. for him upon commission; that pltfs. should make certain advances against the rice & pay the expenses of the consignment; & that pltfs. should sell the rice, & satisfy out of the proceeds the said advances, expenses, & commission, & pay to deft. the balance remaining out of such proceeds. The plea further stated that the rice was duly consigned to pltfs. under the agreement; that the claims in the declaration were the advances, expenses, & commission contemplated by the agreement; & that pltfs. were guilty of such negligence & improper conduct in the care of the rice & management of the sale of it that it fetched much less than it ought to have done, & insufficient to satisfy the advances, expenses, & commission, whereas it would, but for their negligence & misconduct, have realised sufficient, & much more than sufficient, to have fully paid & satisfied same, & the deficiency arising upon the sale, which was the claim for which the action was brought, had entirely arisen from pltfs.' negligence, default, & misconduct:—*Held:* a bad plea.—BEST *v.* HILL (1872), L. R. 8 C. P. 10; 42 L. J. C. P. 10; 27 L. T. 490; 37 J. P. 230; 21 W. R. 147.

Annotation:—**Distd.** White *v.* Wett (1876), 24 W. R. 727.

B. Where there is an express Promise to Indemnify.

1868. Promise to pay for goods bought.] If A. buys goods for B., at B.'s request, & B. promises to repay him, an action lies against B. for the money expended, & the goods bought are the property of

PART VIII. SECT. 3, SUB-SECT. 2.—A.

1862 i. *When right arises.*]—Pltfs., as agents of defts., purchased goods from wholesale dealers, not having pledged their own personal credit, nor the pledging of their own credit being within scope of the agency:—*Held:* they would have no cause of action against defts. for the amount due to the wholesale dealers until they were compelled to pay their demands.—KHURKUN SAHA *v.* DHATIA DAS (1905), I. L. R. 32 Calc. 1145.—**IND.**

B.—MOORE *v.* MOORE (1611), 1 Bulst. 169; 80 E. R. 859.

1869. Promise to indemnify.]—Deft. authorised pltfs. or their agent to distrain certain goods, which turned out to be privileged from distress, & required them to levy forthwith whilst the goods were on the premises, undertaking to indemnify them for so doing:—*Held:* (1) deft. was liable under his undertaking to pltfs. for the expense which they had incurred in consequence of acting under his authority; (2) the knowledge possessed by deft. of the circumstances under which the goods on which the levy was made had been placed upon the premises was sufficient to remove all ground of suspicion as to the legality of the distress from the minds of pltfs., & exempted them from the necessity of making an inquiry upon the subject.—TOPLIS *v.* GRANE (1839), 5 Bing. N. C. 636; 2 Arn. 10; 7 Scott, 620; 9 L. J. C. P. 180; 132 E. R. 1245.

Annotations:—**Apld.** Ibbelt *v.* De la Salle (1860), 6 H. & N. 233. **Folld.** Dugdale *v.* Lovering (1875), L. R. 10 C. P. 196. **Apld.** Sheffield Corpn. *v.* Barclay, [1903] 1 K. B. 1. **Refd.** Cory *v.* Lambton & Hetton Collieries (1916), 86 L. J. K. B. 401, C. A.

See, further, DISTRESS; MASTER & SERVANT.

1870. Promise to reimburse money paid under illegal contract.]—BAILY *v.* RAWLINS, No. 1929, *post.*

1871. Promise of indemnification for costs & charges.]—A landlord signed a warrant of distress in the following form: "I hereby authorise R. I., or his agent, as my agent, to seize & distrain goods on the premises, now in possession of M. G., for £9, being the amount of rent due to me; & for your so doing this shall be your sufficient warrant, authority & indemnification against all costs & charges in respect to any law expenses, action or actions that may arise, as well as any other & all charges or expenses which you or your agent may be at or brought against you or your agent on this account." W. H., the servant of R. I., having distrained, an action of trover was brought against him by the tenant for conversion of certain goods, some of which were alleged not to have been in the inventory, in which action pltf. was nonsuited:—*Held:* assuming W. H. had done nothing wrong, the indemnity extended to the costs of defending the action brought against him.—IBBETT *v.* DE LA SALLE (1860), 6 H. & N. 233; 30 L. J. Ex. 44; 158 E. R. 96.

1872. Promise to pay agent's draft.]—The charterer of a ship at 60*s.* freight per ton wrote to his agent that he was to re-charter her from Taganrog to this country "upon the best terms obtainable, . . . but if there should be a loss, your draft upon us for the difference will meet due honour." The current rate of freight at Taganrog when the ship arrived was 40*s.* The agent, not finding anyone willing to re-charter her, put a cargo of his own on board, & drew a bill on his principal for the difference between the current rate of freight & the charter rate of freight:—*Held:* (1) though the ship was lost on the voyage home, & no freight became actually payable, a loss had accrued to the agent the moment he put his goods on board & so rendered them liable to a rate of freight exceeding the current rate; (2) the principal was bound under the terms of his letter to accept the bill.—YEAMES *v.* LINDSAY (1861), 3 L. T. 855; 9 W. R. 313.

C. Where there is an implied Promise to Indemnify.

(a) As the Result of Principal's Request, etc.

1873. In general.]—The law only implies a promise by a principal to indemnify his agent when acting according to his instructions.—WESTROPP *v.* SOLOMON (1849), 8 C. B. 345; 19 L. J. C. P. 1; 13 Jur. 1104; 137 E. R. 542.

Annotations:—**Mentd.** Raphael *v.* Burt (1884), Cab. & El. 325; Jeffreys *v.* Fair (1896), 36 L. T. 10.

PART VIII. SECT. 3, SUB-SECT. 2.—C. (a).

a. *Agent purchasing at principal's request—Agent advancing price.*]—S., a school trustee, by desire of the board, bought land for the board for a school site, signing the contract with his own name only. The board by resolutions recognised the purchase as their own, &, after paying instalments, applied to the town council for money to pay for school premises. The town council did not comply with the requisition, & subsequently trustees were elected, a majority of whom repudiated the purchase. In an action against the board for indemnification:—*Held:* S. entitled to relief.—SMITH *v.* BELLEVILLE SCHOOL TRUSTEES (1869), 16 Gr. 130.—**CAN.**

b. —— ——.]—An agent who had advanced moneys to purchase goods for deft.:—*Held:* entitled to recover the moneys so advanced.—PETCH *v.* NEWMAN (1914), 26 O. W. R. 650; 6 O. W. N. 705.—**CAN.**

c. *Agent selling at principal's request.*]—When a party employs a broker to sell pork, grain, stock, etc., for him on margin, he is bound to repay the broker for all expenses made in the execution of this mandate.—DENTON *v.* ARPIN (1888), 29 L. C. J. 266.—**CAN.**

d. —— *Principal failing to deliver.*]—Pltf. by his statement of claim alleged that he was authorised by deft. to sell wheat on commission at a fixed price, & sold the wheat, but deft. failed to deliver it, & pltf. claimed as damage the difference between the price at which deft. instructed pltf. to sell & the price at which pltf. had to purchase other wheat owing to deft.'s breach, & commission:—*Held:* the statement of claim disclosed a cause of action against deft. except as to the claim for commission.—BUCHANAN *v.* HANSEL GRAIN CO., LTD. (1917), 2 W. W. R. 799; 10 Sask. L. R. 199.—**CAN.**

e. *Agent making advances—On goods.*]—Factors advanced money on goods intrusted to them, & after shipping the goods drew bills against them in their own names, & sold the bills with the shipping documents in the market. A loss having occurred on the shipments:—*Held:* there being no privity between the consignees & the undisclosed principal, the principal was liable to the factors' estate for the full amount of re-drafts representing that loss.—MIRTUNJOY CHUCKERBUTTY *v.* COCHRANE (1865), 4 W. R. P. C. 1; 10 Moo. I. A. 229.—**IND.**

f. —— —— *Account sales.*]—Pltfs., commission merchants in N., received from deft. a quantity of wheat, with instructions to ship it to L. for sale there, & they made advances upon it, which exceeded the net proceeds of the sales. In an action for the excess thus advanced, pltfs. proved that they had mailed to deft. the account sales received by them from their L. agents, with an account between pltfs. & deft. founded upon them, & that these account sales were afterwards seen in his possession; & evidence was given that the wheat was in a bad condition when shipped, as deft. knew; that the prices realised were what might have been expected, & the charges such as were usual:—*Held:* the evidence was not sufficient to show the price for which the wheat was sold, nor the amount of charges connected with the sales; & a new trial was therefore granted, with costs to abide the event.—CRAIG *v.* CORCORAN (1864), 23 U. C. R. 441.—**CAN.**

g. —— —— *Sale of goods.*]—A broker or commission-agent, having made advances on goods consigned to him, is entitled to all the goods for his indemnification, although the consignor had become bkpt. before the sale.—BROUGHTON *v.* STEWART, PRIMROSE & CO. (1814), 18 F. C. 112.—**SCOT.**

h. —— ——.]—Commission agents are entitled, subject to the principal's choice of market, to reimburse themselves for advances already made by the sale of all such goods as they had obtained delivery orders for from the principal.—HYDE *v.* GOODERHAM (1856), 6 C. P. 21.—**CAN.**

k. —— —— *Goods lost at sea.*]—An agent for sale of goods advanced money to the consignors. The goods were shipped to him & lost at sea:—*Held:* the agent entitled to recover the advance, as the goods still continued the property of the consignor.—GOODERHAM *v.* MARLATT (1855), 14 U. C. R. 228.—**CAN.**

l. —— —— *Evidence.*]—At the trial of an action for advances made by a commission merchant on goods consigned to him for sale, deft. tendered evidence to show the meaning of cash advances so made, & the usual practice as to commission merchants reimbursing themselves for such advances:—*Held:* such evidence was properly rejected.—COWIE *v.* APPS, No. 1884 1., *post.*—**CAN.**

m. —— *To infant's guardian—Sums applied for infant's benefit.*]—Where a minor comes to ct. to have an account taken as between himself & his agent, & it is found on taking the account that the agent has made advances to the guardian, & the advances have been applied for the benefit of the minor, the agent ought to be allowed those advances in taking the accounts.—SURENDRA NATH SARKAR *v.* ATUL CHANDRA ROY (1907), I. L. R. 34 Calc. 892.—**IND.**

Sect. 3.—Agent's rights against principal: Subsect. 2, C. (a) & (b).]

1874. ——.]—In order to maintain an action for money paid, it is necessary the agent should prove either an actual request to pay on the part of the principal, or that the money was paid in discharge of some liability, which the agent had taken upon himself by the principal's authority (TINDAL, C.J.). —BOWLBY *v.* BELL (1846), 3 C. B. 284; 4 Ry. & Can. Cas. 692; 16 L. J. C. P. 18; 7 L. T. O. S. 300; 10 Jur. 669; 136 E. R. 114.

Annotation:—**Distd.** Bayley *v.* Wilkins (1849), 7 C. B. 886.

1875. ——.]—Upon general principles an agent is entitled to indemnity from his principal against liabilities incurred by the agent in executing the orders of his principal, unless those orders are illegal or unless the liabilities are incurred in respect of some illegal conduct of the agent himself or by his default (LINDLEY, J.).—THACKER *v.* HARDY (1878), 4 Q. B. D. 685; 48 L. J. Q. B. 289; 39 L. T. 595; 43 J. P. 221; 27 W. R. 158.

For full anns., *see* GAMING & WAGERING.

1876. Broker giving principal acceptances against goods in his hands.]—PULTNEY *v.* KEYMER, No. 1997, *post*.

For full anns., *see* S. C. No. 1997, *vost*.

1877. Bill drawn on principal by agent at principal's request.]—Defts., the owners of a ship of which pltf. was captain, despatched the latter to M. with instructions to purchase a cargo of timber & draw upon them for the amount. Pltf. proceeded to M., & there purchased some timber from L. for £154 11s. 11d., & drew a bill upon defts. for the amount, at 60 days' sight, in favour of the seller or his order. The bill was dated Sept. 4, 1826, & on Nov. 21, it was duly presented for acceptance & protested for non-acceptance. Pltf. was in Liverpool with the ship under his command from Oct., 1826, until Apr., 1827. It was not proved that pltf. received any notice of the dishonour of the bill either from the then holder or from defts., who had got the cargo. In 1832 pltf. was arrested upon this bill at M., & paid it in order to release himself from the arrest. In a special action of *assumpsit* brought by pltf. against defts. for not paying the bill, for not accepting it, & for not indemnifying pltf. from all loss, etc., sustained by him from having drawn the bill:—*Held:* (1) in these circumstances defts. could not insist on the want of proof of notice to pltf. of the dishonour of the bill as a defence to the action; (2) a promise to indemnify was the promise which the law would in this case imply, & as there was no damnification till 1832, Stat. Limitations did not apply.—HUNTLEY *v.* SANDERSON & WILKINSON (1833), 1 Cr. & M. 467; 3 Tyr. 469; 2 L. J. Ex. 204; 149 E. R. 483.

1878. Wrongful act on principal's instructions—Trover.]—If a principal orders his agent to do that which is in itself a wrongful act, & the agent has an action brought against him, he cannot recover from his principal for damage sustained. If the act which the principal desires his agent to do is such as may or may not be a wrongful act, according to circumstances, & the agent sustains damage, there is an implied promise on the part of the principal to indemnify the agent against the consequences of his act. The same exception applies to actions for contribution as to actions for indemnity.

Where deft. had employed pltfs., carriers & wharfingers, to convey 10 hogsheads of acetate of lime to N. & W., & 2 hogsheads had been delivered, but the remainder was still in pltfs.' possession when N. & W. became bkpts., & deft. had, in consequence of the bills of N. & W. (which were drawn for payment of 10 hogsheads) not being accepted, expressly ordered pltfs. to deliver the remainder to the order of another person, which they did, & the assignees afterwards brought an action of trover against pltfs., which action, after notice to deft., they settled:—*Held:* (1) from the order of deft. an implied promise arose to indemnify pltfs. against the consequences of acting upon it; (2) they were entitled to recover from deft. the sum which they had paid the assignees to settle the action, together with costs.—BETTS & DREWE *v.* GIBBINS (1834), 2 Ad. & El. 57; 4 Nev. & M. K. B. 64; 4 L. J. K. B. 1; 111 E. R. 22.

Annotations:—**Distd.** Shackell *v.* Rosier (1836), 2 Hodg. 17. **Apld.** Toplis *v.* Grane (1839), 5 Bing. N. C. 636. **Consd.** Dugdale *v.* Lovering (1875), L. R. 10 C. P. 196; The Englishman & The Australia, [1895] P. 212; Sheffield Corpn. *v.* Barclay, [1903] 2 K. B. 580, C. A.; [1905] A. C. 392. **Refd.** Tanner *v.* Scovell (1845), 14 M. & W. 28; Burrows *v.* Rhodes, [1899] 1 Q. B. 816; Moxham *v.* Grant, [1900] 1 Q. B. 88, C. A.; Leslie *v.* Reliable Advertising & Addressing Agency, [1915] 1 K. B. 652; Cory *v.* Lambton & Hetton Collieries (1916), 86 L. J. K. B. 401, C. A.

See, further, CONTRACT; GUARANTEE.

1879. —— **Trespass.**]—An agent who is sued for a trespass to chattels committed by command of his principal is entitled to be indemnified, not only against damages & costs to be recovered by pltf. in the action, but also against deft.'s own costs.—GREEN *v.* WARBURTON (1838), 2 Mood. & R. 105, N. P.

1880. Bailiff—Wrongful distress—Loss of costs of action.]—A levy was made on the goods of a trader after he had committed an act of bkpcy., & the money levied was paid over to deft.; an action of trover was afterwards brought by the assignees against him, the sheriff, & the bailiff, in which damages were recovered, & these together with the costs were paid by the bailiff:—*Held:* there was no implied promise on deft.'s part to indemnify the bailiff or to contribute to the damages & costs in the action of trover, but the bailiff might maintain money had & received to his use in order to recover back the money which was paid to deft. under a mistake respecting the trader's bkpcy.—WILSON *v.* MILNER (1810), 2 Camp. 452.

Annotations:—**Expld.** Betts *v.* Gibbins (1834), 2 Ad. & El. 57. **Refd.** Garland *v.* Carlisle (1837), 11 Bli. N. S. 421; Standish *v.* Ross (1849), 3 Exch. 527.

1881. Rights of del credere agent.]—Where a factor makes advances, he has a personal remedy against the principal as well as a lien on the fund; & this is the same whether the factor has or has not a *del credere* commission, except that, when the factor having a *del credere* commission has sold the goods, he cannot sue the principal for advances which are covered by the price of the goods, that price being warranted to the principal by the guarantee arising out of the commission.—GRAHAM *v.* ACKROYD (1853), 10 Hare, 192; 22 L. J. Ch. 1046; 17 Jur. 657; 1 W. R. 107; 68 E. R. 894.

For full anns., *see* BANKRUPTCY & INSOLVENCY.

1882. ——.]—If an agent, in anticipation of the amount of sales for his principal, remits such amount, & the buyers fail to pay, it is not the loss of the agent but of the principal, unless the agent

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1877 1. *Bill drawn on principal by agent at principal's request—Damage to agent's credit from dishonour—Whether recoverable.*]—An agent abroad drew bills on his principal for advances made by the principal's directions; the bills were returned dishonoured, though the principal was perfectly solvent, & the agent's credit & business were thereby destroyed:—*Qu.:* whether such damages were consequential, &, on that account, could not competently found a claim for reparation.—DEMPSTER *v.* WALLACE, HUNTER & CO. (1833), 12 S. 548.—**SCOT.**

1878 1. *Wrongful act on principal's instructions.*]—Where an act is done innocently, under the express directions of another, which occasions injury to the rights of a third party, the principal must indemnify the agent against consequent liability.—BOARD OF SCHOOL TRUSTEES *v.* MUIRHEAD (1895), 4 B. C. R. 148.—**CAN.**

sells on a *del credere* commission.—MCLARTY *v.* MIDDLETON, No. 1413, *ante*.

1883. Accommodation bill accepted by agent for principal's account.]—*Qu.:* whether a commission agent is entitled to be indemnified out of the proceeds of his principal's goods sold by him against all liabilities incurred by him on account of his principal, including the amount of an accommodation bill drawn by the principal & accepted by such agent.—HOOD *v.* STALLYBRASS, BALMER & CO. (1878), 3 App. Cas. 880; 38 L. T. 826; 27 W. R. 1, P. C.

1884. Bills accepted by agent against goods—Agent's right to sell below limit.]—Pltfs. were employed by defts. to sell goods on commission, giving defts. bills for their invoiced value. Defts. had placed a limit on the prices of the goods, which pltfs. contended they had no power to do. Pltfs. applied under R. S. C., O. 50, r. 2, for an order to sell the goods, but defts. objected that pltfs. had not given them sufficient time to decide whether to lower the limit:—*Held:* the order must be refused. —DANGAR, GRANT & CO. *v.* GOSPEL OAK IRON CO. (1890), 6 T. L. R. 260.

1885. Gratuitous agent registering as shareholder.] —Pltf. gratuitously allowed his name to be placed on the register of a colonial co. as owner of certain shares, stated to be fully paid up, & undertook to hold the shares as trustee for deft. The co. having gone into liquidation, pltf. was called upon to make a payment in respect of the shares under a colonial Act:—*Held:* deft. bound to indemnify pltf. against the loss he had incurred.—CAMPBELL *v.* LARKWORTHY (1893), 9 T. L. R. 528 C. A.

1886. Legal proceedings against agent—Costs of.] —Where an agent duly carries out orders of his principal, & is, in consequence, made deft. in an action, which is dismissed for want of prosecution, the indemnity implied by law includes costs of properly defending the action taxed as between solr. & client.—WILLIAMS *v.* LISTER & CO. (1913), 109 L. T. 699, C. A.

See, also, Nos. 1899-1907, *post*.

Payments in connection with Stock Exchange transactions.]—*See* STOCK EXCHANGE.

(b) Acts done within Agent's Authority.

1887. Authority must be proved.]—In an action for money paid, laid out & expended, pltf. must prove some authority from deft. to pay the money.

The guard of a train used to pay the carriage on certain goods delivered to deft. In an action for money so paid:—*Held:* he could not recover without proof of actual authority to pay.—TAPPIN *v.* BROSTER (1823), 1 C. & P. 112.

1888. Agent acting without authority.]—If A. becomes my bailiff of his own wrong without my appointment he is accountable to me, but I am not compellable to make him any allowance for his expenses about my business (PERIAM, J.).—GAWTON *v.* DACRES (LORD) (1590), 1 Leon. 219; 74 E. R. 201.

Annotation:—**Refd.** Lyell *v.* Kennedy, Kennedy *v.* Lyell (1889), 14 App. Cas. 437.

1889. —— Amount of expenses unascertainable.] —A claim by an agent for expenses on account of his principal, which, from the conduct of the agent undertaking the business without authority or agreement, could not be ascertained, was disallowed. —BEAUMONT *v.* BOULTBEE (1805), 11 Ves. 358; 32 E. R. 1126.

1890. Owners of privateer liable to reimburse captain.]—A ship cruising as a privateer captured a French vessel carrying some Turks & Tripolins, etc. Admlty. proceedings being commenced against the captain, the latter incurred damages & costs which he sought to recover from defts., the owners of the vessel:—*Held:* they were liable to reimburse him according to the proportion of their respective interests.—WALTON *v.* HANBURY (1707), 2 Vern. 592; 23 E. R. 985.

1891. Factor buying at higher price than authorised—Goods accepted by principal.]—Pltf., a factor abroad, purchased hemp for deft. that exceeded the price limit. Deft. objected to the contract, but received the goods when they arrived & disposed of them:—*Held:* the contention that he acted as factor for pltf. could not be supported, & he must reimburse pltf.—CORNWAL *v.* WILSON (1750), 1 Ves. Sen. 509; 27 E. R. 1173.

Annotation:—**Expld.** Devaux *v.* Conolly (1849), 8 C. B. 640.

1892. Revocation of authority — Expenditure after.]—If an order is given to an agent to deliver up anything of which he had management, his agency respecting it ceases as soon as he has delivered it up; & if he afterwards lays out money upon it for the benefit of the owner, this is a voluntary payment.—EDMISTON *v.* WRIGHT (1807), 1 Camp. 88, N. P.

1893. —— Premiums paid after.]—The authority of a broker employed to effect a policy of insurance

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1884 i. *Bills accepted by agent against goods—Right to indemnity before sale.*]—An agent for sale of butter consigned to him gave his principal bills at five days, which he met. He was unable to sell in the market at the price fixed & sued for the money paid by him:—*Held:* he was entitled to recover the advance on request & need not wait until a sale should be effected. — COWIE *v.* APPS (1873), 22 C. P. 589.—**CAN.**

1884 ii. —— ——.]—Deft., living at C., consigned to pltf. at N. certain tobacco for sale, & drew upon him at same time for $250, which pltf. accepted & paid. The price which deft. asked could not be obtained in M., & pltf. therefore shipped the tobacco to E., where it was sold. The net proceeds, after deducting freight & charges, were only £14 sterling, & he sued deft. upon the common counts for the difference, $278, the expenses of shipping being also deducted. Deft. pleaded never indebted, payment, & set-off. When the draft fell due deft. had written to pltf. offering to raise funds to retire it by drawing upon him again. The account sales received by pltf. from E. had been sent deft., who said, on receiving them, that he did not think he ought to bear the whole loss, but offered $150:—*Held:* there being no evidence of any special contract, pltf. was entitled to recover his advances without waiting for the sale of the tobacco.—STEWART *v.* LOWE (1865), 24 U. C. R. 434.—**CAN.**

n. *Payment by agent on order drawn by principal in favour of third party.*]—M., formerly deputy sheriff of a district, sued R., the sheriff, for services in the execution of his office. At the trial pltf. produced an order drawn on him by deft. in favour of X., desiring him to pay the latter £50 out of the moneys he had received for sheriff's fees:—*Held:* in the absence of any further information, mere proof of the payment of that order did not entitle pltf. to recover.—MOORE *v.* RAPELJE (1830), 5 O. S. 452. —**CAN.**

PART VIII. SECT. 3, SUB-SECT. 2.—C. (b).

o. *Agent giving bonus to lender of money to preserve principal's property.*]—An agent for sale of mining areas received stock & bonds for conveyance of part of the properties. To borrow money to preserve certain other areas he gave the lender a bonus out of such stock & bonds, & handed over the rest to pltfs., deducting a rateable contribution towards the bonus:—*Held:* (1) he was not entitled to indemnify himself, though the expenses were necessarily incurred for the preservation of the property; (2) if considered as a trustee, the measure of damages was calculable as if the stock were disposed of at the best price possible, if as contractor in breach of agreement, the damages were the selling price of the securities at the time he was bound to deliver.—MCNEIL *v.* FULTZ (1906), 38 S. C. R. 198.—**CAN.**

p. *Agent advancing money to clear goods.*]—Pltf. being employed by defts. to purchase a crane for them, but on his own credit, purchased on terms to which defts. agreed. Defts. paid one-third of the price, & on delivery of the crane pltf. paid the remainder out of his own funds. In an action by pltf. for disbursements, etc.:—*Held:* it was within scope of pltf.'s authority to advance his own money for purchase of the crane.—JOHNSTON *v.* CANADIAN KLONDIKE MINING CO. (1911), 19 W. L. R. 60.—**CAN.**

Sect. 3.—Agent's rights against principal: Subsect. 2, C. (b).]

may be revoked after underwriters have signed the slip till they have actually subscribed the policy; & if the broker, having procured a slip to be written on terms within the scope of his original authority, receives an intimation from his principals that they will not submit to these terms, & afterwards effects the policy & pays premiums to the underwriters, he can maintain no action against his principals for commission or money paid.—WARWICK *v.* SLADE (1811), 3 Camp. 127.

Annotations:—**Distd.** Mead *v.* Davison (1835), 3 Ad. & El. 303. **Consd.** Xenos *v.* Wickham (1867), L. R. 2 H. L. 296; Cory *v.* Patton (1872), L. R. 7 Q. B. 304; The Vindobala (1889), 37 W. R. 409.

1894. —— Expenses legitimately incurred before.]—Where an owner sends goods to an auctioneer to sell for him the owner may at any time before the contract is legally complete interfere or revoke the auctioneer's authority, but he does so at his peril; & if the auctioneer has contracted any liability in consequence of his employment & the subsequent revocation or conduct of the owner, he is entitled to be indemnified (MARTIN, B.).—WARLOW *v.* HARRISON (1859), 1 E. & E. 309; 29 L. J. Q. B. 14; 1 L. T. 211; 6 Jur. N. S. 66; 8 W. R. 95; 120 E. R. 925, Ex. Ch.

Annotations:—**Consd.** Mainprice *v.* Westley (1865), 6 B. & S. 420. **Distd.** Rainbow *v.* Hawkins, [1904] 2 K. B. 322; McManus *v.* Fortescue, [1907] 2 K. B. 1, C. A. **Refd.** Johnston *v.* Boyes, [1899] 2 Ch. 73. **Mentd.** *Re* Agra & Masterman's Bank, *Ex p.* Asiatic Banking Corpn. (1867), 2 Ch. App. 391; Harris *v.* Nickerson (1873), L. R. 8 Q. B. 286; Woolf *v.* Horne (1877), 46 L. J. Q. B. 534.

See, further, AUCTION & AUCTIONEERS.

1895. —— Expense of repairing ship incurred but not paid before.]—An express authority is necessary from a part-owner of a ship to the ship's husband to order works not necessary as repairs, but such authority once given cannot be revoked after it has been acted upon, & it is for the part-owner when sued for contribution to prove that it was revoked before the works were commenced or a contract for them entered into.

Pltf., a ship's husband, being authorised by deft., a part-owner, to repair & lengthen the ship, contracted with a shipbuilder to do so. Afterwards he received a notice from deft. that he would not be answerable. The work was then completed, & pltf. paid for it;—*Held:* (1) the authority to make the alterations could not be revoked after it was acted on; (2) it was for deft. to prove that his notice was given before the work was begun.—CHAPPELL *v.* BRAY (1860), 6 H. & N. 145; 30 L. J. Ex. 24; 3 L. T. 278; 9 W. R. 17.

Annotation:—**Distd.** Hill *v.* Nuttall (1864), 17 C. B. N. S. 262.

1896. —— Charterparty made after.] — The managing owner of a ship entered into negotiations for a charter, but before the charterparty was signed by him some of the co-owners of the ship gave him notice that they declined to continue sailing the ship or to be bound by any new charter. The managing owner subsequently signed the charterparty. The ship was thereupon arrested in an action of restraint at the suit of the above co-owners. In an action by the managing owner for contribution in respect of the expenses & losses incurred:—*Held:* the above co-owners were not liable, as they had revoked the authority of the managing owner to bind them before the charterparty was signed.—THE VINDOBALA (1889), 14 P. D. 50; 58 L. J. P. 51; 60 L. T. 657; 37 W. R. 409; 6 Asp. M. L. C. 376, C. A.

1897. Warehouse rent paid by seller's agent to redeem goods.]—Although by the usage of Liverpool the seller of goods was to pay warehouse rent for 2 months after sale, if the goods remained there so long, where the seller of such goods had, within the 2 months, given the usual order for delivery to the buyer:—*Held:* (1) the property in the goods from that time vested in the buyer; (2) the buyer became responsible for all accidents which might happen to them; (3) the circumstance of the goods having within that time been distrained for warehouse rent was an accident which must fall on the buyer.

Where such rent had been paid by the seller's agent in order to redeem the goods:—*Held:* the agent could not recover same from the seller as money paid to his use.—GREAVES *v.* HEPKE (1818), 2 B. & Ald. 131; 106 E. R. 315.

1898. Legal proceedings—By agent—Costs of.]—Under a general authority to receive goods & dispose of them to the best advantage, the person so authorised may legally & properly commence proceedings against any wrong-doer who withholds possession of the goods; & costs of those proceedings are legally chargeable upon the goods themselves, as a necessary expense; & in such a case the costs of an abortive arbn., which a jury shall think was properly gone into, will become a part of the expense, & will be equally chargeable, as well as the general costs.—CURTIS *v.* BARCLAY, No. 1420, *ante*.

For full anns., *see* S. C. No. 1420, *ante*.

1899. —— Against agent—Costs of Action compromised.]—Pltf., as deft.'s agent, ordered from A. goods of a particular description & for a particular purpose, deft. undertaking to save pltf. harmless from the consequences. The goods were of a different description from what were ordered, & unfit for the purpose required, but A. contended he had been misled by the misspelling contained in the order given by pltf., who was an illiterate person, & refused to take the goods back. An action having been brought by A. against pltf. for the price, & deft. having had notice of same, pltf. compromised such action by returning the goods & paying a sum of money in discharge of debt & costs:—*Held:* (1) pltf. had an authority from deft. to compromise such action; (2) he could recover from deft. the amount so paid in an action for money paid to his use.—PETTMAN *v.* KEBLE (1850), 9 C. B. 701; 19 L. J. C. P. 325; 15 Jur. 38; 137 E. R. 1067.

1894 i. *Revocation of authority — Expenses legitimately incurred before.*]—If the completion of an agent's commission within the time limited is prevented by the revocation of his authority, it is not necessary to enable the agent to recover damages or compensation for money expended that he should prove an express request or knowledge of acquiescence in such expenditure by his principal.—COLLINS *v.* HILL (1910), 12 W. A. R. 174.—**AUS.**

1894 ii. —— ——.]—When his authority is revoked for no fault of his, the salaried agent has redress by an action against his principal to recover expenses incurred & for the value of services rendered down to the day of the recall.—LABONTE *v.* DESJARDINS (1911), Q. R. 40 S. C. 521.—**CAN.**

q. *Expenses incurred through principal's failure to pay for goods bought on his behalf.*]—JOHNSTON *v.* CANADIAN KLONDYKE MINING CO., p. 531, p, *ante*. —**CAN.**

1898 i. *Legal proceedings—By agent—Costs of.*]—S. indorsed a bill to A. in trust to do diligence thereon & recover payment, & A. incurred expenses in the legal execution of his orders:—*Held:* S. liable for such expenses, A. being trust indorsee to recover payment as well as S.'s agent.—ALISON *v.* SMART (1840), 15 Fac. 703.—**SCOT.**

1899 i. —— *Against agent—Costs of—Damages for imprisonment.*]—LEAVITT *v.* PARKS (1851), 2 All. 282.—**CAN.**

1899 ii. —— —— —— *Third party procedure.*]—Pltf. sued the vendor & his agent for misrepresentation, rescission & damages, & the agent issued a third party notice claiming indemnity from the principal:—*Held:* (1) the third party notice was unnecessary; (2) under such procedure there was no right to indemnity as to costs.—MELVIN *v.* MCNAMARA & GRIEVE (1914), 28 W. L. R. 223; 17 D. L. R. 18.—**CAN.**

1900. ——— ——— ——— Agent justified in defending.]—A., a broker, contracted with B. for the purchase (on behalf of C.) of certain goods. C. refusing to accept the goods, B. sued A. for breach of contract. C. had notice of the proceedings, but repudiated liability, & A. defended the action unsuccessfully. In an action by A. against C. for damages & costs paid & incurred by him in the first action, C. paid into ct. enough to cover damages only, & it was left to the jury to say whether A. in defending the former action had pursued the course which a prudent & reasonable man would have done in his own case. The jury having found for pltf.:—*Held:* A. entitled to recover the costs.—BROOM (BROWN) *v.* HALL (1859), 7 C. B. N. S. 503; 34 L. T. O. S. 66; 141 E. R. 911.

Annotation:—**Apld.** The Millwall, [1905] P. 155, C. A.

See, also, No. 1886, *ante.*

1901. ——— ——— ——— Criminal prosecution.]—A master, while at a foreign port with a homeward bound vessel, incurred expenses in defending himself against a charge of murder maliciously brought by two of the crew, whom he had censured for misconduct. The master was tried & acquitted & bound over in a sum of £10 to prosecute the men for perjury. He forfeited the £10 in order to return with the vessel to England. On a motion to review the report of the registrar in a suit for disbursements:—*Held:* (1) the master was entitled to the expenses of his defence, on the ground that the charge originated directly from the performance of his duty to his owners in chastising the men; (2) the ct. allowed the £10 forfeit, as it was for the interests of his owners that the master should not be delayed in returning with the vessel.—THE JAMES SEDDON (1866), L. R. 1 A. & E. 62; 35 L. J. Adm. 117; 15 L. T. 636; 12 Jur. N. S. 609; 2 Mar. L. C. 443.

Annotation:—**Consd. & Expld.** *Re* Famatina Development Corpn., [1914] 2 Ch. 271, C. A.

1902. ——— ——— ——— Agent not justified in defending.]—A. bought bank shares for B. "for the account," but before settling day a petition was presented to wind up the bank, & B. declined to pay the value of the shares. A. resisted the claim of the selling broker, & had to pay the value of the shares & costs of action. In an action by A. against B. to recover the amount:—*Held:* he could not recover costs of the action.—CLEGG *v.* TOWNSHEND (1867), 16 L. T. 180.

1903. ——— ——— ———.]—An action was brought for specific performance of a contract. Deft. pleaded he was not liable on the ground that he signed the contract as agent for A. Deft. served a third party notice on A., who appeared & took no further proceedings. Deft. obtained an order that the question as to the liability of A. should be tried as soon as might be after trial of the action. On the question of liability:—*Held:* (1) as between pltf. & deft., deft. was liable; (2) deft. was to be indemnified by A., who was to pay costs of the third party proceedings between him & deft.; (3) deft. having set up a defence which failed must pay costs of the action.—BLORE *v.* ASHBY (1889), 42 Ch. D. 682; 58 L. J. Ch. 779; 61 L. T. 766; 38 W. R. 141.

1904. ——— ——— ———.]—An official receiver, acting as *interim* receiver, instructed auctioneers to pay off a bill of sale given by debtor, & to take an assignment of it to themselves. The trustee chosen by the creditors sued the auctioneers in order to test the validity of the bill of sale, & they brought in the official receiver as third party. The action was dismissed with costs:—*Held:* under the implied indemnity given by the official receiver, the auctioneers were entitled to receive from him the difference between the costs incurred by them as between solr. & client & the costs as between party & party which they received from the trustee, & the official receiver was entitled to be paid out of the estate his own costs & the amount he had paid under his indemnity to the auctioneers.—*Re* WELLS & CROFT, *Ex p.* OFFICIAL RECEIVER (1895), 72 L. T. 359; 11 T. L. R. 300; 2 Mans. 41; 15 R. 169.

See, further, AUCTION & AUCTIONEERS.

1905. ——— ——— Damages recovered in—What agent must show.]—In an action by an agent in Malta against his principal to recover the amount of damages sustained by him in a suit brought in Genoa upon a breach of contract which he had defended on behalf of his principal:—*Held:* (1) in order to entitle an agent to recover from his principal under such circumstances, he must show (*a*) the loss arose from the fact of his agency (*b*) he was acting within the scope of his authority, (*c*) the blame was not attributable to any fault or laches on his part; (2) the liability deft. was under to indemnify pltf. extended to protect him against the expenses & trouble of an action arising out of his agency in the matter; (3) damages should be decreed against the principal.—FRIXIONE *v.* TAGLIAFERRO & SONS (1856), 10 Moo. P. C. C. 175; 27 L. T. O. S. 21; 4 W. R. 373; 14 E. R. 459, P. C.

Annotation:—**Distd.** Halbronn *v.* International Horse Agency & Exchange, [1903] 1 K. B. 270.

1906. ——— ——— ———.]—S. brought an action against M., his agent, for an account. W. also brought an action against M. for breach of contract The defence in the second action was that M. acted in the transaction as agent of S. The master ordered S. should be bound by the sum for which M. should be held liable to W., & W. should be a party to the first action:—*Held:* (1) the order was right in so far as it provided S. should be bound by the result of W.'s action; (2) the order was wrong in so far as it sought to bring W. into S.'s action.—SELIGMAN *v.* MANSFIELD, WHITE *v.* MANSFIELD (1875), Bitt. Prac. Cas. 57; 1 Char. Cham. Cas. 62.

1907. ——— ——— Damages not arising directly out of agency.]—Defts. instructed in 1898 H., an auctioneer in Paris, to put up for auction a thoroughbred mare, P., with a certain description which was in fact accurate. Another thoroughbred mare named P. had been imported into France & sold by H. in 1893. On the second mare being advertised for sale the owner of the mare P., imported in 1893, brought an action against H. & recovered damages in France. In an action by H. against defts. claiming an indemnity & damages:—*Held:* defts. not liable, as the damages recovered against H. arose, not from any act done by him in pursuance of his employment by defts., but from a mistake as to the identity of the mare P. arising from the fact that some person in France had procured another mare to be entered in the Paris Stud Book as P.—HALBRONN *v.* INTERNATIONAL

1900 i. ——— ——— ——— *Agent justified in defending.*]—Under art. 1725, C. C., an insurance co. is bound to reimburse its agent the law costs caused by his defending an action for damages against him by a person whom he had denounced as pretending to be sub-agent of the co., if insolvent deft. is not able to pay his costs of defence; but these acts must have been done in his office as that of secretary-treasurer.—TALBOT *v.* CIE. D'ASSURANCE DE MONTMAGNY (1897), Q. R. 12 S. C. 64.—**CAN.**

1905 i. ——— ——— *Damages recovered in—What agent must show.*]—An agent instructed to sell goods as agent, but who sells as principal, & so acts beyond scope of his authority, cannot recover against his principal the damages & costs recovered against him (the agent) by the purchaser for breach of the contract.

An agent, even if authorised to contract as principal, cannot recover against his principal damages caused by his (the agent's) imprudent delay in notifying the purchaser of his inability to perform the contract (WILLIAMS, J.)—TAAFE *v.* REID & Co. (1896), 15 N. Z. L. R. 443.—**N.Z.**

Sect. 3.—*Agent's rights against principal: Subsect.* 2, *C.* (*b*) *&* (*c*).]

HORSE AGENCY & EXCHANGE, LTD., [1903] 1 K. B. 270; 72 L. J. K. B. 90; 88 L. T. 232; 51 W. R. 622; 19 T. L. R. 138.

Annotation:—**Dbtd.** Williams *v.* Lister (1913), 109 L. T. 699, C. A.

1908. Principal misleading agent — Agent's rights.]—Every man who employs another to do acts which the employer appears to have a right to authorise him to do undertakes to indemnify him for all such acts as would have been lawful if the employer had the authority he pretended he had.—ADAMSON *v.* JARVIS (1827), 4 Bing. 66; 12 Moore, C. P. 241; 5 L. J. O. S. C. P. 68; 130 E. R. 693.

Annotations:—**Apld.** Betts *v.* Gibbins (1834), 2 Ad. & El. 57. **Expld.** Collins *v.* Evans (1844), 5 Q. B. 820. **Expld. & Distd.** Ormrod *v.* Huth (1845), 5 L. T. O. S. 268; Morley *v.* Attenborough (1849), 18 L. J. Ex. 148. **Distd.** Elliot *v.* Von Glehn (1849), 13 Q. B. 632; Robson *v.* Devon (1857), 5 W. R. 724. **Apld.** Dugdale *v.* Lovering (1875), L. R. 10 C. P. 196. **Expld.** Birmingham & District Land Co. *v.* L. & N. W. Ry. Co. (1886), 34 Ch. D. 261, C. A. **Apprvd.** Palmer *v.* Wick & Pultneytown Steam Shipping Co., [1894] A. C. 318. **Expld.** The Englishman & The Australia, [1895] P. 212. **Distd.** Halbronn *v.* International Horse Agency & Exchange, [1903] 1 K. B. 270. **Apld.** Leslie *v.* Reliable Advertising & Addressing Agency, [1915] 1 K. B. 652; London Assocn. for Protection of Trade *v.* Greenlands, [1916] 2 A. C. 15, H. L. **Refd.** Burrows *v.* Rhodes, [1899] 1 Q. B. 816; Barker *v.* Furlong, [1891] 2 Ch. 172.

1909. —— —— Goods not up to quality.]—Deft., a corn merchant in Ireland, sent written instructions to pltf., a corn factor & *del credere* agent of deft. in London, to sell oats of a certain quality at a certain price on his (deft.'s) account. Pltf. sold them, as described by deft., in his own name. The oats proved to be of inferior quality, & pltf. was obliged to pay to the vendee the difference in value. In an action to recover the difference, it was objected by deft. that pltf. had no right to sell in his own name & thereby to incur liability:—*Held:* evidence was admissible for pltf. to show that, by the custom of the London corn trade, a factor was warranted by such instructions in selling in his own name.—JOHNSTON *v.* USBORNE (1841), 11 Ad. & El. 549; 3 Per. & Dav. 236; 113 E. R. 524.

1910. —— —— ——.]—Deft., having sold to T. through the agency of pltfs., who were factors, some bark, which he agreed should be equal to sample, drew a bill on pltfs. for the price of the bark, which they accepted. The bark not being equal to sample, & being rejected by T., the buyer:—*Held:* the consideration of the bill having failed, pltfs. were entitled to recover the amount of it from deft.—HOOPER *v.* TREFFRY (1847), 1 Exch. 17; 16 L. J. Ex. 233; 9 L. T. O. S. 200; 154 E. R. 8.

1911. Freight paid against instructions.]—Goods being shipped in India for London, on account of A., the bill of lading was forwarded to A., & he indorsed it over for value. The bill of lading, signed by the master, stated freight to have been paid in Bengal, but it was found, after above transfer, that freight never had been paid, through default of the shipper. The brokers employed by the assignees of the bill of lading sold the goods, but, when called upon for delivery, found them to be stopped for freight, which, to obtain possession of the property, they paid, although their principals had formerly directed them not to do so, as freight had been paid in Bengal:—*Held:* (1) the assignees were not liable for freight; (2) this advance by the brokers was made in their own wrong, though freight had not in fact been paid in Bengal, as the principals supposed.—HOWARD *v.* TUCKER (1831), 1 B. & Ad. 712; 9 L. J. O. S. K. B. 108; 109 E. R. 951.

Annotations:—**Refd.** Grant *v.* Norway (1851), 10 C. B. 665; Gledstanes *v.* Allen (1852), 12 C. B. 202; Hubbersty *v.* Ward (1853), 8 Exch. 330; Kirchner *v.* Venus (1859), 12 Moo. P. C. C. 361; Pearson *v.* Goschen (1864), 4 New Rep. 404.

1912. Sale of shares—Shares not validly delivered —Wrongful payment by agent.]—Deft. authorised pltf., a broker, to sell certain shares in a ry., the shares then lying at the co.'s office for registration. Pltf. sold them to R. Correspondence took place between pltf. & deft. on account of delay in transfer of the shares, & ultimately deft. wrote a letter to pltf. requesting that all further communication should be made to his attorney. The transfer not having been made, R., after giving pltf. notice, bought the same number of shares at an advance in price, & charged pltf. with the difference, which pltf. paid & then sued deft. for the amount:—*Held:* (1) pltf. was authorised to sell registered shares only; (2) as no valid transfer could be made except by deed under Cos. Clauses Act, 1845 (c. 16), s. 14, R. was bound to have tendered a deed of transfer before he could have recovered against pltf., & as he had not done so, pltf. made payment to him in his own wrong; 3) the above-mentioned letter did not amount to a refusal to complete the contract so as to dispense with a tender of a deed of transfer.—BOWLBY *v.* BELL, No. 1874, *ante*.

Annotation:—**Distd.** Bayley *v.* Wilkins (1849), 7 C. B. 886.

1913. —— Forged certificates—Payment by agent of excess over amount received by principal.]—Deft. on Mar. 10, 1847, employed pltfs., stock & share brokers, to sell for him 10 scrip certificates for 50 shares each in a projected ry. co., & delivered the certificates to them for that purpose. Pltfs., on Mar. 27, sold them to different purchasers, & paid deft. proceeds of sales. The certificates were afterwards discovered to be forged, & pltfs. were called upon by the purchasers on May 11 to pay them respectively the value put on them by a resolution of the Stock Exchange Committee passed with reference to the forged certificates in that ry. co., of which there were several in the market, & which resolution was come to subsequently to the sales by pltfs. Pltfs. paid those sums which were larger than the sums for which they had sold the certificates. In an action by pltfs. to recover the sums so paid the declaration contained a special count on an alleged warranty by deft. that the certificates were genuine & a count for money paid. Deft. paid into ct. the amount received by him from pltfs., with interest:—*Held:* (1) the purchasers were entitled to nothing more from pltfs. than the sum the purchasers had paid them; (2) pltfs. could recover no more from deft.—WESTROPP *v.* SOLOMON, No. 1873, *ante*.

Annotations:—**Distd.** Jeffreys *v.* Fair (1896), 36 L. T. 10. **Refd.** Raphael *v.* Burt (1884), Cab. & El. 325.

1914. Ultra vires act adopted by principal.]—Where the master of a ship makes a special contract, in itself *ultra vires*, in order to fulfil which he incurs special expenses, if the owner adopts

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1908 i. *Principal misleading agent—Agent's rights.*]—B. instructed M., a broker, to sell through his London correspondents certain bank shares, which proved to be not transferable. B. knew this when giving the order, but did not disclose it. The shares were sold, & M., in order to give delivery in accordance with the rules of the Stock Exchange, had to purchase other shares of the same bank capable of transference. In an action at the instance of M. against B. for payment of the difference of price:—*Held:* M. was entitled to recover.—MACKENZIE *v.* BLAKENEY (1879), 16 Sc. L. R. 770.—**SCOT.**

r. *Money paid on consideration that failed.*]—An agent on behalf of an undisclosed principal received several sums of money from several other persons on a consideration that failed, & paid such money over to his principal:—*Held:* the agent, although entitled to be indemnified by his principal in respect of such sums, was not entitled also to an order that the principal should pay over to him the total amount of such sums.—RANKIN *v.* PALMER (1912), 16 C. L. R. 285.—**AUS.**

the benefit of that contract, he must, in equity, also bear its burdens.

Where the master of an ordinary seeking ship entered into a charterparty, under seal, to carry troops from the Mauritius to England, & stipulated, on his own responsibility, in the charterparty, that he would make certain alterations in the ship in order to enable him to carry the troops, & at the Cape of Good Hope entered into another charterparty, not under seal, to a similar effect, & made the specified alterations, & paid money & drew bills to meet the expenses necessary to the making of these alterations, & the voyage was performed :—*Held :* (1) in equity, the master was first entitled out of the freight earned under these charterparties to be repaid the sums advanced, & to be indemnified against the bills ; (2) the owner (or his mtgee.) was only entitled to the net freight after deducting these charges. *Semble*, the master, if sued at law for the freight as money had & received, would have had the right to deduct the money so advanced without pleading a set-off.—BRISTOW *v.* WHITMORE (1861), 9 H. L. Cas. 391 ; 31 L. J. Ch. 467 ; 4 L. T. 622 ; 8 Jur. N. S. 291 ; 9 W. R. 621 ; 1 Mar. L. C. 95 ; 11 E. R. 781, H. L.

Annotations :—**Apld.** The Feronia (1868), L. R. 2 A. & E. 65 ; Tooth *v.* Hallett (1869), 4 Ch. App. 242. **Distd.** The Two Ellens (1871), L. R. 3 A. & E. 345. **Apld.** The Orienta, [1894] P. 271. **Refd.** Hamilton *v.* Baker, The Sara (1889), 14 App. Cas. 209.

1915. —— Brokers acting as principals.]—Deft. on various occasions instructed pltf., a country stockbroker, to effect for her purchases & sales of stocks & shares in the usual way through brokers on the London Stock Exchange. On receipt of her instructions, pltf. effected various purchases & sales of stocks & shares in a manner of which the following transaction is an example. Deft. having instructed pltf. to buy certain American ry. shares for her, pltf. gave an order for purchase of the shares to a firm of brokers on the London Stock Exchange, between whom & himself there was an arrangement in such cases they should deal at a " net " price for the shares, *i.e.*, a price arrived at by adding to purchase price such sum as the London brokers might fix as their remuneration for the transaction. The London brokers thereupon bought the shares from a jobber, & sent a bought note to pltf. charging " 98½ net " for the shares, the price at which they bought from the jobber not being disclosed. Pltf. then sent a bought note to deft., charging her 98½ for the shares (without adding the word " net ") plus a commission of 7*s.* 6*d.* & 1*s.* for stamp. It appeared the amount added by the London brokers for their remuneration did not exceed the usual commission payable in respect of such a purchase. In an action brought by pltf. against deft. for a balance alleged to be due to him in respect of the above-mentioned transactions :—*Held :* (1) the contracts effected by pltf., being contracts, not made through the London brokers as agents, but as principals, were not in accordance with the authority given to pltf. by deft. ; (2) he was not entitled to indemnity from deft. in respect of them ; (3) the action was not maintainable.—JOHNSON *v.* KEARLEY, [1908] 2 K. B. 514 ; 77 L. J. K. B. 904 ; 99 L. T. 506 ; 24 T. L. R. 729, C. A.

Annotations :—**Distd.** Platt *v.* Rowe (1909), 26 T. L. R. 49. **Consd. & Distd.** Aston *v.* Kelsey, [1913] 3 K. B. 314, C. A. **Distd.** Blaker *v.* Hawes (1913), 109 L. T. 320.

1916. Sale of goods—Altered contract for.]—In the absence of evidence of custom or otherwise, a broker may not treat himself as principal & sue his employer as for goods bargained & sold. Pltfs., as brokers, bought for deft., upon Jan. 6, 5 tons of indiarubber at 2*s.* 11½*d.* per lb., & sent him a bought note in which the indiarubber was set out as deliverable " during Jan." A corresponding sold note was sent to the sellers, at whose instance pltfs. struck out " during Jan.," & wrote " forthwith," but did not communicate the alteration to deft. On Jan. 7 deft. decided to throw up the contract, & sent an order to pltfs. to sell at 3*s.* Pltfs. could only sell at 2*s.* 10*d.*, & having paid the sellers at the rate of 2*s.* 11½*d.*, sued deft. for the difference. Pltfs. having been nonsuited :—*Held :* (1) the alteration was material ; (2) pltfs. could not treat themselves as principals & recover for goods bargained & sold ; (3) the alteration being material, pltfs. had paid to the sellers what deft. was not bound to pay, & could not recover for money paid to deft.'s use.—WHITE *v.* BENCKENDORFF (1873), 29 L. T. 475.

(c) Acts done to conform to Usage of Market in which Agent is employed to act.

1917. In general.]—A principal who employs an agent to purchase goods for him in a particular market is to be taken to be cognisant of, & is bound by, the rules which regulate dealings therein, & the agent is entitled to be indemnified by his principal for all he does in accordance with those rules (WILLES, J.).—CHAPMAN *v.* SHEPHERD, WHITEHEAD *v.* IZOD (1867), L. R. 2 C. P. 228 ; 15 W. R. 314.

For full anns., *see* STOCK EXCHANGE.

PART VIII. SECT. 3, SUB-SECT. 2.—C. (c).

1917 i. *In general.*]—Where a broker enters into a transaction on the Exchange for the purchase or sale of goods on behalf of a customer, & the transaction takes place in the ordinary course of business, the broker's sole interest being his commission, he is entitled to recover from the customer the amount of the loss resulting from the operation. The broker's claim is not restricted to the amount of margin in his hands, but, in the absence of any contract to the contrary, includes the entire loss.—MORRIS *v.* BRAULT (1903), Q. R. 23 S. C. 190 ; Q. R. 24 S. C. 167.—**CAN.**

1917 ii. —— *Agent jointly liable with principal.*]—When, by the custom of trade, in a sale made through an agent, the latter is held jointly liable with his principal for its performance, an action will lie in his favour to recover from his principal whatever he may have expended for that purpose. Hence a broker in Montreal has an action to recover from a customer, together with his commission & charges, an amount expended to fill an order for the sale of stock in consequence of repudiation by the customer & of his joint liability, as a broker, to the purchaser, by the custom of trade governing stock exchange operations in Montreal. Parol testimony is admissible to prove such custom of trade, as well as the price for which the broker was authorised to sell the stock.—PITBLADO *v.* ROSENTHAL (1910), Q. R. 37 S. C. 433.—**CAN.**

s. Glasgow iron market — Broker acting as principal—Carrying over—Averaging prices.]—Brokers on the Glasgow iron market bought iron for two clients, averaging the prices, & subsequently carried over in the common & cheapest way adopted in that market, at the request of deft., the iron bought for him, & advice notes of all the transactions were sent to deft., who had been for some years engaged in similar transactions. The iron was ultimately sold at a loss, & adverse differences were put to deft.'s debit. In an action by the brokers for balance of account deft. contended with regard to purchase for average prices that the brokers had failed to make contracts on which he could sue the original sellers, & that they had acted as principals in carrying over :—*Held :* the brokers were entitled to recover on the grounds (1) they carried through the transactions honestly as brokers with no personal interest therein ; (2) the averaging of prices was legitimate or had been acquiesced in ; (3) deft. was aware of the method adopted in carrying over, & had acquiesced therein. *Robinson* v. *Mollett* (1874), L. R. 7 H. L. 802, cited.—CLAVERING, SON & Co. *v.* HOPE (1897), 24 R. 944 ; 34 Sc. L. R. 721.—**SCOT.**

t. Winnipeg grain market — Broker acting as principal.]—Deft. wrote to pltfs., grain dealers, authorising them to sell oats for 37 per cent. or better, & pltfs., who, unknown to deft., were also brokers on the Winnipeg Exchange, sold at 38½ per cent. without disclosing deft.'s name. Deft. refused to deliver, & pltfs. had to buy elsewhere at an advance to fulfil their contract, according to Winnipeg Exchange rules. In an action to recover the difference in price :—*Held :* pltfs. were not entitled to bind deft. under the Winnipeg

Sect. 3.—Agent's rights against principal: Subsect. 2, C. (c), (d) & (e) & D. (a).]

1918. —— Voluntary payment insufficient.]—Where a broker contracts on behalf of a principal for sale of stock at a future day, & the principal afterwards refuses to make good the bargain, the broker cannot by a voluntary payment of the difference make himself the principal's creditor & recover the amount so paid on an implied *assumpsit*, but he must show he was under some sort of compulsion, as by the usage of the Stock Exchange, to pay the differences.—CHILD *v.* MORLEY (1800), 8 Term Rep. 610; 101 E. R. 1574.

Annotations:—**Consd. & Distd.** M'Callan *v.* Mortimer (1842), 11 L. J. Ex. 429, Exch.; Bayliffe *v.* Butterworth (1847), 1 Exch. 425. **Refd.** Bayley *v.* Wilkins (1849), 7 C. B. 886. **Mentd.** Young *v.* Cole (1837), 3 Bing. N. C. 724; Sawyer *v.* Langford (1848), 2 Car. & Kir. 697, N. P.

1919. —— Resolution passed after transaction—Not binding on principal.]—A transaction was completed on Mar. 27. Subsequently the Stock Exchange Committee passed a resolution in regard to forged certificates of the particular stock involved in the transaction. In pursuance of this resolution, the seller's brokers paid moneys to the purchasers in excess of the sums for which they had sold the certificates:—*Held:* (1) no difference was produced by the Stock Exchange resolution, it being made subsequently to the transaction & there being no rule of the Stock Exchange at the time of sale which required brokers to be bound in respect of their contracts by any resolutions to be made on the subject; (2) the brokers could not recover the above moneys from the seller.—WESTROPP *v.* SOLOMON, No. 1873, *ante*.

Annotations:—**Distd.** Jeffreys *v.* Fair (1896), 36 L. T. 10. **Refd.** Raphael *v.* Burt (1884), Cab. & El. 325.

1920. —— —— ——.]—A jobber failed to deliver stock to the purchaser's broker within the time-limit imposed by the Stock Exchange Rules, & the purchaser repudiated the contract. The Stock Exchange Committee subsequently passed a resolution calling on the purchaser's broker to pay for the stock. In an action by the broker against his principal for the sum so paid:—*Held:* the broker could not recover, notwithstanding the Stock Exchange resolution, which could not make valid a contract already broken.—BENJAMIN *v.* BARNETT (1903), 19 T. L. R. 564; 8 Com. Cas. 244.

1921. —— Resolution amounting to new contract.]—A resolution of the Stock Exchange Committee that in effect amounts to an entire alteration of a contract by placing upon the buyers the obligation of waiting for their stock, leaving the sellers the right to tender their stock when they please, is not binding.—UNION CORPN., LTD. *v.* CHARRINGTON & BRODRICK (1902), 19 T. L. R. 129; 8 Com. Cas. 99.

Annotations:—**Followed.** Benjamin *v.* Barnett (1903), 19 T. L. R. 564. **Apld.** Bernard *v.* Foster, [1915] 2 K. B. 288.

1922. Corn market—Payment of loss.]—Pltfs., brokers in American wheat carrying on business in London, were instructed by deft. in Aug. to sell on the American market 8,000 bushels of wheat for delivery in the following May. Pltfs. carried out the sale through a broker at New York & sent to deft. a sold note containing a condition that, if at any time the market went against deft., pltfs. should be entitled to require more cover, & in case such cover was not provided to close the bargain. Cover having been several times required & paid, deft. finally failed to comply with a request for further cover, & pltfs. closed the bargain at a loss of £191. The rules of the American wheat market were practically the same as those of the London Stock Exchange:—*Held:* (1) the broker at New York was an agent of pltfs., employed by deft.'s authority; (2) by the rules of the American market the New York broker was entitled to be indemnified by pltfs.; (3) deft. must, in his turn, indemnify pltfs.—HANNAN *v.* BEETON (1889), 5 T. L. R. 703, C. A.

1923. Liverpool market—Shares not delivered—Differences.]—Deft., who resided some distance from Liverpool, authorised pltf., a broker there, to sell certain shares for him. Pltf. sold them to C., another broker of Liverpool. The shares not being delivered on the day, C. bought other shares similar in description & amount at the market price & claimed the difference between the contract & the market price. Pltf. paid him the difference & brought an action for money paid to recover this sum. It was proved to be the usage amongst brokers at Liverpool to be responsible to each other upon these contracts, of which usage deft. was cognisant:—*Held:* deft. was liable.—BAYLIFFE (BAILIFF) *v.* BUTTERWORTH (1847), 1 Exch. 425; 5 Ry. & Can. Cas. 283; 17 L. J. Ex. 78; 10 L. T. O. S. 167; 11 Jur. 1019.

Annotations:—**Apld.** Pollock *v.* Stables (1848), 12 Q. B. 765; Ireland *v.* Livingston (1866), L. R. 2 Q. B. 99. **Refd.** Sweeting *v.* Pearce (1859), 7 C. B. N. S. 449. **Mentd.** Simpson *v.* Rand (1848), 17 L. J. Ex. 146.

1924. *S. P.* POLLOCK *v.* STABLES (1848), 12 Q. B. 765; 5 Ry. & Can. Cas. 352; 17 L. J. Q. B. 352; 12 Jur. 1043; 116 E. R. 1057.

1925. Lloyd's—Usage of.]—By the usage of Lloyd's, premiums of insurance are matters of account between the underwriter & the broker, & between the broker & the assured, without any privity between the assured & the underwriter. The broker has a claim, & is entitled to recover not for money paid but for work & labour done, upon the assured for the amount of the premium as soon as the policy is effected, whether he has paid the underwriter or not, & whether the underwriter has, by the policy, confirmed the premium to be paid, or has taken the covenant of the broker to pay it.

By the course of dealing the broker has an account with the underwriter; in that account the broker gives the underwriter credit for the premium when the policy is effected, & he, as agent of both the assured & the underwriter, is considered as having paid the underwriter, & the underwriter as having lent it to the broker again & thus becoming his creditor. The broker is then considered as having paid the premium for the assured: The fact of giving credit in account by the broker to the underwriter & the underwriter by the terms of the policy having acknowledged receipt of the premium are equivalent to actual payment (PARKE, J.).—POWER *v.* BUTCHER (1829), 10 B. & C. 329; 5 Man. & Ry. K. B. 327; L. & Welsb. 115; 8 L. J. O. S. K. B. 217; 109 E. R. 472.

Annotations:—**Apld.** Xenos *v.* Wickham (1863), 14 C. B. N. S. 435; (1867), L. R. 2 H. L. 296, H. L.; Universo Insce. Co. of Milan *v.* Merchants Marine Insce. Co., [1897] 2 Q. B. 93, C. A.

Exchange rules, which could not be held applicable as against deft., & pltfs.' action must fail. *Robinson* v. *Mollett* (1874), L. R. 7 H. L. 802, cited.—BUTLER *v.* MURPHY (1909), 41 S. C. R. 618.—**CAN.**

u. —— ——.]—Pltfs. were members of the Winnipeg Grain Exchange, carrying on a business of buying & selling grain as brokers, whom deft., a farmer, employed to carry out options. Pltfs. made certain purchases & sales as instructed by deft. These transactions were carried on according to the rules of the Exchange, & deft. knew & intended that they should be done in this manner, & from time to time placed money in pltfs.' hands as margins to protect them against losses:—*Held:* as the evidence failed to show that by the manner in which the transactions were made the amounts claimed had been expended in carrying out the commissions according to the instructions given, they were not entitled to recover the balance so claimed from the deft.—BEAMISH *v.* RICHARDSON (1914), 49 S. C. R. 595 (leave to appeal refused by P. C., Nov. 24, 1914).—**CAN.**

1926. Shipbroker' — Recovery of unusual expenses.]—Where a broker is employed by a shipowner to procure a charterparty, if the negotiation goes off on account of any fault in the broker, he is not entitled to recover anything in the shape of remuneration, nor is he, in such case, entitled to recover for any expenses which he may have been put to, unless such expenses are unusual, & have been incurred in consequence of the shipowner having urged him to extraordinary expedition in the matter. *Semble:* where the negotiation is not carried into effect, but there is no fault in the broker, he is not entitled to anything, unless the charterparty is actually signed.—DALTON *v.* IRVIN (1830), 4 C. & P. 289.

Stock Exchange.]—*See* STOCK EXCHANGE.

1927. Sugar market—Transfer of fire risk.]—On May 14, 1861, pltf., a broker, bought for deft. at a public sale 3 lots of sugar in bags, the lots being respectively numbered 67, 68, & 69, the prompt day being July 20. By the terms of sale payment was to be made either by cash on July 20, by acceptance at 70 days from the day of sale, or on delivery of the warrants, interest at the rate of 5 per cent. per annum being allowed to the expiration of 73 days from the day of sale, if payment were made within 21 days. On May 25 pltf. (according to the usage of the trade), at deft.'s request, paid the price of lot 67, obtained a warrant for it, & cleared it at the Custom House. He at the same time, but without any special instructions from deft., paid the price of lots 68 & 69, & obtained the warrants for them. The effect of this payment was that risk of loss by fire was transferred from the seller to the buyer. It was proved to be the common course for brokers, when so employed to clear before prompt one of several lots of sugar in bags bought under one contract, to pay the price & obtain warrants for all the lots, the broker taking discount under the conditions of sale. Deft. not only knew this was the common course among brokers & had been pursued in former instances in relation to sugars bought for him by pltf., but he was informed by pltf.'s clerk shortly after May 25 that pltf. had so paid the price of lots 67 & 68, & obtained the warrants. On June 22 deft. sent instructions to pltf. to clear lot 68. On the same day, & before those instructions could in the usual course of business be acted upon, a fire broke out at the bonded warehouse where the sugars were deposited, & they were destroyed:—*Held:* pltf. was entitled to recover from deft. the money so paid by him in respect of lot 68 on May 25, as money paid to his use.—SENTANCE *v.* HAWLEY (1863), 13 C. B. N. S. 458; 1 New Rep. 323; 7 L. T. 745; 143 E. R. 182; *sub nom.* HAWLEY *v.* SENTANCE, 11 W. R. 311.

1928. Tallow market—Usage converting agent into principal.]—Although a person who as principal employs a broker to transact business for him in a particular market is bound by the usage of that market, though unknown to him, provided the usage is one that merely regulates the mode of performing the contract & does not change the intrinsic character of the contract, yet where the usage is one which gives the broker an interest at variance with his duty, as by converting him into a principal instead of a mere agent to establish privity of contract between two principals, such a usage is not binding on a principal who, being ignorant of the usage, employs a broker to whom the usage is known to perform the ordinary & accustomed duties belonging to the office or employment of a broker. The principal is not bound to inquire what the usage may be, or whether there be any particular usage affecting the market in which he proposes to deal.

Applt., a Liverpool merchant, employed resps., brokers of London, to buy tallow for him in the London tallow market. They having other orders bought in their own name a quantity sufficient to cover all their orders, & by letter informed applt. that they had bought on his account so many tons, but did not mention the name of the seller. A few days after they sent him notice that they were ready to deliver to him so many casks of tallow in fulfilment or part fulfilment of his order, but did not allude to any third party as the seller. Applt. acknowledged the receipt of these notices without observation. There was a usage on the London tallow market for brokers when they received orders to contract in their own names, & if their principals refused to accept or deliver, to buy or sell against them, & charge them with the loss. Applt. was ignorant of this usage. On becoming aware of it, & of the mode in which his order had been executed, tallow having in the meantime fallen, he refused to take the tallow:—*Held:* (1) as resps. were employed to act as brokers only, the usage which converted them into principals was inconsistent with the employment, & as applt. was ignorant of it when he gave his orders, he was not bound by the usage; (2) as the first notice sent by the brokers was that they had bought on applt.'s account, he was not thereby put on inquiry as to the usage or as to the name of the seller; (3) he was not bound to accept when it turned out that his own brokers might in fact be the vendors, or to pay them the difference between the price at which they bought & that at which they sold in consequence of his having refused the contract. —ROBINSON *v.* MOLLETT, No. 1527, *ante*.

Annotations:—**Expld.** *Re* Simpson, *Ex p.* Morgan (1876), 34 L. T. 329, C. A. **Expld. & Distd.** *Re* Rogers, *Ex p.* Rogers (1880), 15 Ch. D. 207, C. A. **Apld.** Perry *v.* Barnett (1885), 14 Q. B. D. 467. **Distd.** Sachs *v.* Spielmann (1889), 5 T. L. R. 487. **Consd. & Expld.** May & Hart *v.* Angeli (1898), 14 T. L. R. 551, H. L.; Lovitt *v.* Hamblett, [1901] 2 K. B. 53, C. A. **Distd.** Scott & Horton *v.* Godfrey, [1901] 2 K. B. 726. **Consd.** Matvieff *v.* Crossfield (1903), 51 W. R. 365; The Kronprinzessin Cecilie (1917), 33 T. L. R. 292, P. C. **Refd.** Anderson & Co. *v.* Beard (1900), 5 Com. Cas. 261; Johnson *v.* Kearley, [1908] 2 K. B. 514, C. A.

(d) Gambling Transactions.

See GAMING & WAGERING.

(e) Illegal Transactions.

1929. Money not recoverable—Notwithstanding express promise to repay.]—If an agent effect an illegal contract, he cannot recover from his principal the sum he has paid in effecting it, although he proves an express promise by the principal to pay him.—BAILEY *v.* RAWLINS (1829), 7 L. J. O. S. K. B. 208.

1930. —— Dealings in stock of illegal corporation.]—Where an assocn. calling itself the Equitable Loan Bank Co. issued shares, transferable without restriction, & assumed to act as a corporate body without an Act of Parliament or a royal charter:—*Held:* (1) the assocn. violated 6 Geo. 1, c. 18, ss. 18 & 19; (2) a broker could not maintain an action against his principal for the price of certain of such shares purchased at request of the latter.—JOSEPHS *v.* PEBRER (1825), 3 B. & C. 639; 1 C. & P. 507; 5 Dow. & Ry. K. B. 542; 3 L. J. O. S. K. B. 102; 107 E. R. 870.

Annotations:—**Consd.** London Grand Junc. Ry. Co. *v.* Freeman (1841), 2 Man. & G. 606. **Refd.** Jackson *v.* Cocker (1841), 4 Beav. 59. **Mentd.** Tomkins *v.* Savory (1829), 9 B. & C. 704.

D. When no Right to Indemnity.

(a) In General.

1931. Lack of qualification—Unlicensed broker.]—To a declaration on two bills of exchange by drawer

Sect. 3.—Agent's rights against principal: Sub-sect. 2, D. (a), (b) & (c).]

against acceptor, & on account stated, deft. pleaded generally to the whole declaration that he retained pltf. to act as his broker in London, &, as such broker, to enter into contracts in London for deft., in purchase of stock & shares, & to pay in & about completing such contracts & purchases certain moneys; that, in pursuance of such retainer, pltf. did, as such broker in London, enter into certain contracts for purchase of shares, & did, by virtue of such retainer as such broker, & as incidental thereto, pay for deft.; in & about completing such contracts & purchases, certain moneys; that pltf. was not at the time of the retainer & employment, & making such contracts & purchasing such shares, or paying such moneys, a broker duly licensed in London, & the bills were accepted by deft. & received by pltf. on account of money due from deft. to pltf., for his having as such broker entered into the contracts & paid such moneys, etc., on general demurrer:—*Held:* bad on the ground that the words "incidental thereto" were ambiguous, & it did not appear by the plea that the payment of the moneys therein mentioned was a necessary part of pltf.'s duty as broker; &, as the contract in such case was not void, & although pltf. could not recover any recompense for his services, yet he was entitled to recover back the money he had paid at deft.'s request.—PIDGEON *v.* BURSLEM (1849), 3 Exch. 465; 18 L. J. Ex. 193.

Annotations:—**Consd. & Folld.** Jessopp *v.* Lutwyche (1 54), 10 Exch. 614. **Expld.** Lindo *v.* Smith (1858), 32 L. T. O. S. 62, Ex. Ch. **Consd. & Folld.** Smith *v.* Lindo (1858), 4 C. B. N. S. 395.

1932. —— ——.]—A plea that causes of action accrued to pltf. as a broker in London, about the purchasing & selling for deft., in London, of divers shares, & that pltf. was not duly licensed, is bad, because 6 Anne, c. 16, does not prevent an unlicensed broker recovering for money paid at request of his employer, or money due on accounts stated with his employer.—JESSOPP *v.* LUTWYCHE (1854), 10 Exch. 614; 24 L. J. Ex. 65; 3 C. L. R. 359; 156 E. R. 584.

Annotations:—**Consd. & Folld.** Smith *v.* Lindo (1858), 4 C. B. N. S. 395; Rosewarne *v.* Billing (1863), 15 C. B. N. S. 316. **Expld.** Thacker *v.* Hardy (1878), 4 Q. B. D. 685, C. A.

1933. —— ——.]—Pltf. acted in London as a broker, but was not licensed, nor was he a member of the Stock Exchange. Deft. employed him to purchase scrip shares in a foreign land co. Pltf. did so, but deft. refused to pay for them. Pltf. was sued for & paid the price & then brought an action against deft. for the amount thus paid, & also for his commission as a broker:—*Held:* (1) pltf. was a broker within 6 Anne, c. 16; (2) not being duly licensed, he was not entitled to recover any commission; (3) he might maintain his action for money which by the usage of the market he had been obliged to pay to the seller, there being nothing to show that payment was made in pursuance of any illegal contract, or that it was a necessary part of the duty of a broker as such to pay the money.—SMITH *v.* LINDO (1858), 5 C. B. N. S. 587; 27 L. J. C. P. 335; 141 E. R. 237; *sub nom.* LINDO *v.* SMITH, 32 L. T. O. S. 62; 4 Jur. N. S. 974; 6 W. R. 748, Ex. Ch.

Annotation:—**Apld.** Scott *v.* Jackson (1865), 19 C. B. N. S. 134.

See London Brokers Relief Acts, 1870 (c. 60) & 1884 (c. 3) (now repealed).

1934. Broker buying in his own name.]—A broker of London may recover the price of goods which he, being employed to purchase, has bought in his own name; & it is not a breach of his bond given for duly performing his office as broker.—KEMBLE *v.* ATKINS (1817), 1 Moore, C. P. 6; 7 Taunt. 260; 129 E. R. 104.

Annotations:—**Folld.** Wilson *v.* Hart (1817), 7 Taunt. 295. **Expld.** Armstrong *v.* Stokes (1872), L. R. 7 Q. B. 598.

(b) Breach of Duty.

1935. Auctioneer—Ignorance of legal requirements.]—An auctioneer was employed to sell an estate, the lowest price of which was fixed by the owner & written down by him on a piece of paper which was put under a candlestick at the time of sale, with the privity of the auctioneer, but not signed by the owner, nor any notice in writing given to the auctioneer of the price so set down, nor had the auctioneer given the previous notice of the sale to the collector of the duty, as required by 19 Geo. 3, c. 56 (repealed by S. L. R. 1861), & 28 Geo. 3, c. 37 (repealed by Revenue Act, 1889 (c. 42), s. 36; but being asked at the sale whether he had taken the proper precautions to avoid the duty in case there were no sale, he said that it was his mode to fix a price under the candlestick, & if the bidding did not come up to that price, there was no sale or duty:—*Held:* the duty having attached though there were no sale, for want of taking the precautions required of the owner by the Acts under such circumstances, & the auctioneer having been sued for the duty on his bond to the Crown & compelled to pay it, he could not recover it over against the owner, he having warranted that proper precautions had been taken to prevent the duty attaching in the event, though both parties were mistaken in the law.—CAPP *v.* TOPHAM (1805), 6 East, 392; 2 Smith, K. B. 443; 102 E. R. 1337.

1936. Broker—Collusion with vendor to delay delivery to principal.]—A broker purchased goods on commission at a month's credit, & paid duties on them, & sent them to the place of the purchaser's abode, consigned to his own order. The seller being fearful of purchaser's credit, procured the broker to delay the arrival of the goods till the month's credit had expired & to tender them to the buyer on payment of the price, whereupon they were refused. In an action for money paid:—*Held:* the broker could neither recover the price, duties, nor commission.—HURST *v.* HOLDING (1810), 3 Taunt. 32; 128 E. R. 13.

PART VIII. SECT. 3, SUB-SECT. 2.—D. (b).

v. *Agent—Failure to defend action against principal—Payment of default judgment.*]—An insurance co., having ceased to carry on business in Canada, paid off a clerk, who was immediately employed by a firm of which the agent of the co. was a member; the clerk sued the co. for salary, & the agent allowed judgment to go by default, & paid the amount of the judgment:—*Held:* the agent not entitled to credit for amount so paid on an account; he was entitled to credit only for the excess of the salary of the clerk above what he received in his new employment.

An agent to receive from other agents moneys due to the principal is bound to take steps for the recovery thereof, unless he show there was good reason to believe they would have been ineffectual.—JAY *v.* MACDONELL (1870), 17 Gr. 436.—**CAN.**

1936 i. *Broker—Not fulfilling instructions.*]—A. employed the firm of B. as brokers to purchase twenty tons of oil, & they advised him they had secured that quantity. They had in fact delivered about half of that quantity to H., relying on a custom of the port of Liverpool of giving orders for immediate use preference over orders for speculation:—*Held:* (1) A. was not obliged to take delivery of the balance; (2) the custom was not proved, nor was it reasonable; (3) B. & Co. were not entitled to reimbursement in respect of their sale at a loss of the oil left on their hands.—ROSCOE & RIGG *v.* RICHARDSON (1837), 12 Fac. 883.—**SCOT.**

1936 ii. —— ——.]—A. instructed his broker to buy iron at the price of the day; on settlement day the broker, at A.'s request, carried over. Other transactions followed, & all were carried over for a year & a half on payment of differences, when A. refused to pay further differences, whereupon the broker in terms of the regulations of the Iron Brokers' Association of Scotland

1937. Factor—Taking bill from purchaser.]—Where a factor upon selling goods takes a security payable to himself from the buyer, & gives his own security to the principal for net proceeds, without disclosing the name of the buyer, if the buyer becomes insolvent before paying his security, the factor cannot compel the principal to refund the money received by him as price of the goods.—SIMPSON *v.* SWAN (1812), 3 Camp. 291.

1938. Insurance—Policy taken in wrong names.]—Deft. authorised his agents, B. & S., to whom he was indebted, to effect in their own names an insurance upon his life. B. & S. having, subsequently to the date of the authority, taken a third person into their firm, caused the policy to be made out in the names of the three:—*Held:* (1) not a proper execution of the authority; (2) B., survivor of the firm of B. & S., could not (in the absence of any ratification by him) recover from deft. premiums paid on this policy, as money paid to his use.—BARRON *v.* FITZGERALD (1840), 6 Bing. N. C. 201; 8 Scott, 460; 9 L. J. C. P. 153; 4 Jur. 88; 133 E. R. 79.

Annotation:—**Distd.** Maclae *v.* Sutherland (1854), 3 E. & B. 1.

1939. Merchant disobeying instructions.]—Deft., a Liverpool cotton merchant, on Apr. 2, 1872, authorised pltfs., merchants at Liverpool & Bombay, to purchase 100 bales S. cotton at 8*d.* per lb., to be shipped by sailing vessel, & to draw for invoice amount at 6 months' sight, which drafts deft. engaged to accept, with shipping documents attached, & to pay same. On Apr. 22 pltfs. wrote from Bombay that the S. cotton would be shipped as soon as it arrived there. On June 14 pltfs. wrote again from Bombay, inclosing invoice of 100 bales S. cotton at 8½*d.* per lb., & informing deft. that they had drawn upon him at 6 months' sight for the amount. On July 2, before receiving pltfs.' letter & invoice of June 14, deft. wrote to pltfs.' Liverpool house that he had waited more than a reasonable time, & that he declined to have anything more to do with the cotton. On July 10 deft. received pltfs.' letter & invoice of June 14, & wrote again to pltfs.' Liverpool house, calling attention to the price charged in the invoice, & refusing acceptance of their draft. The following day pltfs. apologised for what they called the clerical error in the price, said they were prepared to rectify the mistake, & also tendered other cotton shipped at the time deft. wished. Deft. refused to have anything more to do with the matter. In an action for payment for this cotton:—*Held:* in the circumstances pltfs. could not recover.—JEFFERSON *v.* QUERNER (1874), 30 L. T. 867.

1940. Stockbroker — Negligence.]—A holder of stock desiring to sell, inquired from a broker the price *ex* dividend. The broker quoted the official price, which was *cum* dividend, but did not mention this fact through negligence. The holder believing that this was the price *ex* dividend, authorised the broker to sell. The broker having in due course to pay to purchaser the amount of the dividend, sought to recover this sum from the seller:—*Held:* not entitled to do so.—DAVISON *v.* FERNANDES (1889), 6 T. L. R. 73.

See, further, STOCK EXCHANGE.

(c) *Insolvency of Agent.*

1941. Losses occasioned by agent's insolvency—Not arising out of agency.]—Pltfs., brokers on the London Stock Exchange, bought for deft. (who was not a member of the Stock Exchange) certain shares for the account of July 15, 1870, & on that day, by his instructions, carried them over to the account of July 29, & paid differences amounting to £1,688. Deft. & various others, principals of pltfs., not having paid the amount due from them in respect of contracts for July 15, pltfs. became defaulters, & on the 18th, in conformity with the rules of the Stock Exchange, they were declared defaulters, & their transactions were closed, & accounts were made up at the prices current on that day. On the closing of the accounts a further sum became due from them in respect of differences upon the contracts carried over by them for deft. In an action to recover this sum & the £1,688:—*Held:* deft. was not liable for anything beyond the £1,688, there being no implied promise by a principal to his agent to indemnify him for loss caused, not by reason of his having entered into the contracts which he was authorised to enter into by the principal, but by reason of his own insolvency brought on by want of means to meet his other primary obligations.—DUNCAN *v.* HILL, DUNCAN *v.* BEESON (1873), L. R. 8 Exch. 242; 42 L. J. Ex. 179; 29 L. T. 268; 21 W. R. 797, Ex. Ch.

Annotations:—**Distd.** Hartas *v.* Ribbons (1889), 22 Q. B. D. 254, C. A. **Consd. & Apld.** Ellis *v.* Pond & Bloomsbury Syndicate, [1898] 1 Q. B. 426, C. A. **Refd.** Lacey *v.* Hill (1873), 8 Ch. App. 921; Beckhusen & Gibbs *v.* Hamblett, [1900] 2 Q. B. 18. **Mentd.** Levitt & Thornton *v.* Hamblet (1901), 6 Com. Cas. 79, C. A.

1942. —— When direct result of principal's failure.]—Messrs. C., brokers on the London Stock Exchange, on behalf of H., entered into contracts for the purchase of stocks to be completed on July 15, 1870. On July 12 they wrote to H., to the effect that unless he paid them on the 15th a balance (which consisted of the difference between the contract price of the stock, & the value thereof at the market price of the day) owing to them from him, they would be defaulters; but that if such payment were made, they would sell or continue the stocks as he thought fit. H. promised to pay, & directed them to deal with the stocks as they thought best, & they sold part & continued part. H. did not pay on the 15th, but shot himself; on the next day a bank of which he was a partner stopped payment, & on the 19th he died. On the 16th Messrs. C. were (solely by means of H.'s failure to pay them) declared defaulters on the Stock Exchange, & ceased to be members of that body, &, in accordance with the rules, all their transactions for H. were closed, & all the stocks they had continued for H. were sold at the price of the day. In consequence of the value of the stocks having

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sold out through the association secretary & sued for differences:—*Held:* the broker had not proved he ever entered into real transactions of purchase & sale, & therefore he had not in fact fulfilled his instructions, & the action must be dismissed.—GILLIES *v.* M'LEAN (1885), 13 R. 12; 23 Sc. L. R. 6.—**SCOT.**

1936 iii. ——*Mixing client's shares with own shares & selling some.*]—A broker having purchased shares for a client, mixed them with other shares held by him & sold some of them:—*Held:* he was not disentitled to indemnity, as his client's remedy was by way of counterclaim.—USSHER *v.* SIMPSON (1909), 13 O. W. R. 285; 12 O. W. R. 396.—**CAN.**

1936 iv. ——*Lumping orders.*]—Where brokers enter into contracts in their own names & upon conditions different from those under which they had authority to purchase, *e.g.*, by lumping orders from several principals, they can claim no indemnity in respect of such contracts.—KEESING & WRIGHT *v.* ECCLES (1906), 25 N. Z. L. R. 914.—**N.Z.**

w. *Master of ship — Negligence.*]—Deft., owner of a steamboat, of which pltf. was master, sent him to the Bend to tow a ship to St. John; the ship in launching lost her rudder, & was towed in that state to St. John, & while going into harbour in the night came in collision with & sank a schooner, the owner of which recovered damages against pltf. for negligence. In an action by pltf. against deft. for indemnity, the declaration alleged, & it was proved, that towing vessels was a dangerous business, & that the danger was much increased by the loss of the rudder. It was also proved that pltf. might have replaced the rudder, & need not have entered the harbour in the night:—*Held:* pltf. must be presumed to have known that he was doing an unlawful act, & there was no implied contract by deft. to indemnify him against loss.—LEAVITT *v.* PARKS (1851), 2 All. 282.—**CAN.**

Sect. 3.—*Agent's rights against principal: Sub-sect.* 2, *D.* (*c*); *sub-sect.* 3, *A.* (*a*), (*b*) & (*c*).]

fallen, the balance appearing to be due to them from H. was thus largely increased. The stocks afterwards continued to fall in value. Messrs. C. afterwards paid 6*s.* 8*d.* in the pound on their Stock Exchange debts, & were re-admitted as members of the Stock Exchange:—*Held:* although Messrs. C. had not paid their debts in full, they were entitled to prove against H.'s estate for the increased balance appearing due to them after the sales were effected.—LACEY (LACY) *v.* HILL, CROWLEY'S CLAIM (1874), L. R. 18 Eq. 182; 43 L. J. Ch. 551; 30 L. T. 484; 22 W. R. 586.

Annotations:—**Consd.** *Re* Richardson, *Ex p.* St. Thomas's Hospital Governors, [1911] 2 K. B. 705, C. A. **Refd.** Thacker *v.* Hardy (1878), 39 L. T. 595, C. A.; *Re* Blundell, Blundell *v.* Blundell (1888), 40 Ch. D. 370; Wolmershausen *v.* Gullick, [1893] 2 Ch. 514; Williams Torrey *v.* Knight, The Lord of the Isles, [1894] P. 342; Ellis *v.* Pond, [1898] 1 Q. B. 426, C. A.; St. Thomas's Hospital Governors *v.* Richardson, [1910] 1 K. B. 271, C. A. **Mentd.** *Re* Paine, *Ex p.* Read (1896), 66 L. J. Q. B. 71; *Re* Law Guarantee Trusts Accident Soc., Liverpool Mortgage Insce. Co.'s Case, [1914] 2 Ch. 617, C. A.; British Union & National Insce. Co. *v.* Rawson, [1916] 2 Ch. 476, C. A.

1943. ——Transactions ratified after insolvency.]—Deft. employed pltf., a broker on the Stock Exchange, to purchase shares, which he did. Before the settling day pltf. became a defaulter on the Stock Exchange through inability to meet his engagements, &, in accordance with the rules, the accounts which he had open were closed as between himself & the jobbers at the then current prices as fixed by the official assignees of the Stock Exchange. The account in respect of the shares bought for deft. when closed, as above mentioned, showed a balance in favour of the jobbers against pltf. According to the practice of the Stock Exchange, such closing of the account did not affect the client, if he desired to have the contract completed & was not in default to the defaulting broker; & the jobber in that case was bound to complete on the settling day. Pltf., on the same day when he was declared a defaulter & his accounts closed, subsequently informed deft. that he could either have the contract completed as above mentioned, or he might accept the official prices. Deft. said he would do the latter:—*Held:* deft. having ratified the closing of the account before the settling-day, was liable to indemnify pltf. against the amount for which pltf. was liable to the jobbers on such closing.

In these circumstances, the case seems to me to fall within the ordinary rule by which a principal is bound to indemnify his agent (LORD ESHER, M.R.).—HARTAS *v.* RIBBONS (1889), 22 Q. B. D. 254; 58 L. J. Q. B. 187; 37 W. R. 278; 5 T. L. R. 200, C. A.

Annotations:—**Refd.** Ellis *v.* Pond, [1898] 1 Q. B. 426, C. A.; Beckhuson & Gibbs *v.* Hamblet, [1900] 2 Q. B. 18.

SUB-SECT. 3.—AGENT'S RIGHTS UPON THE AGENCY BEING TERMINATED.

A. How far Principal bound to continue in Business for the Period of his Contract with Agent.

See, also, Sub-sect. 1, L., *ante.*

(a) In General.

1944. Principal not bound where no express stipulation.]—Where two parties mutually agree, for a fixed period, the one to employ the other as his sole agent in a certain business at a certain place, the other that he will act in that business for no other principal at that place, there is no implied condition that the business itself shall be continued to be carried on during the period named.

A. & B. agreed "in consideration of the services & payments to be mutually rendered" that for 7 years, or as long as A. should continue to carry on business at the town of L., A. should be sole agent at L. for sale of B.'s coals & B. would not employ any other agent at L. for that purpose. There were stipulations in the agreement that B. should have entire control over the prices for which, & credits at which, the coals were to be sold; & if A. could not sell a certain amount per year, or B. could not supply a certain amount per year, either party might, on notice, put an end to the agreement. At the end of 4 years B. sold the colliery itself. In an action by A. for damages for breach of the agreement thereby occasioned:—*Held:* the action was not maintainable; for the agreement did not bind the colliery owner to keep his colliery, or to do more than employ the agent in the sale of such coals as he sent to L.—RHODES *v.* FORWOOD (1876), 1 App. Cas. 256; 47 L. J. Q. B. 396; 34 L. T. 890; 24 W. R. 1078, H. L.

Annotations:—**Distd.** Turner *v.* Goldsmith, [1891] 1 Q. B. 544, C. A.; Turner *v.* Sawdon (1901), 70 L. J. K. B. 897. **Folld.** Northey *v.* Trevillion (1902), 18 T. L. R. 648. **Distd.** Ogdens *v.* Nelson, Ogdens *v.* Telford, [1903] 2 K. B. 287; Devonald *v.* Rosser, [1906] 2 K. B. 728, C. A. **Consd.** Measures *v.* Measures, [1910] 2 Ch. 248. **Folld.** Lazarus *v.* Cairn Line of Steamships (1912), 106 L. T. 378. **Refd.** *Re* South African Trust & Finance Co., *Ex p.* Hirsch (1896), 74 L. T. 769, C. A.; White *v.* Turnbull Martin (1898), 78 L. T. 727, C. A.; *Re* Royal Aquarium & Summer & Winter Garden Soc. (1903), 20 T. L. R. 35; Joynson *v.* Hunt (1905), 21 T. L. R. 692, C. A.; *Re* Newman, Raphael's Claim (1916), 85 L. J. Ch. 625, C. A.

1945. ——.]—In determining whether under a contract by which a person is appointed to act as agent for a principal for a fixed period a term is to be implied that the principal will do nothing voluntarily to put an end to his business during that period, the first thing to be considered is the language used by the parties. A term which has not been expressed by the parties will not be implied because the ct. thinks it is a reasonable term, but only if the ct. thinks it is necessarily implied in the nature of the contract the parties have made. Where there is a principal subject-matter in the power of one of the parties, & an

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PART VIII. SECT. 3, SUB-SECT. 3.—A. (a).

1944 i. *Principal not bound where no express stipulation.*]—Defts. agreed to pay pltf. a commission of 8 per cent. on all sales of their manufactured goods, whether made by him personally or by defts. or persons on their behalf, with a proviso as to termination in these terms: "In one year from this date, it shall be at the option either of yourself or ourselves to determine this agreement on giving one month's notice in writing":—*Held:* defts. did not undertake to manufacture goods or to continue the concern, & were not liable to pltf. by reason of selling their plant & discontinuing business during the currency of the year. *Rhodes* v. *Forwood* (1876), 1 App. Cas. 256; *Turner* v. *Goldsmith*, [1891] 1 Q. B. 544, C. A.; *Hamlyn* v. *Wood*, [1891] 2 Q. B. 488; *Re English & Scottish Marine Insce. Co., Ex p. Maclure* (1870), 5 Ch. App. 737, cited.—MORRIS *v.* DINNICK (1894), 25 O. R. 291.—**CAN.**

1944 ii. ——.]—A party was engaged as agent for a shipping co., & paid by a commission on the profits of the co.:—*Held:* the agent was not engaged from year to year like a servant, but the co. was entitled to discontinue its trade whenever it saw fit, & without any previous notice to him, or any compensation for the loss of his situation.—LONDON, LEITH, EDINBURGH, & GLASGOW SHIPPING CO. *v.* FERGUSON (1850), 13 D. 51.—**SCOT.**

1944 iii. ——.]—Defts. employed pltf. as manager of the sales department of their business for three years on a salary of $20 a week & 5 per cent. commission on net cash receipts. Somewhat less than two years after the agreement was made, defts. dismissed pltf., as they had sold their business:—*Held:* pltf. was entitled to recover as damages salary at $20 a week for the unexpired term & 5 per cent. commission on such sales as he might have reasonably been expected to make during that period. *Rhodes* v. *Forwood* (1876), 1 App. Cas. 256; *Turner* v. *Goldsmith*, [1891] 1 Q. B. 544; *Ogdens* v. *Nelson*, [1903] 2 K. B. 287, cited.—LAISHLEY *v.* GOOLD BICYCLE CO. (1903), 6 O. L. R. 319; 23 C. L. T. 304; 2 O. W. R. 780 (leave to appeal refused, 35 S. C. R. 184).—**CAN.**

accessory or subordinate benefit arising by contract out of its existence to the other party, the ct. will not, in absence of express words, imply a term that the subject-matter shall be kept in existence merely in order to provide the subordinate or accessory benefit to the other party; but where there is an express term requiring the continuance of the principal subject-matter or giving the agent a right to a continuing benefit, the ct. will not imply a condition that the agent's right in this respect shall cease on certain events not expressly provided for.—LAZARUS *v.* CAIRN LINE OF STEAMSHIPS, LTD. (1912), 106 L. T. 378; 28 T. L. R. 244; 17 Com. Cas. 107; 56 Sol. Jo. 345.

1946. Principal bound to enable agent to earn commission.]—Deft., a shirt manufacturer, by contract in writing, agreed to employ pltf., & pltf. agreed to serve deft., as agent, canvasser, & traveller on the terms—(1) that the agency should be determinable by either party at the end of 5 years by notice; (2) that pltf. should do his utmost to obtain orders for & sell the various goods "manufactured or sold by deft. as should from time to time be forwarded or submitted by sample or pattern to" pltf. And it was further provided that pltf. should be remunerated by such commission as was specified in the contract. After about 2 years deft.'s factory was burnt down, & he did not resume business, & thenceforth did not employ pltf., who brought an action for damages for breach of contract:—*Held:* (1) the action was maintainable; (2) pltf. was entitled to substantial damages, for deft., having agreed to employ him for 5 years, did not fulfil that agreement unless he sent him a reasonable amount of samples to enable him to earn his commission; (3) deft. was not excused from fulfilling his agreement by the destruction of his factory by fire.—TURNER *v.* GOLDSMITH, [1891] 1 Q. B. 544; 60 L. J. Q. B. 247; 64 L. T. 301; 39 W. R. 547; 7 T. L. R. 233, C. A.

Annotations:—**Distd.** Turner *v.* Sawdon & Co., [1901] 2 K. B. 653, C. A.; Northey *v.* Trevillion (1902), 7 Com. Cas. 201 **Apld.** Devonald *v.* Rosser, [1906] 2 K. B. 728, C. A. **Distd.** Measures *v.* Measures, [1910] 2 Ch. 248; Lazarus *v.* Cairn Line of Steamships (1912), 106 L. T. 378. **Refd.** *Re* Newman, Raphael's Claim, [1916] 2 Ch. 309, C. A. **Mentd.** Ogdens *v.* Nelson, Ogdens *v.* Telford, [1903] 2 K. B. 287; Frith *v.* Frith, [1906] A. C. 254, P. C.

1947. ——.]—Where there is a contract to employ another as an agent merely, but with no service or subordination, there is no implied undertaking that the agent is to be supplied with the means of earning his commission. But if the contract is one of service, then the commission is merely intended to be in the place of salary, & the contract cannot be determined without compensation to the servant.—NORTHEY *v.* TREVILLION (1902), 18 T. L. R. 648; 7 Com. Cas. 201.

For full anns., *see* CONTRACT.

(b) Where Principal Partnership is dissolved.

1948. By death of partner.]—A. & B., who carried on business in partnership, appointed pltf. their sole agent in London for a specified period, pltf. to be remunerated by commission on all goods sold by pltf. or supplied by A. & B. to persons originally introduced by pltf. Before the expiration of the specified period A. died, & B. refused to execute orders procured by pltf.:—*Held:* (1) the parties contracted with reference to the existing partnership business; (2) the contract was to employ pltf. for a specified period, subject to the condition that all the parties lived so long. *Qu.:* whether the case fell within the principle of those cases in which, the personal skill of the party being involved, the contract was put an end to by death.—TASKER *v.* SHEPHERD (1861), 6 H. & N. 575; 30 L. J. Ex. 207; 4 L. T. 19; 9 W. R. 476; 158 E. R. 237.

Annotations:—**Distd.** Phillips *v.* Alhambra Palace Co., [1901] 1 K. B. 59. **Refd.** Brace *v.* Calder, [1895] 2 Q. B. 253, C. A.; Friend *v.* Young, [1897] 2 Ch. 421.

1949. By petition for dissolution.]—By an agreement dated June 10, 1857, applt. & others entered into partnership for establishing a factory for the manufacture of cotton twist, & thereby entrusted the whole management of the factory to applt. during his life. The fourth clause thereof ran as follows: "All we shareholders having agreed to make this settlement, that in return for the trouble you have been at in getting up this factory we have appointed you for life the agent or broker of this factory, as to that it is to be understood as follows: Whatever cotton may have to be purchased for this factory do you purchase; & whatever yarn may be made in this factory, all that do you sell; & for whatever you may sell on account of the factory do you duly receive from this co. the commission at the rate of 5 per cent. during your lifetime." A decree for dissolution & winding up of the co-partnership having been obtained by some of the co-partners on the ground that it could not be carried on profitably, applt. contended that he was entitled to compensation in respect of his engagement:—*Held:* there being no agreement by the co-partners to renounce their right of dissolution, or to pay compensation if they exercised such right, even if the partnership were originally intended to exist during applt.'s life, applt. was not entitled to compensation.—COWASJEE NANABHOY *v.* LALLBHOY VULLUBHOY (1876), L. R. 3 Ind. App. 200, P. C.

Annotations:—**Consd.** Turner *v.* Goldsmith, [1891] 1 Q. B. 544, C. A.; *Re* Newman, Raphael's Claim, [1916] 2 Ch. 309, C. A. **Refd.** Measures *v.* Measures, [1910] 2 Ch. 248, C. A.

1950. By retirement of partner.]—Defts., a partnership consisting of four members, agreed to employ pltf. as manager of a branch of their business for a term of years. Before the expiration of the period two of the partners retired, the business being transferred to & carried on by the others. The continuing partners were willing to employ pltf. on the same terms as before for the remainder of the term, but pltf. refused to serve them. In an action for wrongful dismissal:—*Held:* (1) the dissolution of the partnership operated as a wrongful dismissal of pltf.; (2) he was only entitled to nominal damages.—BRACE *v.* CALDER, [1895] 2 Q. B. 253; 64 L. J. Q. B. 582; 72 L. T. 829; 59 J. P. 693; 11 T. L. R. 450; 14 R. 473.

Annotations:—**Apld.** Ogdens *v.* Nelson, Ogdens *v.* Telford, [1903] 2 K. B. 287. **Distd.** Midland Counties District Bank *v.* Attwood, [1905] 1 Ch. 357. **Refd.** Jaeger's Sanitary Woollen System Co. *v.* Walker (1897), 77 L. T. 180, C. A.

(c) Where principal Company is wound up.

1951. By voluntary winding up.]—If a party enters into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own

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PART VIII. SECT. 3, SUB-SECT. 3.—A. (b).

x. *Changes in constitution of firm.*]—By written contract pltf., in Jan., 1868, contracted with defts. to sell their goods in the Maritime Provinces, the engagement to continue for a period of five years, subject to co-partnership or business changes. By the contract he was to have a certain commission. In Dec., 1870, defts. terminated the engagement, alleging that they did so in consequence of the interruption to their business by a recent fire & some changes they expected to make in their firm the ensuing year:—*Held:* as co-partnership & business changes took place in Dec., 1870, in deft.'s firm, this by the terms of the contract entitled them to terminate it as they did.—FULLER *v.* AMES (1880), Cass. Dig. (2nd ed.) 140; Cout. Dig. 308.—**CAN.**

Sect. 3.—Agent's rights against principal: Subsect. 3, A. (c) & B.]

motion to put an end to that state of circumstances under which alone the arrangement can be operative.

An insurance co. covenanted with C. D. for valuable consideration to appoint him their agent in S., together with A. B., & that if A. B. should be displaced from the agency they would pay C. D. a certain sum; the co. having transferred their business to another co., & wound up their affairs, & dissolved themselves:—*Held:* this was a displacement of A. B. within the covenant.—STIRLING *v.* MAITLAND (1864), 5 B. & S. 840; 5 New Rep. 46; 34 L. J. Q. B. 1; 11 L. T. 337; 29 J. P. 115; 11 Jur. N. S. 218; 13 W. R. 76; 122 E. R. 1043.

Annotations:—**Consd.** *Re* Railway & Electric Appliances Co. (1888), 38 Ch. D. 597; Hamlyn *v.* Wood, [1891] 2 Q. B. 488, C. A.; Ogdens *v.* Nelson, Ogdens *v.* Telford, [1903] 2 K. B. 287; City of Dublin Steam Packet Co. *v.* R. (1908), 24 T. L. R. 657. **Refd.** Rhodes *v.* Forwood (1876), 1 App. Cas. 256. **Mentd.** Brace *v.* Calder (1895), 64 L. J. Q. B. 582, C. A.

See, further, MASTER & SERVANT.

1952. —— Measure of damages.]—Directors of a co. contracted with B. for the purchase of his estate, & they published a prospectus stating the purpose for which the co. was formed. They engaged pltf. as stockbroker, on the terms of £100 down & £400 on the allotment of all the shares. Before the whole of the shares were allotted B. refused to complete his contract for the sale of the lands, & defts., the directors, deemed it prudent not to enforce their claim by litigation. They wound up the co., & pltf., who stated that he first heard of the repudiation by B. when notice of the intention to wind up was issued, claimed to be paid the £400:—*Held:* pltf. was entitled to recover the £400, less a sum which represented the risk of the remaining shares never being allotted, supposing the co. had not been dissolved.—INCHBALD *v.* WESTERN NEILGHERRY COFFEE, TEA, & CINCHONA PLANTATION CO., LTD. (1864), 17 C. B. N. S. 733; 5 New Rep. 52; 34 L. J. C. P. 15; 11 L. T. 345; 10 Jur. N. S. 1129; 13 W. R. 95; 144 E. R. 293.

Annotations:—**Refd.** Ogdens *v.* Nelson, Ogdens *v.* Telford, [1903] 2 K. B. 287; Burchell *v.* Gowrie & Blockhouse Collieries, [1910] A. C. 614, P. C.; Dare *v.* Bognor U.D.C. (1912), 76 J. P. 425, C. A.

1953. —— —— Agent paid by salary & commission.]—An insurance co. entered into an agreement with M. that he should act as their agent for 5 years at a salary of £500 a year, & also a commission of 10 per cent. per annum on the net profits of each year to be made from the business. Less than 2 years after the agreement was entered into the co. resolved to wind up voluntarily:—*Held:* M. was entitled to the estimated value of his salary for the 3 years but not to any damages for loss of commission by reason of the co. having put it out of their power to make any profits.—*Re* ENGLISH & SCOTTISH MARINE INURANCE CO., *Ex p.* MACLURE (1870), 5 Ch. App. 737; 39 L. J. Ch. 685; 23 L. T. 685; 18 W. R. 1123, C. A.

Annotations:—**Distd.** *Re* Patent Floor Cloth Co., Dean & Gilbert's Claim (1872), 41 L. J. Ch. 476. **Apld.** *Re* Royal Aquarium & Summer & Winter Garden Soc. (1903), 20 T. L. R. 35. **Consd.** Cyclemakers Co-op. Supply Co. *v.* Sims, [1903] 1 K. B. 477. **Apld.** *Re* Newman, Raphael's Claim, [1916] 2 Ch. 309, C. A. **Refd.** Lazarus *v.* Cairn Line of Steamships (1912), 106 L. T. 378. **Mentd.** Brown *v.* Brown (1877), 36 L. T. 272, C. A.; Brace *v.* Calder (1895), 64 L. J. Q. B. 582, C. A.

1954. —— —— Agent taking shares.]—By an agreement between a limited trading co. & their agent in a British colony, it was provided that the salary of the agent was to be £750 a year for a period of 5 years from the day of his arrival; & in addition he was to be allowed certain commission on remittances in money or produce which should be made by him to England. The agent was to pay up at once £2 per share on 50 shares of £100 each, which he had been required to take in the co. & they agreed from time to time to place £8 per share as well as all other sums that might become due from the agent to his debt on account of the calls to be made on the shares. The agent arrived at the colony in Dec., 1865, & commenced business. In Mar., 1867, a voluntary winding up of the co. was ordered to be continued under supervision & in Jan., 1868, the agent's services were put an end to, under a power of attorney from the co. & the liquidators, upon certain terms of compromise then agreed to:—*Held:* (1) independently of the agreement, the liquidators having in the course of their continued employment of the agent become indebted to him, & having entered into the compromise, were not entitled to enforce against him the payment of a call made in the winding up without bringing the debt into account; (2) the agent was entitled to full salary to the end of the 5 years.—*Re* LONDON & COLONIAL CO., *Ex p.* CLARK (1869), L. R. 7 Eq. 550; 38 L. J. Ch. 562; 20 L. T. 774.

Annotation:—**Apld.** *Re* London & Scottish Bank, *Ex p.* Logan (1870), L. R. 9 Eq. 149.

1955. —— —— ——.]—S. agreed with the promoters to take certain shares in a proposed co. on condition he should be appointed manager at a salary, & in case of his dismissal from the office he should be repaid the amount paid on his shares. The agreement was confirmed by the articles of assocn. The co. was subsequently wound up voluntarily, & S. was appointed liquidator at a salary:—*Held:* (1) the winding-up was *ipso facto* a dismissal of S. from the office of manager; (2) he was entitled to prove in the winding-up for the amount paid up by him on the shares taken under the agreement, less any sums received by him as liquidator since the winding-up.—*Re* IMPERIAL WINE CO., SHIRREFF'S CASE (1872), L. R. 14 Eq. 417; 42 L. J. Ch. 5; 27 L. T. 367; 20 W. R. 966.

Annotations:—**Dbtd.** Midland Counties District Bank *v.* Attwood, [1905] 1 Ch. 357. **Refd.** Reid *v.* Explosives Co. (1886), 56 L. J. Q. B. 68.

1956. —— —— Agent payable by commission only.]—An agent who has been engaged by a co. for a fixed term, & who is to receive a commission on all orders obtained through him, as remuneration for his services, is entitled, upon the determination of the agreement by the winding-up of the co., to claim compensation in respect of the commission which he might otherwise have earned during the

PART VIII. SECT. 3, SUB-SECT. 3.—A. (c).

1952 i. *By voluntary winding up — Measure of damages.*]—Pltf. was engaged by T. Co. as its sales agent on commission, & claimed damages for breach of contract. The co. went into liquidation & pltf. purchased its assets. Pltf.'s claim was for $9,000, *i.e.*, $10,000, at the rate of $5,000 a year, for two years of the period which had still to run under the agreement when the co. went into liquidation, less $1,000 in respect of sums for which he allowed credit to defts. It appeared that by the purchase of defts.' assets he made $11,000, or more than his commission:—*Held:* he was entitled to nominal damages only. *Jamal* v. *Moolla Dawood, Sons,* [1916] A. C. 175; *British Westinghouse Electric & Manufacturing Co.* v. *Underground Electric Rys. Co. of London,* [1912] A. C. 673; *Staniforth* v. *Lyall* (1830), 7 Bing. 169; *Beckham* v. *Drake* (1849), 2 H. L. Cas. 579; *Erie County Natural Gas & Fuel Co.* v. *Carroll,* [1911] A. C. 105; *Wertheim* v. *Chicoutimi Pulp Co.,* [1911] A. C. 301; *Bwllfa & Merthyr Dare Steam Collieries* v. *Pontypridd Waterworks Co.,* [1903] A. C. 426; *Bruce* v. *Calder,* [1895] 2 Q. B. 253; *Soudon* v. *Mills* (1861), 30 L. J. Q. B. 175; *Emmens* v. *Elderton* (1853), 4 H. L. Cas. 624; *Williams* v. *Agius,* [1914] A. C. 510; *The Mediana,* [1900] A. C. 113, cited.—COCKBURN *v.* TRUSTS & GUARANTEE CO. (1917), 38 O. L. R. 397; 33 D. L. R. 159. Appeal to Supreme Court of Canada dismissed, June 20, 1917 (not reported).—**CAN.**

unexpired portion of the term.—*Re* PATENT FLOOR CLOTH CO., LTD., DEAN & GILBERT'S CLAIM (1872), 41 L. J. Ch. 476; 26 L. T. 467.

For full anns., *see* COMPANIES.

1957. By compulsory winding-up.]—R. was appointed managing director of the N. Co. at a salary & 5 per cent. commission as for one year from July 1, 1915. On Nov. 6, 1915, a compulsory winding-up order was made. R. claimed for loss of commission up to June 30, 1916:—*Held:* the claim was not maintainable as the co., owing to no fault of its own, came to an end, & there was no business upon which commission could be earned after the date of the winding-up.—*Re* NEWMAN, LTD., RAPHAEL'S CLAIM, [1916] 2 Ch. 309; 85 L. J. Ch. 625; 115 L. T. 134; 60 Sol. Jo. 585; H. B. R. 129, C. A.

1958. ——.]—THARSIS SULPHUR & COPPER CO., LTD. *v.* SOCIÉTÉ INDUSTRIELLE ET COMMERCIALE DES METAUX (1889), 58 L. J. Q. B. 435; 60 L. T. 924; 38 W. R. 78; 5 T. L. R. 618, D. C.

Annotations:—**Expld.** British Wagon Co. *v.* Gray (1895), 65 L. J. Q. B. 75, C. A. **Folld.** Montgomery, Jones *v.* Liebenthal, [1898] 1 Q. B. 487, C. A.

See, further, MASTER & SERVANT.

B. Where Agent dismissed.

1959. Justification of dismissal—Disobedience or misconduct.]—Where an agent is employed for a fixed period, his dismissal before the expiration of the period may be justified on the ground of disobedience or misconduct known to the principal at the time, although not mentioned as the precise ground of dismissal. *Semble:* it is otherwise where misconduct was not known to the principal at the time of dismissal, since it could not then be the ground of dismissal.—CUSSONS *v.* SKINNER (1843), 11 M. & W. 161; 12 L. J. Ex. 347; 152 E. R. 758.

Annotation:—**Refd.** Pearce *v.* Foster (1885), 55 L. J. Q. B. 121.

1960. —— **Omission in accounts.**]—If an employer discharges his servant, & at the time of the discharge a good cause of discharge in fact exists, the employer is justified in discharging the servant although at the time of the discharge the employer did not know of that cause. Where a traveller, having received part of a bill due to his employer in cash & set off the balance against a debt due from himself to debtor, renders to his employer an account of the cash, but omits to mention the set-off:—*Semble:* this is not a good ground of discharge, unless done fraudulently & wilfully.—WILLETS *v.* GREEN (1850), 3 Car. & Kir. 59.

1961. —— **Question for jury.**]—A master who has dismissed a servant may justify the dismissal by showing that at the time of the dismissal he knew the servant to have committed an act which justified it; & a jury ought not to be asked whether the master was induced to dismiss him for that act or for some other cause.—RIDGWAY *v.* HUNGERFORD MARKET CO. (1835), 3 Ad. & El. 171; 1 Har. & W. 244; 4 Nev. & M. K. B. 797; 4 L. J. K.B. 157; 111 E. R. 378.

Annotations:—**Consd.** Cussons *v.* Skinner (1843), 11 M. & W. 161; Mercer *v.* Whall (1845), 5 Q. B. 447; Pearce *v.* Foster (1885), 55 L. J. Q. B. 121. **Refd.** Lomax *v.* Arding (1855), 10 Exch. 734. **Mentd.** Giraud *v.* Richmond (1846), 2 C. B. 835; Davis *v.* Marshall (1861), 4 L. T. 216; Taylor *v.* Carr & Porter (1861), 30 L. J. M. C. 201.

1962. —— **Disobedience & misappropriation.**]—A. was engaged by B. to conduct the business of a shipping agent for 2 years. It was the duty of A. in the course of his employment to pay freight, dock dues, etc., to meet which B. remitted the necessary funds. A. wrote to B. for a remittance of £140, including an account of the purposes for which the money was required, one of them being payment of £30 salary due to himself; 10 days afterwards B. sent A. £100, directing him to apply the money for business purposes. A. having appropriated £30 of the money in satisfaction of his salary, B. discharged him. In an action for wrongful dismissal, B. justified it on the ground of A.'s having wrongfully & improperly misappropriated the money, & wrongfully & improperly disobeyed B.'s orders to apply the money to business purposes. The jury having found for pltf.:—*Held:* (1) the judge at the trial rightly left it to the jury to say whether pltf. had been guilty of any wrongful or improper misappropriation of the money entrusted to him, or of any wrongful or improper disobedience of orders; (2) the judge was not bound to tell the jury that it was not necessary to justify the dismissal that pltf. should have been guilty of any moral delinquency.—SMITH *v.* THOMPSON (1849), 8 C. B. 44; 18 L. J. C. P. 314; 137 E. R. 424.

Annotations:—**Apld.** Horton *v.* McMurtry (1860), 5 H. & N. 667. **Folld.** Bank of New Zealand *v.* Simpson, (1900) A. C. 182, P. C. **Mentd.** Stucley *v.* Baily (1862), 1 H. & C. 405; Addis *v.* Gramophone Co., [1909] A. C. 488.

1963. —— **Breach of agency agreement.**]—By a written agreement under which A. was appointed surveyor or agent of B. for 2½ years, it was provided that A. should not receive any money on B.'s behalf, & if he did so the agreement should immediately determine. To an action against B. for dismissing A. before expiration of the term:—*Held:* the receipt by A. of deposit money from persons to whom he had agreed to let houses on account of B., was a breach of the agreement & a cause of dismissal.—BRAY *v.* CHANDLER (1856), 18 C. B. 718; 27 L. T. O. S. 69, 185; 4 W. R. 597; 139 E. R. 1553.

1964. —— **Bankruptcy.**]—The bkpcy. of an agent is not *per se* a defence to an action for wrongful dismissal, even though the agent is to receive moneys on account of his principal. The fitness of the agent to perform his duties is a question for a jury.—MCCALL *v.* AUSTRALIAN MEAT CO., LTD. (1870), 19 W. R. 188.

PART VIII. SECT. 3, SUB-SECT. 3.—B.

1959 i. *Justification of dismissal—Misrepresentations.*]—Defts. appointed pltf. their sales agent with exclusive right to handle their coal for five years at 50 cents per ton commission on all coal sold. Pltf. claimed damages for breach of the agreement, & defts. counterclaimed for rescission & damages on account of pltf.'s misconduct & for an account, the misconduct relied on by defts. being a misrepresentation as to the cost of mining the coal made to two of the co-directors, at a time when pltf. was a director & general manager of defts.—*Held:* he stood in a fiduciary relation to defts., & the representations having been the inducement to defts. to enter into the contract they were entitled to rescind it. *Imperial Mercantile Credit Assocn. v. Coleman* (1873), L. R. 6 H. L. 189; *Gibson v. Jeyes* (1801), 6 Ves. 266; *Adam v. Newbigging* (1888), 13 App. Cas. 308, cited.—DENMAN *v.* CLOVER BAR COAL ASSOCN. (1912), 22 W. L. R. 128; 7 D. L. R. 96; *affd.* 48 S. C. R. 318.—**CAN.**

1959 ii. —— *Failure to produce business.*]—A firm of manufacturers gave the agency for sale of their goods in a certain district to a commission agent on the following terms: "We agree to pay you monthly at the rate of £200 per annum, & to allow you 5 per cent. on all sales of biscuits . . . above £300 per month, this to be calculated on the whole year, at the end of the first year, & according to arrangement thereafter." At the end of two months the firm wrote to the agent stating that as his sales were so much less than he had led them to expect, "on the strength of which we guaranteed you commission on sales £300 per month," they "could not continue the guarantee" beyond one month. The agent stated in reply that his engagement was for one year, & that he had not said or implied that he could within a month or two effect sales of £300 per month. After the end of the third month the firm gave the agent notice that his services would not be required beyond the current month. In an action by the agent for damages for illegal dismissal:—*Held:* the agreement was an agreement for one year at least, & pursuer entitled to damages for breach of contract.—DOWLING *v.* HENDERSON & SON (1890), 17 R. 921; 27 Sc. L. R. 738.—**SCOT.**

Sect. 3.—Agent's rights against principal: Subsect. 3, B.]

1965. —— Matters arising before agency began.]—Trustees may dismiss an agent for misconduct committed by him anterior to their own appointment (BRAMWELL, B.).—BELANEY *v.* KELLY, No. 1970, *post.*

1966. —— Agency not profitable.]—By an agreement between A. & B. & Co. it was provided (*inter alia*) that A., who was appointed B. & Co.'s agent, might combine with B. & Co.'s agency an agency for C. until such period within 2 years as A. should, subject to B. & Co.,'s approval, accept a third agency, B. & Co. to pay A. till then a specified salary, & A. in return to devote his time & attention to B. & Co.'s business; any alteration in the terms to the agreement were to be made in a specified manner by mutual consent. The agency not proving profitable, B. & Co. determined pltf.'s employment before the expiration of 2 years, paying A. salary to the date when the employment was determined. In an action by A. for damages for breach of the agreement:—*Held:* (1) if not an express it was an implied term of the agreement that B. & Co. should employ A. for 2 years; (2) A. was entitled to recover.—NIELANS *v.* CUTHBERTSON (1891), 7 T. L. R. 516.

1967. —— Failure to produce business.]—Defts. were appointed by pltfs. for a term of years sole agents in Spain for sale of bicycles, depôts to be established in the principal towns. Defts. failed to establish sufficient depôts or stock them in an adequate manner:—*Held:* pltfs. were justified in terminating the appointment before expiration of the term.—HUMBER & Co. *v.* FOX & Co. (1894), 11 T. L. R. 12.

1968. Consequences of dismissal—Loss of profits.]—A count in a declaration in *assumpsit* set forth an agreement between an attorney & solr. & a co. that "from Jan. then next, pltf. as the attorney & solr. of the co. should receive a salary of £100 per annum, in lieu of rendering an annual bill of costs for general business transacted by him for the co. as such attorney & solr., & should for such salary advise & act for the co. on all occasions, in all matters connected with the co." (the prosecuting & defending of suits, preparing bonds, & some other matters for which he was to be allowed the regular charges, being excepted), "& that he should attend the secretary & board of directors when required." The count then alleged, "That in consideration that pltf. had, at the request of the co. promised to perform his part of the agreement, the co. promised pltf. to perform their part & to retain & employ him as such attorney & solr. of the said co. on the terms aforesaid." The count then alleged for breach that "though for a small space of time the co. did retain & employ pltf. as such attorney & solr. on the terms aforesaid, & did pay him a small part of the salary, & though he was always ready & willing to advise & act for the co. & to accept the salary on the terms aforesaid & in all other respects to fulfil the agreement on his part, yet the co. disregarding, etc., did not, nor would continue to, retain or employ pltf. as such attorney or solr. on the terms aforesaid, but, on the contrary, in May wrongfully dismissed & discharged pltf. from such employment & retainer, & then & from thence hitherto have wholly refused to retain or employ him as such attorney & solr. of the said co. & to pay him the salary as aforesaid, by reason of which last-mentioned premises pltf. has wholly lost & been deprived of the salary, & also of divers great gains & profits which he might & otherwise would have derived from such employment in & about the prosecuting & defending of suits & preparing bonds etc." After a verdict for pltf. with £200 damages:—*Held:* (1) the count did sufficiently allege a consideration for the promise to retain & employ pltf. as attorney & solr.; (2) the consideration was not exhausted by the promise on the part of the co. to perform the agreement.—EMMENS *v.* ELDERTON (1853), 13 C. B. 495; 4 H. L. Cas. 624; 22 L. T. O. S. 1; 18 Jur. 21; 10 E. R. 606, H. L.

Annotations:—**Folld.** Hochster *v.* De La Tour (1853), 2 E. & B. 678. **Expld.** Cuckson *v.* Stones (1858), 5 Jur. N. S. 337; Churchward *v.* R. (1865), L. R. 1 Q. B. 173; Lewin *v.* Brown (1866), 14 W. R. 640. **Consd.** Frost *v.* Knight (1870), L. R. 5 Exch. 322. **Expld.** Turner *v.* Sawdon, [1901] 2 K. B. 653, C. A. **Consd.** Devonald *v.* Rosser (1906), 75 L. J. K. B. 688, C. A. **Refd.** Payne *v.* New South Wales Coal & Intercolonial Steam Navigation Co. (1854), 10 Exch. 283; Whittle *v.* Frankland (1862), 2 B. & S. 49; Worthington *v.* Sudlow (1862), 8 Jur. N. S. 668; M'Intyre *v.* Belcher (1863), 14 C. B. N. S. 654. **Mentd.** Reid *v.* Hoskins (1855), 5 E. & B. 729; Darlow *v.* Edwards (1862), 9 Jur. N. S. 336; Danube & Black Sea Ry. & Kustendjie Harbour Co. *v.* Xenos, Xenos *v.* Danube & Black Sea Ry. & Kustendjie Harbour Co. (1863), 13 C. B. N. S. 825, Ex. Ch.

1969. —— Dismissal involving loss of house.]—The managers of a religious society appointed an agent at a salary with "6 months' notice of separation on either side," liberty to occupy & carry on his trade in a house belonging to the society, & afterwards summarily dismissed him for alleged misconduct, & resumed possession of the house, of which they were afterwards forcibly dispossessed by the agent:—*Held:* an injunction must be granted to restrain the agent from disturbing their possession.—SPURGIN *v.* WHITE (1860), 2 Giff. 473; 3 L. T. 609; 7 Jur. N. S. 15; 9 W. R. 266; 66 E. R. 198.

Annotation:—**Folld.** Collison *v.* Warren, [1901] 1 Ch. 812, C. A.

1970. —— ——.]—A testator by will devised his property upon certain trusts to trustees whom he also appointed exors., & by a codicil willed as follows: "I appoint K. my agent, at a salary of £150 a year, to live in my house called the H., for which such salary he must do my business & business of my exors. & trustees, & not be employed in the service of any other person or persons; to live rent free as long as he continues to be my agent, that is, as long as he does my business honestly & to the satisfaction of my exors. & trustees, or any one of them." K., having refused to deliver up certain leases to the trustees & otherwise to obey their directions, was dismissed from the agency by one of the trustees, such dismissal being afterwards approved by the other of them, but he declined to give up possession of the house called H., & upon ejectment by the trustees against him:—*Held:* (1) the utmost interest which K. had in the house was an estate so long as he did the business of the trustees honestly & to their satisfaction; (2) the direction in the codicil amounted only to a recommendation to the trustees to continue him as agent; (3) they were the judges whether or not he had done the business to their satisfaction, the burden being on defts. to show that they had dismissed him capriciously, or maliciously, or without reasonable warrant.—BELANEY *v.* KELLY (1871), 24 L. T. 738; 19 W. R. 1171.

1971. Refusal of specific performance of agency agreement.]—The ct. will not grant an injunction to restrain a joint stock shipping co. from advertising for a person to be employed as broker, an agreement so to employ pltf. having been entered into with him. Specific performance of such an agreement cannot be enforced in equity.—BRETT *v.* EAST INDIA & LONDON SHIPPING CO., LTD. (1864), 3 New Rep. 688; 2 Hem. & M. 404; 10 L. T. 187; 12 W. R. 596.

1972. ——.]—Specific performance cannot be enforced of an agreement, the essence of which is that it is one for personal services.—WHITE *v.* BOBY (1877), 37 L. T. 652; 26 W. R. 133, C. A.

1973. —— & of injunction.]—By an agreement between the parties, pltf. was constituted agent of deft. for certain purposes. Pltf. sued for specific performance of this agreement, & moved for an injunction to restrain deft. from sending out circulars to customers representing that pltf. had ceased to be deft.'s agent:—*Held:* (1) cts. of eq. declined to enforce specific performance of a contract of agency, whatever the consideration or terms of the contract; (2) pltf. had no case for an injunction.—BERTRAM *v.* BALL (1882), 27 Sol. Jo. 39.

1974. — ——.]—An agreement for the employment of a manager of a business contained a clause providing that the employer would not, except in case of misconduct or breach of agreement, require the manager to leave his employ. The employer gave to the manager notice purporting to determine the agreement & the service created thereby, & the manager brought an action for an injunction to restrain the employer from acting on the notice:—*Held:* (1) the clause above mentioned, though negative in form, was affirmative in substance, being equivalent to a stipulation by the employer that he would retain the manager in his employ; (2) an injunction ought not to be granted.—DAVIS *v.* FOREMAN, [1894] 3 Ch. 654; 64 L. J. Ch. 187; 43 W. R. 168; 8 R. 725.

Annotation:—**Folld.** Kirchner *v.* Gruban, [1909] 1 Ch. 413.

1975. —— Collateral agreement by agent to invest.]—By the articles of assocn. of a limited co. pltf. was appointed agent of the co. in India, & it was provided that he was to take a number of the shares. The directors persuaded him to resign, on condition that he should be freed from all liability on the shares, but they found afterwards they could not legally carry out this condition. They, however, insisted on dismissing pltf., & brought an action against him for the amount due on the shares. Upon a bill filed to restrain the dismissal of pltf., or, in the alternative, the action:—*Held:* defts. being willing to undertake not to set up the voluntary resignation of pltf., the whole matter was one to be tried at law, as the ct. could not enforce the agreement as to the agency.—MAIR *v.* HIMALAYA (HIMALAYAN) TEA CO. (1865), L. R. 1 Eq. 411; 13 L. T. 586; 11 Jur. N. S. 1013; 14 W. R. 165.

1976. —— ——.]—A., upon his appointment as agent to a limited assurance co., agreed to take shares upon the terms that the payment for them should be deducted from his commission as agent, & no deposit was ever paid by him upon them, but he was registered as the holder of the shares. The co., very soon after his appointment, dismissed him, as he contended, wrongfully. On the winding up of the co.:—*Held:* (1) the co.'s cancellation of A.'s appointment as agent, whether justifiable or not, could not operate as a cancellation of A.'s agreement to become a shareholder; (2) subject to any question of account as to payment for the shares, A. was liable as a contributory.—*Re* LIFE ASSOCN. OF ENGLAND, LTD., THOMSON'S CASE (1865), 4 De G. & Sm. 749; 34 L. J. Ch. 525; 12 L. T. 717; 11 Jur. N. S. 574; 13 W. R. 958; 46 E. R. 1114, L.JJ.

Annotation:—**Folld.** *Re* General Provident Assce. Co., Bridger's Case (1869), L. R. 9 Eq. 74.

1977. Agent's remedies.]—On an agreement that pltf. should enter into the service of defts. for the sale of wines on commission, the agreement to continue in force for 5 years, & defts. guaranteeing pltf. £600 per annum as a minimum revenue from the business during the continuation of the agreement:—*Held:* (1) pltf. might sue in any year during the continuance of the agreement for breaches in any former year; (2) if there was an entire dismissal from the service before the expiration of the agreement, pltf. ought to include in one action the whole gravamen that he would probably sustain therefrom.—CLOSSMAN *v.* LACOSTE (1854), 23 L. T. O. S. 91; 2 W. R. 455.

1978. —— Measure of damages for wrongful dismissal.]—Pltf. was employed by defts. as agent to

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1973 i. *Refusal of specific performance of agency agreement — & of injunction.*]—An agreement, dated Aug. 26, 1874, was entered into between a co. & M. F. & Co., the exors., administrators, & assigns for the time being constituting the partnership firm of M. F. & Co., whereby it was agreed that the firm should be agents to the co. for twenty-five years to buy & sell, etc., & particularly to exercise all the powers contained in art. 98 of the articles of assocn. *i.e.*, full power & authority to appoint & employ, in or for the purposes of the transaction & management of the affairs & business of the co., such solrs. as they should think proper. C. & B. were duly appointed solrs. to the co., & acted as such for a considerable time. M. F., one of the members of the firm of M. F. & Co., died in the middle of Mar., 1876. On Aug. 8, 1881, a resolution was passed at a board meeting to the effect that as C. & B., the co.'s solrs., were also the solrs. of the agents, it was desirable, for the interest of the co., that a change should be made, & that H. C. & L. be appointed solrs. of the co. M. F. & Co. sued the co., & prayed for an injunction against defts. to restrain them from committing any breach of the agreement of Aug. 26, 1874, & in particular from carrying into effect the resolution appointing H. C. & L. as solrs. for the co., & to restrain them from doing anything inconsistent with the memorandum & articles of assocn.:—*Held:* inasmuch as the ct. would not, by a decree for specific performance or by injunction, compel the co. to retain pltfs. in the confidential position of agents, it would not restrain defts. or the co. from appointing a solr., which was only a violation of what was ancillary or incidental to the principal part of the contract, viz., the agreement that pltfs. should be the agents of the co. for twenty-five years.—NUSSERWANJI *v.* GORDON (1881), I L. R. 6 Bom. 266.—**IND.**

1977 i. *Agent's remedies—Damages.*]—Deft., by agreement in the nature of a letter of attorney, constituted pltf. & his descendants his hereditary agents, with authority to collect rents, & promised to pay him an annual salary out of the rents. On an improper revocation of this agency pltf. sued for specific performance & arrears of salary:—*Held:* the appointment was valid without valuable consideration passing, but the remedy was for damages for breach of contract, & without a valuable consideration the agreement would be *nudum pactum*, & pltf. would not be entitled to recover, except for work & services actually rendered.—VISHNUCHARYA *v.* RAMCHANDRA (1881), I. L. R. 5 Bom. 253.—**IND.**

1977 ii. —— ——.]—An agreement between the parties, by which defts. were to pay pltf. a fixed sum per month for receiving, storing, handling, & shipping such goods as might be consigned to him for & on account of defts., is a contract of mandate; & such contract may be revoked, without notice, at any time by the mandator, whether the mandatary is salaried or unsalaried, subject to his right to be indemnified against all loss directly flowing from the mandator's wrongful act, where he has acted wrongfully or unjustly in revoking the mandate.—GALIBERT *v.* ATTEAUX, Q. R. 23 S. C. 427.—**CAN.**

1977 iii. —— *Recovery of commission.*]—BELL TELEPHONE CO. *v.* SKINNER (1889), 17 R. L. 350, Q. B.—**CAN.**

1977 iv. —— *Stipulation for consideration for giving up agency.*]—Deft., pltf.'s agent, was dismissed owing to an alleged shortage in his accounts by pltfs., who instructed N., an accountant, to deliver to deft. a letter of dismissal, signed by their manager, & to take over the agency with the widest powers possible, & subject only to the further orders of pltf.'s manager. Deft. maintained that M. had arranged that pltfs. would pay him $1,000 in consideration of his giving up the agency, & in settlement of all claims arising out of the dismissal. The evidence showed that deft. was not guilty of any misconduct which would have justified his dismissal:—*Held:* the dismissal was not justified, & it was only reasonable that deft. should stipulate for some consideration before giving up his agency.—MCCARTHY *v.* MCCARTHY (1911), 18 O. W. R. 423; 2 O. W. N. 842.—**CAN.**

1977 v. —— *Settlement of accounts not condition precedent to right to sue.*]—A. became agent for the sale of goods for B. & Sons, under an agreement which contained elaborate provisions for settlement of accounts between the parties. B. & Sons dismissed A., who brought an action for wrongful dismissal without having previously settled or offered to settle the account between them:—*Held:* the settling or offering to settle the account between A. & B. & Sons was a condition precedent to bringing the action.—MEARA *v.* SMITHWICK (1868), I. R. 4 C. L. 514.—**IR.**

1978 i. —— *Measure of damages for wrongful dismissal.*]—A co. in

Sect. 3.—Agent's rights against principal: Subsect. 3, B. & C.; sub sect. 4, A. (a).]

introduce customers, upon the terms that he should be paid a commission on all business done by defts. with the customers introduced by him. Pltf. introduced customers, & business resulted from such introductions upon which commission was paid. Defts. terminated the employment of pltf., but continued to do business with customers who had been introduced to them by pltf. during the period of his employment. Defts. contended that they were not liable to pay commission to pltf. on such business:—*Held:* (1) there had been a breach of the contract under which pltf. had been employed, for which breach defts. were liable to pay a lump sum as damages; (2) the damages were such a sum as pltf. might reasonably have expected to have earned if his relations with defts. had continued; (3) in assessing the damages regard must be had to the chances of human life, the vicissitudes of trade, the probability of the customers continuing to deal with defts., & other similar considerations.—FAULKNER *v.* COOPER & CO., LTD. (1899), 4 Com. Cas. 213.

1979. —— Undischarged bankrupt may sue.]—An undischarged bkpt. employed as traveller for a firm under a contract made before commencement of bkpcy. can maintain an action against the firm for wrongful dismissal occurring after commencement of bkpcy., the trustee in bkpcy. not having intervened in the action.—BAILEY *v.* THURSTON & CO., LTD., [1903] 1 K. B. 137; 72 L. J. K. B. 36; 88 L. T. 43; 51 W. R. 162; 19 T. L. R. 75; 47 Sol. Jo. 91; 10 Mans. 1, C. A.

Annotation:—**Consd.** Affleck *v.* Hammond, [1912] 3 K. B. 162, C. A.

1980. —— Agreement to be performed within jurisdiction—Breach within jurisdiction.]—By an agreement between pltfs., insurance agents in London, & defts., a Spanish insurance co., entered into at Teneriffe, where the latter were domiciled, defts. agreed to employ pltfs. as their exclusive representatives for a period of five years in England & elsewhere. At the end of one year defts. sent their agent-general to England with authority to revoke the agreement, which he did by notice in writing sent through the London post to pltfs. at their place of business. An action for breach of contract was commenced & an order for service out of the jurisdiction was obtained. On appeal from the refusal of a judge at chambers to set aside the writ & subsequent proceedings:—*Held:* (1) there was to be implied from the agreement a contract by defts. not to do anything to prevent pltfs. from acting as their representatives in England during the agreed term; (2) the action was founded on a breach within the jurisdiction of a contract which according to the terms thereof ought to be performed within the jurisdiction; (3) order for service out of the jurisdiction was rightly made under R. S. C., O. 11, r. 1 (*e*).—MUTZENBECHER *v.* LA ASEGURADORA ESPAÑOLA, [1906] 1 K. B. 254; 75 L. J. K. B. 172; 94 L. T. 127; 54 W. R. 207; 22 T. L. R. 175, C. A.

C. Agent's Right to Notice of Termination of Agency.

1981. Effect of custom or usage.]—Pltf. was employed as agent under an agreement which did not specify the duration of the employment. In an action for wrongful dismissal:—*Held:* as pltf. was a commission agent & not a servant, he was not entitled to any notice.—MOTION *v.* MICHAUD (1892), 8 T. L. R. 447, C. A.

Annotation:—**Refd.** Levy *v.* Goldhill, [1917] 2 Ch. 297.

1982. ——.]—An agreement in writing, by which pltf. agreed to serve deft. as agent at a yearly salary, contained a proviso that deft. would, at the end of the year, if he found pltf. had done sufficient business, give him £30 more:—*Held:* (1) there was nothing in the proviso inconsistent with a usage in the trade to terminate the employment by either party giving to the other a month's notice; (2) it was a misdirection to ask the jury whether the proviso was intended to exclude the usage.—PARKER *v.* IBBETSON (1858), 4 C. B. N. S. 346; 27 L. J. C. P. 236; 31 L. T. O. S. 101; 22 J. P. 659; 4 Jur. N. S. 536; 6 W. R. 519; 140 E. R. 1118.

Annotation:—**Consd. & Distd.** Bridges *v.* Potts (1864), 17 C. B. N. S. 314.

1983. —— London commission agent.]—The employment of a commission agent in London can be determined on either side without notice.—ALEXANDER *v.* DAVIS & CO. (1885), 2 T. L. R. 142.

Annotation:—**Refd.** Levy *v.* Goldhill, [1917] 2 Ch. 297.

1984. *S. P.* HENRY *v.* LOWSON (1885), 2 T. L. R. 199.

Annotation:—**Refd.** Levy *v.* Goldhill, [1917] 2 Ch. 297.

1985. —— Usage inconsistent with written agreement.]—Defts., carrying on business in the glove trade, made an agreement with pltf., a commission agent, in these terms: "We will give 2½ per cent. commission on all business you do for us in London. We will forward your commission quarterly. This refers to orders executed." Defts. terminated this agreement without giving any notice, & pltf. brought an action to recover damages. At the trial pltf. tendered evidence of a custom in the glove trade that 6 months' notice must be given to terminate the agency of a commission agent:—*Held:* (1) evidence of the alleged custom, being inconsistent with the terms of the written agreement, was not admissible; (2) defts. were entitled to terminate the agency without notice.—JOYNSON *v.* HUNT & SON (1905), 93 L. T. 470; 21 T. L. R. 692, C. A.

Annotation:—**Apld.** Levy *v.* Goldhill, [1917] 2 Ch. 297.

England engaged in fulfilling orders sent from Australia to the co., agreed with A. that he should act as the co.'s agent in Australia, & that he should receive a salary at the rate of £150 a year & in addition a certain commission on all orders executed by the co. in Australia:—*Held:* the engagement of A. by the co. was a yearly engagement, terminable upon six months' notice, ending at the expiration of the year.

The co. terminated the agreement by one month's notice, but in an action for breach of agreement it paid six months' salary into ct. In a claim for damages for breach of the agreement:—*Held:* A. was entitled to his salary in lieu of notice, & to commission for the period for which the notice should have been given, although he had, by virtue of the notice of determination of agreement actually given, ceased to act as agent for the co.—BROADHURST & CO., LTD. *v.* ROBINSON (1903), 29 V. L. R. 447.—**AUS.**

1978 ii. —— ——.]—Agency, whether constituted for a valuable consideration or not, is always revocable at the will of the mandator, but the agent has according to circumstances a right to indemnity for actual loss suffered by him through the revocation. Loss of profits *in futuro* cannot enter into the computation of such damages.—CANTLIE *v.* COATICOOK COTTON CO. (1887), 31 L. C. J. 151; 3 M. L. R. 9.—**CAN.**

PART VIII. SECT. 3, SUB-SECT. 3.—C.

a. *Commission agent.*]—A mercantile agent, receiving no other remuneration than a commission upon the transactions negotiated by him, is not entitled to receive from his employers notice of the termination of his employment, like a servant hired for termly wages.—LONDON, LEITH, EDINBURGH & GLASGOW SHIPPING CO. *v.* FERGUSON (1850), 23 Sc. Jur. 4.—**SCOT.**

b. —— *Employment from year to year.*]—A document appointing pltf. agent contained the following passage: "Remuneration allowed by the co. is a nominal salary of one shilling per annum payable in advance & commission as dealt with in separate circular":—*Held:* this constituted an employment from year to year, & if the service extended over the first year notice of its termination must expire at the end of a succeeding year.—MACKENZIE *v.* UNION FIRE & MARINE INSURANCE CO. OF NEW ZEALAND (1880), I. S. N. W. 103.—**AUS.**

1986. Contract for fixed period—Afterwards terminable on notice—When notice must be given.]—An agreement under which A. was to be employed as B.'s traveller provided it should be " binding for 12 months certain from the date thereof, & continue from time to time until 3 months' notice in writing be given by either party to determine same " :—*Held:* (1) this was a contract for a year certain only ; (2) B. was at liberty to put an end to it at the expiration of the year by giving A. 3 months' previous notice.—BROWN *v.* SYMONS (1860), 8 C. B. N. S. 208 ; 29 L. J. C. P. 251 ; 2 L. T. 323 ; 6 Jur. N. S. 1079 ; 8 W. R. 460 ; 141 E. R. 1145.

Annotation :—**Refd.** Gardner *v.* Ingram (1889), 61 L. T. 729.

1987. —— —— ——.]—By a contract dated May 8, 1905, defts. agreed with a partnership firm that the firm should become defts.' agents until Dec. 31, 1911, & should continue thereafter subject to determination by 12 months' previous notice in writing by either side. On Nov. 2, 1910, defts. gave to the partnership firm written notice to determine the contract of agency on Dec. 31, 1911, but the firm refused to accept it :—*Held:* (1) the 12 months' notice did not apply to the fixed period ; (2) the interval of 12 months could not commence until after Dec. 31, 1911 ; (3) the notice of Nov. 2, 1910, was invalid.—*Re* AN INDENTURE, MARSHALL & SONS, LTD. *v.* BRINSMEAD & SONS, LTD. (1912), 106 L. T. 460.

1988. No period stipulated—Reasonable notice required.]—By a written agreement pltf. was engaged by defts. to represent them in the sale of their goods, on terms that pltf. was to receive a commission on all business done by defts. through orders obtained by pltf. The agreement contained no stipulation as to the length of time during which pltf.'s engagement was to last, nor did it provide for termination of the engagement by notice :—*Held:* the engagement could be terminated by a reasonable notice.—BARRETT *v.* GILMOUR, No. 1826, *ante*.

Annotations :—**Refd.** Wilson *v.* Harper (1908), 77 L. J. Ch. 607. **Expld. & Distd.** Levy *v.* Goldhill, [1917] 2 Ch. 297.

SUB-SECT. 4.—AGENT'S LIEN.

A. Lien at Common Law or by Custom.

(a) Factors.

1989. Factor—Advances & charges.]—A factor has a lien upon goods consigned to him, that he may indemnify himself for money advanced to his principal, & charges incurred on his behalf, on the credit, & in consequence of such consignment.—KRUGER (CRUGER) *v.* WILCOX (WILCOCKS) (1755), Amb. 252 ; 1 Keny, 32 ; Dick. 269 ; 27 E. R. 168.

Annotations :—**Consd.** Godin *v.* London Assce. Co. (1758), 1 Burr. 489. **Distd.** Foxcroft *v.* Devonshire (1760), 2 Burr. 931. **Consd.** Houghton *v.* Matthews (1803), 3 Bos. & P. 485. **Refd.** Green *v.* Farmer (1768), 4 Burr. 2214 ; Morris *v.* Cleasby (1813), 1 M. & S. 576 ; Barnett *v.* Brandao (1843), 6 Man. & G. 630.

1990. —— ——.]—A factor has a lien on goods consigned to him, not only for incident charges, but as an item of mutual account for the general balance due to him, so long as he retains the possession.—KRUGER *v.* WILCOX, No. 1989, *ante*.

Annotations :—**Expld.** Godin *v.* London Assce. Co. (1758), 1 Burr. 489. **Consd.** Houghton *v.* Matthews (1803), 3 Bos. & P. 485. **Refd.** Foxcroft *v.* Devonshire (1760), 2 Burr. 931 ; Green *v.* Farmer (1768), 4 Burr. 2214 ; Morris *v.* Cleasby (1813), 1 M. & S. 576 ; Barnett *v.* Brandao (1843), 6 Man. & G. 630.

1991. *S. P.* GARDINER *v.* COLEMAN (1755), cited 1 Burr. 494 ; 97 E. R. 422.

Annotation :—**Refd.** Godin *v.* London Assce. Co. (1758), 1 Burr. 489.

1992. —— **General lien.**]—A factor has a lien on the principal's goods for the general balance due to him.—GODIN *v.* LONDON ASSURANCE CO. (1758), 1 Burr. 489 ; 2 Keny. 254 ; 1 Wm. Bl. 103 ; 97 E. R. 419.

Annotations :—**Consd.** Ebsworth *v.* Alliance Marine Insce. Co. (1873), L. R. 8 C. P. 596. **Refd.** Glover *v.* Black (1763), 3 Burr. 1394 ; Bell *v.* Jutting (1817), 1 Moore, C. P. 155 ; Palmer *v.* Pratt (1824), 9 Moore, C. P. 358. **Mentd.** North British & Mercantile Insce. Co. *v.* London, Liverpool & Globe Insce. Co. (1877), 5 Ch. D. 569, C. A.

1986 i. *Contract for fixed period—Afterwards terminable on notice—When notice must be given.*]—Where a principal listed property with an agent for sale for a certain period, after which time he was to give written notice of intention to withdraw the property from sale or change the price or terms :—*Held:* this was a listing for the period mentioned, & after that an agency until the property was withdrawn, in the absence of proof of notice having been given.—GODDARD & SON *v.* ELLIOTT (1911), 16 B. C. R. 379.—**CAN.**

1986 ii. —— *No notice after expiry of term.*]—B., an architect, agreed in writing with the proprietor of an estate to act as factor for four years at a fixed yearly salary conditioned on his taking the proprietor's stepson as paid apprentice for the term. B. continued to exercise his profession as an architect, & at the end of the term another factor was appointed. In an action by B. for six months' salary in lieu of notice :—*Held:* not entitled to notice as (1) he was not employed as a servant, & (2) the contract by its nature as well as its terms was limited to four years.—BRENAN *v.* CAMPBELL'S TRUSTEES (1893), 25 R. 423 ; 35 Sc. L. R. 341 ; 5 S. L. T. 275.—**SCOT.**

1986 iii. —— *What amounts to notice.*]—GUERARD *v.* ST. GABRIEL TRUSTEES (1916), 22 R. L. N. S. 498 (Que.).—**CAN.**

1988 i. *No period stipulated—Contract terminable without notice.*]—Pltf., an agent employed by defts. to obtain orders for sale of goods on commission, reserved the right to negotiate other agencies not clashing with that of defts., who had no control over pltf.'s movements, & pltf. did not expressly agree to render any services. There being no provision as to terminating the agency, defts. determined it without notice :—*Held:* pltf. was entitled so to do.—LIGHTLAND *v.* MAINE BROTHERS (1905), 25 N. Z. L. R. 50.—**N.Z.**

1988 ii. —— —— *What is reasonable notice.*]—Pltf. was general agent of deft. co. for N. S., employed under an agreement providing " Each party hereto may terminate this agreement by giving the other written notice to that effect, & the agent shall not be entitled to any commission upon premiums collected or received after the expiration of such notice, etc." The co. having terminated the contract without previous notice, pltf. claimed damages :—*Held:* either party was at liberty to terminate the contract at a moment's notice. *Semble:* assuming it to have been contemplated that some time should elapse after notice, the verdict for pltf. could not be upheld, the trial judge having failed to instruct the jury in respect to what was a reasonable time, or to instruct them to confine the damages to the time which should elapse between the giving of the notice & the termination of the contract.—DOYLE *v.* PHOENIX INSURANCE CO. (1893), 25 N. S. R. 436.—**CAN.**

c. *Where agent's own act amounts to revocation.*]—Where a writing appointing deft. pltf.'s agent for a period of thirty days for the sale of pltf.'s property was to be in force until formally revoked by the principal :—*Held:* the statement by the agent to his principal after thirty days, that he had wilfully destroyed the writing in question, terminated the agency & relieved the principal from the obligation to give notice of revocation, & of paying a commission in the event of his finding a purchaser for his property.—BRUNET *v.* CARON (1914), 21 R. de J. 417 ; Q. R. 47 S. C. 244.—**CAN.**

PART VIII. SECT. 3, SUB-SECT. 4.—A. (a).

1992 i. *Factor—General lien.*]—STABB *v.* LORD, 5 R. L. 181.—**CAN.**

1992 ii. —— ——.]—The lien which the law gives a factor upon the goods of his principal is based upon the consideration of the duties & liabilities to which the factor is exposed.—EVANS *v.* BULLEY (ASSIGNEE OF COUGDON) (1823), 1 Nfld. L. R. 330.—**NFLD.**

1992 iii. —— ——.]—A mercantile agent purchased for an undisclosed principal a cargo which he insured, the policy remaining with the broker who effected the insurance. He indorsed the bill of lading to his principal on receiving a bill for the price, etc. The cargo was lost at sea, &, before the bill became due, the principal was sequestrated, & his trustee sued the agent for the insurance, which had been paid :—*Held:* (1) deft. was a factor & the possession of the policy by the broker was that of the factor, who was entitled to a general lien, including the proceeds of the policy, for any general balance due to him ; (2) such lien was not waived by the factor having taken bills from his principal for the sum due on each separate transaction, out of

Sect. 3.—Agent's rights against principal: Subsect. 4, A. (a) & (b).]

1993. —— ——.]—A general lien can only be claimed by express custom, or by the established law in respect of particular trades or dealings, such as wharfingers, factors & banks. It is no part of the general law of principal & agent.—BOCK *v.* GORRISSEN (1860), 2 De G. F. & J. 434; 30 L. J. Ch. 39; 3 L. T. 424; 7 Jur. N. S. 81; 9 W. R. 209; 45 E. R. 689, C. A.

Annotation:—**Consd. & Distd.** Frith *v.* Forbes (1862), 31 L. J. Ch. 793.

1994. —— **Effecting insurance.**]—A factor effecting an insurance on account of his principal is entitled to a lien on the policy for the balance of account between them, notwithstanding that the goods insured have been consigned to a third person by the principal.—GODIN *v.* LONDON ASSCE. CO., No. 1992, *ante*.

Annotations:—**Consd.** Ebsworth *v.* Alliance Marine Insce. Co. (1873), L. R. 8 C. P. 596. **Refd.** Glover *v.* Black (1763), 3 Burr. 1394; Bell *v.* Jutting (1817), 1 Moore, C. P. 155; Palmer *v.* Pratt (1824), 9 Moore, C. P. 358. For full anns., *see* S. C. No. 1992, *ante*.

(b) Other Agents.

1995. Agent carrying on business—Lien in respect of liabilities incurred.]—A business, which was the property of A., was carried on in the name of B., A.'s agent, at a fixed salary. B. being under considerable liabilities in respect of that business, A. became bkpt.:—*Held:* (1) B. had a lien on the property of the concern to the extent of his liabilities; (2) the assignees of A. must be restrained from interfering with the business or property belonging to it & from receiving moneys due to it.—FOXCRAFT *v.* WOOD (1828), 4 Russ. 487; 38 E. R. 888.

1996. Army agent.]—An infant obtained an advancement out of a fund in settlement for the purchase of a commission in the army, which was actually bought; the infant was gazetted, & reported himself at headquarters, but never entered on his duties. Having procured leave of absence, he sold his commission, being very much embarrassed & threatened with arrest. Previous to the sale he had obtained from the army agent of the regiment advances for the alleged purpose of an outfit, which he never bought, & also for certain regimental dues & stoppages. It was contended, but not proved, that the infant had never intended to join, but had merely taken up his commission for the sake of the advancement:—*Held:* the army agent had a lien on the proceeds of the sale of the commission still remaining in his hand for such advances.—LAWRIE *v.* BANKES (1858), 4 K. & J. 142; 27 L. J. Ch. 265; 32 L. T. O. S. 18; 4 Jur. N. S. 299; 6 W. R. 244; 70 E. R. 59.

Annotation:—**Consd.** *Re* Fox, Wodehouse *v.* Fox, [1904] 1 Ch. 480.

Banker.]—*See* BANKERS & BANKING.

1997. Broker—Advances & acceptances on credit of goods.]—If a broker advances money & gives his acceptances on credit of goods lodged in his hands, the owner cannot demand them without a full indemnity, & giving his counter acceptances, or those of any other person, to the amount of those given by the broker, & becoming payable at the same time, is not sufficient indemnity in law.—PULTNEY *v.* KEYMER (1800), 3 Esp. 182.

Annotation:—**Distd.** Martin *v.* Coles (1813), 1 M. & S. 140.

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which the general balance arose.—MILNE & Co. *v.* GAIRDNER (1858), 30 J. 387; 20 D. 565.—**SCOT.**

1992 iv. —— *Commission on previous transaction.*]—The ct. sustained the right of a mercantile agent to retain, as against his principal, from the price of a consignment of goods sold by him the commission due to him upon a previous transaction.—SIBBALD *v.* GIBSON & CLARK (1852), 1 W. R. 168; 15 D. 217; 25 J. 143; 2 Stuart, 108—**SCOT.**

1992 v. —— *Lien on cargo rejected by third party—Repayment of invoice price.*]—A cargo sold by a firm "as agents" for a foreign shipper having been rejected by the purchasers, the agents repaid the invoice price to purchasers, receiving in return the shipping documents. Pending the question as to the right to reject the purchasers, with the agents' authority, had sold a portion of the cargo. In answer to a demand for payment of the price of the part thus sold, the purchasers pleaded that they were entitled to retain it against their claim of damages against the agents' principal for non-fulfilment of the contract:—*Held:* when the agents repaid the invoice price & took up the shipping documents they became masters of the cargo until they were recouped for their advance, & this lien could not be defeated by such claim of retention.—SCOTT & NEILL *v.* SMITH & Co. (1883), 11 R. 316; 21 Sc. L. R. 222.—**SCOT.**

PART VIII. SECT. 3, SUB-SECT. 4.—A. (b).

d. *Agent—Lien for trouble & expense.*]—DOWNIE *v.* BARRIE (1879), 9 R. L. 517.—**CAN.**

e. —— *Lien in respect of liabilities incurred.*]—Agents accepted bills for Rs.12,000 drawn by a branch house of their principals, & to satisfy this liability received bills in their favour for Rs.11,400. Before completely satisfying this liability the agents failed & indorsed two bills remaining in their hands to deft. for their creditors:—*Held:* pltfs. as the principals were entitled as against the trustee to the two bills subject to the agent's lien of Rs.600.—HAZARI MULL NAHATTA *v.* SOBAGH MULL DUDDHA (1872), 9 B. L. R. 1.—**IND.**

1997 i. *Broker — Advances against goods.*]—An agent for sale of goods delivered them to a broker for sale, who made advances *bonâ fide* on them:—*Held:* the broker entitled to retention against the true owner to the extent of covering his advances to the agent.—EDE & BOND *v.* FINDLAY, DUFF & Co. (1818), 19 F. C. 509.—**SCOT.**

f. *Commercial traveller.*]—An agent for sale of goods, in knowledge of insolvency of his principals, but before sequestration, uplifted debts due to them & retained them to account of his own claims against them for salary, etc. Shortly after sequestration of his principals the agent became bkpt., & his assignee claimed the balance from the sequestrated estate of the principals, giving credit for debts so uplifted:—*Held:* (1) the agent was not entitled to collect debts & retain them when he had knowledge of insolvency; (2) having collected the funds as a servant he was not entitled to retain.—DICKSON *v.* NICHOLSON (1855), 27 J. 515; 17 D. 1011.—**SCOT.**

g. *Commission agent — Lien on business books for outstanding debts.*]—An agent for a trading firm was furnished by it with ledger & sales-entry books, etc., it being stipulated *inter alia* that the books should remain the property of the firm. The agent ceasing to act for the firm pleaded a right to retain the books until all the outstanding debts had been recovered:—*Held:* the firm, as having the greatest interest in the books, was entitled to recover them.—MURRAY *v.* BERNARD (1869), 6 Sc. L. R. 230.—**SCOT.**

h. —— *Lien on mortgage deed for charges attending negotiation of loan.*]—A commission agent who attempts to raise a mtge. on land has no lien on the transfer deed for his charges, or for the proposed lender's claim for interest in lieu of notice in respect of a loan which has been negotiated but cancelled.—JEWELL & RUTTER *v.* HAXELL & STEER (1897), 14 S. C. 16; 7 C. T. R. 23.—**S. AF.**

k. *Forwarding agent — General lien.*]—An agent to carry goods for pltfs. received from them bills of lading of various cargoes, & then arranged with defts. that they should carry them, & gave them bills of lading. The agent died insolvent when a balance was due to defts. for services & disbursements & they had certain of the goods still in their hands. Pltfs. alleged defts. contracted with & gave credit to the agent & therefore had no lien on the goods:—*Held:* they had a lien upon each portion of the goods in their possession for their general balance as well as for charges arising in those particular goods.—GREAT WESTERN RY. Co. *v.* CRAWFORD (1880), 6 Q. L. R. 160.—**CAN.**

l. *Landing agent—Lien for expenses.*]—An agent for the landing & sale of goods has a tacit hypothec upon such goods for the amount of his reasonable expenses incurred in the landing & sale of the goods, & may retain them until his expenses have been paid.—WALKER *v.* DURANT & Co. & FRAZER (1883), 2 S. C. 361.—**S. AF.**

m. *Notary — Right to retain principal's cheque—Pending settlement of charges.*]—GIBSONNE & TESSIER (1887), 19 R. L. 494.—**CAN.**

n. *Steward—Right to retain documents of title.*]—A. placed documents relating to his estates in the hands of his factor, & afterwards granted a trust deed for behoof of his creditors, & under this the trustees applied for the documents to the factor, who refused to give them up until his salary & account for outlays were paid:—*Held:* he was entitled to retain the documents on the ground of

1998. Broker purchasing—Paying price as surety—Vendor's lien.]—On Mar. 3 certain goods belonging to C., lying at St. Katharine Dock, in custody of the Docks Co., were bought by D., as broker for buyers & sellers, for B. & Co., without disclosing the names of his principals, & D. indorsed to them the delivery order he had obtained from the sellers, on the representation of B. & Co. that the goods were wanted for immediate shipment. They pledged their interest in the goods to pltfs., & indorsed the order to them. On the prompt day, Mar. 18, pltfs.' clerk lodged the order at the London office of the Docks Co., with this memorandum, "Hold within to our order, & have warrants made out as soon as possible." He was told that warrants would be ready with the goods on Mar. 20. Three hours later a messenger from the office reached the warrant office at the Dock House with a notice that the order had been lodged. Meanwhile B. & Co. stopped payment, & D. being so informed, & having no notice of pltfs.' title, on the same day paid C. for the goods, & through a clerk, who reached the Dock House before the messenger had arrived, obtained at the warrant office a warrant for the goods in the name of C., who indorsed the same to D. & gave him a second delivery order. The first delivery order was returned to pltfs. by the Docks Co., who refused to act upon it. In an action by pltfs. claiming, as against the Docks Co., C., & D., to be entitled to the goods:—*Held:* (1) D. was surety, & B. & Co. principal debtors; (2) in the circumstances the unpaid vendors' lien had passed to D.; (3) the title to the goods was in D.; (4) C. was not a necessary party to the suit.—IMPERIAL BANK *v.* LONDON & ST. KATHARINE DOCKS Co. (1877), 5 Ch. D. 195; 46 L. J. Ch. 335; 36 L. T. 233.

1999. —— Broker's lien against undisclosed principal of employer.]—N. & Co., commission agents, employed defts., who were sworn brokers, to buy 18 chests of indigo for them at one of the East India Co.'s sales. N. & Co. dealt on behalf of pltf. but this was not mentioned. Defts. paid for the chests & kept the India warrants, the goods remaining in the co.'s warehouse. Pltf., being informed of the purchase, paid N. & Co. N. & Co. afterwards directed defts. to sell the indigo & apply proceeds in reduction of a balance due to them from N. & Co. which was done, defts. not knowing that any other person had a claim to the goods & never having been paid, specifically, for the advance which they had made in respect of them. There had been a running account between N. & Co. & defts. for some time, during which defts. held a number of warrants for indigoes purchased by them for N. & Co. & for which defts. had made advances. N. & Co. occasionally withdrew the warrants & at or near the same time paid in money to their account with defts. to about the value. There was no express agreement as to this, but an understanding that the warrants were not to be taken away upon credit. The payments were made & entered generally. Between the time of purchasing the 18 chests & that of the direction to resell them N. & Co. had paid in this manner more than the value of the 18 chests, but had also during all that time been indebted to defts. in a larger amount. On trover brought by pltf. against defts.:—*Held:* (1) the above payments on account could not be considered as appropriated to the discharge of defts.' claim on the 18 chests; (2) they had a lien upon these at the time of the sale, which in the circumstances was an answer to the action.

If a broker sells or procures the sale of goods to another person, who sells the goods to a third person without delivering possession either corporally or symbolically, & the name of the third person is never mentioned to the broker, the broker has the same right as against the third person that he had against the person with whom he originally dealt (LORD TENTERDEN, C.J.).—TAYLOR *v.* KYMER (1832), 3 B. & Ad. 320; 1 L. J. K. B. 114; 110 E. R. 120.

Annotations:—**Consd.** Bonzi *v.* Stewart (1842), 4 Man. & G. 295; Cole *v.* North Western Bank (1875), L. R. 10 C. P. 354, Ex. Ch. **Distd.** Shenstone *v.* Hilton, [1894] 2 Q. B. 452.

2000. Custom-house agent.] — A custom-house agent has a lien on the bills of lading & goods for his services.—LIGHTLY *v.* BUCHANAN (1847), 9 L. T. O. S. 126.

Insurance broker.]—*See* INSURANCE.

Master of ship.]—*See* SHIPPING & NAVIGATION.

2001. Shipbroker.]—A master & part-owner of a vessel consigned her to defts., shipbrokers, on the usual terms of commission, on which the ship's papers were handed over to them, & they made disbursements on his account. He was afterwards arrested, & lay in prison more than 2 months, on which a commission of bkpcy. was issued against him, & pltfs. were appointed his assignees. Whilst he was in prison defts. adjusted their account with him, received the balance due to them on account of their disbursements, & at the same time delivered to him the ship's papers. In an action by the assignees for the recovery of such balance:—*Held:* (1) they were not entitled to recover, as defts. had a lien on the papers until their account was adjusted & paid; (2) neither the bkpt. nor his assignees could have disposed of the vessel before the papers were given up.—THOMPSON *v.* BEATSON (1823), 1 Bing. 145; 7 Moore, C. P. 548; 130 E. R. 59.

Solicitor.]—*See* SOLICITORS.

2002. Stockbroker—General lien.]—Bankers deposited Dutch bonds with a broker to cover an advance, the broker having power to sell the bonds when the advance became payable:—*Held:* the broker was not only entitled to hold the bonds as security for such advance, but had a general lien upon them for all moneys advanced by him to the bankers.—JONES *v.* PEPPERCORNE (1858), John. 430; 28 L. J. Ch. 158; 32 L. T. O. S. 240; 5 Jur. N. S. 140; 7 W. R. 103; 70 E. R. 490.

Annotations:—**Distd.** Inman *v.* Clare (1858), John. 769. **Apld.** Bock *v.* Gorrissen (1860), 2 De G. F. & J. 434. **Distd.** *Re* Bowes, Strathmore *v.* Vane (1886), 33 Ch. D. 586. **Folld.** *Re* London & Globe Finance Corpn., [1902] 2 Ch. 416. **Refd.** Leese *v.* Martin (1873), 43 L. J. Ch. 193; Hope *v.* Glendinning, [1911] A. C. 419.

2003. —— ——.]—Documents relating to shares belonging to a customer were held by stockbrokers to secure a specific advance of £15,000. When this amount was repaid the documents were left with the brokers, & on subsequent transactions on the Stock Exchange by the customer, acting through the same brokers, losses were made for which the customer was liable to the brokers:—*Held:* although the specific purpose of the deposit had been satisfied by the payment of the £15,000, the brokers had a general lien on the shares for the amount due in respect of the Stock Exchange transactions.—*Re* LONDON & GLOBE FINANCE CORPN., [1902] 2 Ch. 416; 71 L. J. Ch. 893; 87 L. T. 49; 18 T. L. R. 679.

Annotation:—**Apprvd.** Hope *v.* Glendenning, [1911] A. C. 419, H. L.

implied contract.—ROBERTSON *v.* ROSS (1887), 15 R. 67; 25 Sc. L. R. 62.—**SCOT.**

o. —— ——.]—A bondholder in possession of a landed estate claimed delivery of leases & other estate documents to enable him to appear as a party to proceedings in a Land Ct.:—*Held:* the factor on the estate had no right to retain the leases or documents in security of a debt due to him by the estate. The only person who has such right available against every one is a law agent.—MACRAE *v.* LEITH, [1913] S. C. 901; 50 Sc. L. R. 406; [1913] 1 S. L. T. 273,—**SCOT.**

Sect. 3.—Agent's rights against principal: Sub-sect. 4, A. (b), B. (a), (b) & (c).]

2004. ——— ———.]—Stockbrokers who have received transfers of stock or shares for delivery to a customer have by the law of Scotland a general lien on these transfers for the balance due to them by the customer.

Applts., stockbrokers in Edinburgh, claimed to retain in their hands an uncompleted transfer of shares purchased & paid for by resp. until a claim by applts. arising out of a subsequent transaction between them & resp. was satisfied:—*Held:* applts., as stockbrokers, had a general lien on the transfer in question until the claim against resp. was satisfied.—HOPE & CO. *v.* GLENDINNING, [1911] A. C. 419; 80 L. J. P. C. 193, H. L.

B. Lien by Agreement.

(a) In General.

2005. Agreement conferring lien—Not bill of sale.]—By an agreement in writing between a foreign manufacturer & his agent in E. it was provided that advances made by the agent should "be covered & secured by the stock of goods which shall be in his hands," which the foreign principal bound himself not to let fall below a certain value. The principal terminated the agency & claimed to remove the goods without satisfying the agent's claims for the expenses of the agency, & contended that the agreement was a bill of sale & void for want of registration:—*Held:* (1) the agreement gave no power to seize the goods, but only to retain possession of the goods come to his hands; (2) when the goods came to the agent's hands he had possession coupled with an agreement which gave him a legal, not an equitable, right; (3) the agreement was not void as a bill of sale.—MORRIS *v.* DELOBBEL-FLIPO (DE FOBBEL-FLIPO), [1892] 2 Ch. 352; 61 L. J. Ch. 518; 66 L. T. 320; 40 W. R. 492; 36 Sol. Jo. 347.

For full anns., *see* BILLS OF SALE.

2006. Factor—Particular lien.]—A factor has a specific lien on goods purchased by him.—*Ex p.* EMERY (1755), 2 Ves. Sen. 674; 28 E. R. 430.

2007. Factor becoming surety.]—A factor who becomes surety for his principal has a lien on the price of goods, sold by him for his principal, to the amount or the sum for which he has so become surety.—DRINKWATER *v.* GOODWIN (1775), 1 Cowp. 251; 98 E. R. 1070.

Annotations:—**Distd.** Copland *v.* Stein (1799), 8 Term Rep. 199. **Folld.** Hudson *v.* Granger (1821), 5 B. & Ald. 27. **Consd.** R. *v.* Humphery (1825), M'Cle. & Yo. 173. **Apprvd.** Barnet *v.* Brandao (1843), 6 Man. & G. 630, Ex. Ch. **Refd.** Houghton *v.* Matthews (1803), 3 Bos. & P. 485; Taylor *v.* Watson (1829), 4 Man. & Ry. K. B. 259; Robinson *v.* Rutter (1855), 4 E. & B. 954; Hood *v.* Stallybrass & Balmer (1878), 3 App. Cas. 880, P. C.

(b) Whether Lien excluded by Agreement or other Circumstances.

2008. Agreement to sell & pay over proceeds.]—If A. deposits goods with B. for sale, & B. promises to pay the proceeds to A. when sold, B. has no lien on them (if not sold) for the balance of his general account arising upon other articles.

The lien which a factor has on the goods of his principal arises upon an agreement which the law implies; but where there is an express stipulation to the contrary it puts an end to the general rule of law (LORD KENYON, C.J.).—WALKER *v.* BIRCH (1795), 6 Term Rep. 258; 101 E. R. 541.

Annotation:—**Consd.** Houghton *v.* Matthews (1803), 3 Bos. & P. 485.

2009. ———.]—An agreement by a broker, that he will sell goods for his principals & pay over the proceeds without setting off a debt due from the principals to him does not deprive the broker of his right of lien or set-off. If he also agrees not to set off a debt due from a prior firm, which, by a previous letter, the principals had agreed to pay him, they having assumed the funds of that firm, the letter & agreement must be set against each other, & the broker will not be allowed to set off that debt against the proceeds of the goods.—MCGILLIVRAY *v.* SIMSON (1826), 9 Dow. & Ry. K. B. 35; 5 L. J. O. S. K. B. 53.

Annotations:—**Mentd.** Buchanan *v.* Findlay (1829), 9 B. & C. 738; Young *v.* Bank of Bengal (1836), 1 Deac. 622.

2010. Course of business.]—The lien of a broker upon policies of insurance which he has effected, & on which he has paid the premiums, may be superseded by a special arrangement or contract, or by his particular mode of dealing with the parties for whom he has effected them. Where he has merely agreed to state monthly accounts & to receive monthly payments, but has never delivered up the policies until after actual payment made to him, his general right of lien is not superseded in any way by this special arrangement. This is so though he has effected the policies through an intermediary, whom he knew to be an intermediary & not the principal, who has received payment from the principal, but has not paid the broker.—FISHER *v.* SMITH (1878), 4 App. Cas. 1; 48 L. J. Q. B. 411; 39 L. T. 430; 27 W. R. 113, H. L.

Annotation:—**Consd. & Expld.** Hope *v.* Glendinning, [1911] A. C. 419.

2011. Express instructions.]—The general lien of a consignee upon goods consigned to him cannot be set up by him against positive directions given him by the consignor; & if he accepts a consignment accompanied by such general directions he is bound to apply it in accordance with them.

Defts. opened an account with B. & Co., merchants abroad, upon which B. & Co. were to draw in the usual way, remitting such bills as they might draw, but the accounts were to be kept at all times fully covered. B. & Co. were also agents for pltfs., & having disposed in their behalf of goods belonging to them, they received in payment certain articles of merchandise which they consigned to defts., transmitting them the bills of lading, & at the same time informing them they had drawn against that cargo bills of exchange in favour of pltfs. Defts. did not accept those bills, & upon the arrival of the vessel they took possession of the cargo, sold it, & applied the proceeds to the discharge of a general balance due to them from the firm of B. & Co.:—*Held:* (1) defts. must have accepted the cargo with knowledge of the lien upon it in pltfs.' favour, & of the bills of exchange drawn against it; (2) as between B. & Co. & pltfs. such charge was effectual;

PART VIII. SECT. 3, SUB-SECT. 4.—B. (b).

p. *Agreement to place goods with agent for advances.*]—S., a principal, out of moneys advanced to him by his agent, as security for which he undertook to place in the agent's hands for sale, sugar to be imported from Batavia—the agent to repay his advances out of proceeds—sent a sum to H., his agent at Batavia, to buy sugar. After S.'s insolvency, H. purchased the sugar & sent it to S., & it was sold by his trustees in bkpcy. The agent claimed a lien on the sugar:—*Held:* (1) the agent had no lien, S. not having agreed to invest the moneys advanced in any particular way; (2) S. having failed before the purchase by H., the sugar consigned was for the benefit of his trustees.—DEAN *v.* BYRNES (1864), 3 Moo. P. C. C. N. S. 92; 16 E. R. 35.—**AUS.**

q. *Agent acting under del credere agreement.*]—A mercantile agent having sold goods & taken the purchaser's bill, which he guaranteed & indorsed to the owner of the goods, & purchaser having become bkpt., & the owner having accepted a composition on the bill & delivered it up:—*Held:* the agent not entitled to withhold delivery of the goods from purchaser till relieved of the effect of his guarantee.—STIRLING & SONS *v.* DUNCAN (1823), 1 Shaw's App. 389.—**SCOT.**

(3) defts., having knowledge of such charge, were bound either to decline the receipt of the cargo, or, if they received it, to treat it as so charged in pltfs.' favour; (4) debts from B. & Co. to defts. & the general lien, which but for this charge defts. would have had upon the cargo, were postponed to pltfs.' bills of exchange; (5) independently of the bills of exchange so made in pltfs.' favour, pltfs. would have been entitled to so much of the consignment as consisted of the goods delivered to B. & Co. in payment of the goods belonging to pltfs. which B. & Co. had sold.—FRITH *v.* FORBES (1862), 4 De G. F. & J. 409; 32 L. J. Ch. 10; 7 L. T. 261; 8 Jur. N. S. 1115; 11 W. R. 4; 1 Mar. L. C. 253; 45 E. R. 1242, L.JJ.

Annotations:—**Consd.** Robey Perseverance Ironworks *v.* Ollier (1872), 7 Ch. App. 695. **Expld.** *Re* Entwistle, *Ex p.* Arbuthnot (1876), 3 Ch. D. 477. **Distd.** Ranken *v.* Alfaro (1876), 35 L. T. 664; *Re* Suse, *Ex p.* Devers (1884), 51 L. T. 437, C. A.; Phelps, Stokes *v.* Comber (1885), 52 L. T. 873, C. A.; Brown, Shipley *v.* Kough (1885), 52 L. T. 878, C. A.

2012. Express instructions to act in principal's name.]—An agent intrusted with the possession of goods for the purpose of sale does not lose his character of factor, or the right of lien attached to it, by reason of acting under special instructions from his principal to sell the goods at a particular price & to sell in the principal's name.—STEVENS *v.* BILLER (1883), 25 Ch. D. 31; 53 L. J. Ch. 249; 50 L. T. 36; 32 W. R. 419, C. A.

2013. Special purpose—Payment of dues.]—A factor for the owner of a ship at an English port requests the master to deliver the certificate of registry to him, in order that he may pay the tonnage duties at the Custom House. He cannot, having thus obtained possession of the certificate, retain it as security for the general balance due to him as factor in respect of the ship.—BURN *v.* BROWN (1817), 2 Stark. 272.

2014. —— Deposit for safe custody only.]—Where a policy of insurance is left in the hands of an agent for safe custody only, the agent has no lien upon it, even though he has made advances without any other security than the policy; but it is otherwise if the policy was deposited with him as security for his advances.—MUIR *v.* FLEMING (1822), Dow. & Ry. N. P. 29.

2015. —— ——.]—G. & Co., merchants & factors in London, acted as correspondents & agents of L. & Co., merchants in Hamburg. In June, 1857, L. & Co. requested G. & Co. to purchase Mexican bonds for them, & "hold them at our disposal." G. & Co. purchased the bonds & wrote to L. & Co. that they had drawn bills upon them for the amount which would balance the transaction. L. & Co. wrote to G. & Co., stating they would honour the bills, & "we request you in the meantime to keep the bonds in a safe custody, & give us the numbers of the same." G. & Co. replied, "We will, until further orders, retain for safe custody the Mexican bonds." The bills drawn by G. & Co. on account of this purchase were duly honoured. Shortly after G. & Co. stopped payment:—*Held:* (1) the correspondence showed a special agreement between the parties that the bonds were deposited for a particular purpose; (2) G. & Co. had no lien upon the bonds for a general balance.—BOCK *v.* GORRISSEN, No. 1993, *ante*.

Annotation:—**Distd.** Frith *v.* Forbes (1862), 31 L. J. Ch. 793.

2016. Agreement between principal & third party for set-off.]—A. agreed to sell goods to B. to be accounted for in part of a debt to B. C. with notice agreed to sell the goods as factor:—*Held:* C. could not retain for a debt to him from A.—WEYMOUTH *v.* BOYER, No. 1417, *ante*.

For full anns., *see* S. C. No. 1417, *ante*.

(c) On what Goods—"Possession."

2017. Only on goods in possession.]—A factor has no lien on goods for a general balance, unless they come into his actual possession. If, in consideration of goods being consigned to him, he accepts bills drawn by the consignor, pays part of the freight after they arrive, & becomes insolvent before the bills are due, & before the goods get into his actual possession, the consignor may stop them *in transitu*.—KINLOCH *v.* CRAIG (1789), 3 Term Rep. 119; 100 E. R. 487; *affd.* (1790), 4 Bro. Parl. Cas. 47.

Annotations:—**Expld.** Feise *v.* Wray (1802), 3 East, 93. **Apld.** Patten *v.* Thompson (1816), 5 M. & S. 350. **Expld.** Nichols *v.* Clent (1817), 3 Price, 547. **Distd.** Bryans *v.* Nix (1839), 4 M. & W. 775. **Reid.** Sweet *v.* Pym (1800), 1 East, 4; M'Combie *v.* Davies (1805), 7 East, 5.

2018. —— Goods left in vendor's possession.]—On Oct. 15, 1817, defts., as brokers of A., purchased goods of B. & Co. on his account, & agreed with them that such goods should remain on their premises one month, free of rent, & after that time A. should pay rent until their removal. From Nov. 7 to 11 defts. shipped part of the goods by order of A., who directed the remainder to be left on B. & Co.'s premises till further orders. Shortly afterwards B. & Co. requested defts. to remove them, which they did not do, but on Dec. 9 & 10, without any direction from A., they removed them to their own premises, a docket having been previously struck against A. on the 6th & a commission issued on the 10th:—*Held:* (1) the possession continued in A.; (2) defts. had no lien on the goods for a general balance due from him to them as his brokers.—TAYLOR *v.* ROBINSON (1818), 8 Taunt. 648; 2 Moore, C. P. 730; 129 E. R. 536.

2019. —— Goods held as agent for third party.]—C., merchant at W., who had been in the habit of

PART VIII. SECT. 3, SUB-SECT. 4.—B. (c).

2017 i. *Only on goods in possession.*]—A factor has no lien on goods assigned to him until they actually come into his possession.—CLARK *v.* GREAT WESTERN RY. CO. (1859), 8 C. B. 191.—**CAN.**

2017 ii. ——.]—L., an agent for purchasing oil for H., claimed a lien for the general balance due to him on the price of certain oil received by F. & F., as agents for sale of the oil for H. H. becoming bkpt., the proceeds were arrested by deft., a creditor:—*Held:* there being no possession of the oil by L. himself or by F. & F. for his behoof, L. had no right of lien over the price.—NEVITT *v.* CLEASLEY (1823), 2 S. 184.—**SCOT.**

2017 iii. —— *Constructive possession of policy.*]—An agent effected an insurance for a principal on a vessel, the policy being made out in the name of the agent, but remaining in the possession of the insurance broker. On the sum in the policy becoming due through loss, both principal & agent claimed, the latter in respect of a balance alleged to be due to him by his principal:—*Held:* the agent had a lien over the policy for his general balance, such lien being equally effectual, whether the policy continued in the broker's custody or his own, the possession of the broker being taken as the possession of the agent.—WILMOT *v.* WILSON (WILMOT'S ASSIGNEE) (1841), 3 D. 815; 16 Fac. 816.—**SCOT.**

2019 i. —— *Goods held as agent for third party.*]—Goods having been purchased by a joint adventure, of which the bills of lading were taken in the name of one of the partners, who, without the knowledge of his co-partner, delivered them to a third party, by whom they were consigned to an agent along with goods belonging to himself, & an advance having been made by the agent to the third party on the consignment:—*Held:* as between the agent & the co-partner (1) the goods of the joint adventure were subject to a lien for money advanced at the time of consignment, but not to a lien for the general balance due by the third party to the agent; (2) the agent was entitled to apply them in extinction of the special advance, so as to enlarge his security over the goods of the third party for payment of the general balance.—JOHNSTON & MANLEY *v.* FINDLAY, DUFF & CO. (1826), 4 S. 407.—**SCOT.**

2019 ii. —— ——.]—A mercantile agent of a co. to purchase goods made large advances on them, & by its orders purchased, as its broker, other goods, of which he obtained possession, making no advances on the latter, which formed part of a joint adventure in which the

Sect. 3.—*Agent's rights against principal: Subsect.* 4, *B.* (*c*) *&* (*d*).]

consigning cargoes of grain to B., a corn-factor at Bristol, wrote to B. stating he was about to ship him a cargo of oats, & had drawn on him for £550, & desiring him to effect an insurance on the cargo. B. accepted the bill. Before the vessel sailed C. stopped payment & sent the bill of lading, indorsed in blank to H., not informing him of his engagement with B. On arrival of the vessel H. sent the bill of lading to B., desiring him to act for him. B. paid the freight, & took possession of the cargo, which was seized by defts., creditors of C. under a foreign attachment:—*Held:* B. had not such a property in the goods as to enable him to maintain trover against defts.

If C. had authorised H. to employ a broker for sale of the goods, & H. had placed them in the hands of B. for the purpose of sale, the argument for pltf. might apply, but all that C. does is to authorise H. to sell, & he has no right to appoint a third person (PARKE, B.).—BRUCE *v.* WAIT (1837), 3 M. & W. 15; Murp. & H. 339; 7 L. J. Ex. 17; 150 E. R. 1036.

Annotations:—**Distd** Bryans *v.* Nix (1839), 4 M. & W. 775; Evans *v.* Nichol (1841), 3 Man. & G. 614.

2020. Factor's general lien only on goods in possession as factor.]—A factor can only claim a lien for his general balance upon goods which come to his hands as factor.—DIXON *v.* STANSFIELD, No. 2021, *post.*

2021. —— Policy of insurance held as insurance broker only.]—A. & Co., who carried on business at Hull as merchants, factors, ship & insurance brokers, & general agents, had had various dealings, as factors, with B. & Co., of London. Whilst these dealings were going on between them, B. & Co. wrote to A. & Co. requesting them to get a policy of insurance effected for them on the ship *Exporter* for a voyage from the Downs to South America, thence to the West Indies. A. & Co. procured the insurance to be effected, & B. & Co. remitted them the premiums, the policy remaining in the hands of A. & Co.:—*Held:* A. & Co. not entitled to hold the policy as a lien for the general balance due to them, as factors, from B. & Co.—DIXON *v.* STANSFIELD (STANSFELD) (1850), 10 C. B. 398; 16 L. T. O. S. 150; 138 E. R. 160.

2022. Goods consigned to factor—Bill of lading or other document—Intention to vest property.]—A., of Liverpool, wishing to draw upon the banking-house of B. in London to a large amount, agreed among other securities given to consign goods to a mercantile house consisting of the same partners as the banking-house, though under the firm of B. & C.; he remitted the invoice of a cargo & the bill of lading indorsed in blank to B. & C., but the cargo was prevented from leaving Liverpool by an embargo. A. then became bkpt., being considerably indebted to B., & the cargo was delivered to his assignees by the captain:—*Held:* B. & C. might maintain trover for it against the captain.—HAILLE *v.* SMITH (1796), 1 Bos. & P. 563; 126 E. R. 1066.

Annotations:—**Consd.** Patten *v.* Thompson (1816), 5 M. & S. 350. **Distd.** Mitchel *v.* Ede (1840), 11 Ad. & El. 888. **Consd.** Burdick *v.* Sewell (1884), 13 Q. B. D. 159, C. A. **Refd.** Bryans *v.* Nix (1839), 4 M. & W. 775. **Mentd.** Leask *v.* Scott (1877), 25 W. R. 654, C. A.

2023. —— —— ——.]—T., a corn merchant at Longford, who had been in the habit of consigning cargoes of corn to pltfs. as his factors for sale at Liverpool, & obtaining from them acceptances on the faith of such consignments, on Jan. 31 obtained from the masters of two canal boats (No. 604 & No. 54) receipts signed by them for full cargoes of oats therein stated to be shipped on board the boats deliverable to T.'s agent in Dublin, in care for & to be shipped to pltfs. at Liverpool. At the time boat 604 was loaded, but no oats were then actually shipped on board boat 54. On Feb. 2 T. enclosed these receipts to pltfs. & drew a bill on them against the value of the cargoes, which pltfs. accepted on the 7th & paid when due. On Feb. 6 W., an agent of deft. who was T.'s factor for sale in London, arrived at Longford & pressed T. for security for previous advances. T. on that day gave W. an order on T.'s agent in Dublin to deliver to W. the cargoes of boats 604 & 54 on their arrival there. Boat 604 had then sailed from Longford, but boat 54 was only partially loaded. The loading was completed on the 9th, & T. then transmitted to W. in Dublin a receipt signed by the master of the boat (in the same form as those sent to pltfs.) making the cargo deliverable to W. W. received this on the 10th. On their arrival in Dublin W. took possession of both cargoes for deft.:—*Held:* the property in the cargo of boat 604 vested in pltfs. on their acceptance of the bill, & they were entitled to maintain trover for it, but they could not maintain trover for the cargo of boat 54, since none of it was on board, or otherwise specifically appropriated to pltfs., when the receipt for that boat was given by the master. *Qu.:* whether a document, similar in form to a bill of lading, but given by the master of a boat navigating an inland canal, has the effect of such an instrument in transferring the property in the goods.—BRYANS *v.* NIX (1839), 4 M. & W. 775; 1 Horn & H. 480; 8 L. J. Ex. 137; 150 E. R. 1634.

Annotations:—**Distd** Evans *v.* Nichol (1841), 3 Man. & G. 614; Jenkyns *v.* Usborne (1844), 7 Man. & G. 678. **Consd.** *Re* Wiltshire Iron Co., *Ex p.* Pearson (1868), 3 Ch. App. 443. **Refd.** Gattorno *v.* Adams (1862), 12 C. B. N. S. 560; British & India Steam Navigation Co. *v.* De Mattos, De Mattos *v.* British & India Steam Navigation Co. (1864), 4 New Rep. 67, Ex. Ch.; Calcutta & Burmah Steam Navigation Co. *v.* de Mattos (1864), 33 L. J. Q. B. 214, Ex. Ch.; Meyerstein *v.* Barber (1866), L. R. 2 C. P. 38.

2024. —— —— ——.]—C., a manufacturer at Newcastle, consigned goods to E. & Co., his factors in London, specifically to meet a bill drawn upon them, transmitting to them a receipt, signed by the mate of the vessel, acknowledging the goods to have been received on board to be delivered to E. & Co.:—*Held:* E. & Co. had a sufficient property in the goods & right to the possession to entitle them to maintain trover against a wrongdoer, the consignor not having repudiated the contract upon which they were sent.—EVANS & EVANS *v.* NICHOL & NICHOL (1841), 3 Man. & G. 614; 4 Scott, N. R. 43; 5 Jur. 1110; 133 E. R. 1286; *sub nom.* EVANS *v.* NICHOL & LUDLOW, 11 L. J. C. P. 6.

For full anns., *see* SALE OF GOODS.

2025. Possession by servant—Pledge by agent.]—Where a broker pledges his principal's goods as his own, the pawnee who claims by such tortious act of the broker cannot claim to retain against the principal in trover for the amount of the lien the broker had on the goods for his general balance at the time of such pledge. It may be otherwise where one who has a lien delivers the goods to a third person as security, with notice of his lien, & appoints him to continue his possession as his servant for preservation of his lien.—MCCOMBIE *v.* DAVIS (1805), 7 East, 5; 3 Smith, K. B. 3; 103 E. R. 3.

Annotations:—**Distd.** Pickering *v.* Busk (1812), 15 East, 38. **Consd.** Cole *v.* North Western Bank (1875), L. R. 10 C. P.

co. & others were concerned. In a competition with creditors of the joint adventure:—*Held:* the agent had no lien over these goods for security of his general balance arising out of the transaction with the co., & was bound to consign the whole proceeds, although one of the creditors had drawn dividends which considerably diminished his debt—there being other claimants to the fund.—M'CALL & Co. *v.* BLACK & Co. (1824), 2 Shaw's App. 188.—**SCOT.**

354 **Refd.** Donald *v.* Suckling (1866), 30 J. P. 565. **Mentd.** Featherstonehaugh *v.* Johnston (1818), 2 Moore, C. P. 181

2026. Lien on price though no possession of goods.] —Where a factor is in advance for goods by actual payment, or where he sells under a *del credere* commission, whereby he becomes responsible for the price, he has a lien on the price, though he has parted with the possession of the goods (CHAMBRE, J.).—HOUGHTON *v.* MATTHEWS (1803), 3 Bos. & P. 485; 127 E. R. 263.

Annotations:—**Refd.** Morris *v.* Cleasby (1813), 1 M. & S. 576; Hudson *v.* Granger (1821), 5 B. & Ald. 27; Bramwell *v.* Spiller (1870), 21 L. T. 672.

2027. Ship's papers—Agent for sale of ship.]—Where A. commissioned B. to sell a ship for him, &, having deposited her register with him for that purpose, became bkpt.:—*Held:* B. had a lien on the register against the assignees of A. for the amount of his demand against A., consisting partly of charges incurred on the ship's account, & partly of other charges.—MESTAER *v.* ATKINS (1814), 5 Taunt. 381; 1 Marsh. 76; 128 E. R. 737.

Annotation:—**Distd.** Wilson *v.* Heather (1814), 5 Taunt. 642.

2028. Possession after bankruptcy of principal.]—An actual possession given to a factor by a carrier, by order of the shipper, after the latter's bkpcy., is not such a possession as will give him a lien against the assignees, although the goods were shipped on account of the factor, & bills had been accepted by him on the faith of it. Such an order rather operates to defeat his claim of lien, as being an act of ownership exercised by bkpt. Nor is a delivery to a master of a vessel, where the consignor has written to the consignee, apprising him that he has consigned to him, & requesting him, on the faith of such consignment, to accept bills (which he accepts & pays), such a constructive delivery to a consignee as will give him a lien against the assignees; it is not within the principle of the cases, which decide that an equitable right will supply the deficiency of an actual delivery in support of a well-founded lien not perfected by possession. Letters advising of a consignment of goods to a party who has accepted bills on the faith of such consignment are not equivalent in effect to bills of lading indorsed.—NICHOLS *v.* CLENT (1817), 3 Price, 547; 146 E. R. 348.

Annotation:—**Distd.** Bryans *v.* Nix (1839), 4 M. & W. 775.

2029. Possession after secret act of bankruptcy.]—A trader, after a secret act of bkpcy., consigned goods to a factor, who agreed to advance money thereon, & accepted & paid bills drawn on him by the trader. A commission afterwards issued against the trader on such prior act of bkpcy., after which the factor sold the goods & received money:—*Held:* he was answerable to the assignees for the value of the goods.—COPLAND *v.* STEIN (1799), 8 Term Rep. 199; 101 E. R. 1344.

Annotations:—**Distd.** Cash *v.* Young (1824), 2 B. & C. 413. **Mentd.** *Re* Slobodinsky, *Ex p.* Moore, [1903] 2 K. B. 517; *Re* Hart, *Ex p.* Green, [1912] 3 K. B. 6, C. A.

See, now, Bkpcy. Act, 1914 (c. 59), s. 45.

(d) In respect of what Disbursements, Debts, etc.

2030. Debts contracted before relationship existed.]—A., a factor, having sold goods of B. in his own name to C., the latter, without paying for these goods, sent another parcel of goods to A. to sell for him, never having employed A. as a factor before. C. then became bkpt., & his assignees claimed the goods sent by him to A. which still remained unsold, tendering the charges upon those goods. A. refused to deliver them up, claiming a lien upon them for the price of the former goods sold by him to C., there being a balance then due from B. to himself:—*Held:* the assignees entitled to recover.

A factor has no general lien in respect of debts which arise prior to the time at which his character of factor commences. Liens of factors have been allowed for the convenience of trade & with a view to encourage factors to advance money upon goods in their possession, or which must come to their hands as factors; debts which are incurred prior to the existence of the relation of principal & agent are not contracted upon this principle (CHAMBRE, J.).—HOUGHTON *v.* MATTHEWS, No. 2026, *ante.*

Annotations:—**Refd.** Morris *v.* Cleasby (1813), 1 M. & S. 576; Hudson *v.* Granger (1821), 5 B. & Ald. 27; Bramwell *v.* Spiller (1870), 21 L. T. 672.

2031. Liabilities incurred without authority—Goods delivered to broker as agent for principal.]—A broker purchasing goods for his principals, without their knowledge, added to the terms of purchase, which the principals had agreed to, a guarantee by himself of their bills. The goods were delivered to the broker, & the principals became bkpts.:—*Held:* the broker could neither detain the goods as upon a stoppage *in transitu*, nor had he any lien on them for the money he had paid on his guarantee.—GURNEY *v.* SHARP (1812), 4 Taunt. 242; 128 E. R. 322.

Annotation:—**Foll.** Morris *v.* Cleasby (1816), 4 M. & S. 566.

2032. Charterer's agent—Expenses & loss—Not commission or profits.] — A., in New Brunswick, employed B., an agent in London, to charter a number of vessels for the removal of a quantity of deals from the former place, which were to be consigned to B. for sale. A., in breach of the contract, consigned the ships & forwarded the bills of lading to C.:—*Held:* (1) B. had a lien on all the cargoes for the expenses & pecuniary loss actually incurred by him under the contract in respect of each of the vessels; (2) he was entitled to stay the proceeds of one of the cargoes, before it had been transmitted by the consignee to the shipper, until the whole of such expenses had been paid to him; (3) he was not entitled to any lien for commission or profits which he might have earned if the cargoes had been duly consigned to him.—

PART VIII. SECT. 3, SUB-SECT. 4.—B. (d).

r. Advances to shipbuilders—Custom-house expenses.] — Agents directed to contract to build a ship, so contracted, making advances to the builders, it being agreed that the principals should supply the rigging, which was delivered to the agents. The agents obtained a transfer of the ship & registered it in the name of one of their partners:—*Held:* the property in the rigging was in the principals, but the agents had a lien on it for the advances made & for custom-house expenses.—ROGERSON *v.* REID (1830), S. R. 412; 1 C. R. A. C. 8; 1 Rep. 362; 1 R. J. R. Q. 330; 12 Eng. Rep. 357.—**CAN.**

s. Money advanced to redeem bonds.] —Pltfs. sued defts. to recover bonds of a land co., claimed to be the property of pltfs. The board of directors of both pltf. & defts. cos. were composed of same individuals, who also controlled the land co. Defts. acted as agent for the land co. in the handling of its bonds, & when certain of the bonds matured, as a temporary expedient took them up with money in part belonging to pltfs. Later, the land co. being unable to redeem, a minute was put through the books of both cos., reciting that pltfs. had purchased the bonds:—*Held:* pltfs. were entitled to the bonds subject to defts.' lien for that part of the purchase-money paid by them.—NORTHERN SULPHIDE CO. *v.* CRAIG (1912), 22 O. W. R. 563; 3 O. W. N. 1388; 4 D. L. R. 82.—**CAN.**

t. Agent of purchaser paying lien note.] —An instrument in the form of a promissory note given for the price of an article with the added condition that title to the property, for which the note is given, shall remain in the vendor until the note is paid, is not a promissory note or negotiable instrument; & an agent who, having indorsed such instrument as surety to the vendor, pays the amount thereof upon default of the maker, is subrogated by law in the rights of the vendor & is entitled to the ownership of the property sold under such agreement.—DORVAL *v.* CARRIER (1916), Q. R. 51 S. C. 343.—**CAN.**

u. Costs incurred by agent in conducting legal proceedings.]—An agent conducting an appeal to Land Tax Comrs. has not a lien upon documents of his principal coming into his hands for his charges in respect of such appeal.—WATSON *v.* CLINCH (1879), 5 V. L. R. L. 278.—**AUS.**

Sect. 3.—Agent's rights against principal: Subsect. 4, B. (d), C. & D.]

YOUNG *v.* NEILL (1863), 32 Beav. 529; 9 L. T. 9; 9 Jur. N. S. 976; 11 W. R. 1052; 55 E. R. 208.

2033. Interest.]—The petitioners, factors of the bkpt., held a large quantity of sugars in their hands at the time of the bkpcy., on which they had a lien for £41,591 15*s.* 4*d.* & interest in respect of previous advances. They had deferred the sale of the sugars at the request of bkpt. before the bkpcy., & of the assignees afterwards, in expectation of a rising market; & the sugars were eventually sold to great advantage:—*Held:* petitioners entitled to apply the proceeds of the sugars in payment of the interest on their debt accruing after the bkpcy., & to prove for the balance of the principal without deduction being made in respect of the interest so received.—*Re* LANCASTER, *Ex p.* KENSINGTON (1835), 1 Deac. 58; 2 Mont. & A. 300; 5 L. J. Bcy. 4.

Annotation:—**Distd.** *Re* Savin (1872), 7 Ch. App. 761 n.

2034. Outstanding acceptances.]—A principal gave notice to his factor of an intended consignment of a ship to him for the purpose of sale, & in consequence drew bills on him, which the factor accepted. The principal died, & his exors. directed the captain of the ship to follow his former orders; the captain thereupon delivered the ship into the possession of the factor, who sold same:—*Held:* the factor had a lien upon the proceeds as well for the amount of money disbursed by him for the necessary use of the ship on its arrival, & for the acceptances by him actually paid, as for the amount of his outstanding acceptances not then due.—HAMMONDS *v.* BARCLAY (1802), 2 East, 227; 102 E. R. 356.

Annotations:—**Distd.** Dyson *v.* Peat, [1917] 1 Ch. 99. **Mentd.** Richardson *v.* Goss (1802), 3 Bos. & P. 119; Giles *v.* Grover (1832), 9 Bing. 128.

2035. —— Winding up—Goods delivered up under order.]—W. was appointed agent of a co. for the sale of goods manufactured by the co. Part of the arrangement was that the co. should draw on W. against goods assigned to him as agent. W. accepted a bill for £200 at 4 months' date; before the bill arrived at maturity the co. was ordered to be wound up, & goods then in possession of W. were taken by the liquidators & sold by them. W. honoured the bill when it arrived at maturity:—*Held:* (1) W. had a lien on goods to the extent of the payment by him in respect of the bill; (2) he was entitled to be repaid the amount paid by him, out of the proceeds of the sale of the goods.—*Re* PAVY'S PATENT FELTED FABRIC CO. (1876), 1 Ch. D. 631; 45 L. J. Ch. 318; 24 W. R. 507.

2036. Outstanding bills.]—S., who had for many years traded as a timber merchant in his own name, entered into an agreement with F. & Co., also timber merchants, to carry on his business thenceforth as their agent at a remuneration by way of a share of profits. The business was thenceforth carried on under this agreement, but in the name of S. as before. S. dealt with the timber in his possession as if he were the absolute owner of it (except as between himself & F. & Co.) & there was nothing done to inform the outside world of the change which had taken place. In the course of the business F. & Co. drew bills on S., which he accepted in his own name to be protected by F. & Co. Both F. & Co. and afterwards S. filed liquidation petitions. Before S.'s liquidation F. & Co.'s trustee demanded the timber in his hands, which was refused:—*Held:* to the extent of the current bills, S.'s estate had a lien on the timber.—*Re* FAWCUS, *Ex p.* BUCK (1876), 3 Ch. D. 795; 34 L. T. 807.

C. Rights under and Effect of Lien.

2037. Lien not assignable—Right of principal to recover goods—Pledge a discharge of lien.]—If a factor pledge the goods of his principal, the latter may recover the value of them in trover against the pawnee, on tendering to the factor what is due to him, without any tender to the pawnee.—DAUBIGNY *v.* DUVAL (1794), 5 Term Rep. 604; 101 E. R. 338.

Annotations:—**Refd.** M'Combie *v.* Davies (1805), 7 East, 5; Fielding *v.* Kymer (1821), 2 Brod. & Bing. 639; Donald *v.* Suckling (1866), 7 B. & S. 783.

2038. Bankruptcy of principal—Goods in order & disposition of principal.]—A Scotch firm had a branch in London, which was wholly conducted by an agent & manager at a salary, but in their name. By contract, he was to have a lien on goods consigned to him for bills accepted by him for the firm. The firm became bkpt. in Scotland:—*Held:* (1) the goods under the manager's control at the time were within the "order & disposition" of bkpts.; (2) they passed to the assignees of bkpts. unaffected by his lien.—HOGGARD *v.* MACKENZIE (1858), 25 Beav. 493; 4 Jur. N. S. 1008; 6 W. R. 572; 53 E. R. 725.

2039. Crown—Available against—Goods seized under extent.]—A factor to whom goods have been sent for sale & who has accepted bills of exchange, drawn on him by his principal to the amount of their value, has a lien on such goods, & the purchase-money, available against the Crown where the goods or money have been seized by the sheriff under an extent against the principal for a debt due to the Crown.—R. *v.* LEE (1819), 6 Price, 369; 146 E. R. 837.

Annotations:—**Consd.** R. *v.* Humphery (1825), M'Cle. & Yo. 173; Spears *v.* Lord Advocate (1838-9), 6 Cl. & Fin. 180. **Refd.** Giles *v.* Grover (1832), 9 Bing. 128; A.-G. *v.* Trueman (1843), 11 M. & W. 694.

See, further, CROWN PRACTICE.

2040. Exercise of dominion over goods—Securing possession.]—An agent having a lien is not guilty of a conversion for dealing with goods in such a way as is right & reasonable in order to retain it. A shipping agent having a lien on the bill of lading of goods he has shipped may, if the lien is not satisfied before they have reached their destination, have the goods brought home in order to retain his lien on them, & is not liable in trover for so doing.—EDWARDS *v.* SOUTHGATE (1862), 10 W. R. 528.

2041. Consideration—Giving up policy subject to lien—Promise to pay amount due—Statute of Frauds.]—Pltf., a broker, having a lien on certain policies of insurance effected for his principal, for whom he had given his acceptances, deft. promised that he would provide for the payment of those acceptances as they became due, upon pltf.'s giving up to him such policies, in order that he might collect for the principal the money due thereon from the underwriters. This was done, & the money was afterwards received by deft:—*Held:* this was not a promise for the debt or default of another within Stat. Frauds; & pltf. might recover against deft. as well for the breach of agreement in not providing for the payment of the acceptances, as also upon a count for money had & received.—CASTLING *v.* AUBERT (1802), 2 East, 325; 102 E. R. 393.

Annotations:—**Distd.** Thomas *v.* Williams (1830), 10 B. & C. 664; Rounce *v.* Woodyard (1846), 8 L. T. O. S. 186. **Apld.** Macrory *v.* Scott (1850), 5 Exch. 907. **Refd.** Edwards *v.* Kelly (1817), 6 M. & S. 204; Bampton *v.* Paulin (1827), 4 Bing. 264; Fitzgerald *v.* Dressler (1859), 7 C. B. N. S. 374; Harburg India Rubber Comb Co. *v.* Marten, [1902] 1 K. B. 778, C. A. **Mentd.** Andrews *v.* Smith (1835), 2 Cr. M. & R. 627; Couturier *v.* Hastie (1852), 8 Exch. 40.

2042. Priority—Lien on freight.]—A. purchased a ship of C., in consideration of three bills of exchange,

2042 i. *Priority—Lien for advances—Claim of judgment debtor.*]—An agent for purchase of goods, who supplied funds for the purchase & for carriage & insurance, consigned the goods, & while in transit A., the principal, failed. When the agent proceeded to take steps to obtain possession, his right was disputed by a judgment creditor:—*Held:* (1) the agent was an unpaid vendor &

which he indorsed & delivered to the vendor. A. about the same time wrote an order to his agent W. directing him to pay the amount of one of the bills, £750, to C. out of the freight of the ship. By a subsequent written order A. directed W. to satisfy out of the freight the amount of any current bills given by him in payment for the vessel. W., after accepting both orders, discounted for C. the £750 bill. Upon the construction of the orders & circumstances of the case generally:—*Held:* (1) the second order was not a revocation of the first; (2) the lien of W. on the freight for the amount of the £750 bill was prior to that of the holders of the other bills.—MILN (MILNE) *v.* WALTON (1843), 2 Y. & C. Ch. Cas. 354; 7 Jur. 892; 63 E. R. 156.

2043. —— Lien for advances—Joint property — Separate debt.]—Three firms, A., B., & C., purchased corn in America, in which purchases they were jointly interested; part was remitted to England: the bills of lading being indorsed in blank were put into the hands of C. on account of the three firms, & C. consigned such part to defts. for sale by them. Defts. sold same, & realised a net sum of £8,960 10*s.* 7*d.* C., previously to this consignment, had made other large consignments of corn for sale to defts., being partly corn which they held as factors, & partly corn belonging to themselves. These cargoes so consigned were sold by defts., who received the proceeds. C. drew upon defts., who accepted the bills & duly paid the same. The whole so paid exceeded the sum realised by the sale of all the cargoes consigned including that which produced the £8,960 10*s.* 7*d.* Defts. having claimed a lien on this latter sum:—*Held:* (1) there was no contract, express or implied, giving them any further lien; (2) when all demands on the three firms jointly had been satisfied, those firms had a right to the proceeds, notwithstanding any separate debt due from any one of the consigning firms.—DENNISTOUN *v.* YOUNG (1850), 15 L. T. O. S. 346.

2044. Production—Document subject to lien not privileged from.]—A broker who has effected a policy, & has a lien on it for his premiums, may be compelled by the assured to produce it on the trial of an action against the underwriters, & he is a competent witness (notwithstanding his lien) to prove all matters connected with the policy.—HUNTER *v.* LEATHLEY (1830), 10 B. & C. 858; L. & Welsb. 125; 5 Man. & Ry. K. B. 522; 8 L. J. O. S. K. B. 201; 109 E. R. 667; *affd.* on another point, 7 Bing. 517, Ex. Ch.

Annotations:—**Apld.** Ley *v.* Barlow (1848), 1 Exch. 800; *Re* Hawkes, Ackerman *v.* Lockhart, [1898] 2 Ch. 1, C. A. **Refd.** Gibson *v.* Overbury (1841), 7 M. & W. 555; Boyle *v.* Wiseman (1855), 10 Exch. 647.

2045. Sale—No right of.]—A factor who has made an advance to his principal in respect of consignments already made, has no right to sell contrary to his principal's orders, even after demand of payment, & notice that in default he will sell to repay himself. If in such a case the factor does sell, it is no defence that he believed the sale to be, & that it was in fact, for the principal's benefit.

The making of the advance may be good consideration for an agreement that the authority of the factor to sell shall be irrevocable, but such an effect will not arise independent of the agreement (WILDE, C.J.).—SMART *v.* SANDERS (1848), 5 C. B. 895; 17 L. J. C. P. 258; 11 L. T. O. S. 178; 12 Jur. 751; 136 E. R. 1132.

Annotations:—**Refd.** Read *v.* Anderson (1882), 10 Q. B. D. 100; Frith *v.* Frith, [1906] A. C. 254, P. C. **Mentd.** Donald *v.* Suckling (1866), L. R. 1 Q. B. 585.

2046. —— —— Except by usage—Silk trade.]—SIEBEL *v.* SPRINGFIELD (1863), 8 New Rep. 36; 9 L. T. 324; 12 W. R. 73.

Annotations:—**Refd.** Johnson *v.* Stear (1863), 15 C. B. N. S. 330. **Mentd.** De Comas *v.* Prost (1865), 3 Moo. P. C. C. N. S. 158, P. C.

2047. Settlement with agent—Answer to claim by principal for price.]—The owner of goods being indebted to a factor in an amount exceeding their value, consigned them to him for sale; the factor being also similarly indebted to S., sold the goods to him. The factor afterwards became bkpt., &, on settlement of accounts between S. & the assignees, S. allowed credit to them for the price of the goods, & he then proved the residue of his claim against the estate:—*Held:* as the factor had a lien on the whole price of the goods, such settlement of accounts between the vendee & the assignees afforded a good answer to an action against the vendee for the price of the goods, brought either by or on account of the original owner.—HUDSON *v.* GRANGER (1821), 5 B. & Ald. 27; 106 E. R. 1103.

Annotations:—**Distd.** McCall *v.* Australian Meat Co. (1870), 19 W. R. 188. **Refd.** Turner *v.* Thomas (1871), L. R. 6 C. P. 610.

D. How Lost.

2048. Parting with possession.]—If a factor parts with possession of the goods to the owner, he loses his lien for the balance of accounts.—KRUGER *v.* WILCOX, No. 1989, *ante*.

Annotations:—**Consd.** Godin *v.* London Assce. Co. (1758), 1 Burr. 489. **Distd.** Foxcroft *v.* Devonshire (1760), 2 Burr. 931. **Consd.** Houghton *v.* Matthews (1803), 3 Bos. & P. 485. **Refd.** Green *v.* Farmer (1768), 4 Burr. 2214; Morris *v.* Cleasby (1813), 1 M. & S. 576; Barnett *v.* Brandao (1843), 6 Man. & G. 630.

2049. ——.]—C. purchased goods of pltf. in London, & ordered them to be forwarded to Guernsey by the care of deft., C.'s shipping agent at Southampton. Deft. took the goods from the warehouse of a London & Southampton waggoner, by whom they had been brought from London, paid the waggoner's charges, & shipped the goods for Guernsey in deft.'s name. C., who was insolvent, wrote at the request of pltf. to deft. to reland the goods without saying why; deft.'s clerk, in his master's absence, obtained a custom-house order for that purpose, but before he had relanded the goods, the vendor of other goods sold to C. & shipped in the same vessel, although a stranger to & without authority from pltf., ordered deft.'s clerk to stop the goods sold by pltf. to C.; when deft.'s clerk promised deft. should hold them for the owner:—*Held:* deft.'s having taken these goods from the waggoner, & having paid the waggoner's charges & shipped the goods, was not such a determination of the *transitus* to Guernsey as to authorise deft. to hold goods in assertion of a lien for a general balance due to him from C.—NICHOLLS *v.* LE FEUVRE (1835), 2 Bing. N. C. 81; 1 Hodg. 255; 4 L. J. C. P. 281; 132 E. R. 32.

2050. ——.]—C. & Co., cotton brokers in Bombay, were in the habit of buying & shipping cotton

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had a lien on the goods, a completed contract for the sale notwithstanding, for the price & advances made in respect of them by him; (2) the right of stoppage *in transitu* by the consignor was an elder & preferential lien & could not be defeated by claims of other creditors.—BHOLANATH *v.* BAIJ NATH (1867), 2 Agra, 11.—**IND.**

v. *No right to register charge on realty.*]—The right of retention by an agent of what he has received, even when his claim for work is contested, does not authorise him to register a notice of his lien against any realty he retains.—EDDY *v.* EDDY, Q. R. 7 Q. B. 300.—**CAN.**

PART VIII. SECT. 3, SUB-SECT. 4.—D.

w. *Lien on title deeds — Not terminated by transfer o property to another proprietor.*]—Title deeds of a property continuing in the hands of the agent of a former proprietor are subject to the agent's hypothec, in security of any account for business incurred by the proprietor, subsequent to the date of deposit, notwithstanding the transference of the estate to another proprietor, & same being conducted by the agent.—GUTHRIE *v.* OGILVIE, DYKES, ETC. (1830), 2 Sc. Jur. 193.—**SCOT.**

Sect. 3.—Agent's rights against principal: Sub-sect. 4, D. & E.; sub-sect. 5.]

for H. & Co., retaining the mate's receipts for the cotton until payment of their charges. C. & Co. having purchased & shipped for H. & Co. a quantity of cotton, took receipts from the mate in the name of H. & Co., which were indorsed to them by H. & Co. H. & Co. obtained from the master of the ship, to whom C. & Co. gave no notice of their lien, bills of lading for the cotton which were hypothecated to a firm of bankers, who also had no notice of C. & Co.'s claim :—*Held :* (1) C. & Co.'s lien was gone when they had shipped the cotton ; (2) the bankers' security was not affected ; (3) the master was not chargeable with default.—HATHESING *v.* LAING, LAING *v.* ZEDEN (1873), L. R. 17 Eq. 92 ; 43 L. J. Ch. 233 ; 29 L. T. 734.

2051. Possession once parted with—Lien cannot be revived by stoppage in transitu.]—One who has a lien on goods in his possession, if he afterwards deliver them to a ship carrier to be conveyed on account & at his principal's risk, though unknown to the carrier, cannot recover his lien by stopping the goods *in transitu* & procuring them to be redelivered to him by virtue of a bill of lading signed by the carrier in the course of his voyage.—SWEET *v.* PYM (1800), 1 East, 4 ; 102 E. R. 2.

Annotation :—**Consd.** M'Combie *v.* Davies (1805), 7 East, 5.

2052. —— Recovery of possession—Revival of lien—Insurance broker.]—Although a broker may have parted with the possession of a policy, still, if he becomes repossessed thereof, as for the purpose of procuring an adjustment after loss, he has a lien upon it for premiums which may be unpaid.—LEVY *v.* BARNARD (1818), 2 Moore, C. P. 34 ; 8 Taunt. 149 ; 129 E. R. 340.

2053. Taking security.]—If a security is taken for a debt for which the agent has a lien upon property of the principal, such security being payable at a distant day, the lien is gone (TINDAL, C.J.).—HEWISON *v.* GUTHRIE (1836), 2 Bing. N. C. 755 ; 2 Hodg. 51 ; 3 Scott, 298 ; 5 L. C. J. P. 283 ; 132 E. R. 290.

Annotations :—**Consd.** Angus *v.* McLachlan (1883), 23 Ch. D. 330. **Refd.** *Re* Morris, [1908] 1 K. B. 473, C. A.

2054. Waiver.]—Pltfs. were merchants in London & Melbourne. Deft. consigned goods to the Melbourne house, on an agreement that the advances made to him by pltfs. in London & Melbourne should be retained out of the proceeds of the goods, & the surplus should be handed over to deft. The Melbourne house remitted to deft. a sum as balance, but omitted to retain advances made in London :—*Held :* (1) pltfs. had merely a right of lien or of retainer which they had abandoned by remitting the balance ; (2) a bill to make the remittance available for their debt must be dismissed.—BLIGH *v.* DAVIES (1860), 28 Beav. 211 ; 54 E. R. 346.

E. Insurance Broker's Lien.

See INSURANCE.

SUB-SECT. 5.—AGENT'S RIGHT OF STOPPAGE IN TRANSITU.

See, generally, SALE OF GOODS.

2055. Agent abroad consigning goods to principal.]—A , being abroad, consigns goods to B., in London, but before the goods arrive B. becomes bkpt. If A. can prevent the goods coming into B.'s hands or the assignees, it is allowable in equity, & B. or the assignees shall have no relief in equity.—WISEMAN *v.* VANDEPUTT (1690), 2 Vern. 203 ; 23 E. R. 732.

Annotations :—**Consd.** Scott *v.* Surman (1742), Willes, 400. **Apld.** Snee *v.* Prescot (1743), 1 Atk. 245. **Consd.** Hodgson *v.* Loy (1797), 7 Term Rep. 440 ; Gibson *v.* Carruthers (1841), 8 M. & W. 321. **Refd.** Paul *v.* Birch (1743), 2 Atk. 621 ; Lickbarrow *v.* Mason (1787), 2 Term Rep. 63 ; Dixon *v.* Baldwen (1804), 5 East, 175 ; Booth S.S. Co. *v.* Cargo Fleet Iron Co., [1916] 2 K. B. 570, C. A.

2056. ——.]—Where agents abroad are in disburse for their principal, & upon being doubtful of his circumstances make bills of lading to their own order indorsed in blank, notwithstanding these bills of lading come to the principal's hands, yet if the agents' partner in London writes them word that their principal is bkpt. & desires them to send the bills of lading, & an order to the captain to deliver goods to him, he may retain them for himself & partners against the assignees under the commission till paid & reimbursed so much as the partnership is in advance.—SNEE *v.* PRESCOT (1743), 1 Atk. 245 ; 26 E. R. 157.

For full anns., *see* SALE OF GOODS.

2057. ——.]—A merchant abroad at request of A. purchases goods & consigns them to A. in England. A. becomes insolvent. The consignor may stop the goods at any time before they get into A.'s hands.—D'AQUILA *v.* LAMBERT (1761), Amb. 399 ; 2 Eden, 75 ; 27 E. R. 266.

Annotations :—**Refd.** Gibson *v.* Carruthers (1841), 8 M. & W. 321 ; Booth S.S. Co. *v.* Cargo Fleet Iron Co., [1916] 2 K. B. 570, C. A.

2058. ——.]—A., a merchant in England, sent goods of a given value to B., a merchant at Quebec, for sale on his account. Before the goods were sold or the proceeds ascertained, B. shipped three cargoes of timber to A. to credit in account. Two of them arrived. Against the third B. drew a bill for the amount whilst it was *in transitu*. In the interval A. dishonoured the bill & became insolvent: —*Held :* B. had a perfect right of stoppage *in transitu*, & was not bound to wait until the mutual accounts between him & A. were finally adjusted.—WOOD *v.* JONES (1825), 7 Dow. & Ry. K. B. 126.

2059. —— Agent liable for price of goods.]—A. gave an order to B., his correspondent abroad, to ship him certain goods, which B. procured upon his own credit, without naming A., & shipped to him at the original price, charging only his commission :—*Held :* (1) B. was so far a vendor as between him & A. that on A.'s bkpcy. he might stop the goods *in transitu* by procuring the bill of lading from A.'s brother ; (2) it was immaterial that A. had before his bkpcy. accepted bills drawn on him by B. for the amount of goods, such acceptances provable under his commission amounting at most to part payment for goods which did not take away vendor's right to stop *in transitu*.—FEISE *v.* WRAY (1802), 3 East, 93 ; 102 E. R. 532.

Annotations :—**Distd.** Siffken *v.* Wray (1805), 6 East, 371. **Consd. & Distd.** Nichols *v.* Hart (1831), 5 C. & P. 179, N. P. **Consd. & Apld.** Edwards *v.* Brewer (1837), 2 M. & W. 375, Exch. **Consd.** Jenkyns *v.* Usborne (1844), 7 Man. & G. 678. **Apld.** The Tigress (1863), Brown. & Lush. 38, Adm. **Consd. & Distd.** Falk *v.* Fletcher (1865), 18 C. B. N. S. 403. **Consd. & Apld.** Ireland *v.* Livingston (1870), L. R. 5 Q. B. 516. **Consd. & Expld.** Mollett *v.* Robinson (1870), L. R. 5 C. P. 646. **Expld.** Wegueliu *v.* Cellier (1873), L. R. 6 H. L. 286 ; Cassabogiou *v.* Gibb (1883), 11 Q. B. D. 797, C. A. ; *Re* Bruno, Silva, *Ex p.* Francis (1887), 56 L. T. 577.

2060. Agent purchasing goods for principal.]—An agent who purchases goods for another has the same right of stopping *in transitu* as the original

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2054 i. *Waiver—Acts not amounting to.*]—Where there is a general balance due by the principal to his agent, the agent's lien over property of his principal in his possession is not removed by the agent taking a bill in the ordinary course of dealing from the principal for the amount due on any particular transaction.—MILNE & Co. *v.* GARDNER, No. 1992 iii., *ante*.—**SCOT.**

PART VIII. SECT. 3, SUB-SECT. 5.

2060 i. *Agent purchasing goods for principal.*]—BHOLANATH *v.* BALJ NATH, No. 2042 i., *ante*.—**IND.**

seller.—COXE *v.* HARDEN (1803), 4 East, 211; 1 Smith, K. B. 20; 102 E. R. 811.

Annotations:—**Distd.** Morison *v.* Gray (1824), 2 Bing. 260. **Consd. & Distd.** Brandt *v.* Bowlby (1831), 2 B. & Ad. 932; Mitchel *v.* Ede (1840), 11 Ad. & El. 888. **Expld. & Distd.** Turner *v.* Liverpool Docks Trustees (1851), 6 Exch. 543. **Consd. & Expld.** Shepherd *v.* Harrison (1869), L. R. 4 Q. B. 493; Burgos *v.* Nascimento (1908), 100 L. T. 71. **Refd.** Seagrave *v.* Union Marine Insce. Co. (1866), L. R. 1 C. P. 305.

2061. ——.]—When goods are furnished to the agent of a bkpt., on the agent's credit, he may, to protect himself, stop them *in transitu*, & give them a new direction adverse to his principal, but if he give them a fresh destination in furtherance of the usual course of business of the principal, they pass to the assignees as in the order & disposition of bkpt.

A., carrying on business at E., ostensibly for himself, but really for B., his father, ordered goods in his own name, met them when arrived at E., &, before delivery, gave them a further destination to his uncle C.'s house, situate in W., where he occasionally did business:—*Held:* as A. appeared to do so in the ordinary course of business & according to an original intention, & not adversely (B. being in prison for debt), to protect himself in respect of a lien on them for the price, for which he was liable, the goods were the property of B. in the hands of C. —HAWKES *v.* DUNN (1831), 1 Cr. & J. 519; 1 Tyr. 413; 9 L. J. O. S. Ex. 184.

Annotation:—**Refd.** Heald *v.* Carey (1852), 11 C. B. 977.

2062. ——.]—Where an agent buys goods on behalf of his principal & pays for them with his own money, the property in the goods is in the agent. If the agent ships the goods for transmission to the principal, taking the bill of lading to his own order & drawing upon the principal for the price, the property does not pass to the principal subject to the agent's lien, but conditionally only on the bill of exchange being paid.—JENKYNS *v.* BROWN (1849), 14 Q. B. 496; 19 L. J. Q. B. 286; 14 L. T. O. S. 395; 14 Jur. 505; 117 E. R. 193.

Annotations:—**Consd.** Shepherd *v.* Harrison (1869), L. R. 4 Q. B. 196. **Refd.** Sewell *v.* Burdick (1884), 10 App. Cas. 74, H. L.

2063. None when only surety & not vendor or consignor.]—B., a trader in London, ordered goods to be shipped to him by D. & Co., his correspondents at Dantzig, who were to draw for the amount on F. at Hamburg (who had agreed to accept the bills upon receiving commission on the amount), & the bills of lading & invoices were to be transmitted by D. & Co. from Dantzig to F. at Hamburg, who was to forward them to B. in London; & F. accepted the bills of exchange drawn upon him, & on receipt of the bills of lading transmitted same (which were made out to the order of the shippers & not indorsed) to B. in London, who received them, together with the invoices & letter of advice, 5 days after an act of bkpcy. committed by him. F. also became bkpt., & the bills of exchange drawn on him by D. & Co. were obliged to be taken up & paid by themselves:—*Held:* F. had no right to stop the goods *in transitu*, being no more than a surety for the price, & not vendor or consignor.—SIFFKEN & FEIZE *v.* WRAY (1805), 6 East, 371; 2 Smith, K. B. 480; 102 E. R. 1328.

2064. Agent in position of vendor.]—Pltf., broker for defts., having bought cotton in his own name, to be consigned to them for sale, on an undertaking on their behalf by their agent that he would make advances to meet pltf.'s bills for the price, to be drawn on certain parties through whom he consigned the cotton to defts., & these parties having failed after shipment of the cotton, & before payment of bills:—*Held:* (1) the question was, whether defts.' agent had made the advances *bonâ fide;* (2) if he had, & had not undertaken to see that the cotton was paid for, pltf., though entitled to all the rights of a vendor, could not stop *in transitu*, nor recover the value of the cotton from defts.—OAKFORD *v.* DRAKE (1861), 2 F. & F. 493.

2065. ——.]—A., at the direction of B. to purchase goods of a certain kind, ordered goods on his own credit from C., his own foreign agent; C. indorsed the bill of lading to A., & A. indorsed it to B.:—*Held:* A. had to B. the relation of vendor to vendee, & possessed the right to stop in transit.—THE TIGRESS (1863), Brown. & Lush. 38; 32 L. J. P. M. & A. 97; 8 L. T. 117; 9 Jur. N. S. 361; 11 W. R. 538; 1 Mar. L. C. 323.

Annotations:—**Distd.** The Princess Royal (1870), L. R. 3 A. & E. 41. **Apld.** The Patria (1871), L. R. 3 A. & E. 436. **Distd.** Gaudet *v.* Brown, Geipel *v.* Cornforth, The Hewsons (1873), 28 L. T. 77, P. C.; Glyn, Mills, Currie *v.* East & West India Dock Co. (1880), 5 Q. B. D. 129. **Apld.** Booth S.S. Co. *v.* Cargo Fleet Iron Co., [1916] 2 K. B. 570, C. A.

2066. ——.]—D., a merchant in London, was in the habit of shipping salt for exportation at Liverpool. He usually employed pltf. to purchase the salt & pltf. shipped it, taking receipts in his own name from the mate for each delivery, &, when the cargo was complete, taking bills of lading in his own name, which he remitted to D. in exchange for D.'s acceptances for the price of the salt. Pltf. was paid no commission, but he charged D. an advance on the price of the salt. On the present occasion D. had chartered a ship to load a full cargo of salt for Calcutta, & pltf. had placed on board her, in accordance with instructions from D., 1,000 tons of salt which he had purchased for that purpose, & for which he had taken the mate's receipts in the usual course. When this quantity had been placed on board D. stopped payment, & pltf. then ceased loading, & demanded the bills of lading for the salt already on board in his own name. Deft., the shipowner, refused to allow them to be given, filled up the ship, & sent her with salt to Calcutta. The jury found when pltf. put the salt on board he did not intend to pass the property therein to D., but to retain it in himself:—*Held:* (1) this was the proper question for the jury; (2) on this finding & these facts there was a conversion of the salt by deft. at Liverpool.—FALK (FALKE) *v.* FLETCHER (1865), 18 C. B. N. S. 403; 5 New Rep. 272; 34 L. J. C. P. 146; 11 Jur. N. S. 176; 13 W. R. 346; 144 E. R. 501, C. P.

Annotations:—**Distd.** Jones *v.* Hough (1879), 5 Ex. D. 115, C. A. **Consd.** Cassaboglou *v.* Gibb (1883), 11 Q. B. D. 797, C. A. **Refd.** Gabarron *v.* Kreeft, Kreeft *v.* Thompson (1875), L. R. 10 Exch. 274.

2067. Agent for purchaser liable for paying price.]—IMPERIAL BANK *v.* LONDON & ST. KATHARINE DOCKS CO., No. 1998, *ante*.

2068. Agent consigning goods to principal.]—If an agent buys goods & consigns them to his principal, & allows the property in the goods to pass to his principal, & the goods on the bkpcy. of the principal are in the possession of the principal or come into the possession of his trustee, the agent, in the absence of any agreement to the contrary, has no right to have the proceeds of the goods specifically applied in taking up bills of exchange that have been drawn by him on his principal in respect of the price of goods; nor, in the event of the principal or his trustee refusing to accept such bills, has the agent any right to have the goods returned.

2064 i. *Agent in position of vendor.*]—A. & Co. purchased, in their own names & on their own credit, goods on the order of B., to whom they shipped them, & sent the bill of lading. B. accepted bills for the price, but was insolvent when he received the bill of lading. In an action by A. & Co. to reduce indorsations of the bills they averred they had stopped the goods *in transitu*:—*Held:* A. & Co. were in the position of sellers &, as such, were entitled to stop the goods *in transitu*.—ADAMSON, HOWIE & CO. *v.* GUILD, ETC. (1868), 6 M. 347.—**SCOT.**

Sect. 3.—*Agent's rights against principal: Subsects.* 5, 6, 7 & 8.]

But, if the bills have been refused acceptance before the goods have arrived, the agent has a vendor's right of stoppage *in transitu*. If, however, the agent has made the goods deliverable to his own order & forwarded the bill of lading to an agent of his own with a direction that it is not to be handed over unless the bills of exchange are accepted, then if the bills are not accepted the agent has a right to the goods.

C. & Co., of Para, purchased on commission for T. & Co., of Liverpool, 96 cases of indiarubber which they paid for out of moneys raised by the sale of certain bills of exchange drawn by them upon T. & Co. They advised T. & Co. of the bills without reference to the indiarubber, which they afterwards consigned to T. & Co., & forwarded to them by post the bills of lading & invoices, together with a balanced account, showing price of indiarubber & commission & interest, on one side, & amount of the bills or such parts of the bills as had been applied in the purchase of the indiarubber & interest, on the other, also a letter stating the amount of bills remaining unapplied, & containing a direction to T. & Co. to place price of the indiarubber to the credit & the bills to the debit of C. & Co.'s general account. This transaction was in accordance with the usual course of dealing between the two firms. T. & Co. failed while the indiarubber was in transit. None of the bills in question had been paid, some of them had been accepted by T. & Co. before their failure, & the trustee of their estate refused to accept the remainder. C. & Co. having failed:—*Held:* (1) the relation of C. & Co. & T. & Co. being that of agent & principal, the property in the goods passed to T. & Co. as soon as goods were shipped & bills of lading posted to T. & Co.; (2) it so passed absolutely & not conditionally on payment or acceptance of the bills of exchange; (3) there was no reservation of any lien or charge upon goods in favour of C. & Co.; (4) the trustee of T. & Co.'s estate was entitled to the goods.—*Re* TAPPENBECK, *Ex p.* BANNER (1876), 2 Ch. D. 278; 45 L. J. Bcy. 73; 34 L. T. 199; 24 W. R. 476, C. A.

Annotations:—**Expld.** Phelps, Stokes *v.* Comber (1884), 26 Ch. D. 755. **Consd.** König *v.* Brandt (1901), 84 L. T. 748, C. A.

2069. Commission agent who is liable for price.]—If a commission agent has not been paid, & if after the goods have been shipped the principal becomes insolvent so that the agent will have to pay the person from whom he has purchased the goods, then the commission agent has a right to stop *in transitu* as though he were a vendor (BRETT, M.R.). —CASSABOGLOU *v.* GIBB, No. 1649, *ante*.

Annotations:—**Refd.** The Kronprinzessin Cecilie (1915), 32 T. L. R. 139. **Mentd.** Johnston *v.* Braham & Campbell, [1916] 2 K. B. 529.
For full anns., *see* S. C. No. 1649, *ante*.

2070. —— Liabilities incurred without authority.]—GURNEY *v.* SHARP, No. 2031, *ante*.
For full anns., *see* S. C. No. 2031, *ante*.

SUB-SECT. 6.—AGENT'S RIGHT TO AN ACCOUNT.

2071. Circumstances in which right arises.]—The rights of principal & agent to an account are not necessarily correlative. The right of the principal rests upon the trust & confidence reposed in the agent, but the agent reposes no such trust or confidence in the principal. It does not follow that because the principal may file a bill against his agent the agent may file a bill against his principal (TURNER, V.-C.).—PADWICK *v.* STANLEY (1852), 9 Hare, 627; 22 L. J. Ch. 184; 19 L. T. O. S. 293; 16 Jur. 586; 68 E. R. 664.

Annotations:—**Refd.** Makepeace *v.* Rogers (1865), 4 De G. J. & Sm. 649; Ascherson *v.* Tredegar Dry Docks & Wharf Co., [1909] 2 Ch. 401.

2072. ——.]—An action at law being brought to recover the produce of some foreign specie, remitted by a merchant abroad to an agent in London, the agent filed his bill, alleging generally that there were mutual dealings & transactions between the parties & praying an account might be taken of them, & for an injunction; a demurrer was allowed. —FRIETAS *v.* DOS STANTOS (1827), 1 Y. & J. 574; 148 E. R. 800.

Annotations:—**Consd.** Bowles *v.* Orr (1835), 1 Y. & C. Ex. 464; Ellis *v.* Colman (1858), 25 Beav. 662; Evan *v.* Avon Corpn. (1860), 29 Beav. 144; Grenville-Murray *v.* Clarendon (1869), L. R. 9 Eq. 11. **Expld.** Vanner *v.* Frost (1870), 39 L. J. Ch. 626. **Folld.** Sharpe *v.* San Paulo Brazilian Ry. Co. (1872), 27 L. T. 699. **Refd.** Houghton *v.* Reynolds (1843), 2 Hare, 264; Crowther *v.* Crowther (1857), 23 Beav. 305. **Mentd.** Padwick *v.* Hurst (1854), 18 Beav. 575; Wright *v.* Chard (1857), 5 W. R. 857; Spencer *v.* Peek (1867), L. R. 3 Eq. 415.

2073. ——.]—The relation of principal & agent is not alone sufficient to entitle an agent to an account in equity when it can be determined at law. A bill for an account by a solr. & agent against his principal stating receipt & payment of moneys, also the transaction of various matters of business for deft., as well as advances by way of loan & payments made by pltf., & that deft. had paid to pltf. various sums of money, & alleging that the accounts were complex & intricate, & that pltf. & deft. were mutually indebted upon an open & running account, cannot be maintained when the facts disclose a case of set-off, without showing any difficulty in taking the accounts at law, & a demurrer to such bill was allowed.

If the principal also paid various sums on behalf of his agent, so that a fresh relationship was created between them, there being accounts to be taken by the principal against the agent, as well as by the agent against the principal, then there arises a case of cross demands or mutual accounts (ROMILLY, M.R.).—PADWICK *v.* HURST (1854), 18 Beav. 575; 2 Eq. Rep. 1071; 23 L. J. Ch. 657; 23 L. T. O. S. 240; 18 Jur. 763; 2 W. R. 501; 52 E. R. 225.

2074. ——.]—BLYTH *v.* WHIFFIN, No. 1411, *ante*.

2075. Jurisdiction of court.]—In matters of account cts. of law & of equity have, generally speaking, a concurrent jurisdiction, & in deciding whether the account shall be taken by a pltf. in equity or not, the ct. will be guided by a consideration of what is best, with a view to the convenience of the parties.

S., by his bill, alleged that he was employed by defts. to obtain orders for goods on commission; that orders had been given to defts. in consequence of his introduction, the commission on which they refused to pay, & he prayed for discovery & an account. A demurrer, on the ground that an

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PART VIII. SECT. 3, SUB-SECT. 6.

2071 i. *Circumstances in which right arises—Agent to collect debts.*]—Where pltf. alleges that he was employed by deft. to assist in the collection of certain moneys due to deft., & that he was to have a percentage of all such moneys as deft., through his assistance, should collect:—*Held:* pltf. entitled to bring an action to account.—BRUNET *v.* LA BANQUE NATIONALE (1897), Q. R. 12 S. C. 287.—**CAN.**

2071 ii. —— *Settlement induced by misrepresentation.*]—A. engaged B. as agent for purchase of furs on certain terms. B. impugned the *bona fides* of a settlement he had made with A., acting through an agent, & the ct. being satisfied that the settlement had been obtained by fraudulent misrepresentation of the agent:—*Held:* B. entitled to an account & an inspection of the books of A., notwithstanding 36 Vict. c. 25, s. 1 (R. S. O., 1877, c. 133, s. 3).—ROGERS *v.* ULLMANN (1879), 27 Gr. 137. —**CAN.**

2071 iii. —— *Agent entitled to commission on all sales whether made by himself or principal.*]—FULLER *v.* AMES (1880), Cout Dig. 318.—**CAN.**

2075 i. *Jurisdiction of court.*]—Ordinarily a bill for an account will not lie by an agent against a principal.—JAMES *v.* SNARR (1868), 15 Gr. 229.—**CAN.**

account might be taken at law, & the ct. of equity had no jurisdiction, was overruled, with costs.—SHEPARD *v.* BROWN (1862), 4 Giff. 203; 1 New Rep. 162; 7 L. T. 499; 9 Jur. N. S. 195; 11 W. R. 162; 66 E. R. 681.

2076. ——.]—Defts., a mercantile firm, employed pltf. as their traveller & agent, under an agreement that he should receive a commission of £7 10*s.* per cent., & an allowance of £3 10*s.* per cent. on all orders received from his friends, first introduced by him. Disputes having arisen between the parties, pltf. filed his bill, praying for an account of this commission & allowance, but not even alleging any mutuality or complexity of accounts:—*Held:* (1) the case presented was merely one of contract on the part of defts. to pay a certain commission; (2) it made no difference that the agent, as a rule, could not know what orders had been received from his friends; (3) the proper remedy of pltf. was by an action at law; (4) the bill must be dismissed, with costs.—SMITH *v.* LEVEAUX (1863), 2 De G. J. & Sm. 1; 3 New Rep. 18; 33 L. J. Ch. 167; 9 L. T. 313; 9 Jur. N. S. 1140; 12 W. R. 31; 46 E. R. 274, C. A.

Annotations:—**Dbtd.** Hemings *v.* Pugh (1863), 4 Giff. 456. **Distd.** Edwards-Wood *v.* Baldwin (1863), 4 Giff. 613. **Expld.** Flockton *v.* Peake (1864), 12 W. R. 464. **Refd.** Moxen *v.* Bright (1869), 4 Ch. App. 292.

See, further, MASTER & SERVANT.

SUB-SECT. 7.—AGENT'S RIGHT TO INTEREST.

2077. Mercantile advances.]—An agent who has advanced money for his principal in effecting insurances & other mercantile business is entitled to charge interest, & at the end of every year to make a rest & add interest then due to the principal.—BRUCE *v.* HUNTER (1813), 3 Camp. 467.

Annotation:—**Distd.** *Re* Edwards, Williams *v.* Trench (1891), 61 L. J. Ch. 22.

2078. Special contract necessary.]—An agent who has laid out & expended money at his principal's request cannot recover interest, in the absence of a contract to pay interest.—CARR *v.* EDWARDS (1822), 3 Stark. 132.

2079. Remuneration.]—Pltf., by a verbal agreement, in 1858 agreed to become manager of deft.'s ironworks. By the terms of the agreement pltf. was to receive 7½ per cent. of the profits made in each year, to be made up to £500 in case the proportion in question could not amount to that sum. Pltf. continued to act as manager to deft. until 1864, when the business was sold. In 1859 & 1861 the sums due to pltf. under the agreement exceeded the fixed sum of £500 by £440 2*s.* & £405 17*s.* 6*d.* respectively. No portion of these two sums of £440 2*s.* & £405 17*s.* 6*d.* was demanded by pltf., or paid by deft., until Sept. 13, 1864, when deft. paid pltf. the sum of £554, leaving £291 19*s.* 6*d.* still due. Deft. was not chargeable with any fraud, or anything beyond a certain inaccuracy in his accounts:—*Held:* (1) pltf. was not entitled to interest on the sums of £440 2*s.* & £405 17*s.* 6*d.* for the respective periods preceding Sept. 13, 1864; (2) pltf. was entitled to interest on the sum of £291 19*s.* 6*d.* from Sept. 13, 1864, to the date of the present order.—RISHTON *v.* GRISSELL (1870), L. R. 10 Eq. 393; 18 W. R. 821.

2080. Money spent to acquire secret benefit.]—TARKWA MAIN REEF *v.* MERTON, No. 1586, *ante*.

SUB-SECT. 8.—AGENT'S RIGHTS WHEN APPOINTED SOLE AGENT.

2081. Breach of agreement by principal—Agent's right to commission.]—Deft., a merchant in Spain, agreed to consign to pltfs., agents in London, all the raisins which should be shipped by him for this country, to sell for him for a certain commission on the "invoice price." In an action to recover the amount of commission on two shipments consigned by deft. in breach of his agreement to third persons:—*Held:* (1) deft. liable to pay commission; (2) it was competent to pltfs. to show the proximate value of the consignments upon which they claimed commission, without producing the invoices, the production of the invoices not being a condition precedent.—PLANK *v.* GAVILA (GAVELER, GAVELLER) (1858), 3 C. B. N. S. 807; 30 L. T. O. S. 260, 287; 6 W. R. 210; 140 E. R. 960.

PART VIII. SECT. 3, SUB-SECT. 7.

2077 i. *Mercantile advances.*] — An agent for sale of timber agreed in writing to advance money to get out the timber, for which advances he was to be paid commissions; the timber was forwarded to him, but, prices being low, with consent of his principal he held it over for six months & claimed interest on his advances. The custom of the trade was to charge interest in such cases where there was no writing, but of this the principal did not know:—*Held:* interest could not be charged.—DE HERTEL *v.* SUPPLE (1867), 13 Gr. 648; 14 Gr. 421.—**CAN.**

2077 ii. —— *To procure delivery of goods bought for principal—Rate of interest.*]—JOHNSTON *v.* CANADIAN KLONDYKE MINING CO. (1911), 19 W. L. R. 60.—**CAN.**

2079 i. *Remuneration.*]—R., who was engaged in the lumber business, employed S. as his agent, & by letter agreed to pay him $10 per 1,000 cubic feet on all timber which S. manufactured for him, which rate (the letter said) "includes purchasing, superintending the making, & attending to the shipping of same," R. paying all travelling expenses. S. bought a quantity of timber for R., which was not manufactured under the superintendence of S., & he was entitled to a reasonable compensation for his service. There having been considerable delay in enforcing payment, caused by R. having obtained an injunction restraining S. from proceeding at law:—*Held:* S. entitled to interest on the amount of his claim.—RIDLEY *v.* SEXTON (1871), 18 Gr. 580; 19 Gr. 146.—**CAN.**

x. *Awarded from date of filing declaration for account & interest.*]—Where a principal was found indebted to his agent on the taking of accounts, the ct., in exercise of its discretion, allowed interest on the amount from the time of filing the declaration (which contained a count for interest) in an action at law brought by the agent, & to restrain which a bill had been filed.—RIDLEY *v.* SEXTON (1871), 19 Gr. 146.—**CAN.**

y. *Compound interest, when chargeable—Factor.*]—A factor, in making up his account, sought to charge compound interest, but on a suggestion from the ct. withdrew his claim.—DILLON *v.* KIRBY (1830), 3 L. Rec. O. S. 350.—**IR.**

z. —— ——.]—In an accounting for trust funds under a family settlement for the fourteen years following the truster's death, the factor had accumulated interest on his advances with the principal at the end of eleven years:—*Held:* in the circumstances, the accumulation must be sustained.—SCOTT *v.* HANDYSIDE'S TRUSTEES (1868), 6 M. 753; 40 Sc. Jur. 387.—**SCOT.**

a. —— *Land agent.*]—*Semble:* land agents may charge compound interest on advances made by them to the use of their principal, if such be the general usage; & evidence of general usage is admissible, in the absence of an express contract, in this as well as in any other description of agency (DOHERTY, C.J.).—CLENDINNING *v.* MOORE (1841), Arm. & O. 219.—**IR.**

PART VIII. SECT. 3, SUB-SECT. 8.

b. *Manner of appointment as sole agent.*]—Mere statement of a price, which an owner of land is willing to take, & reference to a commission, does not vest a real estate agent with a general monopoly of sale. A servitude of that kind needs a specific written contract, or, at least, an equivalent admission of its existence on the part of the owner.—MAINWARING *v.* CRANE (1902), Q. R. 22 S. C. 67.—**CAN.**

c. *Principal's right to appoint second agent.*]—A contract of hiring of services which declares that the lessee shall be the sole representative in a certain territory does not give the latter the exclusive right to sell therein. Thus, if the traveller cannot cover the territory within a reasonable delay, the employer may engage another to represent him in such territory.—PICHER *v.* MARCEAU (1916), Q. R. 51 S. C. 305.—**CAN.**

2081 i. *Breach of agreement by principal—Damages.*]—ROGERS *v.* NATIONAL PORTLAND CEMENT CO. (1913), 25 O. W. R. 298; 5 O. W. N. 349.—**CAN.**

2081 ii. —— *Whether injunction or action at law proper remedy.*]—Pltfs. entered into an agreement with defts. that they should take up the selling

Sect. 3.—*Agent's rights against principal: Sub-sect.* 8. *Sect.* 4: *Sub-sects.* 1 & 2.]

2082. —— ——.]—Pltf. was appointed sole agent for defts. in a certain district at a fixed scale of commission, & subject to certain restrictions as to discount, etc., to be offered by him, but was unable to transact any business owing to defts. interfering in his district behind his back, & underselling him. In an action to recover commission on all sales effected by defts. in pltf.'s district since his appointment, & for damages :—*Held :* defts. not entitled either to appoint any other agent in the district, or to effect any sales in the district except through pltf.'s agency.—SNELGROVE *v.* ELLRINGHAM COLLIERY CO. (1881), 45 J. P. 408.

2083. —— —— **Measure of damages.**]—Deft. appointed pltf. his sole agent to sell pianos in a district at 10 per cent. commission. In breach of the agreement, deft. sold to D. 19 pianos on which the commission would amount to £164, & subsequently determined the agreement :—*Held :* the measure of damages was pltf.'s actual loss, viz., £164, & the jury were not entitled to award general damages.—MILSOM *v.* BECHSTEIN (1898), 14 T. L. R. 159, C. A.

SECT. 4.—CO-PRINCIPALS AND CO-AGENTS.

SUB-SECT. 1.—RIGHTS OF PARTIES WHEN PRINCIPAL EMPLOYS CO-AGENTS.

2084. Right to account.]—Two factors for pltf. in Spain had goods of his in their hands in 1654 ; in 1656 the goods remaining were seized under an embargo, & the books of account were lost ; one factor died, & pltf. exhibited a bill for an account of the goods against the other without making the extrix. of the dead factor a party :—*Held :* (1) though among merchants *jus accrescendi* had no place, the surviving factor must account for what was received by either ; (2) an account also lay against the extrix. of the dead factor ; (3) the account should be limited to sales before seizure, & the factor's oath should be conclusive.—HOLCOMB *v.* RIVIS (1670), Nels. 139 ; 21 E. R. 810.

2085. —— **Where one co-agent abroad.**]—A bill may be brought against one factor without his co-factor, being beyond the sea.—COWSLAD *v.* CELY (1698), 1 Eq. Cas. Abr. 73 ; 2 Eq. Cas. Abr. 165 ; Prec. Ch. 83 ; 21 E. R. 885.

2086. Co-agents acting through quorum.]—Where an authority is expressly given to several persons with no stipulation that any specified number shall form a quorum, they must all join in exercising the authority.

Deft., member of a provisional committee of a ry., joined in a resolution appointing eight specified persons as managing committee, authorised to take most energetic measures towards carrying out the scheme ; there was no provision that any number less than the whole might act :—*Held :* deft. was not bound by an order (within scope of authority) given by six only out of the whole committee.—BROWN *v.* ANDREW (1849), 18 L. J. Q. B. 153 ; 12 L. T. O. S. 398 ; 13 Jur. 938.

Annotation :—**Distd.** Moore *v.* Ullcoats Mining Co. (1907), 97 L. T. 815.

SUB-SECT. 2.—RIGHTS OF PARTIES WHEN CO-PRINCIPALS EMPLOY AGENT.

2087. Recovery of loss on insurance policy.] Joint owners of the property insured for their joint use & on their joint account cannot recover upon a count on the policy averring the interest to be in one of them only.—BELL *v.* ANSLEY (1812), 16 East. 141 ; 104 E. R. 1042.

Annotations :—**Apprvd. & Folld.** Cohen *v.* Hannan (1813), 5 Taunt. 101. **Distd.** Wright *v.* Welbie (1819), 1 Chit. 49. **Reid.** Ebsworth *v.* Alliance Marine Insce. Co. (1873), L. R. 8 C. P. 596. **Mentd.** Harrison *v.* Vallance (1822), 7 Moore, C. P. 304.

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agency of certain coal upon condition that pltfs. were to act as defts.' sole selling agents. Pltfs. sought to restrain defts. from dealing with the coal otherwise than by the agency of pltfs. :—*Held :* (1) the contract between pltfs. & defts. was an agreement for personal service, with an implied covenant not to employ any one else ; (2) the injunction must be refused because the proper remedy was for damages at law.—CANT *v.* MILLER (1913), 13 S. R. (N. S. W.) 505 ; 30 N. S. W. W. N. 143.—**AUS.**

2081 iii. —— ——.]—Pltf. was appointed by deft. the sole agent for the sale of goods within a specified area for a stated period, but before the expiration of that period deft. authorised others to sell similar goods within that area. Pltf. applied for an injunction restraining deft. from appointing other agents :—*Held :* an injunction could not be granted, unless there was an express negative agreement in the contract. *Donnell* v. *Bennett* (1883), 22 Ch. D. 835 ; *Whitwood Chemical Co.* v. *Hardman*, [1891] 2 Ch. 416 ; *Lumley* v. *Wagner* (1852), 1 De G. M. & G. 604, cited.—MACDONALD *v.* CASEIN, LTD. (1917), 2 W. W. R. 1132 ; 35 D. L. R. 443 ; 24 B. C. R. 218.—**CAN.**

2081 iv. —— *Revocation of authority.*]—RICHARDSON *v.* MCCLERY (1906), 3 W. L. R. 141.—**CAN.**

2081 v. —— ——.]—An agent who has been given the exclusive sale of real estate for a limited period, on terms of being paid a commission in case of sale, is entitled to substantial damages upon revocation of his authority, if he has, within the time limited, found a purchaser for the property as the result of special efforts & the expenditure of money in advertising & otherwise, which the principal knew or had reason to believe the agent would make & incur to find a purchaser. *Prickett* v. *Badger* (1856), 1 C. B. N. S. 296 ; *Simpson* v. *Lamb* (1856), 17 C. B. 603 ; *Toppin* v. *Healey* (1863), 11 W. R. 466 ; *Houghton* v. *Orgar* (1885), 1 T. L. R. 653, cited.—ALDOUS v. SWANSON (1910), 20 Man. L. R. 101.—**CAN.**

2081 vi. —— —— *Justified by misconduct of agent.*]—Deft. signed a document authorising pltf. to act as his sole agent for sale of a farm. The appointment was for three months from the date of signature of the agreement of authority & thereafter until fourteen days' notice of deft.'s intention to withdraw the property. In the event of sale during the agency deft. was to pay pltf.'s commission at a specified rate. Pltf. without deft.'s knowledge or consent inserted alterations in the description of the soil of the farm. While pltf.'s appointment as agent was unrevoked deft. sold the property through another agent, & pltf. thereupon sued for commission on the sale at the rate specified :—*Held :* the alterations made by pltf. were material alterations, &, being unauthorised, the whole instrument became void. —THORNES *v.* EYRE (1915), 34 N. Z. L. R. 651.—**N.Z.**

2083 i. —— *Agent's right to commission—Measure of damages.*]—Pltfs. were defts.' agents in E. county with an exclusive right of sale of defts.' automobiles. Defts. sold three automobiles within the county during the agreement. The agreement gave pltfs. no right to commission on sales within the county, & there was no evidence that pltfs. would have earned commission on the sales to the three purchasers or that they introduced them or promoted the sales to them :—*Held :* pltfs. entitled to nominal damages only. *Simpson* v. *Lamb* (1856), 17 C. B. 603 ; *Prickett* v. *Badger* (1856), 1 C. B. N. S. 296 ; *Green* v. *Bartlett* (1863), 32 L. J. C. P. 261 ; *Green* v. *Reed* (1862), 3 F. & F. 226, cited.—CURRY *v.* E. M. F. CO. OF CANADA, LTD. (1913), 28 O. L. R. 427 ; 4 O. W. N. 1023 ; 12 D. L. R. 613.—**CAN.**

PART VIII. SECT. 4, SUB-SECT. 2.

d. *Co-principals having different interests.*]—A., B., & C. appointed F. irrevocably their attorney to receive the rents of mtged. premises & an annuity, to pay the interest & premiums on a policy, & to pay the balance of the annuity to C. & of the rents to A. It was provided that F. should not act as receiver until the interest or premiums on the policy should be in arrear. F. entered into receipt of the rents & of the annuity, & applied the rents for the purposes of A. :—*Held :* F. was not agent or trustee for C. as to the lands, & was not bound to account to her assignee for bygone rents.—M'DOWELL *v.* REEDE (1865), 16 I. C. L. R. 430.—**IR.**

e. —— *Manner of dividing commission.*]—Deft., who owned a section of land & also had an undivided one-third interest in another section, agreed to pay L. a commission if he could dispose of deft.'s land. L. obtained from the deft. a description of the land, which he placed before F., acting for a principal with city properties, & eventually arranged a meeting of the principals, which resulted in deft. & his co-owners

2088. ——.]—An action of *assumpsit* for money had & received is maintainable by an assured part-owner of a vessel against an insurance broker, who has received from the underwriters the full amount of sums subscribed on a total loss, although there are several other persons interested as part-owners, & who had given deft. notice of their interest, where pltf. insured on the whole ship generally, by means of his captain, who gave the order for effecting the insurance.—ROBERTS *v.* OGILBY, No. 1431, *ante*.

For full anns., *see* S. C. No. 1431, *ante*.

2089. —— **Broker a part-owner.**]—Where a ship-broker generally employed an insurance broker to effect insurances on vessels, & amongst others on vessels in which the shipbroker was part-owner, & the insurance broker charged all premiums in a running account which he kept with the ship-broker, & charged him for the amount, allowing him half commission:—*Held:* the insurance broker might on bkpcy. of the shipbroker sue the other joint co-owners of his vessels (who had authorised the insurance), their names being unknown to the insurance broker when the insurance was effected, & no fraud or laches on his part being proved.—ROBINSON *v.* GLEADOW (1835), 2 Bing. N. C. 156; 1 Hodg. 245; 2 Scott, 250; 132 E. R. 62.

2090. Price of ship sold for several co-principals.]—A broker was employed to sell a ship belonging to three part-owners, two of whom communicated with him on the subject. To them he paid their shares of the proceeds of sale, but after admitting the amount of the third part-owner's share to be in his hands, refused to pay it without consent of the other two. An action of *assumpsit* having been brought by the third part-owner for the share:—*Held:* not entitled to recover.—HATSALL *v.* GRIFFITH (1834), 2 Cr. & M. 679; 4 Tyr. 487; 3 L. J. Ex. 191.

Annotation:—**Folld.** Brown *v.* Bradford (1842), 2 Mood. & R. 413.

2091. Agent acting for two of three executors.]—Under a written authority from two of three exors. (who alone had proved the will), C. received the amount of rents due from tenants of lands in which testator had a term of years, & gave a receipt for it in the name & on account of the two:—*Held:* the three exors. could not jointly sue C. for the money unless found by the jury that the two contracted with him on account of themselves & the other exor., or generally on account of the estate, with a view to interference of the co-exor., in case he should choose to take part in the management of it.—HEATH *v.* CHILTON (1844), 12 M. & W. 632; 13 L. J. Ex. 225; 2 L. T. O. S. 424; 152 E. R. 1352.

Annotations:—**Refd.** Muttyloll Seal *v.* Dent (1853), 5 Moo. Ind. App. 328. **Mentd.** Abbott *v.* Parfitt (1871), L. R. 6 Q. B. 346.

2092. Agent not discharged by payment to one of several co-principals.]—A firm of solrs. having been employed by the trustees of a will to receive the proceeds of testator's real estate, which had been taken by a ry. co., paid over the money to one of such trustees without the receipt or authority of the other. The money having been lost to the estate by the insolvency & death of the trustee to whom it was paid:—*Held:* (1) the receipt of one trustee only, though also an exor., was not a sufficient discharge to the solrs. for the money which they had received by the authority of the two; (2) they were liable to make good the loss which had resulted to the trust estate from such improper payment.—LEE *v.* SANKEY (1873), L. R. 15 Eq. 204; 27 L. T. 809; 21 W. R. 286.

Annotations:—**Consd.** *Re* Barney, Barney *v.* Barney, [1892] 2 Ch. 265; Soar *v.* Ashwell, [1893] 2 Q. B. 390, C. A. **Refd.** Wilson *v.* Bury (1880), 5 Q. B. D. 518, C. A.

2093. Joint action against agent.]—A married woman had freehold & leasehold property devised to her separate use, & she being desirous of building & repairing some cottages upon part of it, & her husband wanting to pay off a debt, it was arranged under the advice of deft., their solr., that a loan of £550 should be raised by the mtge. of the wife's property, & the deposit of two policies of the husband of £500 each on the life of the husband & wife respectively. The mtge. was executed by the husband & wife, & the husband covenanted for the repayment of the loan. The money was to be advanced by instalments, & a joint authority signed by both was given to deft. to receive the first instalment from the mtgees. He received it & paid the husband's debt, but he claimed to retain the balance for a debt due to him from the husband. An action was then brought by the husband & wife for the balance:—*Held:* the joint action could be maintained.—JONES *v.* CUTHBERTSON (1873), L. R. 8 Q. B. 504; 42 L. J. Q. B. 221; 28 L. T. 673; 21 W. R. 919, Ex. Ch.

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agreeing to purchase the city properties, handing over their land in part payment.

Deft., who admitted his liability to pay commission in respect of his own land, but resisted the claim as to the property in his hands for sale on behalf of his co-vendors, had received from them a commission in respect of the sale of their interests, which he claimed for services rendered:—*Held:* L. was entitled to his commission on the sale of deft.'s interests & to one-half of the commission to which deft. was entitled on the sale of his co-vendors' interests.—LEWIS *v.* BUCKNAM (1912), 20 W. L. R. 4; 1 W. W. R. 760; 1 D. L. R. 277.—**CAN.**

f. ————*Right against each.*]—An agent employed by a meeting of distillers in the business of the trade is entitled to claim against each individual by whom he was employed for payment of his whole account.—WALKER *v.* BROWN (1803), M. Solidum et pro rata, App. No. 1.—**SCOT.**

2092 i. *Agent not discharged by settlement with one of several co-principals.*]—One of two co-mandators, acting for himself only, on a settlement with the mandatary paid charges erroneously credited to the mandatary payable in equal shares by both mandators:—*Held:* the settlement was no bar to an action by the mandator who so settled to recover the amount paid by him on behalf of his co-mandator.—SHEFFIELD *v.* LIGHTHALL (1907), Q. R. 16 K. B. 361.—**CAN.**

Part IX.—Relations between Principal and Third Parties.

SECT. 1.—IN GENERAL.

SUB-SECT. 1.—WHETHER AGENT HAS BEEN AUTHORISED TO DO PARTICULAR ACTS SO AS TO BIND PRINCIPAL. *See* Part V., Sects. 2, 3, *ante*.

SUB-SECT. 2.—LIMITATIONS ON PRINCIPAL'S LIABILITY.

Effect of secret limitations of agent's ostensible authority to do particular acts. *See* Part V., Sect. 6, *ante*.

SECT. 2.—AS TO GOODS, ETC., INTRUSTED TO AGENT.

SUB-SECT. 1.—PRINCIPAL'S RIGHT TO FOLLOW PROPERTY INTO THE HANDS OF THIRD PARTIES.

See, further, BANKRUPTCY & INSOLVENCY; EQUITY; TRUSTS & TRUSTEES.

2094. Factor intrusted with goods for sale—Proceeds of sale invested in other goods.]—If one employs a factor & intrusts him with the disposal of merchandise, & the factor receives the money & dies indebted to debts of a higher nature, & it appear in evidence that this money was vested in other goods & remains unpaid, those goods shall be taken as part of the merchant's estate & not the factor's; but if the factor have the money it shall be looked upon as the factor's estate & must first answer the debts of a superior creditor, for money not being earmarked cannot be followed in equity. —WHITECOMB *v.* JACOB (1710), 1 Salk. 160; 91 E. R. 149.

Annotations:—**Folld.** Scott *v.* Surman (1742), Willes, 400; Ryall *v.* Rolle (1749), 1 Atk. 165; Taylor *v.* Plumer (1815), 3 M. & S. 562. **Distd.** *Re* West of England & South Wales District Bank, *Ex p.* Dale (1879), 11 Ch. D. 772. **Consd.** *Re* Hallett's Estate, Knatchbull *v.* Hallett (1880), 13 Ch. D. 696, C. A. *Whitecomb* v. *Jacob* decides that the equity as to following the proceeds attaches to the case of a factor as well as to the case of *cestui que trust* & trustee; but it decides, secondly, that you could not follow money because it had no earmark; the first part is good law at the present day, the second is not (JESSEL, M.R.). **Apld.** Patten *v.* Bond (1889), 60 L. T. 583.

2095. —— Proceeds of sale in form of bill.]—If goods be consigned to a factor & he sell & receive the money before his bkpcy. & do not purchase with it any specific thing capable of being distinguished from the rest of his property, the consignors cannot recover the whole money from his assignees but must come in under the commission. So if the factor at the time of the sale agree to set off a debt of his own due to the vendee, it is the same as if the factor received so much money from the vendee, & the consignors must come in under the factor's commission. But if the goods remain *in specie* in the factor's hands at the time of his bkpcy., the consignors may recover the goods in trover from the assignees. Or if a factor sell goods for his principal, & become bkpt. before payment, & his assignees afterwards receive the money for them, the principal may recover it from them in an action for money had & received. So if the factor on such sale take notes in payment from the vendee payable to him at a future day, & his assignees afterwards receive the money due on the notes, the principal may recover it from the assignees in an action for money had & received. If the assignees of a factor (bkpt.) receive bounty-money on any article under an Act of Parliament giving the bounty to the importer, the consignor of that article may recover such bounty-money from them in an action for money had & received. —SCOTT *v.* SURMAN (172), Willes, 400 125 E. R. 1235.

Annotations:—**Consd.** Houghton *v.* Matthews (1803), 3 Bos. & P. 485; *Re* Trye & Lightfoot, *Ex p.* Pauli (1838), 3 Deac. 169; Boddington *v.* Castelli (1853), 1 E. & B. 879. **Refd.** Ryall *v.* Rowles (1750), 1 Ves. Sen. 348; Gladstone *v.* Hadwen (1813), 1 M. & S. 517; Taylor *v.* Plumer (1815), 3 M. & S. 562; Thompson *v.* Giles (1824), 2 B. & C. 422; Cavalho *v.* Burn (1833), 4 B. & Ad. 382; D'Arnay *v.* Chesneau (1845), 13 M. & W. 796; Morgan *v.* Taylor (1859), 5 C. B. N. S. 653; De Mattos *v.* Saunders (1872), L. R. 7 C. P. 570; *Re* West of England & South Wales District Bank, *Ex p.* Dale (1879), 11 Ch. D. 772; *Re* Hallett's Estate, Knatchbull *v.* Hallett (1880), 13 Ch. D. 696, C. A.; Patten *v.* Bond (1889), 60 L. T. 583; St. Thomas' Hospital Governors *v.* Richardson (1909), 101 L. T. 771, C. A. **Mentd.** Parnham *v.* Hurst (1841), 8 M. & W. 743.

2096. Agent to purchase certain securities—Different securities purchased.]—Where a draft of money was intrusted to a broker to buy Exchequer bills for his principal, & the broker received the money & misapplied it by purchasing American stock & bullion, intending to abscond with it & go to America, & did accordingly abscond, but was taken before he quitted England, & thereupon surrendered to the principal the securities for the American stock & bullion, who sold the whole & received the proceeds:—*Held*: the principal was entitled to withhold the proceeds from the assignees of the broker, who became bkpt. on the day on which he so received & misapplied the money.—TAYLOR *v.* PLUMER (1815), 3 M. & S. 562; 2 Rose, 457; 105 E. R. 721.

Annotations:—**Apld.** Small *v.* Attwood (1831-2), You. 407. **Distd.** Ashnall *v.* Wood (1856), 28 L. T. O. S. 30. **Apld.** *Re* Hammond, *Ex p.* Brook (1869), 20 L. T. 547; *Re* Strachan, *Ex p.* Cooke (1876), 4 Ch. D. 123, C. A.; Birt *v.* Burt (1877), 36 L. T. 943. **Consd.** *Re* Hallett's Estate, Knatchbull *v.* Hallett (1880), 13 Ch. D. 696, C. A. Lord Ellenborough, in *Taylor* v. *Plumer*, entirely throws over all the prior decisions as to money not ear-marked not being followed; at that time it was well known it could be ear-marked in equity, & therefore, when you come to look at it, you will find it an express decision in conflict with others as to the ear-marking of money; Lord Ellenborough's statement of the law is law at the present moment, & though I cannot say it always was law it always ought to have been law because it is consonant with principle (JESSEL, M.R.) **Apld.** Harris *v.* Truman (1881), 7 Q. B. D. 340; Collins *v.* Stimson & France (1883), 52 L. J. Q. B. 440. **Distd.** King *v.* Hutton, [1899] 2 Q. B. 555. **Refd.** Twiss *v.* White (1826), 3 Bing. 486; Neate *v.* Harding (1851), 6 Ex. Ch. 349; Muttyloll Seal *v.* Dent (1853), 5 Moo. Ind. App. 328; *Re* West of England & South Wales District Bank, *Ex p.* Dale (1879), 11 Ch. D. 772; Crowther *v.* Elwood

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PART IX. SECT. 2, SUB-SECT. 1.

2. *Agent employed to collect debt — Note received with mortgage as collateral.*]—P. was agent of U. to collect certain debts & remit to U., being paid a monthly salary. Among the debts was a claim against deft. S. S. made a note & executed a chattel mtge. under seal. The note was payable to U.'s order & comprised the debt, the mtge. being collateral security. P. delivered both note & mtge. to T., a creditor of his, representing he was U.'s agent & had authority to deal with them, & T. paid P. the difference between his claim & the value of the note. The note was not indorsed by U.:—*Held*: A., as assignee of U., was entitled to recover the sum due on the note, as P. had no authority to pass a title by transfer of the note or the mtge. *Goodwin* v. *Roberts* (1876), 1 App. Cas. 476; *Rumball* v. *Metropolitan Bank* (1877), 2 Q. B. D. 194; *London Joint Stock Bank* v. *Simmons*, [1892] A. C. 201; *Freeman* v. *Cooke* (1848), 2 Exch. 654; *Pickard* v. *Sears* (1837), 6 A. & E. 469, cited.—ABRAMOVICH *v.* SAIR (1900), 7 Terr. L. R. 15.—**CAN.**

(1887), 56 L. J. Ch. 416, C. A.; Patten *v.* Bond (1889), 60 L. T. 583; Sinclair *v.* Brougham, [1914] A. C. 398, H. L. **Mentd.** Sheppard *v.* Shoolbred (1841), Car. & M. 61; Walshe & Howlett *v.* Provan (1853), 1 C. L. R. 823; R. *v.* Bunkall (1864), 3 New Rep. 492; Lister *v.* Stubbs (1890), 45 Ch. D. 1, C. A.; Moss *v.* Hancock, [1899] 2 Q. B. 111.

See, further, BANKRUPTCY & INSOLVENCY.

2097. Agent receiving cheques—Right to follow cheques but not cash.]—A banking firm at S. sent to a bank at C. certain average orders for collection at C. & payment of the proceeds over to bankers in London, who were London agents for both parties. The bank at C. collected some of the orders, & received a cheque for one & cash for the remainder (except two which were returned uncasned). They then paid the cash into their till with other moneys, & stopping payment went into liquidation:—*Held:* (1) the cheque could be followed by the firm at S., as it was specific property resulting from the special agency; (2) the cash could not be followed.—*Re* WEST OF ENGLAND & SOUTH WALES DISTRICT BANK, *Ex p.* DALE & Co. (1879), 11 Ch. D. 772; 48 L. J. Ch. 600; 40 L. T. 712; 27 W. R. 815.

Annotations:—**Dbtd.** *Re* Hallett's Estate, Knatchbull *v.* Hallett (1880), 13 Ch. D. 696, C. A. **Expld.** Crowther *v.* Elgood (1887), 34 Ch. D. 691, C. A.

2098. —— ——.]—The manager of pltf.'s bank obtained the signature of deft. to a cheque, purporting to be drawn upon the bank by deft., under the pretence that it was a receipt (deft. being unable to read it), & then paid him a private debt of his own with the banker's money. The transaction was entered in the books of the bank as a loan from the bank to deft. upon his cheque:—*Held:* the banker was not entitled to maintain an action against deft. to recover back the money, the cheque having been obtained by his agent's fraud.—FOSTER *v.* GREEN (1862), 7 H. & N. 881; 31 L. J. Ex. 158; 158 E. R. 726.

2099. Agent depositing principal's funds in bank—Accounts manipulated so as to show large balance due to principal offset by equal balance due from agent.]—A., as agent, but without the knowledge or authority of his principal, B., & the general manager of a bank, without the knowledge or authority of the bank directors, concerted for their own purposes the following scheme, which the ct. held to be entirely void for fraud, & not binding on B. Two accounts were opened with the bank in the respective names of the agent & principal. The agent, on behalf of his principal, requested the bank to honour the agent's cheques, & guaranteed repayment thereof, all moneys standing to the credit of the principal to be charged with such payment. The agent paid to his principal's account £1,500 belonging to the principal, & drew on his own account for a like sum, which he spent in promoting the scheme. He drew other cheques on his own account, & paid the proceeds to his principal's account as moneys belonging to the principal. Thus, in the bank books the agent's account stood with a large debit, & the principal's account stood witn an equal credit charged with the guarantee. The principal having brought an action against the bank to recover the whole amount standing to his credit:—*Held:* he could recover £1,500 thereof, his own money; but not the residue, which never had been his money.—BRITISH & AMERICAN TELEGRAPH CO., LTD. *v.* ALBION BANK, LTD. (1872), L. R. 7 Exch. 119; 41 L. J. Ex. 67; 26 L. T. 257; 20 W. R. 413.

Annotations:—**Apprvd.** Gray *v.* Lewis, Parker *v.* Lewis (1873), 8 Ch. App. 1035. **Mentd.** R. *v.* Aspinall (1876), 1 Q. B. D. 730.

2100. Agent employed to sell bills & apply proceeds to specific purpose—Proceeds of sale wrongfully applied.]—Where bills of exchange are remitted for sale, & the proceeds directed to be applied to a specific purpose, the property in the bills remains in the remitter until the purpose for which they were remitted is satisfied. And where the money realised by the sale is wrongfully applied by the agent the remitter is entitled to recover the value of the bills in *assumpsit*, upon an *indebitatus* count, from a purchaser of them, who had notice of the purpose for which they were remitted, & of the misapplication of proceeds by the agent.—MUTTYLOLL SEAL *v.* DENT (1853), 5 Moo. Ind. App. 328; 8 Moo. P. C. C. 319; 18 E. R. 920.

2101. Agent employed to sell goods—Goods pawned.]—If one employed to sell goods by commission pawns them, the owners of the goods may maintain trover against the pawnbroker after a demand & refusal, although the duplicate has not been tendered according to Pawnbrokers Act, 1800 (c. 99), s. 5.—PEET *v.* BAXTER (1816), 1 Stark. 472.

Annotation:—**Refd.** Singer Manufacturing Co. *v.* Clark (1879), 49 L. J. Q. B. 224.

2102. —— Goods pledged—Sold by pledgee.]—Pltf., residing abroad, shipped sugars under a bill of lading addressed to A. in London, directing him to sell the sugars on pltf.'s account & place the net proceeds to the credit of B., to whom pltf. was indebted for advances made previously to shipment. The invoice stated pltf. to be the shipper. A., on arrival of the sugars, pledged them to defts. for advances made by them to him, & having become bkpt. pltf. authorised an agent to demand the sugars of defts., but they sold them, & the proceeds were demanded after sale by the agent with pltf.'s authority:—*Held:* (1) the latter had a sufficient title in the sugars to sue defts. in trover, as the right of possession was in him, as B. had only an equitable interest; (2) defts., by selling the sugars after demand by pltf.'s agent, were guilty of a conversion.—SELLECK *v.* SMITH, KEELING & DRAKE (1826), 3 Bing. 603; 11 Moore, C. P. 469; 4 L. J. O. S. C. P. 194; 130 E. R. 646.

For full anns., *see* TROVER.

2103. —— Goods sent to be forwarded—Sold by agent on own account.]—H., a commission agent, being employed by B. to effect sales of goods at B.'s risk, had certain goods consigned to him by B. to be forwarded to W. H. fraudulently sent these goods to R. on his own account, & afterwards assigned his property to trustees for his creditors' benefit. A balance was due from R. to H.:—*Held:* B. was entitled to the balance due from R., in part discharge of the amount due to him (B.) from H., & to prove under the assignment for the balance.—BROADBENT *v.* BARLOW (1861), 3 De G. F. J. 570;

2101 i. *Agent employed to sell goods—Goods exchanged.*]—Pltfs. employed R. as agent to sell cultivators for them at $27 cash & $30 on time; he was to take cash or good notes, & had no authority to barter. Deft. took three cultivators from R. in exchange for a buggy:—*Held:* there was no evidence of a holding out of R. as agent with authority to barter, & the ct. below was right in entering a verdict for pltfs. in an action of replevin for the three cultivators. *Jenkins* v. *Morris*, 14 Ch. D. 674; *Hamilton* v. *Johnson*, 5 Q. B. D. 263; *Dixon* v. *Simmons*, 41 L. T. 783; *Jones* v. *Rough*, 5 Ex. D. 115; *Smith* v. *McGuire*, 27 L. J. Ex. 465; *Hazzd* v. *Treadwell*, 1 Stra. 506; *Milissich* v. *Lloyds*, 46 L. T. 423, C. A.; *Clark* v. *Molyneux*, 3 Q. B. D. 237, C. A.; *Yorkshire Banking Co.* v. *Beatson*, 5 C. P. D. 109, C. A., cited.—STEWART *v.* ROUNDS (1882), 7 A. R. 515.—CAN.

b. *Agent intrusted with goods—Goods pledged—Knowledge of pledgee.*]—Where goods intrusted to an agent had been pledged by him to a third party for advances, & an action was brought by the owner to revendicate the goods:—*Held:* the pledgee could not hold the goods against the owner, seeing that he knew the ownership was not in the pledgor, even though the pledgor had had no notice from the owner forbidding him to pledge.—JOHNSON *v.* LOMER (1861), 6 L. C. J. 77.—CAN.

Sect. 2.—As to goods, etc., intrusted to agent: Sub-sect. 1.]

30 L. J. Ch. 569 ; 4 L. T. 193 ; 7 Jur. N. S. 479 ; 45 E. R. 999.

Annotation :—**Follo.** *Re* Holland, *Ex p.* Alston (1868), 4 Ch. App. 168.

2104. —— —— Pledged by agent.]—A., owner of a personal chattel, parted with a half-share in it to B., A. to have possession until the chattel was sold. A. intrusted the chattel to B. for the purpose of taking it to an auctioneer for sale. B. did not take the chattel to an auctioneer, but lodged it with C. as security for his debt :—*Held :* A. had a special property in the chattel which entitled him to possession of it as against C.—NYBERG (NYBURG) *v.* HANDELAAR, [1892] 2 Q. B. 202 ; 61 L. J. Q. B. 709 ; 67 L. T. 361 ; 56 J. P. 694 ; 40 W. R. 545 ; 8 T. L. R. 549 ; 36 Sol. Jo. 485, C. A.

2105. Agent holding principal's funds—Money applied to discharge debt.]—Where merchants, by direction of an exor., their commercial correspondent, applied a fund, which they knew to be part of the testator's assets, in satisfaction of advances made by them, in course of trade, to relieve embarrassments of their correspondent :—*Held :* they were responsible for the fund so applied to general pecuniary legatees under testator's will.—WILSON *v.* MOORE (1834), 1 My. & K. 337 ; 39 E. R. 709.

Annotations :—**Aplđ.** Collinson *v.* Lister (1855), 20 Beav. 356 ; Gray *v.* Lewis (1869), L. R. 8 Eq. 526 ; Piercy *v.* Fynney (1871), L. R. 12 Eq. 69. **Consd. & Distd.** Child *v.* Thorley (1880), 16 Ch. D. 151. **Aplđ.** Foxton *v.* Manchester & Liverpool District Banking Co. (1881), 44 L. T. 406 ; Cowper *v.* Stoneham (1893), 68 L. T. 18. **Refd.** Fairlie *v.* Hartwell (1839), 3 Jur. 791 ; Fyler *v.* Fyler (1841), 3 Beav. 550 ; Pannell *v.* Hurley (1845), 2 Coll. 241 ; Bank of Bengal *v.* Fagan, Bank of Bengal *v.* M'Leod (1849), 5 Moo. Ind. App. 27 ; Rolfe *v.* Gregory (1863), 9 L. T. 250 ; Macbryde *v.* Eykyn (1871), 24 L. T. 461 ; Mara *v.* Browne (1895), 73 L. T. 638, C. A. **Mentd.** Blyth *v.* Fladgate, Morgan *v.* Blyth, Smith *v.* Blyth, [1891] 1 Ch. 337 ; Soar *v.* Ashwell, [1893] 2 Q. B. 390, C. A.

2106. —— Money paid into agent's banking account—Agent in fiduciary capacity.]—If money held by a person in a fiduciary character, though not as a trustee, has been paid by him to his account at the banker's, the person for whom he held the money can follow it, & has a charge on the balance in the banker's hands.

If a person holding money in a fiduciary character pays it to his account at his banker's & mixes it with his own money, & afterwards draws out sums by cheques in the ordinary manner, the rule in *Clayton's Case* (1816), 1 Mer. 572, attributing the first drawings out to the first payments in does not apply, & the drawer must be taken to have drawn out his own money in preference to the trust money. —*Re* HALLET'S ESTATE, KNATCHBULL *v.* HALLETT (1880), 13 Ch. D. 696 ; 49 L. J. Ch. 415 ; 42 L. T. 421 ; 28 W. R. 732, C. A.

Annotations :—**Distd.** *Re* Mawson, *Ex p.* Hardcastle (1881), 44 L. T. 523. **Consd.** New Zealand & Australian Land Co. *v.* Watson (1881), 7 Q. B. D. 374, C. A. **Distd.** Spartali *v.* Crédit Lyonnais (1885), 2 T. L. R. 178. **Aplđ.** *Re* Murray, Dickson *v.* Murray (1887), 57 L. T. 223 ; Hancock *v.* Smith (1889), 41 Ch. D. 456, C. A. **Distd.** *Re* Miller, *Ex p.* Official Receiver, [1893] 1 Q. B. 327, C. A. ; Ellis *v.* Goulton, [1893] 1 Q. B. 350, C. A. **Follo.** *Re* Wreford, Carmichael *v.* Rudkin (1897), 13 T. L. R. 153 ; *Re* Dacre, Whitaker *v.* Dacre, [1915] 2 Ch. 480. **Refd.** Collins *v.* Stimson (1883), 11 Q. B. D. 142 ; Martin *v.* Rocke, Eyton (1885), 2 T. L. R. 140 ; *Re* Hallet & Co., *Ex p.* Blaine (1894), 2 Q. B. 237 ; *Re* Stenning, Wood *v.* Stenning, [1895] 2 Ch. 433 ; Cory *v.* Mecca, [1897] A. C. 286 ; *Re* Oatway, Hertslet *v.* Oatway, [1903] 2 Ch. 356 ; Davis *v.* Petrie (1906) 2 K. B. 786, C. A. ; Wilsons & Furness-Leyland Line *v.* British & Continental Shipping Co. (1907), 23 T. L. R. 397 ; Burdett *v.* Horne (1911), 27 T. L. R. 402. **Mentd.** New Zealand & Australian Land Co. *v.* Ruston (1880), 5 Q. B. D. 474 ; Harris *v.* Truman (1881), 7 Q. B. D. 340 ; Lyell *v.* Kennedy (1887), 18 Q. B. D. 796 ; Moss *v.* Hancock' [1899] 2 Q. B. 111, D. C. ; Mutton *v.* Peat, [1899] 2 Ch. 556 ; Grunnell *v.* Welch, [1905] 2 K. B. 650 ; Wimbledon *v.* Eden, *Re* St. Mark's, Wimbledon, [1908] P. 167 ; Galula *v.* Pintus (1911), 104 L. T. 574 ; Kreglinger *v.* New Patagonia Meat & Cold Storage Co., [1914] A. C. 25, H. L.

2107. —— —— Agent not in fiduciary capacity.]—The B. Co. collected advance freights on account of pltfs., & the course of business known & assented to by the latter was for the B. Co. to pay the freights when collected into their general account with the P. Bank. They also paid into that account moneys of their own & freights collected for other shipowners. They paid disbursements on behalf of pltfs. by cheques drawn on same account. Accounts were rendered periodically by the B. Co. to pltfs. showing freights received, & disbursements made & the balance owing to pltfs., or, as sometimes happened, the balance owing by pltfs. to the B. Co. The B. Co. having gone into liquidation, & there being a large sum due to pltfs. for freights collected by the B. Co., pltfs. claimed to be entitled to the amount standing to the credit of the B. Co. with the P. Bank, alleging it was the proceeds of freights collected on their account :—*Held :* pltfs. were not entitled to follow the money in the hands of the P. Bank, as there was no fiduciary relationship between the B. Co. & pltfs., but merely the relationship of debtor & creditor.—WILSONS & FURNESS-LEYLAND LINE, LTD. *v.* BRITISH & CONTINENTAL SHIPPING CO., LTD. (1907), 23 T. L. R. 397.

2108. Agent keeping agency account with same bank as private account—Funds transferred from former to pay overdraft on latter.]—Where three accounts had been opened by A. with his bankers, one of which was called the "R. estate account," & was opened by A. as the receiver of rents of the R. estate belonging to pltf. :—*Held :* (1) the bankers were not warranted, knowing such was a receivership account, in allowing A. to draw cheques on that particular account to liquidate a balance due from A. to the bankers on his "office account" : (2) A. having failed, the bankers were liable to make good to pltf. the balance so allowed by them to be carried over from the "R. estate account" to the credit of A.'s private account.—BODENHAM *v.* HOSKINS (HOSKYNS) (1852), 21 L. J. Ch. 864 ; 19 L. T. O. S. 294 ; 16 Jur. 721 ; *affd.* 2 De G. M. & G. 903.

Annotations :—**Consd. & Aplđ.** *Re* Gross, *Ex p.* Adair (1871), 24 L. T. 198. **Distd.** *Re* Gross, *Ex p.* Kingston (1871), 6 Ch. App. 635 n. **Consd.** Macbryde *v.* Eykyn (1871), 24 L. T. 461. **Distd.** Wilson *v.* Bury (1880), 5 Q. B. D. 518, C. A. **Consd. & Aplđ.** Greenwell *v.* National Provincial Bank (1883), Cab. & El. 56. **Distd.** Marten *v.* Rocke, Eyton (1885), 53 L. T. 946 ; Coleman *v.* Bucks & Oxon. Union Bank, [1897] 2 Ch. 243. **Consd.** Bath *v.* Standard Land Co., [1911] 1 Ch. 618, C. A. **Refd.** Bailey *v.* Johnson (1871), L. R. 6 Exch. 279 ; Pearson *v.* Scott (1878), 9 Ch. D. 198.

2105 i. *Agent holding principal's funds—Instructions to buy goods.*]—That money placed in the hands of an agent in order that he may invest it for the benefit of his principal will be considered trust funds is commonplace doctrine (STRONG C.J.).—CARTER *v.* LONG & BISBY (1896), 26 S. C. R. 430.—**CAN.**

c. *Agent selling principal's land in fraud of principal's rights.*]—In an action by pltf. against S. & C., & the parties to whom C. had transferred a part of the land in question, claiming a reconveyance & damages for registering a cloud upon pltf.'s title as well as for detention of the land, it appeared that S. knew that pltf. was in effect the beneficial owner of the land & that P. held the title for her subject only to the payment of his lien ; that S. paid P. the amount of the lien & took the title in his own name, falsely representing to P. it was part of the arrangement upon a sale he had made to pltf. :—*Held :* 1 (S.) was a trustee for pltf. of the title he had so obtained with a lien for the amount he had paid P. ; (2) the defence of purchase by C. for value without notice could not be sustained, C. having actual notice that pltf. & not P. was the true owner, & the other parties were not entitled to any better position ; (3) upon payment of the lien with interest the land must be reconveyed.—MURRAY *v.* SIMPSON (1903), 2 O. W. R. 95.—**CAN.**

2109. Agent receiving post office orders—Payment into agent's banking account.]—Pltfs. banked with defts. It was the duty of pltfs.' secretary to pay all moneys received by him on behalf of pltfs. into defts.' bank to the credit of pltfs. The secretary without the knowledge of pltfs. kept an account at defts.' bank, into which he paid to his own credit certain post office orders belonging to pltfs., which defts. subsequently cashed. The Post Office Regulations with regard to post office orders provided that, when presented for payment by a banker, they should be payable without the signature by the payee of the receipt contained in the order, provided the name of the banker presenting the order was written or stamped upon it:—*Held:* (1) there had been a wrongful conversion of the post office orders above mentioned by defts.; (2) the above regulations of the Post Office did not give to post office orders in the hands of bankers the character of instruments transferable to bearer by delivery so as to give defts. a good title to the post office orders, independently of the authority given to pltfs.' secretary.—FINE ARTS SOCIETY, LTD. *v.* UNION BANK OF LONDON, LTD. (1886), 17 Q. B. D. 705; 56 L. J. Q. B. 70; 55 L. T. 536; 51 J. P. 69; 35 W. R. 114; 2 T. L. R. 883, C. A.

Annotations:—**Apld.** Kleinwort, Sons *v.* Comptoir National d'Escompte de Paris, [1894] 2 Q. B. 157; Lacave *v.* Crédit Lyonnais, [1897] 1 Q. B. 148. **Consd.** McEntire *v.* Potter (1889), 22 Q. B. D. 438. **Apld.** Gordon *v.* London City & Midland Bank, [1902] 1 K. B. 242, C. A. **Refd.** Bavins *v.* London & South Western Bank (1899), 81 L. T. 655, C. A.; Morison *v.* London County & Westminster Bank, [1914] 3 K. B. 356, C. A.

2110. Agent trading abroad for principal—Original goods sold—Proceeds invested in further goods for trading purposes.]—S., supercargo of a ship trading to the East Indies, borrowed of B. £600 for use in the purchase & sale of goods, & gave a bottomry bond to pay £40 per cent. if the ship traded for 3 years; he also gave B. a bill of sale of the goods then purchased & put on board & of the produce & advantage that should be made thereof. The ship traded in the East for 3 years, but S. died on the voyage home. The original goods had been sold & there had been several purchases & sales:—*Held:* (1) S.'s possession of the goods after the giving of the bill of sale was not fraudulent as in the case of a bkpt., & he was in effect trading on account of B.; (2) B. was entitled to follow the specific goods which S. was bringing home, & to be paid his advance out of the produce of them.—BUCKNAL *v.* ROISTON (1709), Prec. Ch. 285; 24 E. R. 136.

2111. *S. P.* Anon. (1709), 2 Eq. Cas. Abr. 479.

2112. Bank manager investing misappropriated funds in overdue bills—Bills sold to company.]—D., formerly manager of the O. Bank, then in liquidation, by means of moneys belonging to that bank he had misappropriated, bought some overdue bills of exchange which were drawn upon & accepted by the E. Bank, also then in liquidation. A few days later he sold three bills to the C. Co., which had been registered two days previously, & of which he was sole director:—*Held:* (1) the C. Co. could not be taken to be affected with notice of the fraud committed by D., as he could not be taken to have communicated that fraud to the C. Co., for which he was acting in the transaction merely as agent, not as a partner; (2) the right of the O. Bank to follow their money into the bills was an equity affecting the bills themselves; (3) the C. Co., though holders for value, had no better title to the bills than D. would have had if he had not parted with them.—*Re* EUROPEAN BANK, LTD., *Ex p.* ORIENTAL COMMERCIAL BANK, LTD. (1870), 5 Ch. App. 358; 39 L. J. Ch. 588; 22 L. T. 422; 18 W. R. 474, C. A.

Annotations:—**Apld.** *Re* Marseilles Extension Ry. & Land Co., *Ex p.* Crédit Foncier & Mobilier of England (1871), 20 W. R. 254, C. A. **Refd.** Waldy *v.* Gray (1875), 32 L. T. 531.

2113. Broker intrusted with securities for transfer—Securities pledged.]—The English exors. of a deceased English owner of shares in an American co. desired to be entered in the New York registry in respect of them to enable them to receive the dividend & if necessary to sell. On the instructions of their broker they signed in blank a form of transfer & power of attorney, which was indorsed on the share certificates, & sent them to the broker in London to be forwarded to New York for registration. The broker fraudulently deposited the certificates with defts. banks as security for advances & afterwards became bkpt:—*Held:* the state of the certificates put defts. banks on inquiry; & the exors. were entitled to the shares, & were not estopped from denying the title of the banks to them.—COLONIAL BANK *v.* CADY, LONDON CHARTERED BANK OF AUSTRALIA *v.* CADY (1890), 15 App. Cas. 267; 60 L. J. Ch. 131; 63 L. T. 27; 39 W. R. 17; 6 T. L. R. 329, H. L.

Annotations:—**Consd.** Montagu *v.* Weston, Clevedon & Portishead Light Ry. Co. (1903), 19 T. L. R. 272; Fry *v.* Smellie, [1912] 3 K. B. 282, C. A. **Apld. & Distd.** Fuller *v.* Glyn, Mills, Currie, [1914] 2 K. B. 168. **Refd.** Bentinck *v.* London Joint Stock Bank, [1893] 2 Ch. 120; Fox *v.* Martin (1895), 64 L. J. Ch. 473. **Mentd.** Simmons *v.* London Joint Stock Bank, Little *v.* London Joint Stock Bank, [1891] 1 Ch. 270, C. A.; Alcock *v.* Smith, [1892] 1 Ch. 238, C. A.; Venables *v.* Baring, [1892] 3 Ch. 527; Schofield *v.* Londesborough, [1896] A. C. 514; Stern *v.* R., [1896] 1 Q. B. 211; Bechuanaland Exploration Co. *v.* London Trading Bank, [1898] 2 Q. B. 658.

2114. Broker receiving funds for investment—Funds deposited with broker's creditor.]—A. employed B., a broker at Liverpool, to purchase a security for him, for which purpose he remitted him a letter of credit for £2,010 on a bank there, payable to B. or order. C., who had had dealings with B., in the course of which the latter had become indebted to him in £1,940, under pretence of borrow-

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2112 i. *Bank manager investing misappropriated funds in mining concession—Sale of concession—No knowledge in purchaser of manager's fraud.*]—The unauthorised purchase of property in an agent's name does not vest the ownership in the principal so as to enable him to follow it up in the hands of third parties, who have acquired cession thereof *bond fide* & for valuable consideration.

The manager of pltf. bank improperly & fraudulently purchased a mining concession with moneys belonging to the bank, & afterwards sold & ceded his rights of action to defts.:—*Held:* in the absence of any allegation that defts. purchased with knowledge of the manager's fraud, there was no ground of action to compel defts. to account to the bank for all profits made by them out of the concession.—CAPE OF GOOD HOPE BANK *v.* DE BEERS' MINES & DUNKELSBUHLER, 11 Supreme Court (Cape), 441; 4 C. T. R. 451.—**S. AF.**

d. *Partner discounting firm's drafts—Proceeds placed to private account—Knowledge of bank.*]—R., deft. bank's manager, was aware that Y., a partner, in Y., V. & Co., drew upon pltfs. & placed the amounts sometimes to his own credit in breach of trust, & sometimes to that of Y., V. & Co. R. admitted knowledge of Y.'s breaches of trust, of which deft. bank reaped the benefit:—*Held:* pltfs. could recover against deft. bank the sums paid into Y.'s account in breach of trust, & interest. *Coleman v. Bucks & Oxon Union Bank*, [1897] 2 Ch. 243; *Bridgman v. Gill*, 24 Beav. 302, 305; *Re Emmet's Estate*, 17 Ch. D. 142 at p. 150, cited.—BRITISH AMERICAN ELEVATOR CO. *v.* BANK OF BRITISH NORTH AMERICA (1914), 20 D. L. R. 944; 29 W. L. R. 214; 6 W. W. R. 1444.—**CAN.**

e. *Person employed to take orders—Goods procured by fraud & delivered to third party on payment of price.*]—M., who was in the habit of taking orders for pltfs.' machines & forwarding the orders to pltfs. to be filed, but who was not employed by pltfs. to sell their machines, by falsehood & forgery obtained a windmill from pltfs., which he sold to defts., & for which he received the price. In an action for conversion of the windmill:—*Held* (1): M. never had any title thereto, & could pass none to defts.; (2) pltfs. were entitled to succeed.—ONTARIO WIND ENGINE & PUMP CO. *v.* LOCKIE (1904), 24 C. L. T. 220; 7 O. L. R. 385; 3 O. W. R. 281.—**CAN.**

Sect. 2.—*As to goods, etc., intrusted to agent: Sub-sects.* 1, 2, 3 & 4. *Sect.* 3: *Sub-sect.* 1, *A.*]

ing the money for a few days, & knowing it was A.'s money, induced B. to part with it, & then insisted upon applying it in discharge of B.'s debt to him:—*Held:* A. might recover the amount from C. in an action for money had & received.—LITT *v.* MARTINDALE (1856), 18 C. B. 314; 27 L. T. O. S. 68; 4 W. R. 465; 139 E. R. 1390.

2115. Drawer of bill instructed by acceptor not to part with bill without permission—Drawer parting with bill for own purpose.]—A bill was drawn by A. & accepted by B. for the purpose of being discounted & having the proceeds applied in the payment of other bills accepted by B., but the other bills before they became due were paid by B., who directed A. to hold the first-mentioned bill for his, B.'s use, & not to part with it without his authority. A., however, for his own purposes indorsed it to C. for valuable consideration, having first informed the latter that it belonged to B. & that he, A., had no authority to part with it:—*Held:* the property in the bill was in B., the acceptor, who might in these circumstances maintain trover for the bill against C.—EVANS *v.* KYMER (1830), 1 B. & Ad. 528; 9 L. J. O. S. K. B. 92; 109 E. R. 883.

2116. Factor drawn on for goods consigned to him—Goods sent to third party & drawn for by factor.]—Where pltfs. consigned goods to their factor, & at the same time drew bills upon him for the amount, which they themselves ultimately paid, & the factor sent them to deft., with whom he had general dealings, without intimating that they were the property of a third person, & drew a bill upon him for the amount, which deft. accepted & paid, after which the factor became insolvent, having before that time apprised deft. that he had received a notice of countermand of the sale from pltfs., but deft. afterwards sold the goods:—*Held:* (1) deft. was liable for the value of the goods in an action for money had & received; (2) he would have been equally liable had he not known that the goods were the property of pltfs.—JACKSON *v.* CLARKE (1824), M'Cle. 72; 13 Price, 208; 147 E. R. 967.

2117. Factor intrusted with goods for sale—Bills of lading indorsed to third party & drawn for.]—Where goods were placed in the hands of a factor for sale, & he indorsed the bills of lading to defts., who accepted a bill for him, & he at the same time directed defts. to sell the goods & reimburse themselves the amount of the bill out of the proceeds:—*Held:* defts., having sold the goods, could not be sued for them in trover by the original owner. *Semble:* (1) he might have maintained money had & received for the proceeds; (2) defts. could not have retained the amount of money advanced to the factor.—STIERNELD *v.* HOLDEN (1825), 4 B. & C. 5; 6 Dow. & Ry. K. B. 17; 3 L. J. O. S. K. B. 127; 107 E. R. 961.

Annotations:—**Consd.** Selleck *v.* Smith (1826), 3 Bing. 603. **Mentd.** Heald *v.* Carey (1852), 11 C. B. 977.

2118. Factor employed to sell goods on del credere commission—Proceeds of sale in hands of sub-agent employed by factor.]—Pltfs., landowners in New Zealand, employed M. & T., factors in Scotland, to sell for them certain cargoes of corn upon a *del credere* commission. M. & T., who employed defts., corn factors & brokers in London, generally in their business, employed them to sell these cargoes in the London market, upon a commission not *del credere*, & differing in its terms from that agreed on between pltfs. & M. & T. The course of business was for pltfs. to indorse bills of lading to M. & T., who in turn indorsed them to defts., but by neither of such indorsements was it intended to pass, nor did there pass, the property in the goods. Pltfs. were aware M. & T. employed others to effect the sales, but they were not parties to the sub-contracts, & gave credit to M. & T. only. On the face of such sub-contracts M. & T. appeared as principals. Defts. from time to time sold portions of the cargoes, & made general remittances to M. & T. as well on account of such cargoes as of their sales effected by them for M. & T. M. & T. having become insolvent at a time when they were indebted to defts. in respect of transactions other than those concerning pltfs.' cargoes, pltfs. brought an action against defts. to recover the balance due in respect of their cargoes, after giving credit for remittances already made by defts. to M. & T.:—*Held:* pltfs. were not, as owners of the cargoes, entitled to follow their proceeds in the hands of defts. irrespective of the state of the general account between the latter & M. & T.—NEW ZEALAND & AUSTRALIAN LAND CO. *v.* WATSON (1881), 7 Q. B. D. 374; 50 L. J. Q. B. 433; 44 L. T. 675; 29 W. R. 694, C. A.

Annotations:—**Distd.** Maspons *v.* Mildred (1882), 9 Q. B. D. 530, C. A. **Consd.** Kaltenbach *v.* Lewis (1885), 10 App. Cas. 617, H. L. **Distd.** Anderson *v.* Sutherland (1897), 13 T. L. R. 163. **Refd.** Kaltenbach *v.* Lewis (1883), 48 L. T. 844, C. A. **Mentd.** Henry *v.* Hammond, [1913] 2 K. B. 515.

2119. Treasurer keeping corporation's moneys in own banking account—Funds transferred to another bank & deposit receipt given as security to surety.]—A person who receives by way of security from a defaulting agent a deposit of money, which turns out to have been withdrawn from the funds of his principal, cannot, where the circumstances are suspicious, be allowed to insist on ignorance of the truth.

A., treasurer of a municipal corpn., for whom B. was surety to the extent of £2,000, kept a banking account in his own name, which was shown to have been in continuation of an account kept as treasurer, & several sums of money paid in to that account were shown to have been corpn. money. A. drew out from his account a sum of £2,300 & placed it at interest, upon a deposit note, in another bank in the name of his daughter. Being indebted to the corpn. in a sum greater than that amount, he was required to account, but refused, & the corpn. having informed B. of the debt & A.'s refusal to account, B. went to A. & demanded an indemnity, when A. gave him the deposit note for £2,300, stating at the same time that he had sufficient means to meet any demand of the corpn. against him. Upon a bill by the corpn. for the purpose of recovering the £2,300:—*Held:* it was to be considered as part of the corpn. moneys, although B., by his answer, stated that at the time when the deposit receipt was delivered to him he believed it was the proper money of A.—BERWICK-ON-TWEED CORPN. *v.* MURRAY (1856-7), 7 De G. M. & G. 497; 26 L. J. Ch. 201; 5 W. R. 208; 44 E. R. 194; *sub nom.* BERWICK CORPN. *v.* MURRAY, BERWICK CORPN. *v.* DOBIE, 28 L. T. O. S. 277; 3 Jur. N. S. 1, L.C.

Annotation:—**Distd.** General Steam Navigation Co. *v.* Rolt (1858), 6 C. B. N. S. 550.

SUB-SECT. 2.—UNAUTHORISED DISPOSITIONS BINDING ON PRINCIPAL.

A. Authority of Agent in Possession of Principal's Property to sell same so as to bind Principal as regards Third Parties. *See* Part V., Sect. 3, Sub-sect. 15, *ante.*

B. Authority of Agent (not being a Mercantile Agent under the Factors Acts) in Possession of Principal's Property to pledge same so as to bind Principal as regards Third Parties. *See* Part V., Sect. 3, Sub-sect. 10, A. (b), B., *ante.*

SUB-SECT. 3.—DISPOSITIONS UNDER THE FACTORS ACTS.

Authority of mercantile agent under the Factors Acts to pledge principal's property so as to bind principal as regards third parties. *See* Part V., Sect. 3, Sub-sect. 10, A. (a), *ante*.

SUB-SECT. 4.—PRIVILEGE FROM DISTRESS.

See DISTRESS.

SECT. 3.—CONTRACTS MADE BY AGENT.

SUB-SECT. 1.—IN GENERAL.

A. Principal's Right to sue on Contracts made by Agent acting within Scope of his Authority.

For cases where contracts must be enforced by the principal, the agent having no right to sue thereon, *see* Part X., *post*.

2120. General rule.]—Where a contract, not under seal, is made with an agent in his own name for an undisclosed principal, either the agent or the principal may sue upon it, deft. in the latter case being entitled to be placed in the same situation, at the time of the disclosure of the real principal, as if the agent had been the contracting party. This rule is most frequently acted upon in sales by factors, agents, or partners, in which cases either the nominal or the real contractor may sue; but it may be equally applied to other cases; & we do not say that where a person lends money nominally on his own account, but really on account of & as the loan of another, the real lender may not sue for the money. But where money is lent by another in his own name pltf. who alleges that he was in reality the lender must prove that fact distinctly & clearly, he must show that the loan, though nominally that of another, was really intended to be his own (DENMAN, C.J.).—SIMS *v.* BOND (1833), 5 B. & Ad. 389; 2 Nev. & M. K. B. 608; 110 E. R. 834.

Annotations:—**Distd.** Cobb *v.* Becke (1845), 4 L. T. O. S. 394. **Consd.** New Zealand & Australian Land Co. *v.* Ruston (1880), 5 Q. B. D. 474. The doctrine of *Sims v. Bond* seems to me applicable to contracts of employment as to those of sale, & to authorise the intervention by the principal in the contract with the sub-agent as fully as it does in the ultimate contract of sale by the latter (FIELD, J.). **Refd.** Brunton *v.* Thompson (1846), 7 L. T. O. S. 430; Humble *v.* Hunter (1848), 17 L. J. Q. B. 350; Walshe *v.* Howlett & Provan (1863), 1 C. L. R. 825; Cooke *v.* Eshelby (1887), 12 App. Cas. 271, H. L.; Soc. Coloniale Anversoise *v.* London & Brazilian Bank, [1911] 2 K. B. 1024. **Mentd.** Parker *v.* Marchant (1843), 1 Ph. 356; Foley *v.* Hill (1844), 1 Ph. 399; Cooke *v.* Seeley (1848), 2 Exch. 746; *Re* Gibson & Sturt, *Re* St. Alban's Bank (1850), 15 L. T. O. S. 95; Coulthurst *v.* Sweet (1866), L. R. 1 C. P. 649; *Re* Derbyshire's Estate, Webb *v.* Derbyshire (1905), 94 L. T. 138.

2121. ——.]—A principal may sue, although he has dealt with the person sued through an agent & the principal's name was not disclosed.—LANGTON *v.* WAITE (1868), L. R. 6 Eq. 165; 37 L. J. Ch. 345; 18 L. T. 80; 16 W. R. 508; *revsd.* on another point (1869), 4 Ch. App. 402, L. JJ.

2122. ——.]—By the law of England, speaking generally, an undisclosed principal may sue & be sued upon mercantile contracts made by his agent in his own name, subject to any defences or equities which without notice may exist against the agent (SIR MONTAGUE E. SMITH).—BROWNING *v.* PROVINCIAL INSURANCE CO. OF CANADA (1873), L. R. 5 P. C. 263; 28 L. T. 853; 21 W. R. 587; 2 Asp. M. L. C. 35, P. C.

2123. —— **Proper question for jury.**]—Where an undisclosed principal sues upon a contract alleged to have been made with his agent, & proved by the agent, the proper question to be left to the jury is whether it was really made by the agent for the principal, although in his (the agent's) name, & not whether deft. meant to & did contract with the agent.—BRUNTON *v.* THOMPSON (1846), 7 L. T. O. S. 430.

2124. Action for account of profits on principal's securities—Deposited by agent in own name as security for a loan to principal.]—Defts., stock-brokers, contracted with Messrs. P., also stock-brokers, for a loan to the latter of £6,000. The money was for the use of pltf., an undisclosed principal, & was advanced on the security of £22,000 worth of his stock. Defts. improperly realised pltf.'s stock during the currency of the loan:—*Held*: pltf. was entitled to bring a bill in his own name for an account of the profits realised by defts. from the sale of his stock.

A principal may sue upon a contract entered into on his behalf by an agent, although his name was wholly concealed at the time of the contract (MALINS, V.-C.).—LANGTON *v.* WAITE, No. 2121, *ante*.

2125. Action for deposit—Made by agent in own name on contract for purchase of land.]—A., as

PART IX. SECT. 3, SUB-SECT. 1.—A.

2120 i. *General rule.*]—A principal, for whose benefit a contract has been made by his agent, may sue thereon in his own name, though deft. may have known nothing of his interest in the subject-matter. — MAIR *v.* HOLTON (1848) 4 U. C. R. 505.—**CAN.**

2120 ii. ——.]—All that an agent does within the limits of his agency with third parties, even in his own name, he does for his principal; & this latter has the right to be subrogated in his rights against third parties.—WILSON *v.* BENJAMIN (1888), M. L. R. 5, 18.—**CAN.**

2120 iii. ——.]—An action may be brought on a contract by the principals, though the contract was made by their agents in their own name & without disclosing their principals.—MACKILL *v.* MORGAN (1892), Q. R 1 S. C. 535.—**CAN.**

2120 iv. ——.]—A principal has a right of action against a third person who has contracted with his agent in the name of the agent.—FORTIN *v.* CARON (1894), Q. R. 7 S. C. 109.—**CAN.**

2120 v. *Marine insurance contract.*]—An undeclared principal can sue on a contract of marine insurance made by his agent in the agent's name.—ANCHOR MARINE INSURANCE CO. *v.* ALLAN (1886), 13 Q. L. R. 4.—**CAN.**

2120 vi. —— *Effect of tender & payment into court.*]—Pltfs. by their agents, M. & Co., sold, through a broker, coal to defts. Defts. pleaded that the contract was with M. & Co. personally, that the coal was short, & that they had offered M. & Co., as the price of the coal actually delivered, $2,890.72, which they brought into ct., without acknowledging their liability to pltfs., & prayed dismissal of the action as to any greater sum:—*Held*: it was unnecessary to decide the question as to whether the action could be brought by the undisclosed principal, for by their plea of tender & payment into ct. defts. had acknowledged their liability to pltfs., although such tender & deposit had been made "without acknowledging their liability."—HUDON COTTON CO. *v.* CANADA SHIPPING CO. (1882), 13 S. C. R. 401.—**CAN.**

2120 vii. —— *Principal's right excluded by terms of contract.*]—Contracts for the sale of sugar were signed as sellers by a firm of sugar brokers on account of a named principal. The contracts each contained the following clause: "Persons acting as brokers or agents between two principals declared on the face of the contract shall be entitled to sign same, principals signing the confirmation slip. But in all other cases the contract shall confer & impose no rights or liabilities on any principals except those who shall sign same or the confirmation slip." In the case of the contracts in question, the buyer, who was not a sugar broker or sugar merchant, signed a confirmation slip, but neither the contracts nor any relative confirmation slips were signed by the principals of the selling brokers. In actions by them against the buyer in which the buyer maintained that he had no contract with them:—*Held*: (1) the effect of the above clause was to exclude the right of disclosed principals to enforce contracts made on their behalf, unless the principals themselves signed the contract or a confirmation slip; (2) the principals of the selling brokers had no right to enforce these contracts against the buyer.—RAMSOHOFF & WISSLER *v.* BURRELL (1897), 35 Sc. L. R. 229.—**SCOT.**

Sect. 3.—Contracts made by agent: Sub-sect. 1, A. & B.]

agent of B., owner of an estate, entered into an agreement for the sale of it with C., who appeared to act on his own account, but in fact was D.'s agent. A. & C. bound themselves in a penalty for the performance of the agreement, & C. paid A. a deposit of the purchase-money. On a breach of the conditions of sale on the part of the vendor:—*Held:* an action lay for money had & received at the suit of D. against B. to recover back the deposit, without proof of the money being paid over by A. to B.

On the agreement C. only may be liable, but the question here is, whose money was paid as a deposit? If it was the money of a principal paid through the medium of an agent, it may be recovered back by the principal upon the contract under which it was paid being rescinded. I therefore think that the action is rightly brought in the name of the present pltf. (LORD ELLENBOROUGH, C.J.).—NORFOLK (DUKE) *v.* WORTHY (1808), 1 Camp. 337.

Annotations:—**Distd.** Bickerton *v.* Burrell (1816), 5 M. & S. 383. **Refd.** Humble *v.* Hunter (1848), 2 Q. B. 310; Ellis *v.* Goulton, [1893] 1 Q. B. 350, C. A. **Mentd.** Leach *v.* Mullett (1827), 3 C. & P. 115; Wright *v.* Wilson (1832), 1 Mood. & R. 207; Flight *v.* Booth (1834), 1 Bing. N. C. 370; Marston *v.* Roe d. Fox, Roe d. Fox *v.* Marston (1838), 8 Ad. & El. 14; Taylor *v.* Bullen (1850), 5 Exch. 779; *Re* Davis & Cavey (1888), 40 Ch. D. 601.

2126. Action for price of goods—Sold by factor under *del credere* commission.]—Where a factor, having a *del credere* commission, sold goods for pltfs. to deft. without disclosing their names, deft. knowing that he was factor, & pltfs., according to the settled course of dealing between them, drew on the factor for the amount, who before the bills became due stopped payment & afterwards became bkpt.:—*Held:* notwithstanding the *del credere* commission, pltfs. might have *assumpsit* against deft. for the price of the goods, the balance of the account current between the factor & deft., being at the time he stopped payment in favour of the factor, but at the time of action brought in favour of deft.

The factor is agent; the parties to be considered as principals are the owner & the buyer. The owner has a right to look for payment to the buyer, unless by some act in which he has concurred he has deprived himself of that right. When he gives a *del credere* commission, he means to obtain an additional security, that is, the security of the factor; & it would be extremely hard if, instead of having an additional security, he should find that he had only substituted one for another, that he had shifted the responsibility from the buyer to the factor (BAYLEY, J.).—HORNBY *v.* LACY (1817), 6 M. & S. 166; 105 E. R. 1205.

Annotations:—**Consd.** Gabriel *v.* Churchill & Sim, [1914] 1 K. B. 449. **Refd.** Bramwell *v.* Spiller (1870), 21 L. T. 672.

2127. —— Sold by one of several joint-owners in own name.]—The joint-owners of a vessel engaged in the whale-fishery may sue a purchaser for the price of whale-oil, although the contract of sale was made by one of the joint-owners, & purchaser did not know that other persons had any interest in the transaction.—SKINNER *v.* STOCKS (1821), 4 B. & Ald. 437; 106 E. R. 997.

Annotations:—**Distd.** Steel *v.* Western (1822), 7 Moore, C. P. 29; Humble *v.* Hunter (1848), 12 Q. B. 310.

2128. Action on bill—Held by agent.]—Where pltf. was not, at the time when deft. was arrested, in possession of the bill of exchange on which the

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2126 i. *Action for price of goods—Sold by agent.*]—In an action to recover the price of wine, deft. pleaded that he had not bought from pltf., but from W., & produced an account in W.'s name. Pltf. answered that W. was his agent, & sold for his account, which was proved:—*Held:* an action on a contract made by an agent in his own name might be brought in the name of the principal.—READ *v.* BIRKS (1858), 2 L. C. J. 161.—**CAN.**

2126 ii. —— —— *Delivered by principal.*]—A person who buys goods from an agent without knowing the position of the latter, but who receives the goods directly from the principal with the invoice in his name, acquires sufficiently the knowledge that he has bought from the principal to be bound to pay him the amount thereof, especially where he has not yet paid the agent.—HIGGINS *v.* LAVIGNE (1889), 12 L. N. 194.—**CAN.**

2126 iii. —— —— *Held out by principal as owner.*]—Pltfs. authorised sale of lumber by M. & assented to a sale to defts., to whom they represented M. as owner. After sale & part payment, pltfs. disclosed themselves as owners, & demanded balance due, which defts. notwithstanding paid to M.:—*Held:* pltfs. were entitled to recover as the real principals in the transaction, & were not estopped by the representation.—LAYTON *v.* SMITH (1884), 5 R. & G. 331.—**CAN.**

2126 iv. —— —— *Negotiations by agent before agency established.*]—A person offered, in his own name, to sell to the Govt. certain machinery which at the time did not belong to him. Before acceptance of the offer applt. agreed with the vendor to buy the machinery & employ the vendor as his agent to effect a sale of it to the Govt. The Govt. then sent to the agent a request to deliver the machinery at the price originally asked, but under somewhat different conditions. Without disclosing the agency the agent delivered the machinery, & it was accepted by the Govt. Applt., before payment, gave notice to the purchasers that he was the owner of the machinery, & that the sale had been made on his behalf by the agent. The purchasers on these representations agreed to treat him as the person entitled to payment, the agent acquiescing in this arrangement:—*Held:* (1) as the original offer to sell was not accepted in terms by the purchasers, the request by the latter to deliver was really a new offer to purchase, which was accepted by delivery in accordance therewith; (2) as the agency was in existence at the date of the offer, & the agent did in fact sell on the principal's behalf, the principal was entitled to sue for the purchase-money, & the purchasers were not discharged by unauthorised payment to the agent.—MOONEY *v.* WILLIAMS (1905), 3 C. L. R. 1.—**AUS.**

2126 v. —— —— *Costs of action.*]—Pltf. sued for balance of the price of a carriage sold to deft. Deft. denied purchasing the carriage from pltf. & proved he had bought it from V., pltf.'s agent, of which agency he was unaware. Judgment was given for pltf. for the amount, but with costs against pltf. of the defence as well as of the claim. The ct. will not give pltf. costs in such a case, even where deft. has not paid the sum claimed into ct.—LABELLE *v.* PATRIS (1873), 4 R. L. 530.—**CAN.**

f. Action for specific performance of contract of sale — Land sold by agent.]—W. purporting to be the owner of land sold it through an agent, O., to deft., C., & a conveyance was executed. W. was merely agent for pltf., who was the real owner, & subsequently brought an action against deft. for specific performance or damages:—*Held:* W. being the authorised agent of pltf., the latter could avail himself of the contract even though W. purported to act as owner.—MCCARTHY *v.* COOPER (1884), 8 O. R. 316.—**CAN.**

g. —— *Land bought by agent.*]—Deft. verbally agreed to sell to R., pltfs.' agent, & gave him a receipt for $25 paid as a deposit; on his repudiating the sale, & returning the deposit:—*Held:* pltfs. could enforce the contract with their agent, though only his name had been used in the receipt & draft agreement of sale. *Filby* v. *Hounsell*, [1896] 2 Ch. 737.—SELKIRK LAND & INVESTMENT CO. *v.* ROBINSON (1913), 25 W. L. R. 392; 13 D. L. R. 935; 23 Man. L. R. 774.—**CAN.**

h. Action for money paid by agent under duress.]—Pltf. conveyed his land to G. to raise money by mtge. upon it for pltf.'s use. G. did so, & paid to deft.'s attorney for pltf. about $160 under pressure, but under protest, which pltf. sued to recover back:—*Held:* after verdict, it might be presumed that G. had paid, or accounted for, the money to pltf., as he had raised it for pltf., & pltf. might recover.—SANDERSON *v.* GAIRDNER (1864), 14 C. P. 330.—**CAN.**

k. Action in trover — Contract signed by agent "for the proprietors."]—In trover for timber, pltfs. claimed under an agreement made by D. of the one part, & S. (under whom deft. claimed) of the other part, whereby D. granted licence to S. to cut timber on certain land, the timber to remain the property of the grantor till the stumpage was paid. The agreement was signed by D. "for the proprietors," & it was sworn by D. that pltfs. were the proprietors of the land, & that he acted as their agent in making the agreement:—*Held:* it appeared by the agreement that it was made by D. as agent for the proprietors of the land, & they could take the benefit of it.—HERSEY *v.* HATHEWAY (1865), 6 All. 237.—**CAN.**

l. Action on option — Taken by agent.]—Where an agent obtains an option the principal may assert his true position as principal & accept the option.—MCKAY *v.* WAYLAND (1911), 18 O. W. R. 696; 2 O. W. N. 741.—**CAN.**

action was brought, but it was in the possession of persons to whom pltf. was indebted, & to whom he had indorsed it over, but it appeared that those persons only held the bill as trustees for pltf., & that they were ready to give up possession of the bill to pltf. for the purpose of the suit:—*Held:* deft. was not entitled to be discharged out of custody.—STONES (STONE) *v.* BUTT (1834), 2 Cr. & M. 416; 2 Dowl. 335; 3 L. J. Ex. 135; 149 E. R. 822.

Annotation:—**Expld.** Smith *v.* Johnson (1858), 3 H. & N. 222. That case (*Stones* v. *Butt*) is not satisfactory but it involves no principle; it amounts to no more than this, that as a matter of practice the ct. refused to interfere (POLLOCK, C.B.).

2129. —— ——.]—To an action on a promissory note, deft. pleaded that pltf. was not the holder of the note, but that it was outstanding in the hands of W. Pltf. replied that W. was holder, by consent of both parties, as trustee for pltf., & on account of pltf.'s claim, & not in satisfaction of it or in suspension of his right to sue:—*Held:* the replication was good & judgment must be for pltf.—NATIONAL SAVINGS BANK ASSOCN., LTD. *v.* TRANAH (1867), L. R. 2 C. P. 556; 36 L. J. C. P. 260; 16 L. T. 592; 15 W. R. 1015.

2130. Action on contract—Made by agent in own name—Certain obligations to be fulfilled by agent personally.]—Where a contract is entered into by an agent in his own name the principal may sue upon it, even though it is in part to be performed by the agent personally.

A. sued by B. for rent upon a lease, in which A. had an interest, an agreement was made between them, signed by B. & C., as agent for A., by which, in consideration of B. withdrawing the record in the action against A. & C. undertaking to pay a certain sum of money by cheque on his own bank in addition to a sum for which A. had given his bills, B. undertook to discharge A. from all further liability to the rents & covenants of the lease upon his assigning to B. all his (A.'s) interest in such lease:—*Held:* although the agreement was made & signed by C. in his own name, yet, if in fact it was made by him as agent for A., A. might sue on it in his own name.—PHELPS *v.* PROTHERO (1855), 16 C. B. 370; 24 L. J. C. P. 225; 1 Jur. N. S. 1170; 3 C. L. R. 906; 139 E. R. 801.

Annotation:—**Apld.** Dunlop Pneumatic Tyre Co. *v.* Selfridge (1914), 83 L. J. K. B. 923, C. A.

2131. —— **Made by member of metal market—Effect of known rule of market.]**—By r. 1 of the Metal Exchange rules members were responsible to each other, & to each other only, for the fulfilment of every contract in which another principal was not named:—*Held:* the effect of the rule was that a person who, knowing of the rule, instructed a broker to buy metal for him could not sue upon the contract in his own name.—MORRISON, KEKEWICH & Co. *v.* MENDEL (1888), 5 T. L. R. 153, C. A.

2132. —— **Made by stockbroker in own name—Effect of Stock Exchange Rules.]**—GRISSELL *v.* BRISTOWE (1868), L. R. 3 C. P. 112; 37 L. J. C. P. 89; 17 L. T. 564; 16 W. R. 428; *revsd.* on another point, L. R. 4 C. P. 36, Ex. Ch.

Annotations:—**Consd.** Duncan *v.* Hill (1871), L. R. 6 Exch. 255. **Refd.** Torrington *v.* Lowe (1868), 19 L. T. 316; Hodgkinson *v.* Kelly (1868), L. R. 6 Eq. 496; Sheppard *v.* Murphy (1868), 16 W. R. 948; Street *v.* Morgan (1869), 21 L. T. 432; Davis *v.* Haycock (1869), L. R. 4 Exch. 373; Maxted *v.* Paine (1871), L. R. 6 Exch. 132; Merry *v.* Nickalls (1872), 7 Ch. App. 733. **Mentd.** Coles *v.* Bristowe (1868), 4 Ch. App. 3, C. A.; Langton *v.* Waite (1868), L. R. 6 Eq. 165; Dickenson *v.* Jardine (1868), L. R. 3 C. P. 639; Allen *v.* Graves (1870), L. R. 5 Q. B. 478; Bowring *v.* Shepherd (1871), L. R. 6 Q. B. 309, Ex. Ch.; Dent *v.* Nickalls (1873), 29 L. T. 536.

See, further, STOCK EXCHANGE.

2133. —— **Made by two as agents for five trustees.]**—Deft. entered into a written agreement for certain premises with two persons, who described themselves as agents of five trustees of a certain joint estate. In an action for use & occupation:—*Held:* the five trustees might bring the action, though not named in the agreement.—FLEMING *v.* GOODING (1834), 10 Bing. 549; 4 Moo. & S. 455; 3 L. J. C. P. 214; 131 E. R. 1008.

B. Liability of Principal to be sued on Contracts made by Agent within Scope of his Authority.

See, further, Part X., Sect. 1, *post.*

2134. General rule.]—The principal must always be debtor, & that whether he is known in the first instance or not, except where the broker has by the form of the instrument made himself so liable.—(LORD ELLENBOROUGH, C.J.).—MORRIS *v.* CLEASBY (1816), 4 M. & S. 566; 105 E. R. 943.

Annotations:—**Consd.** Gabriel *v.* Churchill & Sim, [1914] 1 K. B. 449. **Refd.** Hornby *v.* Lacy (1817), 6 M. & S. 166; Wolff *v.* Koppell (1843), 2 L. J. Ex. 103 n.; Fleet *v.* Murton (1871), 41 L. J. Q. B. 49. **Mentd.** Campbell *v.* Hassel (1816), 1 Stark. 233; Magor *v.* Wilks (1827), 5 L. J. O. S. K. B. 308.

2135. Where principal undisclosed.]—It is not necessary that a tradesman should know, at the time of furnishing the goods, who the person was

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2130 i. *Action on contract—Made by agent in own name.]* — Where an agent sells in his own name for an undisclosed principal, the principal is entitled to recover the price from the buyer, unless, in making the contract, the buyer was induced by the conduct of the principal to believe, & did in fact believe, that the agent was selling on his own account.

R., a broker, sold mining shares in his own name to G., payable in sixty days, on behalf of an undisclosed principal. G., who knew that R. was carrying on a brokerage business, understood that the transaction was with R. on his own account:—*Held:* G. was liable in an action brought by the principal for the price of the shares.—BAKER *v.* MACGREGOR (1914), 20 B. C. R. 15; 16 D. L. R. 371; 6 W. W. R. 132; 27 W. L. R. 209.—**CAN.**

PART IX. SECT. 3, SUB-SECT. 1.—B.

2135 i. *Where principal undisclosed—Being one of several firms for which agent known to act.]*—By the memorandum & articles of assocn. of N. Co. K. was appointed secretary, treasurer, & agent of the co., with power to raise or borrow such sums of money as he might think expedient. K. was also secretary, treasurer, & agent of three other mill cos. On Oct. 31, 1878, the directors of N. Co. passed a resolution: "That the unallotted shares be filled up in the name of K., secretary, treasurer, & agent, who is empowered to mtge. them at a fair rate of interest to enable him to obtain funds for the use of the co." On Nov. 11, 1878, P. advanced money upon terms contained in a writing of that date, signed by K., in which K. acknowledged receipt of the money, for which three hundred and thirty-five shares in N. Co. were duly handed over as security, & he agreed to repay it within three months. On Jan. 17, 1879, an order was made for the winding-up of N. Co., & on Feb. 4, 1879, P. gave notice on the official liquidators of the co. of his claim against the co. for the money advanced by him on Nov. 11, 1878. On Apr. 24, 1879, P. filed his affidavit in support of his claim against the co. The co. resisted the claim:—*Held:* when P. advanced the loan to K. he was led to believe that K. was obtaining it on behalf of the four mill cos. of which he was secretary, treasurer & agent, but P. was not aware & was not informed for which of the cos. the loan was obtained, & the money was in fact advanced to K. as to an agent acting on behalf of an undisclosed principal, & P., when he discovered that the money was obtained for N. Co., was entitled to claim against the co. & to rank as a creditor of the co. for the amount advanced to K.—PURMANUNDASS *v.* CORMACK (1881), I. L. R. 6 Bom. 326.—**IND.**

m. *Where agent acts as principal.]*—B., sole partner of M. & Co., who were agents for sale of A. & Co's oil, induced C. to buy a quantity of this oil below market price, saying that he was personally "hard up" & "badly wanting money." M. & Co. having become bkpt. & the oil not having been delivered:—*Held:* C. had in fact bought from B., & B. had sold as a principal, & not as A. & Co.'s agent, & C. could not claim the oil from A. & Co.—HAYMAN, THOMAS & SONS *v.* AMERICAN COTTON OIL CO. (1907), 45 Sc. L. R. 207.—**SCOT.**

Sect. 3.—Contracts made by agent: Sub-sect. 1, B. & C.; sub-sect. 2, A. B. C. D. & E.]

for whom they were obtained; but, if they are obtained by an agent, & it is afterwards found he had a principal, the tradesman may sue the principal. If persons hold themselves out, they make themselves virtually liable, as much as if they actually made the contract.—GLENESTER *v.* HUNTER (1831), 5 C. & P. 62.

Annotation:—**Refd.** Royal Albert Hall Corpn. *v.* Winchilsea (1891), 7 T. L. R. 362, C. A.

2136. ——.]—An action for goods sold, etc., delivered to a daughter, who was licensed & carried on a public-house for her father, on his credit & for his benefit, may be maintained against the father. Such is no fraud on the licensing system.—BROOKER *v.* WOOD (1834), 5 B. & Ad. 1052; 3 Nev. & M. K. B. 96; 3 L. J. K. B. 96; 110 E. R. 1081.

2137. ——.]—Where a person is the licensee of an hotel & is known so to be, & nothing is brought to the attention of a seller to indicate to him that the position of the person with whom he is dealing is that of a mere manager of a tied house, the seller who trades with the licensee as a principal & afterwards discovers he is an agent is entitled to sue the real principal when disclosed, notwithstanding any limitation placed by the principal on the authority of the licensee.—KINAHAN & CO. *v.* PARRY, [1910] 2 K. B. 389; 79 L. J. K. B. 1083; 102 L. T. 826; *revsd.* on another point, [1911] 1 K. B. 459, C. A.

2138. —— **Agent put forward as real owner.**]—Where the owner of property for sale addressed a letter to his agent which in terms excluded all personal liability on the part of the principal & ostensibly put forward the agent as sole owner, & advances were made on the faith of the letter:—*Semble:* the form of the document did not prevent the owner of the property from being liable as a concealed principal.—DIPROSE *v.* BELGRAVIA HOTELS CO. (1902), 46 Sol. Jo. 214, C. A.

2139. Policy effected by agent on behalf of owners.]—Pltfs., a mutual insurance assocn., sued defts., part-owners of a ship insured with pltfs., for premiums payable in respect of its insurance. The ship had been insured through J., an agent on behalf of the owners:—*Held:* (1) the matter did not depend solely upon the terms of the contract between the assocn. & J., but also upon the fact that "the assured parties" in the policy meant those who took the benefit of the contract, & the assocn., not content with this liability of the agent, had in fact stipulated that they should be entitled to look to the principals as well as to the agent; (2) in these circumstances the contract was binding upon the principals as being the persons to whom the policy was issued & who were to have the benefit of it.—OCEAN IRON S.S. INSURANCE ASSOCN., LTD. *v.* LESLIE (1887), 22 Q. B. D. 722 n.; 57 L. T. 922; 6 Asp. M. L. C. 326.

Annotations:—**Folld.** Great Britain 100 A 1 S.S Insce Assocn. *v.* Wyllie (1889), 22 Q. B. D. 710, C. A. **Distd.** Montgomerie *v.* United Kingdom Mutual S.S. Assocn., [1891] 1 Q. B. 370. **Consd.** British Marine Mutual Insce. *v.* Jenkins, [1900] 1 Q. B. 299.

C. Right and Liability of Principal to sue and be sued on Contracts made by Agent beyond Scope of his Authority. See Part VII., *ante.*

SUB-SECT. 2.—LIMITATIONS ON PRINCIPAL'S RIGHTS AND LIABILITIES.

A. Where Contract under Seal. See Part X., Sect. 1, Sub-sect. 2, *post.*

B. In regard to Bills of Exchange and other Negotiable Instruments. See Part X., Sect. 1, Sub-sect. 3, *post.*

C. Where Contract on behalf of Foreign Principal. See Part X., Sect. 1, Sub-sect. 4, *post.*

D. As to Construction of Written Contracts. See Part X., Sect 1, Sub-sect. 1, B., *post.*

E. Where Principal is Creditor and Debtor seeks to set-off as against Principal a Debt due from Agent to Debtor.

2140. General rule.]—If a factor, who sells under a *del credere* commission, sells goods as his own, & the buyer knows nothing of any principal, the buyer may set off any demand he may have on the factor against a demand for goods made by the principal.—GEORGE *v.* CLAGETT (1797), 7 Term Rep. 359; Peake, Add. Cas. 131; 2 Esp. 557; 101 E. R. 1019.

Annotations:—**Distd.** Houghton *v.* Matthews (1803), 3 Bos. & P. 485. **Consd.** Baring *v.* Corrie (1818), 2 B. & Ald. 137. **Distd.** Wright *v.* Snell (1822), 5 B. & Ald. 350. **Consd.** Tucker *v.* Tucker (1833), 4 B. & Ad. 745. **Distd.** Leuckhart *v.* Cooper (1836), 3 Bing. N. C. 99; Fish *v.* Kempton (1849), 7 C. B. 687. **Apld.** Wilson *v.* Gabriel (1863), 4 B. & S. 243. **Folld.** Semenza *v.* Brinsley (1865), 18 C. B. N. S. 467. **Distd.** Watson *v.* Mid Wales Ry. Co. (1867), L. R. 2 C. P. 593. **Apprvd.** Turner *v.* Thomas (1871), L. R. 6 C. P. 610. **Apld.** Borries *v.* Imperial Ottoman Bank (1873), L. R. 9 C. P. 38. **Consd.** Cooke *v.* Eshelby (1887), 12 App. Cas. 271. The case of *George* v. *Clagett* has been commented upon & its principles explained in many subsequent decisions & notably in *Baring* v. *Corrie*, *Semenza* v. *Brinsley*, & *Borries* v. *Imperial Ottoman Bank*; these decisions appear to me to establish conclusively that it is not enough to show that the agent sold in his own name; it must be shown that he sold the goods as his own or, in other words, that the circumstances attending the sale were calculated to induce & did induce on the mind of the purchaser a reasonable belief that the agent was selling on his own account & not for an undisclosed principal (LORD WATSON). **Consd. & Apld.** Christie *v.* Taunton, Delmard, Lane, [1893] 2 Ch. 175. **Apld.** Montagu *v.* Forwood, [1893] 2 Q. B. 350, C. A. **Refd.** Weldon *v.* Gould (1801), 3 Esp. 268; Kuckein *v.* Wilson (1821), 4

PART IX. SECT. 3, SUB-SECT. 2.—E.

2140 i. *General rule.*]—When a party deals with an agent supposing him to be the sole principal without the knowledge that the property involved belongs to another person, that party is to be protected, & is entitled to set off the amount due to him from the agent against the price of the goods.—SMITH *v.* GROUETTE (1885), 2 Man. L. R. 314.—**CAN.**

2140 ii. ——.]—A person purchasing from the agent of an undisclosed principal without notice of the agency, is entitled to set off against the price claimed by the principal a debt owing to the purchaser by the agent.—HEYDENRYCH *v.* WOOLVEN (1897), 14 S. C. 376; 7 C. T. R. 406.—**S. AF.**

2140 iii. ——.]—To a claim for goods sold & money expended & on an account stated, deft. pleaded (1) never indebted; (2) payment before action; (3) set-off by payment to A., who sold deft. the goods in his own name with pltfs.' consent, & deft. believed A. to be the principal & did not know of pltfs.:—*Held:* a good plea of set-off. *Re Henley, Ex p. Dixon*, 4 Ch. D. 133, cited.—BOWMANVILLE MACHINE CO. *v.* DEMPSTER (1877), 2 S. C. R. 21.—**CAN.**

2140 iv. —— *Lease by agent—Proper question for jury.*]—In an action for use & occupation it appeared that pltf. was assignee of R. M. & Co., in trust to secure payment of a dividend to their creditors, who instructed him not to interfere with the property until default. F., one of the firm, orally leased the premises in question, which were included in the assignment, to deft., & said he believed he mentioned to him at the time pltf.'s name as owner, & referred deft. to him with regard to a proposition to purchase. Afterwards the firm & deft. had dealings together, & deft. claimed that after crediting the rent they were still indebted to him. Pltf., being examined, swore that he had no knowledge of deft.'s occupation, or of the premises, but that F. was authorised to rent the place, & to use his name in the suit:—*Held:* it was properly left to the jury to say whether deft. had taken the premises from pltf. through F. as his agent, or from the firm, & the evidence warranted a verdict for deft.—CRAWFORD *v.* FRASER (1862), 21 U. C. R. 518.—**CAN.**

B. & Ald. 443; Carr *v.* Hinchliff (1825), 4 B. & C. 547; Warner *v.* M'Kay (1836), 1 M. & W. 591; *Re* Trye & Lightfoot, *Ex p.* Pauli (1838), 3 Deac. 169; Purchell *v.* Salter (1841), 1 Q. B. 197; Gordon *v.* Ellis (1846), 3 Dow. & L. 803; Frith *v.* Cazenove (1848), 12 L. T. O. S. 177; Isberg *v.* Bowden (1853), 8 Exch. 852; Luckie *v.* Bushby (1853), 22 L. J. C. P. 220; Oulds *v.* Harrison (1854), 10 Exch. 572; Drakeford *v.* Piercy (1866), 7 B. & S. 515; Spurr *v.* Cass, Cass *v.* Spurr (1870), L. R. 5 Q. B. 656; Abbott *v.* Parfitt (1871), 19 W. R. 718; Thornton *v.* Maynard (1875), L. R. 10 C. P. 695; Thackrah *v.* Fergusson (1877), 25 W. R. 307; Maspons *v.* Mildred (1882), 9 Q. B. D. 530, C. A.; Kaltenbach *v.* Lewis (1885), 10 App. Cas. 617.

2141. —— Not applicable to unliquidated damages.]—To an action for damages for not accepting goods "To arrive" deft. pleaded, by way of equitable defence, that the contract was made with H., agent of & intrusted by pltf. with the possession, etc., of the goods, as apparent owner thereof; that H., with the consent of pltf., contracted in his own name, & deft. believed him to be the owner, & did not know pltf. was the owner of or interested in the goods, or H. was an agent; that H. was afterwards adjudicated bkpt.; that before the bkpcy. mutual credit had been given by deft. & H. in respect of the sale of goods under the contract, & in respect of money payable by H. to deft. upon accounts stated, etc., before bkpcy. & before deft. had notice that H. was acting as agent, claiming a set-off:—*Held:* a bad plea, the action being for unliquidated damages, & the set-off not within the rule in *George* v. *Clagett*, No. 2140, *ante*.—TURNER *v.* THOMAS (1871), L. R. 6 C. P. 610; 40 L. J. C. P. 271; 24 L. T. 879; 19 W. R. 1170.

Annotations:—**Distd.** De Mattos *v.* Saunders (1872), L. R. 7 C. P. 570; Thornton *v.* Maynard (1875), L. R. 10 C. P. 695. **Apld.** *Re* Pollitt, *Ex p.* Minor, [1893] 1 Q. B. 175. **Mentd.** Lister *v.* Hooson, [1908] 1 K. B. 174, C. A.

Consider, now, JUDICATURE ACT, 1873 (c. 66), s. 24 (3); R. S. C., O. 19, r. 3.

2142. —— Not applicable where agent is debtor's agent.]—If goods are bought by a broker who does not mention his principal until he himself has become insolvent, the principal cannot set off the price of the goods against a debt due to him from the broker, but is still liable to the vendor.—WARING *v.* FAVENCK (1807), 1 Camp. 85.

Annotation:—**Consd.** Armstrong *v.* Stokes (1872), L. R. 7 Q. B. 598.

2143. Agent—Held out as principal—Intervention by principal.]—Where a principal permits an agent to sell as apparent principal & afterwards intervenes, the buyer is entitled to be placed in the same situation at the time of disclosure of the real principal as if the agent had been the real contracting party, & is entitled to the same defence, whether it is by common law, or by stat., payment or set-off, as he was entitled to at that time against the agent, the apparent principal (MARTIN, B.).—ISBERG *v.* BOWDEN, No. 2897, *post*.

Annotations:—**Consd.** Christie *v.* Taunton, Delmard, Lane, [1893] 2 Ch. 175. **Refd.** Wilson *v.* Gabriel (1863), 4 B. & S. 243.

For full anns., *see* S. C. No. 2897, *post*.

2144. —— Sale to broker—Knowledge of broker imputable to third party.]—Pltf. placed goods in the hands of H. to sell in his own name, & defts. bought them of H. through C., their broker. Defts. did not know the goods belonged to pltf., but C. did from having been previously in the employ of H., but not from anything communicated to him while acting as defts.' broker in the transaction:—*Held:* (1) defts. were affected by such knowledge of their broker; (2) they were not entitled to set off a debt due to them from H. against pltf.'s claim for the price of the goods. *Qu.:* whether H.'s ignorance of C.'s state of knowledge would make any difference.—DRESSER *v.* NORWOOD (1864), 17 C. B. N. S. 466; 4 New Rep. 376; 34 L. J. C. P. 48; 11 L. T. 111; 10 Jur. N. S. 851; 12 W. R. 1030; 144 E. R. 188, Ex. Ch.

Annotations:—**Refd.** Semenza *v.* Brinsley (1865), 13 W. R. 634; McCaul *v.* Strauss (1883), Cab. & El. 106.

2145. —— Third party ignorant of principal's existence at time of sale.]—One who buys goods of a person whom he knows to be selling them as an agent cannot set off in an action by the principal for their price a debt due to him from the agent, even though he did not at the time of the purchase know, & had not the means of knowing, who was the real owner.

To an action for goods sold & delivered, defts. pleaded the goods were sold to them by M., then agent of pltfs., & intrusted by them with the possession of the goods as apparent owner thereof; that M. sold them in his own name & as his own goods with consent of pltfs.; that defts. at the time of sale & delivery did not know, & had not the means of knowing, that pltfs. were the owners of the goods, or that M. was their agent; & that, at the time of the sale & delivery, & before defts. knew pltfs. were the owners of the goods, or that M. was pltfs.' agent, M. became & continued indebted to defts. for goods sold, etc., to an equal amount, which they were willing & offered to set off:—*Held:* a bad plea, for not averring defts. did not know, & had not the means of knowing, that M. at the time he sold goods to them was a mere agent.—SEMENZA *v.* BRINSLEY (1865), 18 C. B. N. S. 467; 34 L. J. C. P. 161; 12 L. T. 265; 11 Jur. N. S. 409; 13 W. R. 634; 144 E. R. 526.

Annotations:—**Apld.** Borries *v.* Imperial Ottoman Bank (1873), L. R. 9 C. P. 38. **Expld. & Distd.** *Re* Henley, *Ex p.* Dixon (1876), 4 Ch. D. 133, C. A. **Apprvd.** Cooke *v.* Eshelby (1887), 12 App. Cas. 271. **Refd.** Maspons *v.* Mildred (1882), 9 Q. B. D. 530, C. A.; Stevens *v.* Biller (1883), 25 Ch. D. 31, C. A.

2146. —— —— Pleading.]—In order to constitute a valid defence within the rule in *George* v. *Clagett*, No. 2140, *ante*, the plea should show that the contract was made by a person whom pltf. had

2143 i. *Agent—Held out as principal.*]—H. had been connected with a business for a number of years, but after the business had been taken over by pltf., who retained H. as a clerk, H. represented to deft. that he was still owner of the business; deft., who had a running account with the business, believing H. to own it, had supplied him with goods. Pltf. had given no public notice of any change of ownership, & used the old stationery. On being sued by pltf. for goods supplied before & after pltf. took over, deft. admitted having bought the goods, but claimed to set off the value of goods supplied to H. & tendered the balance on proof that pltf. was owner of the business:—*Held:* deft. was entitled to set off the value of goods supplied to H.—WELLS *v.* DON & Co., Eastern Dist. Local Div. (1917), 303.—**S. AF.**

2143 ii. —— —— *Intervention by principal.*]—L. was in the habit of consigning goods to H. for sale & return, & sent him silks with a letter, naming their price & adding "I trust you will take it to account." H. kept them, making no answer. L. became bkpt. & G. claimed the goods, alleging he had consigned them to L. as his agent. H. pleaded compensation on a debt due to him from L.:—*Held:* H. entitled against G. to hold the goods till his debt was paid.—GALL *v.* MURDOCK (1821), 1 S. 75.—**SCOT.**

2143 iii. —— —— *Agent exceeding authority.*]—When a party allows his agent to act as though he were principal, & a third party deals with him as owner, the principal is bound by the act of his agent, even if he exceeded his authority. So where a stores manager sold goods to pltf., who had no knowledge that the goods belonged to another, allowing him to set off the price against a debt due to him personally by the manager:—*Held:* pltf. entitled to set off the amount due to him from the manager, & the principal was bound by the agent's act though he exceeded his authority.—SMITH *v.* GROUETTE (1885), 2 Man. L. R. 314.—**CAN.**

2145 i. —— *Third party ignorant of principal's existence at time of sale.*]—A. sold goods belonging to an undisclosed principal to B., & then failed. B., hearing A. had stopped payment, allowed him to set off against the price a debt due from him to the firm he was employed by. In an action by the undisclosed principal against B. for the price:—*Held:* the transaction by which payment was made discharged B., as A. had dealt with him without disclosing his principal.—ANDERSON, MCGREGOR & Co. *v.* SMITH (1847), 19 Sc. Jur. 308.—**SCOT.**

Sect. 3.—*Contracts made by agent: Sub-sect.* 2, *E.*]

intrusted with possession of the goods; that the person sold them as his own goods in his own name as principal with authority of pltf., & deft. dealt with him as, & believed him to be, the principal in the transaction, & that before deft. was undeceived the set-off accrued. It is not necessary in such a plea to negative "means of knowledge" that the seller was dealing as an agent.

To a count for goods sold & delivered defts. pleaded that the goods were sold & delivered to them by S., then agent of pltfs., & intrusted by them with possession of the goods as apparent owner thereof; that S. sold the goods in his own name & as his own goods with consent of pltfs.; that at the time of sale defts. believed S. to be owner of the goods & did not know pltfs. were owners of them or interested therein, or that S. was agent; & that before defts. knew pltfs. were owners of the goods, or S. was agent in the sale thereof, S. became indebted to defts., etc., claiming a set-off. Replication that, before sale by S., defts. had means of knowing he was merely apparent owner of the goods, that same were intrusted to him as agent, & that S. was agent, & as such sold the goods to defts.:—*Held:* (1) the plea was good; (2) the replication was no answer to it.—BORRIES *v.* IMPERIAL OTTOMAN BANK (1873), L. R. 9 C. P. 38; 43 L. J. C. P. 3; 29 L. T. 689; 22 W. R. 92.

Annotation:—**Refd.** Cooke *v.* Eshelby (1877), 12 App. Cas. 271.

2147. —— Third party knowing agent to be such.]—Deft., a tailor at W., ordered some gin of pltf., a wine merchant in London, through B., who professed himself an agent of pltf. The gin was sent to deft. with an invoice. When called upon to pay deft. set off a debt for goods supplied to the agent B.:—*Held:* deft. had no right to do this knowing B. to be an agent.—WINTLE *v.* DAVIES (1852), 19 L. T. O. S. 65, 123.

2148. —— Custom.]—Pltf. was a hop grower & defts. were hop merchants. Pltf. instructed C., a hop factor, to sell hops for him. C. sold them to defts., who paid partly by cash & bill, & partly by setting off a sum then due from C. on other transactions. Defts. did not deal with C. in the belief that C. was selling his own hops & not those of an undisclosed principal; & the learned judge found that C. in fact told defts. he was only selling on behalf of the owner. Defts. set up a custom of the hop trade, that a merchant had a right to treat the factor as the only principal & to settle by payment to, or composition with, him only:—*Held:* (1) defts. were not entitled to set off C.'s debt against pltf.; (2) the custom was not proved, & in any case was too wide to be reasonable.—COOPER *v.* STRAUSS (1898), 14 T. L. R. 233.

2149. —— Third party's knowledge that agent dealt both as agent & on own account—No knowledge as to particular transaction.]—Where an agent sells in his own name for an undisclosed principal, & the principal sues the buyer for the price, the buyer cannot set off a debt due from the agent unless in making the contract he was induced by the conduct of the principal to believe, & did in fact believe, the agent was selling on his own account.

L. & Co. sold cotton to C. in their own names, but really on behalf of an undisclosed principal. C. knew L. & Co. were in the habit of dealing both for principals & on their own account, & had no belief on the subject whether they made this contract on their own account or for a principal. In an action brought by the principal for the price of the cotton:—*Held:* C. could not set off a debt due from L. & Co.—COOKE & SONS *v.* ESHELBY (1887), 12 App. Cas. 271; 56 L. J. Q. B. 505; 56 L. T. 673; 35 W. R. 629; 3 T. L. R. 481, H. L.

Annotations:—**Folld.** Blackburn *v.* Mason (1893), 68 L. T. 510, C. A. **Apld.** Cooper *v.* Strauss (1898), 14 T. L. R. 233. **Refd.** Sheffield *v.* London Joint Stock Bank (1888), 13 App. Cas. 333; London Joint Stock Bank *v.* Simmons, [1892] A. C. 201; Farquharson *v.* King (1901), 70 L. J. K. B. 985, C. A.

2150. —— Third party sub-agent—Proceeds of sale placed to agent's account.]—A., a merchant, employed B. as agent to sell goods; B. employed as his sub-agent C., with whom he had a running account. B. became bkpt., & his assignees claimed from C. a balance then appearing to be due for sale of goods, which afterwards appeared to be the property of A., who also claimed the amount. C. interpleaded:—*Held:* (1) A., owner of the goods, had a right to recover the price from the sub-agent; (2) the mere fact of entering the amount by C. in his books to the account of B. was not an appropriation of the money so received in payment of the debt of B. to C. within the principle laid down in *George* v. *Claggett*, No. 2140, *ante*, so as to bar the right of A.

If A. desires B. to pay a sum, & B. employs C. & there is any mistake, A. cannot bring an action; it must be brought by the person whose money it was at the time. In the case of goods it is different. If A. employs B. to sell goods, & he employs C., & C. employs D. & so on, the goods remain the property of A., & when sold, the moment A. hears of the sale he has a right to go to the buyer & demand the price; unless he had a defence by reason of the decision in *George* v. *Claggett*, No. 2140, *ante*, he would be bound to pay A. (POLLOCK, C.B.).—FRITH *v.* CAZENOVE (1848), 12 L. T. O. S. 177.

2151. —— Third party unauthorised to treat agent as principal.]—To an action for money had & received, to recover money received by defts. in a transaction with F., pltfs.' agent, defts. pleaded that at the request & with the consent of pltfs. they dealt with & treated F. as principal in the transaction, & claimed a set off of debts due to defts. from F. On demurrer:—*Held:* the plea was bad.

It was necessary to aver that pltfs. authorised defts. to treat the money as the money of F. (COCKBURN, C.J.).—FERRAND (FERAND) *v.* BISCHOFFSHEIM (1858), 4 C. B. N. S. 710; 27 L. J. C. P. 302; 140 E. R. 1271.

2152. Broker — Concealed principal.]—Where a broker sold goods without disclosing the name of his principal:—*Held:* (1) the character of broker was materially different from that of factor; (2) the broker acted beyond scope of his authority; (3) the buyer could not set off a debt due from the broker to him against the demand for the goods

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2147 i. —— *Third party knowing agent to be such.*]—When the buyer of goods from an agent knows that he is only an agent, he cannot set off a claim against the agent in an action by the principal for the price, although the ownership of the goods may have been transferred to another principal before he bought & without his knowledge. So far as the claim of set-off is concerned, it is immaterial whose agent the buyer thought him to be. *Boulton* v. *Jones*, 2 H. & N. 564, cited.—WOOD *v.* ARBUTHNOT (JOHN) CO. (1906), 4 W. L. R. 305; 16 Man. L. R. 320.—CAN.

2147 ii. —— ——.]—A. ordered coals from B., who transmitted the order to a co., & the co. delivered the coals to A. with invoices & accounts which bore that the coals were sold by the co. A. on inquiry was assured by B., who had on previous occasions sold coal to A., that he (B.) was the seller, & subsequently A. ordered more coals from B., which were again supplied by the co. In an action by the co. against A., who alleged he dealt with B. as principal, against whom he had a *contra* account:—*Held:* A. having in the circumstances bought the coals from the co., he was liable to them for the whole price. *Cooke* v. *Eshelby* (1887), 12 App. Cas. 271, & *Cornish* v. *Abington* (1859), 4 H. & N. 549, cited.—WESTERN MOFFATT COLLIERY CO., LTD. *v.* JEFFERY & CO., [1911] S. C. 346.—SCOT.

made by the principal.—BARING *v.* CORRIE (1818), 2 B. & Ald. 137; 106 E. R. 317.

Annotations:—**Apld.** Drakeford *v.* Piercy (1866), 7 B. & S. 515. **Consd.** Cooke *v.* Eshelby (1887), 12 App. Cas. 271. **Refd.** Carr *v.* Hinchliff (1825), 4 B. & C. 547; Warner *v.* M'Kay (1836), 2 Gale, 86; Milford *v.* Hughes (1846), 16 M. & W. 174; Fish *v.* Kempton (1849), 7 C. B. 687; Dresser *v.* Norwood (1863), 11 W. R. 624; Fairlie *v.* Fenton (1870), L. R. 5 Exch. 169; Pearson *v.* Scott (1878), 9 Ch. D. 198. **Mentd.** Borries *v.* Imperial Ottoman Bank (1873), L. R. 9 C. P. 38; Montagu *v.* Forwood, [1893] 2 Q. B. 350, C. A.

2153. —— —— Broker authorised to sell in own name.]—Where a broker (though known to be such) sells in his own name, with implied authority from his principal so to do, it seems the buyer may set off against the price a demand which he has upon the broker.—WYNEN *v.* BROWN (1826), 4 L. J. O. S. K. B. 203.

2154. Factor—Concealed principal.]—Action for the value of goods sold to deft. by means of R. & Co. at Exeter, factors to pltf. Deft., vendee of the goods, set off a debt due to him from R. & Co upon another account, alleging that pltf. had not appeared at all in the transaction, & that credit had been given by R. & Co. & not by pltf.:—*Held:* where a factor, dealing for a principal but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him to all intents & purposes as the principal; & though the real principal may appear & bring an action upon that contract against purchaser of the goods, yet that purchaser may set off any claim he may have against the factor in answer to the demand of the principal. This has been long settled.—RABONE *v.* WILLIAMS (1785), 7 Term Rep. 360 n.; 101 E. R. 1020.

Annotations:—**Folld.** George *v.* Clagett (1797), Peake, Add. Cas. 131. **Distd.** Houghton *v.* Matthews (1803), 3 Bos. & P. 485; Baring *v.* Corrie (1818), 2 B. & Ald. 137. **Apld.** Purchell *v.* Salter (1841), 1 Q. B. 197. **Distd.** Fish *v.* Kempton (1849), 7 C. B. 687. **Apld.** Montagu *v.* Forwood, [1893] 2 Q. B. 350, C. A. **Refd.** Tucker *v.* Tucker (1833), 4 B. & Ad. 745; Isberg *v.* Bowden (1853), 8 Exch. 852; Thackrah *v.* Fergusson (1877), 25 W. R. 307; New Zealand & Australia Land Co. *v.* Ruston (1880), 5 Q. B. D. 474.

2155. —— ——.]—GEORGE *v.* CLAGETT, No. 2140, *ante*.

For full anns., *see* S. C. No. 2140, *ante*.

2156. —— —— Pleading.]—*Assumpsit* for goods sold & delivered. Plea that the goods were sold & delivered to deft. by A., factor & agent of pltf., with the privity of pltf. as & for the goods of A., & deft. did not know the goods were not the property of A. at the time of the sale & delivery; that A. had been & still was indebted to deft. in more than the value of the goods, & that deft. was ready & willing to set off & allow to pltf. the value of the goods out of the moneys so due & owing from A. On special demurrer:—*Held:* the plea was good.—CARR *v.* HINCHLIFF (1825), 4 B. & C. 547; 7 Dow. & Ry. K. B. 42; 4 L. J. O. S. K. B. 5; 107 E. R. 1164.

Annotations:—**Consd.** Maggs *v.* Ames (1828), 4 Bing. 470; Hammond *v.* Teague (1829), 3 Moo. & P. 474. **Distd.** Gibson *v.* Winter (1833), 5 B. & Ad. 96; Tucker *v.* Tucker (1833), 4 B. & Ad. 745. **Consd.** Hayselden *v.* Staff (1836), 2 Har. & W. 204; Purchell *v.* Salter (1841), 9 Dowl. 517. In *Carr v. Hinchliff* some of the judges spoke of the plea as being one in discharge by extinguishing the debt; but their attention was not drawn to the difference between pleas in excuse & pleas in discharge, & the question in that case was not whether the plea was a plea in excuse (LORD DENMAN, C.J.). **Distd.** Leaf *v.* Tuton (1842), 10 M. & W. 393; Mittelholzer *v.* Fullarton (1842), 6 Q. B. 989; Turnley *v.* Macgregor (1843), 12 L. J. C. P. 295; Isberg *v.* Bowden (1853), 8 Exch. 852; Luckie *v.* Bushby (1853), 1 C. L. R. 685; Oulds *v.* Harrison (1854), 10 Exch. 572; Ferand *v.* Bischoffsheim (1858), 27 L. J. C. P. 302. **Expld.** Semenza *v.* Brinsley (1865), 18 C. B. N. S. 467. **Distd.** Drakeford *v.* Piercy (1866), 7 B. & S. 515. **Refd.** Crisp *v.* Griffiths (1835), 2 Cr. M. & R. 159; Isaac *v.* Farrer (1836), 1 M. & W. 65; Fopping *v.* Hayter (1844), 3 L. T. O. S. 51; Gordon *v.* Ellis (1846), 3 Dow. & L. 803; Humble *v.* Hunter (1848), 11 L. T. O. S. 265; Thackrah *v.* Fergusson (1877), 25 W. R. 307.

2157. —— Debt due to factor—Third party's right to allow credit to factor's assignees.]—The owner of goods being indebted to a factor in an amount exceeding their value, consigned them to him for sale; the factor being also similarly indebted to S. sold the goods to him. The factor afterwards became bkpt.; & on a settlement of accounts between S. & the assignees, S. allowed credit to them for the price of the goods, & he then proved the residue of his claim against the estate:—*Held:* as the factor had a lien on the whole price of the goods, such settlement of accounts between the vendee & the assignees afforded a good answer to an action against vendee for the price of the goods, brought either by or on the account of the original owner.—HUDSON *v.* GRANGER (1821), 5 B. & Ald. 27; 106 E. R. 1103.

Annotations:—**Refd.** McCall *v.* Australian Meat Co. (1870), 19 W. R. 188; Turner *v.* Thomas (1871), L. R. 6 C. P. 610.

2158. —— Principal assenting to sale.]—Debt for goods sold & delivered. Plea that the goods were sold by M., factor of pltf., & intrusted by him with goods as M.'s own goods by pltf.'s consent, & deft. did not know, & had no means of knowing, the goods were not M.'s, & a set-off against pltf. of a debt due from M. to deft.:—*Held:* a good plea.—PURCHELL *v.* SALTER (1841), 1 Q. B. 197; 9 Dowl. 517; 1 Gal. & Dav. 682; 10 L. J. Q. B. 81; 5 Jur. 502; 113 E. R. 1105; *revsd.* on another point, 1 Q. B. 209, Ex. Ch.

For full anns., *see* SET-OFF & COUNTERCLAIM.

2159. —— Principal disclosed before payment or completion of delivery.]—Although a factor has sold goods as a principal, yet if before they are all delivered, & before any part of them is paid for, the purchaser is informed that they belonged to a third person, in an action by the latter for the price of them, purchaser cannot set off a debt due to him from the factor.—MOORE *v.* CLEMENTSON (1809), 2 Camp. 22.

Annotations:—**Expld.** Jones *v.* Littledale (1837), 6 Ad. & El. 486. **Refd.** Warner *v.* M'Kay (1836), 1 M. & W. 591.

2160. —— Principal not privy to sale.]—*Assumpsit* for goods sold & delivered. Plea that the goods were, with the knowledge, privity & consent of pltfs., sold & delivered to deft. by H., then factor of pltfs., in H.'s name as owner, & as his own goods, deft. not knowing pltfs. were interested; set-off of a debt due from H. Replication that the goods were not, with the knowledge, privity or consent of pltfs., sold & delivered to deft. by H. in his own name as owner, & as his own goods, in manner & form, etc.:—*Held:* a good replication.—PIGEON *v.* OSBORN (1840), 12 Ad. & El. 715; 4 Per. & Dav. 345; 10 L. J. Q. B. 86; 5 Jur. 365; 113 E. R. 985.

Annotations:—**Folld.** Bell *v.* Tuckett (1842), 3 Man. & G. 785. **Apld.** De Wolf *v.* Bevan (1844), 13 M. & W. 160. **Distd.** Bonzi *v.* Stewart (1844), 8 Scott, N. R. 525. **Apld.** Jones *v.* Jones (1847), 16 M. & W. 699.

2161. —— Sale to agent—Knowledge of agent not imputable to third party.]—Where a factor sells goods to an agent without stating he is selling as a factor, & not on his own account, the principal of the agent has a right to set off a debt due to him from the factor against the price of the goods, being

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2159 i. *Factor — Principal disclosed before maturity of debt proposed to be set off.*]—Deft. purchased oil of M., pltf.'s factor, not knowing it belonged to pltf. At the time of the purchase deft. held a note made by M. for goods previously sold him, which, however, was not due at the time of the purchase of the oil, & did not mature until after deft. had received notice of M.'s agency. In an action brought by pltf. to recover for the oil:—*Held:* deft. could not set off the amount of the note which he held against M.—KENNEDY *v.* TURNBULL (1874), 2 Pug. 378.—CAN.

Sect. 3.—Contracts made by agent: Sub-sect. 2, E. & F. (a).]

ignorant of the fact that the factor was not selling on his own account, although his agent knew it.—DUNN *v.* NORWOOD (1863), 8 L. T 247.

2162.—— Third party agent for sale—Not purchaser of goods.]—Applts., foreign merchants, employed a factor to sell goods on their account. The factor employed resps., London brokers, to sell the goods. The factor died on May 5, 1880, insolvent, having pledged the goods to resps. for an advance protected under Factors Acts. The goods were sold by resps. at a price more than sufficient to repay the advance, but the price had not been paid nor the goods delivered when resps. had notice of applts.' claim:—*Held:* (1) resps. could not retain the surplus proceeds of sale in discharge of the general balance due to them by the factor; (2) applts. had the right to recover the surplus proceeds of sale under Factors Act, 1842 (c. 39), s. 7, as money had & received on their account, & also on the grounds of privity of contract & right to the possession of goods not delivered until after notice of applts.' claim.—KALTENBACH *v.* LEWIS (1885), 10 App. Cas. 617; 55 L. J. Ch. 58; 53 L. T. 787; 34 W. R. 477, H. L.

2163.—— Third party aware of factor's position.]—A. bought goods of B., knowing B. was selling them as factor:—*Held:* he could not, in an action by the principal for the price, set off a debt due to him from B., although it was found A. made the purchase *bonâ fide*. *Semble:* payment to B., though made prematurely, would, if made *bonâ fide*, bind the principal.—FISH *v.* KEMPTON (1849), 7 C. B. 687; 18 L. J. C. P. 206; 13 L. T. O. S. 72; 13 Jur. 750; 137 E. R. 272.

Annotations:—**Distd.** Catterall *v.* Hindle (1866), Har. & Ruth. 267. **Apld.** New Zealand & Australian Land Co. *v.* Ruston (1880), 5 Q. B. D. 474. **Apprvd.** Cooke *v.* Eshelby (1887), 12 App. Cas. 271. **Consd.** Montagu *v.* Forwood, [1893] 2 Q. B. 350, C. A. **Refd.** Drakeford *v.* Piercy (1866), 7 B. & S. 515; Grissell *v.* Bristowe (1868), L. R. 3 C. P. 112; Maspons *v.* Mildred (1882), 9 Q. B. D. 530, C. A.

2164.—— ——.]—*Re* HENLEY, *Ex p.* DIXON, No 2165, *post.*

For full anns., *see* S. C. No. 2165, *post.*

2165.—— —— Secret limitation — Whether third party affected by notice.] — It being within ordinary scope of a factor's authority to sell his principal's goods in his own name, a purchaser who has no knowledge of the agency is entitled to set off against the price of the goods a debt due to him from the factor personally.

A principal had stipulated with his factor that bills of exchange for the price of goods sold should be made payable in such manner as to show the factor's connection with the principal, & they were, in fact, stamped "Agent for W. D. Ltd., C. & G. Ironworks, Glasgow," in pale blue ink, but so that the stamp was concealed or obscured by the agent's signature:—*Held:* (1) the purchase being from a factor, & not a mere agent, the stipulation was immaterial as regarded purchaser, unless he was affected with notice; (2) the stamping of the bills was not sufficient evidence of notice against purchaser's uncontradicted oath that he was unaware of any agency.—*Re* HENLEY, *Ex p.* DIXON (1876), 4 Ch. D. 133; 46 L. J. Bcy. 20; 35 L. T. 644; 25 W. R. 105, C. A.

Annotations:—**Apld.** Thackrah *v.* Fergusson (1877), 25 W. R. 307. **Consd.** Stevens *v.* Biller (1883), 25 Ch. D. 31, C. A. In *Re Henley, Ex p. Dixon*, Brett, L.J. seems to treat the law in the manner in which I have endeavoured to express it, namely, that a man is not the less a factor because he has private instructions not to sell in his own name; in other words, there may be a factor who as between himself & his principal is not justified in selling except in his principal's name (CHITTY J.). That case shows that if a factor sells in his own name, although contrary to the instructions of his principal, it will give a right of set-off as between the purchaser & the factor; it will not take away his character of factor (COTTON, L.J.). **Refd.** Maspons *v.* Mildred (1882), 9 Q. B, D. 530, C. A.

2166.—— Third party believing factor to be selling on own account to pay himself advances.]—A factor, employed to sell a cargo of goods consigned to him, on Feb. 6 sold to A. one parcel of the goods & delivered to him an invoice in his own name. On Feb. 13 A. applied to purchase another parcel, but some difference occurring as to the price, the factor said he must write to his principals. He did so, & on Feb. 20 informed A. of their answer. A. bought the goods at the price named by the principals, & the factor delivered to him an invoice, & a bought note in the names of the principals, the payment to be at 4 months in cash. On the same day, & on other occasions within that period, A. made payments to the factor, not expressly on account of these goods. It appeared it was the factor's practice, when he sold goods on his own account to pay himself advances, to deliver an invoice in his own name, &, when he sold merely as a broker, to deliver a bought note. In an action by the owners of the goods against A. for the price of the parcel sold on Feb. 6, the jury found the factor communicated to A. that he sold the goods for other persons as principals, but A., until Feb. 20, *bonâ fide* believed he sold to pay himself advances, & using the ordinary precaution of merchants, A. was not bound to make further inquiry:—*Held:* A. was entitled to set off in this action the payments made by him to the factor.—WARNER *v.* MCKAY (1836), 1 M. & W. 591; 2 Gale, 86; Tyr. & Gr. 965; 5 L. J. Ex. 276.

Annotations:—**Distd.** Smart *v.* Sandars (1846), 3 C. B. 380; Fish *v.* Kempton (1849), 7 C. B. 687.

2167. Lloyd's broker—Set-off against agent of cargo owners.]—Pltfs.' bankers, acting for owners of a cargo, employed B. & Co. as their agents to collect from underwriters contributions in respect of a general average loss. B. & Co., not being brokers, employed defts., brokers at Lloyd's, to collect the money, & they did so. At the time when defts. received the money there was a debt due to them from B. & Co. Defts., not knowing, & having no reason to suppose, that B. & Co. were acting otherwise, believed that B. & Co. were acting as principals:—*Held:* (1) defts. were entitled to stand in the position in which they would have stood if B. & Co. had been really principals; (2) defts. were entitled to set off against pltfs.' demand for the money which they had collected the debt due to them from B. & Co.—MONTAGU *v.* FORWOOD, [1893] 2 Q. B. 350; 69 T. L. 371; 42 W. R. 124; 9 T. L. R. 634; 37 Sol. Jo. 700; 4 R. 579, C. A.

2168.—— Set-off against insurance agent.] — LEGGE *v.* BYAS, MOSLEY & Co. (1901), 7 Com. Cas. 16; 18 T. L. R. 137.

2169. Sleeping partners—Active partner held out as principal.]—*Assumpsit* for goods sold; pleas on *assumpsit* & a set-off. Pltfs. jointly carried on trade as grocers, but R. was the only ostensible person engaged in the business, & appeared to the world as solely interested therein. By the terms of the partnership, R. was to be the apparent trader, & the others were to remain mere sleeping partners. Deft. was a policy broker, & being indebted for grocery (as he conceived) to R., he effected insurances & paid premiums on account of R. solely, to the amount of his debt, under the idea that one demand might be set off against the other. R.'s affairs being much deranged, payment of the money due from deft. was demanded by the firm, & was refused by him upon the ground of his having been deceived by the other partners keeping back & holding out R. as the only person concerned in the trade:—*Held:* as deft. had a good defence by way of set-off as against R., & had been by the conduct

of pltfs. led to believe that R. was the only person he contracted with, they could not claim payment of debts supposed to be due to R. alone without allowing the parties the same advantages & equities in their defence that they would have had in actions brought by R.—STRACEY & ROSS *v.* DEEY (1789), 7 Term Rep. 361 n.; 1 Esp. 469 n.; 101 E. R. 1021.

Annotation:—**Distd.** Gordon *v.* Ellis (1846), 2 C. B. 821.

2170. ——— ———.]—In an action by A., B., & C. against D. for money received to their use, D. pleaded that A., B., & C. were partners; that A., with the privity of B. & C., employed D. to sell certain personal property of pltfs., as partners, which D. agreed to do; that at the time A. so applied to D., & also at the time of the sale, D. believed A. to be sole owner of the property & to have full authority to dispose of it as his own, D. having no knowledge that B. & C. had any interest in it; that, after being so employed & before the sale, D., at A.'s request, advanced A. money on an agreement that D. might retain the full amount of such money out of the proceeds of the property to be sold, & that the advance was made on the faith of such agreement & not otherwise. The plea then alleged D. sold the property for A., B., & C., suffering A. to deal with the property as his own, & justified retaining the money for the advance under the agreement. Replication that B. & C. did not suffer A. to deal with the property as his own. After verdict for pltfs., on motion to arrest the judgment:—*Held*: the unanswerable facts in the plea constituted a good defence to the action.—GORDON, REID & PHIPPS *v.* ELLIS (1846), 2 C. B. 821; 3 Dow. & L. 803; 15 L. J. C. P. 175; 7 L. T. O. S. 85; 10 Jur. 359; 135 E. R. 1167.

For full anns., *see* PARTNERSHIP.

2171. Stockbroker—Country broker indebted to—Custom of set-off unreasonable.]—BLACKBURN *v.* MASON (1893), 68 L. T. 510; 4 R. 297.

F. Election whether to treat Principal or Agent as liable.

(a) In what Cases the Right to Elect arises.

2172. Agent contracting in own name for undisclosed principal.]—Where an agent contracts in his own name for an undisclosed principal the person with whom he contracts may sue the agent, or he may sue the principal. A person entering into a contract with one to whom, & to whom alone, he trusts may, on discovering that the contractor really has a principal, though he neither trusted to him, nor gave credit to him, nor even knew of his existence, change that principal, unless something has happened to prevent his doing so; but he is not bound to do so (LORD BLACKBURN).—KENDALL *v.* HAMILTON, No. 2195, *post*.

For full anns., *see* S. C. No. 2195, *post*.

2173. Agent not naming principal.]—When an agent states that he is contracting as agent for another, but does not name his principal, the person with whom he contracts may elect whether he will sue the principal or the agent.—THOMSON *v.* DAVENPORT, FYNNEY *v.* PONTIGNY, DAVENPORT *v.* THOMSON, No. 2179, *post*.

Annotations:—**Expld.** Smyth *v.* Anderson (1849), 7 C. B. 21. **Apld.** MacClure *v.* Schemeil (1871), 20 W. R. 168; Armstrong *v.* Stokes (1872), L. R. 7 Q. B. 598. **Distd.** Eastman *v.* Harry (1876), 33 L. T. 800. **Consd.** Irvine *v.* Watson (1880), 5 Q. B. D. 102, 414, C. A. In *Thomson* v. *Davenport*, both Lord Tenterden & Bayley, J., suggest in the widest terms that a seller is not entitled to sue the undisclosed principal on discovering him, if in the meantime the state of account between the principal & the agent has been altered to the prejudice of the principal; but to construe the dicta of those judges literally would operate most unjustly to the vendor; the opinion of Parke, B., in *Heald* v. *Kenworthy* seems to me preferable (BRAMWELL, L.J.). **Reid.** Robinson *v.* Gleadow (1835), 2 Bing. N. C. 156; Poirier *v.* Morris (1853), 2 E. & B. 89; Mahony *v.* Kekulé (1854), 2 C. L. R. 343; Heald *v.* Kenworthy (1855), 10 Exch. 739; Collen *v.* Wright (1857), 8 E. & B. 647; Bottomley *v.* Nuttall (1858), 5 C. B. N. S. 122; Barber *v.* Pott (1859), 4 H. & N. 759; Smethurst *v.* Mitchell (1859), 1 E. & E. 622; Wake *v.* Harrop (1861), 8 Jur. N. S. 845, Ex. Ch.; Calder *v.* Dobell (1871), L. R. 6 C. P. 486; Curtis *v.* Williamson (1874), L. R. 10 Q. B. 57; Hough *v.* Suart (1890), 7 T. L. R. 134, C. A.; Chapman *v.* Great Central Freehold Mines (1905), 22 T. L. R. 90, P. C.; Miller, Gibb *v.* Smith & Tyrer, [1917] 2 K. B. 141, C. A.
For full anns., *see* S. C. No. 2179, *post*.

2174. Agent naming principal.]—The right to elect also arises when the agent names his principal.—CALDER *v.* DOBELL, No. 2188, *post*.

Annotations:—**Reid.** Fleet *v.* Murton (1871), L. R. 7 Q. B. 126; Browning *v.* Provincial Insce. for Canada (1873), L. R. 5 P. C. 263; Curtis *v.* Williamson (1875), L. R. 10 Q. B. 57.
For full anns., *see* S. C. No. 2188, *post*.

2175. ——**Joint or separate account.**]—Petitioner proved a debt against the joint estate, as due to him from the two bkpts., R. B. & G. B., jointly for goods sold & delivered. The goods had, in fact, been bought by G. B. as agent of R. B., on R. B.'s separate account, but petitioner took it for granted they were purchased on account of the partnership, & did not discover till later they were bought on the separate account of R. B. On a petition for leave to transfer the proof from the joint estate to the separate estate of R. B.:—*Held*: the petition should be granted.

G. B. acted as agent of R. B. & made this purchase solely for the benefit of R. B.; & when this fact was discovered, petitioner was entitled to treat either G. B., in whose name the goods were bought, or R. B., for whose benefit & on whose account they were bought, as his debtor (ERSKINE, C.J.).—*Re* BOWERMAN, *Ex p.* VINING (1836), 1 Deac. 555; 5 L. J. Bcy. 44.

2176. No right to elect when contract excludes liability of agent.]—There is no right to sue the agent unless the form of the contract is such as to render him liable on it. The right does not arise when the agent does not purpose to contract himself at all. MILLER, GIBB *v.* SMITH & TYRER, No. 2585, *post*.

Annotation:—**Folld.** Mercer *v.* Wright, Graham (1917), 33 T. L. R. 343.

2177. None where credit given to agent.]—A., a merchant, purchases goods of B. for the use of C., who is present & selects the goods & stipulates

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PART IX. SECT. 3, SUB-SECT. 2.—F. (a).

2172 i. *Agent contracting in own name for undisclosed principal.*]—The husband of a woman having separate property purchased goods on credit, without stating whether he was buying for himself or for another:—*Held*: the vendors might, on procuring evidence that the wife was really the principal in the matter, maintain a complaint against her for the amount.—MCINTOSH *v.* TONKIN (1873), 4 V. L. R. L. 127.—**AUS.**

2176 i. *No right to elect when contract excludes liability of agent.*]—Where an agent contracts on behalf of a principal to the knowledge of the other party, & the principal is known to the other party, the other party cannot afterwards elect to treat the agent as the debtor, as the principal is alone responsible, & there cannot, therefore, be any election.—YOUNG (T. & W.) *v.* TURNER (1900), 18 N. Z. L. R. 827.—**N.Z.**

n. *None when contract excludes liability of principal.*]—A person contracting with an agent may look directly to the principal unless by the terms of the contract he has agreed not to do so, whether he was or was not aware when he made the contract that the person with whom he was dealing was an agent only. *Calder* v. *Dobell* (1871), L. R. 6 C. P. 486, cited.—*Re* GANGES STEAM TUG CO., *Ex p.* DELHI & LONDON BANK (1890), L. L. R. 18 Calc. 31.—**IND.**

2177 i. *None where credit given to agent.*]—R., a broker, effected insurance with pltf. on account of deft. The policy was issued in the name of R., on account of "whom it may concern"; but pltf.

Sect. 3.—Contracts made by agent: Sub-sect. 2, F. (a), (b) & (c).]

with B. the price & other terms of the purchase. A. credits B. with the amount, & debits C. with the amount & a commission. B. debits A. in his books & invoices. B. cannot recover the price of the goods against C.—ADDISON *v.* GANDASSEQUI (1812), 4 Taunt. 574; 128 E. R. 454.

Annotations:—**Distd.** Seymour *v.* Pychlau (1817), 1 B. & Ald. 14; Thomson *v.* Davenport (1829), 9 B. & C. 78; Robinson *v.* Gleadow (1835), 2 Bing. N. C. 156. **Apprvd.** Smyth *v.* Anderson (1849), 7 C. B. 21. **Distd.** Bottomley *v.* Nuttall (1858), 5 C. B. N. S. 122. **Apprvd.** Calder *v.* Dobell (1871), L. R. 6 C. P. 486; Elbinger Akt. *v.* Claye (1873), L. R. 8 Q. B. 313; Curtis *v.* Williamson (1874), L. R. 10 Q. B. 57. **Mentd.** Wake *v.* Harrop (1862), 7 L. T. 96, Ex. Ch.; Armstrong *v.* Stokes (1872), L. R. 7 Q. B. 598; Miller, Gibb *v.* Smith & Tyrer, [1917] 2 K. B. 141, C. A.

2178. ——.]—In an action against an exor. for work done for deceased in repairing a vessel, it was proved by witnesses, called for pltf., that deceased was registered owner, & the repairs were done at request of the master of the vessel, but it also appeared that the master, when he received the bill, said he was the biggest owner, & deceased was part owner; that pltf. in his books gave credit to the master only, & had originally applied to him for payment, drawing a bill upon him which he did not accept. No witnesses were called for deft.; but it was objected on his behalf that there was no evidence to go to the jury. The case went to the jury, who found verdict for pltf.:—*Held:* (1) there must be a new trial, as there was no evidence that deceased owner had authorised the master to employ pltf.; (2) the verdict was against the evidence, which showed pltf. treated the master as the person with whom he contracted.—PEARSON *v.* NELL (1865), 6 New Rep. 304; 12 L. T. 607; 13 W. R. 967; 2 Mar. L. C. 213.

Annotation:—**Refd.** Hibbs *v.* Ross (1866), 7 B. & S. 655.

2179. —— **Unless principal undisclosed.**]—Where a person sells goods to another, not knowing at the time the buyer is an agent, the seller, upon afterwards discovering the principal, may resort to him for payment, although he has debited the agent; & he may recover against the principal, unless the latter has in the meantime paid the agent.

Where the seller knows the buyer is an agent, but does not know the name of his principal, he may afterwards, on discovering who the principal is, compel payment from the principal, unless payment has been made to the agent in the meantime.

Where the seller, with full knowledge of both facts that there is a principal, & who that principal is, debits the agent as the person to whom he gives credit, he cannot afterwards resort to the principal, although the latter may not have paid the agent.

At the time of making a contract of sale, the party buying the goods represented that he was buying them on account of persons resident in Scotland, but did not mention their names, & the seller did not inquire who they were, but afterwards debited the party who purchased the goods:—*Held:* the seller might afterwards sue the principals for the price.—THOMSON *v.* DAVENPORT, FYNNEY *v.* PONTIGNY, DAVENPORT *v.* THOMSON (1829), 9 B. & C. 78; Dan. & Ll. 278; 4 Man. & Ry. K. B. 110; 7 L. J. O. S. K. B. 134; 109 E. R. 30

Annotations:—**Expld.** Smyth *v.* Anderson (1849), 7 C. B. 21. **Apld.** MacClure *v.* Schemeil (1871), 20 W. R. 168; Armstrong *v.* Stokes (1872), L. R. 7 Q. B. 598. **Distd.** Eastman *v.* Harry (1876), 33 L. T. 800. **Consd.** Irvine *v.* Watson (1880), 5 Q. B. D. 102, 414, C. A. The dicta in *Thomson* v. *Davenport* go the length of saying that a settlement on account is sufficient (BRETT, L.J.). **Refd.** Robinson *v.* Gleadow (1835), 2 Bing. N. C. 156; Poirer *v.* Morris (1853), 2 E. & B. 89; Mahony *v.* Kekulé (1854), 2 C. L. R. 343; Heald *v.* Kenworthy (1855), 10 Exch. 739; Collen *v.* Wright (1857), 8 E. & B. 647; Bottomley *v.* Nuttall

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knew that the insurance was for deft.'s benefit, & that R. was only agent. All the entries relating to the transaction in pltf.'s books were in R.'s name:—*Held:* the jury were properly directed that if pltf., knowing that R. was only agent, gave credit to R., he could not afterwards look to deft. for the premium.—STYMEST *v.* SOLOMON (1870), 2 Han. 68. —**CAN.**

2177 ii. ——.]—G. & D. carried on business in partnership as Union Medicine Co. D. entered into a contract in his own name with pltfs., signing it in his own name, & it was entered in pltfs.' books "D., Toronto, Union Medicine Co., advertising contract." It authorised the publication of "our business announcements for which we agree to pay," etc. D. made two payments, but refused to make the third payment, & eventually pltfs. moved for judgment against D. under r. 80, & G. was added as a co-deft. on D.'s application:—*Held:* (1) credit was given to D. alone; (2) treating D. as agent for an undisclosed principal, the partnership, there had been a binding election by pltfs. to treat D. as alone liable. *Scarf v. Jardine*, 7 App. Cas. 345; *Smethurst v. Mitchell*, 1 E. & E. 622; *Cox v. Hickman*, 8 H. L. Cas. 268, 312; *Calder v. Dobell*, L. R. 6 C. P. 486, at p. 490, cited.—MAIL PRINTING CO. *v.* DEVLEIN & GRAHAM (1888), 17 O. R. 15. —**CAN.**

2177 iii. ——.]—M. & Co., as managing owners of the *G.*, instructed insurance brokers to insure the *G.* & other ships managed by them. The course of dealing between M. & Co. & the brokers was for the latter to pay the premiums to the underwriters, & for M. & Co. to accept bills drawn by the brokers for sums representing the premiums so disbursed by them. It was agreed between M. & Co. & the brokers that, if any acceptance was not met by M. & Co., the brokers would be entitled to cancel any of the policies in whole or in part, & apply the return premiums due in respect of such cancellation in liquidation of any debt due to them by M. & Co. On the bkpcy. of M. & Co. certain premiums disbursed by the insurance brokers on policies on the *G.* had not been paid to them by M. & Co. In an action by the brokers against the owners for payment of these premiums the ct. assoilzied defenders on the ground that pursuers had elected to take M. & Co. as their sole debtors. *Xenos v. Wickham* (1867), L. R. 2 H. L. 296, cited.—LAMONE, NISBET & Co. *v.* HAMILTON, [1907] S. C. 628. —**SCOT**

2179 i. —— *Unless principal undisclosed—Contract Act (IX. of* 1872), *s.* 233.]—Where an agent is personally liable for a debt the creditor has the option to proceed either against the principal or the agent. Where it did not appear that in lending the money the lender (who knew that the money was being borrowed on behalf of certain principals) looked exclusively to the agent for repayment:—*Held:* he could proceed to realise the money from the principals. *Paterson v. Gandasequi* (1812), 15 East, 62; *Thomson v. Davenport* (1829), 9 B. & C. 78, cited.—SATYA PRIYA GHOSAL *v.* GOBINDA MOHUN ROY CHEWDHURY (1909) 14 C. W. N. 414.—**IND.**

2179 ii. —— —— *Disclosure of principal before debt incurred.*]—Pltf. sued defts. on an account for goods alleged to have been supplied by him to defts. These goods were ordered through S., formerly defts.' manager, but defts. had appointed M. manager in his place before the debt was incurred. Before the debt was incurred defts. gave S. a written option upon their mining property, & directed their employees to turn same over to him, putting up a notice at the mine that they would not be responsible for any debts incurred in operating same:—*Held:* pltf. must look to S., against whom he made out the account, rather than defts.—DAVIDSON *v.* ST. ANTHONY GOLD MINING CO. (1910), 15 O. W. R. 446; 1 O. W. N. 525.—**CAN.**

o. —— *To whom credit given question for jury.*]—Where a purchase is made by an agent, who discloses the name of his principal, it is a question for the jury to determine to whom the credit was given; & where the evidence is conflicting, the ct. will not disturb the verdict.—SCOTT *v.* CURRY (1834), Hil. T. 1834, New Brunswick.—**CAN.**

p. —— —— *Proper question for jury.*]—Defts. arranged with L. for a consideration specified that all goods bought by defts. in England should be charged to L. by the various sellers, with whom L. was to settle. Pltfs.' agent, K., sold goods to defts. on credit, & pltfs.' draft on L. having been protested, they sued defts. The evidence was contradictory as to K.'s knowledge of defts.' arrangement with L., & as to whom credit was given upon the sale. The jury were directed that pltfs. were bound by K.'s arrangement for payment, if any, made with defts., & were asked to say whether the goods were sold on the credit of L., looking only to him for payment, or to defts., on their own credit, in the ordinary way, & they found for defts.:—*Held:* direction was right; but, upon the evidence, a new trial was granted on payment of costs.—CREIGHTON *v.* JANES (1877), 40 U. C. R. 372.—**CAN.**

(1858), 5 C. B. N. S. 122; Smethurst *v.* Mitchell (1859), 1 E. & E. 622; Barber *v.* Pott (1859), 4 H. & N. 759; Wake *v.* Harrop (1861), 8 Jur. N. S. 845, Ex. Ch.; Calder *v.* Dobell (1871), L. R. 6 C. P. 486; Curtis *v.* Williamson (1874), L. R. 10 Q. B. 57; Southwell *v.* Bowditch (1876), 1 C. P. D. 100; Gadd *v.* Houghton (1876), 1 Ex. D. 357, C. A.; Concordia Chemische Fabrik *v.* Squire (1876), 34 L. T. 824, C. A.; Ogden *v.* Hall (1879), 40 L. T. 751; Hough *v.* Suart (1890), 7 T. L. R. 134, C. A.; Chapman *v.* Great Central Freehold Mines (1905), 22 T. L. R. 90, P. C.; Miller, Gibb *v.* Smith & Tyrer, [1917] 2 K. B. 141, C. A. **Mentd.** Schmalz *v.* Avery (1851), 20 L. J. Q. B. 228; Green *v.* Kopke (1856), 18 C. B. 549; Gillett *v.* Offor (1856), 18 C. B. 905; Elbinger Akt. *v.* Claye (1873), L. R. 8 Q. B. 313; British Homes Assce. Corpn. *v.* Paterson, [1902] 2 Ch. 404; Darlow *v.* Shuttleworth (1902), 71 L. J. K. B. 460.

2180. —— Unless principal acknowledges liability.]—Goods were sold to the agents of a known principal, the seller giving credit to the agents, who afterwards ran away. The principal who had received the goods, then acknowledged his liability to the seller:—*Held:* the seller could recover against the principal in an action for goods sold & delivered.—WILDING *v.* COLLYER (1832), 1 L. J. C. P. 50.

2181. —— Evidence showing credit not given to agent.]—Evidence that deft.'s agent has been a bkpt. is admissible in an action for goods supplied on the order of the agent to show that the agent was in such circumstances as he was not likely to get credit for himself.—SMETHURST *v.* TAYLOR (1843), 2 L. T. O. S. 1.

2182. None when no joint contract or relation of principal & agent.]—When there is no joint contract or relation of principal & agent, an unsatisfied judgment against one person for the price of goods sold is not a bar to a subsequent action against another person for the price of the same goods.—ISAACS & SONS *v.* SALBSTEIN, [1916] 2 K. B. 139; 85 L. J. K. B. 1433; 114 L. T. 924; 32 T. L. R. 370; 60 Sol. Jo. 444, C. A.

(*b*) *At what Time the Right arises and must be exercised.*

2183. No election until facts known.]—In the case of an undisclosed principal there cannot be an election until there is knowledge of the right to elect (LORD BLACKBURN.)—KENDALL *v.* HAMILTON, No. 2195, *post.*

For full anns., *see* S. C. No. 2195, *post.*

2184. None without knowledge of facts.]—To constitute an election between the agent & the undisclosed principal there must be actual knowledge of the real facts.—DUNN *v.* NEWTON (1884), Cab. & El. 278.

2185. ——.]—Where an agent has personally pledged his credit there is no conclusive election on the part of the creditor to charge the principal, unless (1) at the time of election the person electing has full knowledge of the facts & freedom of choice; (2) there are two persons at least at the time of election known to him, either of whom he may sue; (3) having such knowledge, & two or more persons against whom to proceed, such person expresses by a patent unequivocal act or acts his election to proceed against one in exoneration of the other.—LONGMAN *v.* HILL (LORD) (1891), 7 T. L. R. 639.

Annotation:—**Folld.** Sugg *v.* Hill (1893), 10 T. L. R. 126.

2186. Must be within reasonable time after discovery.]—A vendor who sells to a person known to be agent of an unknown principal, must elect to proceed against the principal within a reasonable time after discovering him; otherwise he loses his right to treat the principal as vendee, if the state of the account between the latter & his agent has been altered to the prejudice of the principal before he makes his election.—SMETHURST *v.* MITCHELL (1859), 1 E. & E. 622; 28 L. J. Q. B. 241; 33 L. T. O. S. 9; 5 Jur. N. S. 978; 7 W. R. 226; 120 E. R. 1043.

Annotations:—**Apld.** Curtis *v.* Williamson (1874), L. R. 10 Q. B. 57. **Consd.** Davison *v.* Donaldson (1882), 47 L. T. 564, C. A. **Apld.** Fell *v.* Parkin (1882), 52 L. J. Q. B. 99.

2187. Not lost by mere delay.]—The seller of goods bought by a broker in his own name does not lose his right to resort to the broker's undisclosed principal by reason of his delay in so doing until the persons to whom the broker has resold the goods have become insolvent, if the undisclosed principal has not in the meantime paid the broker or otherwise altered his position.—CAMPBELL *v.* HICKS (1858), 28 L. J. Ex. 70.

Annotation:—**Refd.** Macfarlane *v.* Giannacopulo (1858), 28 L. J. Ex. 72.

(*c*) *What constitutes an Election.*

2188. Question of fact for jury.]—Deft. had commissioned C. to buy 100 bales of cotton, but par-

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2181 i. —— *Evidence showing credit not given to agent.*]—Deft. sent B. to open a branch of his business in S. B had no business of his own & acted solely for deft. on a salary & bonus. B. ordered goods from pltf., the order being signed "J. B. B.," & written on paper headed "James B. Butler, Flour Merchant, sole agent for Norman & Co., Millers, etc." Pltf. supplied the goods to B., charged them to him in his books & took in payment B.'s cheque for part & promissory notes for the balance. The notes were dishonoured:—*Held:* there was evidence to support the finding of the jury that pltf. had not in the circumstances given exclusive credit to B., & thereby released deft.—MATTHEWS *v.* NORMAN (1895), 16 N. S. W. 48.—**AUS.**

2181 ii. —— ——.]—Deft. transferred his business to P., & pltfs., who had supplied goods to deft., continued to supply P. On P. becoming bkpt. pltfs. applied to deft. for payment, claiming that they had had no notice of the transfer of business. In an action for goods sold & delivered, evidence was given by deft. that some of the accounts were rendered to P. & his cheques accepted in payment. The trial judge found that pltfs. did not give credit to P. but to deft.:—*Held:* assuming the *onus* of proof was shifted from deft. to pltfs. notwithstanding the way the accounts were rendered, credit was given to deft.—PIESSE & CO. *v.* CARGEEG (1904), 6 W. A. R. 223.—**AUS.**

PART IX. SECT. 3, SUB-SECT. 2.—F. (b).

2186 i. *Must be within reasonable time after discovery.*]—Of several defts., B. was the active member & the others were, in respect of the contract sued upon, undisclosed principals. On a motion for an order that pltf. should elect against which of defts. he would proceed or to strike out the name of B.:—*Held:* pltf. must elect within a reasonable time which of defts. he would proceed against. *Smethurst v. Mitchell* (1859), 1 E. & E. 622; *Bennett v. McIlwraith*, [1896] 2 Q. B. 464, cited.—PHILLIPS *v.* LAWSON (1913), 11 D. L. R. 453; 22 O. W. R. 655; 4 O. W. N. 1364.—**CAN.**

PART IX. SECT. 3, SUB-SECT. 2.—F. (c).

2188 i. *Question of fact for jury.*]—The only conclusive election in law is by suing the agent to judgment. If it is alleged that there has been an election short of this, it is a question of fact upon the whole evidence & so a question for the jury, or for a magistrate where the case is before a magistrate. *Calder v. Dobell* (1871), L. R. 6 C. P. 486, & *Curtis v. Williamson*, L. R. 10 Q. B. 57, cited.—YOUNG (T. & W.) *v.* TURNER (1900), 18 N. Z. L. R. 327.—**N.Z.**

2188 ii. ——.]—C., agent of H., bought cattle from M. & B. for H. disclosing the name of his principal. In payment C. gave his draft on a bank, on same piece of paper with which was a written statement signed by the manager of the bank that he would honour the draft in favour of any payee if presented within a time named. C. filled in the names of M. & B. as payees, who took the draft & delivered the cattle. The draft was not presented within the time named & was dishonoured. M. & B. brought separate actions against H. for the price:—*Held:* (1) these facts were not inconsistent with the view that pltfs. had given credit to H., the disclosed principal, rather than C., who gave his draft & got delivery of the cattle; (2) there was no conclusive evidence of election, but at the utmost evidence only from which the jury might or might not have inferred the election; (3) the inference of election on these facts should have been drawn by the jury only & not by the ct.; (4) a verdict must be entered for pltf. in each case.—MATE *v.* HERBERT, BARDWELL *v.* HERBERT (1863), 2 W. & W. L. 258.—**AUS.**

Sect. 3.—Contracts made by agent: Sub-sect. 2, F. (c).]

ticularly directed that his name should not be disclosed. C. bought the cotton for delivery on a future day of pltfs., who, unwilling to trust C., insisted on having the name of C.'s principal. C. having told pltfs. the cotton was for deft., but that deft. did not wish his name to transpire, pltfs. sold the cotton & delivered to C. a sold note, addressed to him personally, & received from him a corresponding bought note, signed by him personally, & not as agent. Pltfs. debited C. in their books. C. delivered to deft. an advice note, "Bought on your account of Messrs. C. & D. 100 bales," etc., which deft. accepted & retained without demur. Before time for delivery cotton had fallen in price, & deft. settled differences with C. When time for delivery arrived, cotton had still further fallen in price. Pltfs. called on C. to accept the cotton or pay the difference in price, threatening proceedings in case he failed to do so. On C.'s failure to do so pltfs. called on deft. to accept the cotton or pay the difference in price, & on his refusing to do so sold the cotton, & brought an action to recover the difference between the contract price & the price realised:—*Held:* (1) there was evidence to go to the jury to show that deft. had notice of & ratified the contract made on his behalf by C., though it was not the contract he originally authorised him to make; (2) parol evidence was admissible to show that deft. was the principal in an action brought with a view to charging him as such; (3) it was a question for the jury to consider whether, looking at all the circumstances, pltfs. had elected, at time of entering into the contract, to give credit to C., dealing with him alone; (4) there was evidence to go to the jury that they had not done so; (5) if they had not done so they had subsequently an election whether to treat C. or deft. as liable to them on the contract; (6) the facts warranted the jury in finding that pltfs. had never elected to treat C. as their debtor so as to preclude themselves from bringing the action.—CALDER *v.* DOBELL (1871), L. R. 6 C. P. 486; 40 L. J. C. P. 224; 25 L. T. 129; 19 W. R. 978, Ex. Ch.

Annotations:—**Folld.** Longman *v.* Hill (1891), 7 T. L. R. 639. **Refd.** Fleet *v.* Murton (1871), L. R. 7 Q. B. 126; Browning *v.* Provincial Insce. for Canada (1873), L. R. 5 P. C. 263; Curtis *v.* Williamson (1875), L. R. 10 Q. B. 57; Codling *v.* Mowlem, [1914] 2 K. B. 61.

2189. Action commenced but discontinued.]—*Semble:* a principal may be sued if an action has been brought against the agent & discontinued.—PRIESTLY *v.* FERNIE, No. 2194, *post.*

For full anns., *see* S. C. No. 2194, *post.*

2190. Bankruptcy proceedings.]—A. & B. were both in the habit of sending goods to C., a factor, for sale. In the course of his dealings with C., B. purchased of him goods belonging to A., which were invoiced to him by C. in his own name, though upon the balance of accounts between them C. was indebted to B. A. afterwards filed an affidavit in the Bkpcy. Ct. in which he alleged C. was justly & truly indebted to him in a certain sum for goods belonging to him sold & delivered by C. as factor or agent of A. to B., & for which goods C. received payment by means of goods sold & delivered to him by B., & which goods were used by C. in his trade of a cheesemonger. Upon this affidavit a fiat was worked out against C. to its termination:—*Held:* this affidavit did not estop A. from suing B. for the price of the goods or afford sufficient evidence to sustain a plea of payment in that action.—MORGAN *v.* COUCHMAN (1853), 14 C. B. 100; 23 L. J. C. P. 36; 2 W. R. 59; 2 C. L. R. 53; 139 E. R. 42.

2191. ——.]—One of the members of a foreign firm resident in England bought goods on account of the firm, for which he gave his own acceptances. Before maturity of the bills the acceptor became bkpt., & the drawer (or those to whom he had indorsed them) proved for the amount against the acceptor's estate, & received dividends:—*Held:* the vendor of the goods (to whom the bills had been returned) had done nothing to prejudice his right to have recourse against the other members of the firm for the unpaid balance, as the mere fact of vendor's dealing with the resident partner making out the invoices to him individually, & drawing upon him alone though aware that he was a member of a firm, & that the goods were to be shipped for the firm, made no difference.—BOTTOMLEY *v.* NUTTALL (1858), 5 C. B. N. S. 122; 28 L. J. C. P. 110; 32 L. T. O. S. 222; 5 Jur. N. S. 315; 141 E. R. 48.

Annotations:—**Apld.** Keay *v.* Fenwick (1876), 1 C. P. D. 745, C. A. **Consd.** Scarf *v.* Jardine (1882), 7 App. Cas. 345. **Mentd.** Mears *v.* Western Canada Pulp & Paper Co., [1905] 2 Ch. 353, C. A.

2192. ——.]—When goods are sold to an apparent principal for ready money the seller must at his peril obtain immediate payment, & if the buyer is only an agent contracting in his own name, & receives the price forthwith from his principal, the seller who omits to enforce immediate payment cannot at a subsequent time recover the value of the goods from the principal upon the failure of the agent to pay over to the seller their price. The seller of goods to an apparent principal upon discovery that the buyer is only an agent may so conduct himself by demanding payment from, & taking proceedings against, the agent that he will be deemed to have elected to look to the agent only for payment, & will be debarred from any remedy against the real principal.

Defts. instructed R. to buy 700 pieces of cloth. R. obtained the cloth from pltfs., who made out the invoices to him. The terms of sale to R. were "cash on delivery." R. forwarded the cloth to defts., making out the invoice in his own name. The value of the cloth was £271 17*s.* 6*d.* Upon receipt of the cloth defts. sent R. £55, & defts. were allowed by R., on account of some silk, £19 10*s.* R. afterwards drew a bill for £200 in favour of pltfs. upon defts., which was duly paid. Pltfs. charged R. with interest, & not obtaining payment of the balance, requested by letter payment of it by defts.; defts. replied by letter repudiating the liability. After receiving defts.' letter pltfs. twice demanded payment of the balance from R. & took proceedings in bkpcy. against him. R. having become insolvent, pltfs.

q. *Action commenced against agent —Principal sought to be joined.*]—An application was made by pltf. in a cty. ct. action to add the wife of deft. as a deft., it being alleged that the goods claimed for, as sold to the husband, went into the stock-in-trade & were used in the business, which the wife carried on by her husband & agent, & that she received the benefit thereof, &, further, that pltf. was not aware of the real proprietorship of the business at the time of the sale of the goods. The judge dismissed the application, holding that "having sued the agent pltf. has made his election, & must abandon & discontinue suit, if he would make the principal liable." On appeal the appeal was allowed with costs.—PERRIN *v.* COOK (1898), 40 N. S. R. 631.—**CAN.**

2190 i. *Bankruptcy proceedings.*]—A. carried on business in the name of A. & Co., but really as agent for defts. Pltfs. sold goods to A. & received his promissory note, signed with his name simply, for the price, without being aware of his agency. A. went bkpt., & pltfs., who then were aware of the agency, proved against A.'s estate, & received a dividend. In an action to recover balance from defts.:—*Held:* the proof alone, & certainly the proof followed by acceptance of the dividend, was an unequivocal act of election.—NATHAN *v.* CLARKSON (1889), 7 N. Z. L. R 602.—**N.Z.**

afterwards sued defts. to recover the sum of £71 17*s.* 6*d.*, the balance due after the payment of £200 :—*Held :* pltfs. were not entitled to recover, because (1) the goods were sold for ready money, & pltfs. having failed to enforce immediate payment from R., could not hold defts. liable, who had meanwhile paid R. the value of the goods ; (2) by demanding payment from R., & taking proceedings in bkpcy. against him after they knew him to be only an agent, they had made a final & irrevocable election to treat him as their debtor instead of defts.—MACCLURE *v.* SCHEMEIL (1871), 20 W. R. 168.

2193. —— **Filing affidavit of débt.**]—B., a butty-collier working upon defts.' mine gave orders in his own name to pltfs. for a supply of gunpowder to be used in the mine. The gunpowder was supplied, & subsequently pltfs. became aware that defts. were B.'s principals. B. filed a petition in liquidation, whereupon pltfs.' clerk made an affidavit of debt, treating B. as debtor, for the purpose of proving under the liquidation. The affidavit was placed upon the file of the proceedings, although an endeavour was made by pltfs.' attorneys to prevent its being so filed. It remained upon the file, but pltfs. took no further step in the liquidation, nor did they receive any dividend :—*Held :* there was no such election by pltfs. to treat B. as their debtor as would be a bar to their maintaining an action against defts., the principals.—CURTIS *v.* WILLIAMSON (1874), L. R. 10 Q. B. 57 ; 44 L. J. Q. B. 27 ; 31 L. T. 678 ; 23 W. R. 236.

Annotations :—**Apprvd.** Scarf *v.* Jardine (1882), 7 App. Cas. 345. The case of *Curtis* v. *Williamson* simply held that the mere act of making & filing in bkpcy. an affidavit of the kind which was made was not one as to which the party would have no *locus penitentiæ* under any circumstances, where he had been desirous, when he had fully considered the matter, of withdrawing it before it was put upon the file ; & nothing was don , so far as appears, after it was put upon the file (LORD SELBORNE, C.). **Refd.** *Re* Davison, *Ex p.* Chandler (1884), 13 Q. B. D. 50 ; Codling *v.* Mowlem, [1914] 2 K. B. 61. **Mentd.** Fell *v.* Parkin (1882), 52 L. J. Q. B. 99 ; Longman *v.* Hill (1891), 7 T. L. R. 639.

2194. Judgment is conclusive election—Although unsatisfied.]—If the situation of the principal is altered by dealings with the agent as principal, the principal is no longer subject to an action. Where, on the agent of an undisclosed principal making a contract in his own name, the third party sues the agent for breach of contract & obtains judgment against him, the third party cannot afterwards, upon discovery of the principal, sue the principal in respect of the same breach of contract, although the judgment recovered against the agent remains unsatisfied. There is no distinction in this respect between the master of a vessel signing a bill of lading in his own name for an undisclosed owner & the ordinary case of agent & undisclosed principal. —PRIESTLY *v.* FERNIE (1865), 3 H. & C. 977 ; 34 L. J. Ex. 172 ; 13 L. T. 208 ; 11 Jur. N. S. 813 ; 13 W. R. 1089 ; 2 Mar. L. C. 281.

Annotations :—**Distd.** Curtis *v.* Williamson (1874), L. R. 10 Q. B. 57. **Apld.** Kendall *v.* Hamilton (1879), 4 App. Cas. 504.

2195. —— ——.]—Where an agent contracts in his own name for an undisclosed principal, the person with whom he contracts may sue the agent, or he may sue the principal, but if he sues the agent & recovers judgment, he cannot afterwards sue the principal, even although the judgment does not result in satisfaction of the debt (LORD CAIRNS, C.)—KENDALL *v.* HAMILTON (1879), 4 App. Cas. 504 ; 48 L. J. Q. B. 705 ; 41 L. T. 418 ; 28 W. R. 97, H. L.

Annotations :—**Expld.** *Re* Hodgson, Beckett *v.* Ramsdale (1885), 55 L. J. Ch. 241, C. A. ; Leduc *v.* Ward (1886), 54 L. T. 214. **Consd.** Hammond *v.* Schofield, [1891] 1 Q. B. 453 ; *Re* Crook, *Ex p.* Collins (1892), 66 L. T. 29. **Expld.** Weall *v.* James (1893), 68 L. T. 515, C. A. ; Wegg Prosser *v.* Evans, [1895] 1 Q. B. 108, C. A. ; Isaacs *v.* Salbstein, [1916] 2 K. B. 139, C. A. **Refd.** Munster *v.* Cox (1885), 10 App. Cas. 680, H. L. ; Badeley *v.* Consolidated Bank (1886), 34 Ch. D. 536 ; Odell *v.* Cormack (1887), 19 Q. B. D. 223 ; Beck *v.* Pierce (1889), 23 Q. B. D. 316, C. A. ; Hoare *v.* Niblett, [1891] 1 Q. B. 781 ; McLeod *v.* Power, [1898] 2 Ch. 295 ; Morel *v.* Westmorland (1902), 87 L. T. 635, C. A. ; Codling *v.* Mowlem, [1914] 2 K. B. 61. **Mentd.** *Re* McRae, Forster *v.* Davis, Morden *v.* McRae (1883), 25 Ch. D. 16, C. A. ; *Re* Davison, *Ex p.* Chandler (1884), 13 Q. B. D. 50 ; Cambefort *v.* Chapman (1887), 19 Q. B. D. 229 ; Pilley *v.* Robinson (1887), 20 Q. B. D. 155 ; Blyth *v.* Fladgate, Morgan *v.* Blyth, Smith *v.* Blyth, [1891] 1 Ch. 337 ; Westmoreland, Green & Blae Slate Co. *v.* Feilden, [1891] 3 Ch. 15, C. A. ; British South Africa Co *v.* Companhia de Moçambique, [1893] A. C., 602, H. L. ; Wilson, Sons *v.* Balcarres Brook S.S. Co., [1893] 1 Q. B. 422, C. A. ; *Re* Errington, *Ex p.* Mason, [1894] 1 Q. B. 11 ; Hall *v.* Sun (1894), 10 T. L. R. 463 ; Wigram *v.* Cox, Sons, Buckley, [1894] 1 Q. B. 792 ; Eccl. Comrs. *v.* Puiney, [1899] 2 Ch. 729 ; McCheane *v.* Gyles, [1902] 1 Ch. 911.

2196. ——.]—Pltf. recovered damages against deft.'s husband for breach of an agreement to let a house to pltf., who was to have the option of purchasing the furniture therein. The husband of deft. having become bkpt., deft. claimed the furniture as her separate property. Pltf. now sued present deft. for damages for breach of the same agreement upon which he had sued her husband :—*Held :* even if the agent who let the house to pltf. was acting on behalf of deft. as well as her husband, they were joint contractors, & an action was not maintainable against deft., judgment having been already recovered against her husband upon the same contract.—HOARE *v.* NIBLETT, [1891] 1 Q. B. 781 ; 60 L. J. Q. B. 565 ; 64 L. T. 659 ; 55 J. P. 664 ; 39 W. R. 491.

2197. ——.]—A wife, acting as her husband's agent, ordered goods from applts. for the use of the

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2194 i. *Judgment is conclusive election.*]—Pltf. sold & judgment against K. to G., who was acting as agent for Mrs. K., to whom he at once assigned the judgment & received £1,000 from her therefor. G., by his instructions from Mrs. K., was limited to $1,000 as the purchase price of the judgment, but, as he was interested in the architect's commission which he expected to receive out of the erection of a building proposed to be erected on the land against which the judgment was registered, he agreed to pay pltf. $1,000 in cash & $500 in addition, & he also agreed to enforce the judgment against K. & pay pltf half the proceeds he received. G. failed to pay the $500 to pltf., who sued for it in a cty. ct., & took judgment against G. Subsequently pltf. sued G. & Mrs. K. to have assignment set aside or to have Mrs. K. declared trustee for pltf. :—*Held :* pltf., by taking judgment against G., elected to treat him as the sole principal, & Mrs. K. having bought the judgment without any knowledge of the agreement between pltf. & G., was not bound by its terms.—SEMISCH *v.* GUENTHER (1904), 10 B. C. R. 371. —**CAN.**

2194 ii. ——.]—A., prior to suing on a bond made in his favour by B., became aware that B. acted as agent. A. obtained decree against B., but the principal debtor as the real owner of the property successfully resisted A. obtaining possession. A. then sued the principal debtor on the bond :—*Held :* A. elected to hold the agent liable &, having obtained decree against him, could not afterwards sue the principal debtor. — BIR BHADDHAR SEWAK PANDE *v.* SARJU PRASAD (1887), I. L. R. 9 All. 681.—**IND.**

2194 iii. —— *Although unsatisfied.*]—Where an agent having made a contract in his own name has been sued on it & judgment obtained against him, an action will not lie against the principal on the same contract, although satisfaction has not been obtained on the judgment against the agent, & although pltf. was not until after the recovery of judgment aware of the existence of a principal. The right of election to sue either agent or principal is determined where either of them has been sued to judgment, though the fact of the agency was not discovered until after the date of judgment.—JORDIE & Co. *v.* GIBSON (1894), 28 I. L. T. 83.—**IR.**

2194 iv. ——.]—C. carried on two trading concerns, & formed them into a co. L., the assignee of advances made to C. before & after the co. was formed, having obtained judgment against C., on the co. going into liquidation claimed to rank as creditor :—*Held :* he could not, having elected to sue C.—*Re* TORONTO CREAM & BUTTER CO., LTD., LUXTON'S CASE (1909), 13 O. W. R. 673.—**CAN.**

Sect. 3.—Contracts made by agent: Sub-sect. 2, F. (c), (d) & (e); sub-sect. 3, A. & B. (a).]

household. An action for the price of the goods was brought against husband & wife claiming against them alternatively, & judgment was obtained against the wife under R. S. C., O. 14:—*Held:* in absence of any evidence of a joint liability, applts. could not afterwards recover against the husband.—MOREL BROTHERS & Co., LTD. *v.* WESMORLAND (EARL), [1904] A. C. 11; 73 L. J. K. B. 93; 89 L. T. 702; 52 W. R. 353; 20 T. L. R. 38, H. L.

Annotations:—**Apld.** Cross *v.* Matthews & Wallace (1904), 91 L. T. 500. **Distd.** French *v.* Howie, [1905] 2 K. B. 580; Walton *v.* Topakyan Kervorkian & Marler (1905), 49 Sol. Jo. 650, C. A. **Apld.** French *v.* Howie, [1906] 2 K. B. 674, C. A. **Consd.** Slater *v.* Parker (1908), 24 T. L. R. 621. **Refd.** Isaacs *v.* Salbstein, [1916] 2 K. B. 139, C. A.

2198. —— Although for part of claim only.]—An action was brought against a husband & wife, living together, for the balance of an account for groceries supplied by pltf. to defts. upon the order of the wife. Upon an application for judgment under R. S. C., O. 14, against both defts. the husband denied all liability, while the wife admitted indebtedness for the greater part of the claim. In view of this admission by the wife, the master gave judgment against the wife for part of the sum claimed, with leave to her to defend as to the balance & to the husband to defend the action. Afterwards a jury found there was no joint liability of husband & wife, & that pltf. had given credit to the husband only. Judgment was given against the husband for the balance of the amount:—*Held:* (1) there being no joint liability of husband & wife, but an alternative liability only, & the debt claimed being one undivided & indivisible debt, the taking of judgment by pltf. against the wife for part of that one indivisible debt was an election by him to accept the liability of the wife in respect of the whole claim; (2) he could not afterwards proceed against the husband for any part of that claim.—FRENCH *v.* HOWIE, [1906] 2 K. B. 674; 75 L. J. K. B. 980; 95 L. T. 274, C. A.

2199. —— Setting aside of judgment will not revive liability.]—Pltfs., a firm of printers, sued deft. for the cost of printing for him a newspaper of which they supposed him to be the sole proprietor. There being no defence to the action, deft. consented to final judgment being signed against him. After judgment had been so signed, pltfs. received information that at the time the work was done T. was a partner of deft. & joint proprietor of the newspaper. They accordingly, with deft.'s consent, applied for an order that the judgment should be set aside, & that the writ should be amended by adding T. as a deft. in the action:—*Held:* (1) deft.'s consent to the setting aside of the judgment could not enable pltfs. to evade the rule that judgment recovered against one of two joint contractors is a bar to an action against the other; (2) there was no jurisdiction to make the order.—HAMMOND *v.* SCHOFIELD, [1891] 1 Q. B. 453; 60 L. J. Q. B. 539; 7 T. L. R. 300.

Annotations:—**Refd.** Hoare *v.* Niblett, [1891] 1 Q. B. 781; Cross *v.* Matthews & Wallace (1904), 91 L. T. 500.

2200. —— ——.]—A. & B. were sued in the High Ct. for the price of goods supplied. Judgment was obtained by default against A., & B. had leave to defend, & the action was remitted to the cty. ct. At the trial the cty. ct. judge found the debt was contracted by A. solely as agent for B., & pltf. had given credit to B. alone, & he adjourned the case to enable an application to be made to set aside the judgment against A. This was done, & the judgment was set aside & the action against both defts. was remitted to the cty. ct. At the second trial the cty. ct. judge entered judgment for A. & against B.:—*Held:* (1) pltf. by signing judgment against the agent had conclusively elected to proceed against him; (2) there was no power to set aside that judgment so as to revive pltf.'s right to proceed against the principal.—CROSS & Co. *v.* MATTHEWS & WALLACE (1904), 91 L. T. 500; 20 T. L. R. 603.

2201. —— —— Unless set aside on merits.]—P. had supplied goods on K.'s order to a theatre, for payment of which P. brought an action against K. & obtained judgment. Subsequently P., while the judgment against K. was still subsisting, issued a writ against H., lessee of the theatre, for payment for the same goods. H. objected that the matter was *res judicata*. The judgment against K. was set aside two days before the motion in the action against H. came on for argument in the Div. Ct.:—*Held:* as the judgment against K. had now been set aside, the action was rightly brought against H.—PARTINGTON *v.* HAWTHORNE (1888), 52 J. P. 807.

2202. Other conduct.]—The seller of goods to an apparent principal, upon discovering that the buyer is only an agent, may so conduct himself by demanding payment from & taking proceedings against the agent that he will be deemed to have elected to look to the agent only for payment, & will be debarred from any remedy against the real principal.—MACCLURE *v.* SCHEMEIL, No. 2192, *ante*.

2203. —— Account rendered to agent debiting principal.]—The sub-charterparty of a ship to B. provided that the stevedore was to be nominated by B. & be under the control of the master & was to be paid by the owner. B. employed pltf., a stevedore, to load the ship, & introduced him to deft. as the person who was to load the ship. Deft. frequently came on board while the ship was being loaded & superintended & gave certain instructions relative to the stowage of the cargo. On completion of loading pltf. sent in his account to B headed "To master & owners," & pressed B. for payment. B. had sent in his account to A., the charterer, & A. had sent in his account to deft., with the item "Stevedore's account charged." Deft. had paid A.'s account, & A. had paid B.'s account. B. became bkpt., & did not pay pltf. In an action by pltf. against deft. for non-payment of his charges:—*Held:* (1) there was evidence of a contract between pltf. & deft.; (2) deft. was liable to pay pltf.'s account.—EASTMAN *v.* HARRY (1875), 33 L. T. 800; 3 Asp. M. L. C. 117, C. A.

2204. —— Debiting in books not enough.]—Pltfs., specialists in steel work, tendered to a firm of architects employed by deft. for execution of certain work which formed part of a building to be erected for deft., building owner. At the date of the tender, which was accepted, pltfs. did not know the names of the builder or building owner. Some

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2201 i. *—— Unless set aside on merits.*]—Pltf. proceeded against the owners of a ship under Absent Debtors Act, & obtained judgment & issued execution. Upon the ct. holding that pltf. could not proceed under that Act & setting aside the judgment & execution, pltf. brought an action against the master of the ship:—*Held:* this was no election; to constitute election final judgment is necessary against one, after which no action is maintainable against the other. —BUCKINGHAM *v.* TROTTER (1901), 1 S. R. (N. S. W.) 253.—**AUS.**

r. *—— Not on bill taken from agent without knowledge of principal.*]—A person who takes the note of an agent believing him to be the principal, &, after obtaining judgment upon it, finds out the true principal, has not elected to accept the liability of the agent.—DICK *v.* LAMBERT (1916), 29 D. L. R. 42; 9 Sask. L. R. 355; 34 W. L. R. 1156.—**CAN.**

2202 i. *Other conduct.*]—After the period allowed for payment of goods had expired the vendors, without making any demand on the purchaser, took payment by a bill from his agent who purchased:—*Held:* the vendors had elected to take the agent as debtor & were not entitled to claim from the principal.—CAMPBELL & M'LEAN *v.* STEVENSON (1836), 11 Fac. 486.—**SCOT.**

months after the tender a building contract was signed by the building owner, which contained the usual clauses as to employment of specialists, & provided for the steel work a sum in excess of that at which pltfs. had undertaken to carry it out. Subsequently the builder gave pltfs. an order for the steel work in accordance with their tender. Shortly before conclusion of his work by the builder the architects, at request of pltfs., sent the builder a certificate & cheque for £500, stating that this included £150, being part of the sum due to pltfs. The builder went into liquidation without having paid pltfs. the £150. In an action by the specialists against the building owner to recover that sum :—*Held :* (1) the mere fact that pltfs. entered the name of the builder in their books as their debtor up to the date of his bkpcy. was not a sufficient election to preclude their having recourse to the building owner ; (2) in substance the contract with pltfs was made with the builder acting as agent for deft. ; (3) pltfs. were entitled to judgment.—YOUNG & CO., LTD. *v.* WHITE (1911), 76 J. P. 14; 28 T. L. R. 87.

Annotation :—**Dbtd.** Hampton *v.* Glamorgan County Council (1915), 84 L. J. K. B. 1506, C. A.

2205. —— Exclusive credit given to agent.]—In an action against one of the owners for work done to a vessel by order of the ship's husband, such owner will be liable, unless it be shown that the dealing was that the person who directed the work to be done should be looked to exclusively.—THOMPSON *v.* FINDEN (1829), 4 C. & P. 158.

(d) Effect of Election.

2206. Election to sue one discharges other.]—The shipper has not a concurrent remedy against both master & shipowner on a bill of lading signed by the master ; he has merely a right to elect which of the two he will hold liable, & having once finally elected, his remedy against the other is gone.—REPETTO *v.* MILLAR'S KARRI & JARRAH FORESTS, No. 2558, *post*.

(e) Effect of Payment or Alteration of Accounts or Position between Principal and Agent. *See* Sub-sect. 3, *post*.

SUB-SECT. 3.—SETTLEMENT WITH AGENT.

A. Where Principal is Creditor and Debtor pays Creditor's Agent.

Authority of agent to receive payment. *See* Part V., Sect. 3, Sub-sect. 13, *ante*.

B. Where Principal is Debtor and pays his own Agent.

(a) In General.

2207. General rule.]—Whether a principal who has paid his agent for goods supplied by a third party can be made to pay over again depends on the circumstances. He will not be made to pay again if it would be unfair to make him do so (LORD MANSFIELD, C.J.).—RAILTON *v.* HODGSON, PEELE *v.* HODGSON, No. 2484, *post*.

Annotations :—**Distd.** Addison *v.* Gandassequi (1812), 4 Taunt. 574. **Apld.** Thomas *v.* Edwards (1836), 2 M. & W. 215. **Refd.** Smyth *v.* Anderson (1849), 7 C. B. 21 ; Thöl *v.* Leask (1855), 1 Jur. N. S. 117 ; Armstrong *v.* Stokes (1872), L. R. 7 Q. B. 598.

2208. ——.]—A principal is not discharged by payment to his agent, except by positive agreement or by circumstances leading to the inference that the creditor has abandoned his rights against the principal.—STEWART *v.* HALL (1813), 2 Dow, 29 ; 3 E. R. 777.

2209. Payment to agent—To repay loan—Money misappropriated.]—Directors of a building society deposited money in a manner unauthorised by their rules with a finance co., the manager of which was also manager of the building society. Afterwards the deposit was called in, & the directors of the finance co. gave a cheque for the amount to their manager, to be paid by him to the building society. He appropriated it to his own use. A bill was then filed by the trustees of the building society to recover the money from the finance co. :—*Held :* (1) the manager held the money as agent for the finance co. until he should pay it to some person competent to give a receipt on behalf of the building society ; (2) as he never paid it over, it must be taken to be still in the hands of the finance co., which was liable to repay it to the building society. —HARDY *v.* METROPOLITAN LAND & FINANCE CO. (1872), 7 Ch. App. 427 ; 41 L. J. Ch. 257 ; 26 L. T. 407 ; 20 W. R. 425, L.JJ.

Annotation :—**Distd.** *Re* Coltman, Coltman *v.* Coltman (1881), 19 Ch. D. 64.

2210. —— To take up promissory note—Bankruptcy of agent.]—The maker of a promissory note paid money into the hands of an agent to retire it ; the agent tendered the money to the holder of the note, on condition of having it delivered up ; the note being mislaid, this condition was not complied with, & the agent afterwards became bkpt. with the money in his hands :—*Held :* (1) the maker was still responsible on the note ; (2) interest was not recoverable after the time of the tender.—DENT *v.* DUNN (1812), 3 Camp. 296.

2211. Payment to broker—Before due date.]—If goods are bought by a broker, the principal is liable to the vendor if called upon when payment becomes due, although he has previously paid the price of the goods to the broker. *Secus*, if the day of payment is allowed to pass by without any demand being made upon the principal.—KYMER *v.* SUWERCROPP (1807), 1 Camp. 109.

Annotations :—**Distd.** Clay *v.* Harrison (1829), 5 Man. & Ry. K. B. 17 ; Smyth *v.* Anderson (1849), 7 C. B. 21. **Apld.**

PART IX. SECT. 3, SUB-SECT. 2.—F. (d).

2208 i. *Suit against defendants as principals — Bars second suit against defendants as agents.*]—A previous suit in which pltf. elected to sue defts. as principals bars a second suit on same contract in which defts. are charged as responsible agents under a trade usage. —DEVRAV KRISHNA *v.* HALAMBHAI (1876), I. L. R. 1 Bom. 87.—**IND.**

PART IX. SECT. 3, SUB-SECT. 3.—B. (a).

2207 i. *General rule.*]—WESTERN HOSPITAL *v.* PHŒNIX SUNDRY CO. (1911), 17 L. R. N. S. 496.—**CAN.**

2209 i. *Payment to agent—To pay expenses—Receipts given by creditor to agent before receiving payment.*]—Pltfs. sued for balance due for hire of teams & board & lodging of men employed by defts. on railway work. K., an engineer, was in charge of the party. Defts. furnished K. with money sufficient to pay the bills incurred, he sending vouchers for payments, & when his account showed that the advances were nearly exhausted, further advances were sent. Pltfs. made out their accounts making K. their debtor, sometimes adding defts.' name after his name, & receipted their accounts without previous payment on K.'s representations that it was necessary that they should be sent to the head office in duplicate & receipted, & defts. believed the accounts had been duly paid out of their advances :—*Held :* defts. were led by pltfs.' conduct to believe that K. had discharged the obligation & had consequently dealt with K. to their prejudice, & pltfs. were estopped from denying that they had received payment. *Wyatt* v. *Hertford*, 3 East, 147, cited.—GENTLES *v.* CANADIAN PACIFIC RY. CO. (1907), 14 O. L. R. 286 ; 9 O. W. R. 601.—**CAN.**

2209 ii. *—— To purchase land—Receipt given by vendor to agent without receiving payment.*]—A principal paid to his agent $700 to be applied in payment *pro tanto* of certain lands to be bought by the agent. The agent paid $20 to the vendor & procured him to execute an agreement under seal containing a recital of the payment of & receipt for $700 on account of the purchase price, which the agent delivered to his principal & then absconded with the balance :—*Held :* the vendor was estopped from denying the receipt of the $700.—TUYTENS *v.* NOBLE (1908), 13 B. C. R. 484.—**CAN.**

Sect. 3.—*Contracts made by agent: Sub-sect.* 3, *B.* (*a*) *&* (*b*).]

Heald *v.* Kenworthy (1855), 10 Exch. 739; MacClure *v.* Schemeil (1871), 20 W. R. 168. **Apprvd.** Irvine *v.* Watson (1880), 5 Q. B. D. 102. **Apld.** Davison *v.* Donaldson (1882), 9 Q. B. D. 623, C. A. **Refd.** Armstrong *v.* Stokes (1872), L. R. 7 Q. B. 598.

2212. —— Bill given by principal according to terms of sale.]—A., a merchant at Liverpool, circulated catalogues of certain goods to be sold by auction, subject to the following condition amongst others: "payment to be made by bills, not exceeding 3 months' date, to be made equal to cash in 4 months." B., a broker at Liverpool, sent a catalogue to C., a merchant in London, who in return gave him directions to buy certain lots, which B. bought. Before the sale began the auctioneer stated that payment by known buyers was to be on the usual credit, 2 & 2 months. B., as a known buyer, received the goods without giving bills, & forwarded them to C. in London, with an invoice stating payment was to be equal to cash at 4 months. A few days afterwards B. drew on C. for the amount at 4 months from the day of the sale, which bill C. accepted & paid at maturity. Within 2 months from the sale B. failed, never having given bills to A. for the price, & A., finding C. was B.'s principal, sued him for the value:—*Held:* he could not recover, as C. would naturally be induced by A.'s catalogue to suppose B. had given bills for the goods at time of delivery, & accepted B.'s draft under a mistake occasioned by A.

Whenever the broker has stated to his principal & the latter has *bonâ fide* adopted a different contract from that under which the broker bought, the seller cannot call upon the principal, because the seller sues on the actual contract under which the goods were sold & must show that the principal authorised or ratified that contract, not a different one substituted by the broker (PARKE, J.).—HORSFALL *v.* FAUNTLEROY (1830), 10 B. & C. 755; L. & Welsb. 340; 5 Man. & Ry. K. B. 653; 8 L. J. O. S. K. B. 259; 109 E. R. 630.

2213. Payment to factor—With knowledge that factor had not paid creditor.]—A factor made purchases for his principal, who made payments to him on account. Afterwards the factor was pressed for payment by a letter which came to the hands of the principal, who transmitted it to the factor &, with knowledge of the fact, paid him the residue:—*Held:* the principal was liable over to the sellers for money so paid to the factor after notice.—POWEL *v.* NELSON (1784), cited 15 East, 65; 104 E. R. 769; *sub nom.* NELSON *v.* POWELL, 3 Doug. K. B. 410.

Annotation:—**Consd.** Paterson *v.* Gandassequi (1812), 15 East, 62.

2214. Payment to servant—To discharge debt for goods bought on principal's credit.]—Deft. intrusted his servant to buy provisions & paid her every Saturday night upon her note:—*Held:* he was liable to the seller for non-payment by the servant.—SOUTHBY *v.* WISEMAN (1676), 3 Keb. 625, 630; 84 E. R. 917, 920.

2215. —— ——.]—A master gave his servant money every Saturday to pay the charges of the foregoing week; the servant kept the money:—*Held:* the master was liable to those who supplied the unpaid-for goods.—WAYLAND'S CASE (1706), 3 Salk. 234; 91 E. R. 797.

2216. —— ——.]—In an action for sheep sold & delivered, deft. pleaded a payment of £175. It was proved by A. that he received a sum of £175 from deft.'s wife & gave it to pltf.:—*Held:* evidence might be given that when deft.'s wife gave him the money she told A. to take it to pltf. for the sheep.—WALTERS *v.* LEWIS (1836), 7 C. & P. 344.

(*b*) *Payment induced by Conduct of Creditor.*

2217. General rule.]—Where a principal authorises his agent to pledge his credit, & the latter makes a purchase on his behalf, & thereby creates a debt, the principal is not discharged by payment to the agent, if the money is not paid over to the seller, unless the latter by his conduct makes it unjust that the principal should be sued, *e.g.*, where the seller by his words or conduct induces the principal to believe that a settlement has been come to between the seller & the agent, in consequence of which the principal pays the amount of the debt to the agent.

To an action for goods sold, deft. pleaded that the purchase was made by T., deft.'s agent, & that deft. within a reasonable time after the sale, & not unduly early, *bonâ fide* paid T. sufficient money to pay pltfs. On demurrer:—*Held:* the plea was bad.—HEALD *v.* KENWORTHY (1855), 10 Exch. 739; 24 L. J. Ex. 76; 24 L. T. O. S. 260; 1 Jur. N. S. 70; 3 W. R. 176; 3 C. L. R. 612; 156 E. R. 638.

Annotations:—**Consd.** Armstrong *v.* Stokes (1872), L. R. 7 Q. B. 598; Irvine *v.* Watson (1880), 5 Q. B. D. 102. The opinion of Parke, B., in *Heald* v. *Kenworthy* seems

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2213 i. *Payment to factor—Payments on account accepted by creditor from factor.*]—An agent purchased goods *factorio nomine*, & the seller in his books entered the goods as sold to the principal, & the principal remitted the price to his agent, who, instead of paying the seller, merely made payments to account:—*Held:* the purchaser was not released from his obligation to pay the outstanding balance by reason of his having put his agent in funds so to do, nor by the seller accepting partial payment from the purchaser.—WILLIAMS & Co. *v.* NEWLANDS & Co. (1860), 23 D. 1355.—**SCOT.**

PART IX. SECT. 3, SUB-SECT. 3.—B. (*b*).

2217 i. *General rule.*]—A person who sells goods to the agent of an undisclosed principal, believing the agent to be the principal, may sue the principal on discovery of the facts, & the principal will not be discharged from liability by having made payment to the agent before such discovery, unless the conduct of the seller has been such as to make it unjust for him to call upon the principal for payment, or unless the character of the business is such as naturally to lead the principal to suppose that the seller would give credit to the agent alone. *Irvine v. Watson* (1880), 5 Q. B. D. 102, & *Heald* v. *Kenworthy* (1855), 10 Exch. 739, cited.—ARBUTHNOT *v.* DUPAS (1905), 15 Man. L. R. 634; 2 W. L. R. 445.—**CAN.**

2217 ii. —— *Effect of Contract Act* (*IX. of* 1872), *s.* 232.]—Deft., who resided in Dholera, employed K. as his agent in Bombay. On Apr. 1, K. received from deft. remittances sufficient to pay for all goods bought from pltf., & to leave a balance of Rs.1,727 to the credit of deft. in his account with K. These remittances were made by deft. in good faith, & were received by K. at a time when pltf. gave credit to K., & did not know of any one else to be charged with the price of the goods. On Apr. 2 K. stopped payment, & on Apr. 3 pltf., in consequence of the failure of K. & the non payment of the price of the goods, transhipped & sold them, the proceeds of the sale being deposited in the bank. On Apr. 4 pltf. discovered that deft. was the principal in the transaction, & brought a suit against him to recover the price of the goods. Deft. contended that, having in good faith paid his agent K. for the goods before the institution of the suit, he (deft.) was not liable to pltf.:—*Held:* pltf. was entitled to recover. The rule of English law, which makes the liability of an undisclosed principal subject to the qualification that he has not *bonâ fide* paid the agent, or that the state of accounts has not been altered, is not adopted in the above Act, *s.* 232 of which does not impose upon the right of the other contracting party the qualification laid down by *Thompson* v. *Davenport* (1829), 9 B. & C. 78, & *Armstrong* v. *Stokes* (1872), L. R. 7 Q. B. 598, namely, that the principal has not paid the agent, or that the state of the account between the principal & agent has not been altered to the prejudice of the principal. The only qualification to the right of the creditor against the principal is that imposed by *s.* 234, namely, that he has not induced the principal to act upon the belief that the agent only will be held liable.—PREMJI TRIKAMDAS *v.* MADHOWJI MUNJI (1880), I. L. R. 4 Bom. 447.—**IND.**

to me preferable to that of Lord Tenterden & Bayley, J., in *Thomson* v. *Davenport*; that opinion is in my judgment a much more accurate statement of the law (BRAMWELL, L.J.). **Apprvd.** Davison *v.* Donaldson (1882), 9 Q. B. D. 623, C. A. **Mentd.** Green *v.* Kopke (1856), 18 C. B. 549; Risbourg *v.* Bruckner (1858), 3 C. B. N. S. 812; Smethurst *v.* Mitchell (1859), 1 E. & E. 622.

2218. ——.]—Where a third party dealing with an agent has by his conduct led the principal to believe he looks to the agent alone for payment, & thereby induces the principal, after the debt has become due, either to pay the agent the amount or to allow him to retain it out of the principal's money in his hands, the third party cannot afterwards resort to the principal.—MACFARLANE *v.* GIANNACOPULO (1858), 3 H. & N. 860; 28 L. J. EX. 72; 32 L. T. O. S. 133.

2219. ——.]—A vendor, who has given credit to an agent believing him to be the principal, cannot recover against the undisclosed principal, if the principal has *bonâ fide* paid the agent at a time when vendor still gave credit to the agent & knew of no one else as principal.

R. & Co. were commission merchants, acting sometimes for themselves & sometimes as agents. Pltf., a merchant, had had dealings with them, & had never inquired whether they had principals or not, & had always settled with them. On June 15 pltf. contracted to sell to R. & Co. 200 pieces of shirtings at a certain price, payment to be made in 30 days after delivery, with a discount of 1½ per cent. Pltf. delivered shirtings (grey or unbleached), & payment ought to have been made on Aug. 25. On Aug. 24 R. & Co. asked for delay till the next pay-day, Sept. 1. While pltf. was considering what to do R. & Co., on Aug. 30, stopped payment. It turned out R. & Co. had bought the goods for defts. in the following circumstances. Defts., merchants, had been in the habit of giving orders to R. & Co. for white & grey shirtings; when white were ordered, R. & Co. went into the market, bought grey shirtings, had them bleached, & charged defts. with the price of the grey shirtings & of bleaching, & 1 per cent. on the aggregate as their commission, with the charges of packing, etc. In previous transactions defts. had always paid R. & Co., generally in cash, *i.e.*, on the next weekly pay-day, & had never been brought into communication with those who supplied or those who bleached the goods. In the present case defts. gave a verbal order for 200 white shirtings, the price not being named, nor the mode of payment. R. & Co., having received the grey shirtings from pltf., got them bleached, & sent them to defts., charging the price at which they had bought of pltf., the cost of bleaching, & 1 per cent. on the aggregate of those two sums, with the charges of packing, etc.; & defts., with perfect good faith, paid R. & Co. on the next pay-day after they received them, viz., on Aug. 11. On the above facts, the ct. having power to draw inferences:—*Held*: (1) pltf.'s delay in taking no steps between Aug. 25 & 30 was not laches such as would have precluded him, if otherwise entitled, from recovering payment from defts.; (2) assuming there was authority from the course of dealing between defts. & R. & Co. to establish privity of contract between defts. & those from whom R. & Co. obtained the goods, after the *bonâ fide* payment by defts. to R. & Co. at a time when pltf. still gave sole credit to R. & Co., & knew of no one else as principal, pltf. could not come upon defts. for the price.—ARMSTRONG *v.* STOKES (1872), L. R. 7 Q. B. 598; 41 L. J. Q. B. 253; 26 L. T. 872; 21 W. R. 52.

Annotations:—**Apld.** Hutton *v.* Bullock (1874), L. R. 9 Q. B. 572, Ex. Ch. **Expld.** Irvine *v.* Watson (1880), 5 Q. B. D. 102, 414, C. A. *Armstrong* v. *Stokes* is a very remarkable case—it seems to have turned in some measure upon the peculiar character filled by R. & Co. as commission merchants; I think upon the facts of that case that the agents would have been entitled to maintain an action for the money against the defts., for as commission merchants they were not mere agents of the buyer (BRAMWELL, L.J.). **Consd.** Maspons *v.* Mildred (1882), 9 Q. B. D. 530, C. A. **Refd.** Elbinger Akt. *v.* Claye (1873), L. R. 8 Q. B. 313; Hutton *v.* Bullock (1873), L. R. 8 Q. B. 331; Hood *v.* Stallybrass, Balmer (1878), 3 App. Cas. 880, P. C.; Davison *v.* Donaldson (1882), 9 Q. B. D. 623, C. A.; Kaltenbach *v.* Lewis (1885), 10 App. Cas. 617, H. L.; Glover *v.* Langford (1892), 8 T. L. R. 628; Harper *v.* Keller, Bryant (1915), 84 L. J. K. B. 1696.

2220. Delay in claiming against principal after disclosure—Principal prejudiced thereby.]—H., a commission agent, known by pltf. to be such, ordered goods of pltf. in Aug., 1857, in pursuance, though not to pltf.'s knowledge, of deft.'s orders. Pltf. sent the goods to H. with invoices debiting him with the price, & he was entered in pltf.'s books as purchaser. By the course of dealing the price became due in cash, minus discount, on the last Friday in Oct., 1857. H. had been employed for many years by deft., a merchant carrying on business in L. & C., to buy goods for him, deft. giving H. acceptances from time to time, in order to put him in funds to meet the current account. The goods were sold by pltf. in the unfinished state. H. got them finished, & reinvoiced them to deft. as from himself, charging the cost price of the goods, & also the cost of finishing &, separately, a commission for himself. H. sent the goods, when finished, to deft.'s shipping agent, to be shipped for deft. to C. On Oct. 13, 1857, deft. suspended payment, having between Aug. & that date sent H. acceptances more than sufficient to cover the price of the goods & of all other goods purchased by H. for him, which bills had been discounted by H. & were then in the hands of third persons, having still to run. H. did not pay pltf. either on the last Friday in Oct., 1857, or at any time. On Oct. 16, 1857, H. sent deft. his account current, including the invoice made out by him for the goods, crediting himself with the price of the goods, & debiting himself with the amount of the bills, the balance being in deft.'s favour. On Nov. 19, 1857, H. first informed pltf. that deft. was H.'s principal in the purchase. Pltf. took no proceedings in the matter till Sept., 1858, when he commenced the present action. After Nov. 19, 1857, & before the suit, deft. arranged with the holders of the bills discounted by H., as above stated, to give them promissory notes for the amount. The notes became due & were dishonoured; whereupon, & before the suit, deft. arranged, by way of composition, to give the holders fresh acceptances at 12*s.* 6*d.* in the pound on the amount of the notes. These acceptances were still running when this action was commenced, H. being a party to both renewals. At the trial the jury found that H. purchased as agent for deft.:—*Held*: assuming on this finding that pltf. had a right on Nov. 19, 1857, to elect whether to sue deft. or H., he must either be taken by his conduct to have elected to look only to H. & not to charge deft., or if not to be taken to have made that election, he had by lying by during an unreasonable time, & thereby inducing deft. to alter for the worse his position towards H., precluded himself from recovering against deft. *Qu.*: whether pltf. had on Nov. 19, 1857, a right of election between H. & deft. or whether he was not bound to look to H. alone.—SMETHURST *v.* MITCHELL, No. 2186, *ante*.

Annotations:—**Consd.** Davison *v.* Donaldson (1882), 47 L. T. 564, C. A. **Refd.** Curtis *v.* Williamson (1874), L. R. 10 Q. B. 57; Fell *v.* Parkin (1882), 52 L. J. Q. B. 99.

2221. —— **Principal not prejudiced thereby.**]—In order to discharge a principal from his liability for a debt contracted by his agent, the principal must show that the third party has himself misled him into supposing he has elected to give exclusive

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credit to the agent, & that the principal has been prejudiced by that supposition. Mere delay in enforcing payment from the agent will not be sufficient for the purpose.

Pltf. sold stores for a ship to T., ships's husband & managing owner. Deft. was part-owner of the ship, & was also interested jointly with T. in the adventure for which the ship was being fitted out. Pltf. applied to T. for payment, but did not obtain it. Three months after the goods were supplied, & again two years after that deft. settled accounts with T. & gave him credit for the price of the goods, supposing that they had been paid for. More than 3 years after they had been supplied, T. having become bkpt., pltf. for the first time applied for payment to deft. & brought his action for the debt:—*Held:* there had been no such conduct on the part of pltf. as would discharge deft. from his liability.—DAVISON *v.* DONALDSON (1882), 9 Q. B. D. 623; 47 L. T. 564; 31 W. R. 277; 4 Asp. M. L. C. 601, C. A.

Annotation:—**Apld.** The Huntsman, [1894] P. 214.

2222. Delay in demanding payment from agent—Goods sold for ready money.]—MACCLURE *v.* SCHEMEIL, No. 2192, *ante*.

2223. —— Usual trade terms of payment not insisted on.]—Defts. employed C., a broker, to buy oil for them. C. bought of pltfs., informing them at the time of the sale that he was buying for principals, though he did not tell them who those principals were. The terms of the sale were "cash on or before delivery"; but, though it was not infrequent in the oil trade in such a case to require payment before delivery, there was no invariable custom to that effect. Pltfs. delivered the oil to C. without insisting on prepayment, & defts., not knowing pltfs. had not been paid, paid C. Shortly afterwards C. stopped payment, & pltfs. sued defts. for the price:—*Held:* (1) as pltfs. at the time of sale knew the broker was buying for principals, & not on his own account, the fact of defts. having paid the broker did not preclude pltfs. from suing them for the price, unless before such payment they had by their conduct induced defts. to believe they had already been paid by the broker; (2) the mere omission on the part of pltfs. to insist on prepayment was not, in absence of an invariable custom to that effect, such conduct as would reasonably induce such belief.—IRVINE & CO. *v.* WATSON & SONS (1880), 5 Q. B. D. 414; 49 L. J. Q. B. 531; 42 L. T. 800, C. A.

Annotations:—**Apld.** Davison *v.* Donaldson (1882), 9 Q. B. D. 623, C. A. **Refd.** Maspons *v.* Mildred (1882), 9 Q. B. D. 530, C. A.

2224. Payment made to agent to enable him to meet his acceptances of creditors' drafts.]—The right of the seller of goods to resort to an undisclosed foreign principal is barred by any circumstance which shows that the enforcement of that right would operate injustice.

A., as agent of B., a merchant residing abroad, bought goods of C. At the time of the purchase A. did not inform C. who was his principal, but the invoices described the goods as "bought on account of B., per A." C. afterwards drew upon A. for the amount, at 4 & 6 months, but A. became insolvent before either of the bills arrived at maturity. B., after receiving advice of the purchase & of the acceptance of the bills by A., made large remittances to A. on account of these & other goods, & A., at the time of his stoppage, was considerably indebted to B.:—*Held:* in these circumstances, it was not competent to C. to sue B. for price of the goods.—SMYTH *v.* ANDERSON, No. 2705, *post*.

Annotations:—**Distd.** Mahony *v.* Kekulé (1854), 18 Jur. 313; Heald *v.* Kenworthy (1855), 10 Exch. 739. **Foll.d.** MacClure *v.* Schemeil (1871), 20 W. R. 168. **Consd.** Armstrong *v.* Stokes (1872), L. R. 7 Q. B. 598; Irvine *v.* Watson (1880), 5 Q. B. D. 414, C. A. **Refd.** Fish *v.* Kempton (1849), 13 L. T. O. S. 72; Schmalz *v.* Avery (1851), 20 L. J. Q. B. 228; Hutton *v.* Bullock (1873), L. R. 8 Q. B. 331.
For full anns., *see* S. C. No. 2705, *post*.

C. Where Principal is Debtor and his Agent pays Third Party otherwise than in Cash.

2225. Creditor taking agent's bill—Drawn on principal.]—A., wishing to send goods to B., a consignee for sale at X., employed C. to carry & deliver them to B. & engaged to pay C. for the freight. C., on delivering them according to the order, took a bill of exchange from B. drawn on A., in accordance with mercantile usage. The bill was never paid:—*Held:* A. was liable to pay the amount of the freight to C. notwithstanding the bill of exchange.—TAPLEY *v.* MARTENS (1800), 8 Term Rep. 451; 101 E. R. 1483.

Annotations:—**Consd.** Shepard *v.* De Bernales (1811), 13 East, 565. **Distd.** Strong *v.* Hart (1827), 9 Dow. & Ry. K. B. 189. **Apld.** Robinson *v.* Read (1829), 9 B. & C. 449. **Consd.** Anderson *v.* Hillies (1852), 16 Jur. 819. **Expld.** *Re* London, Birmingham & South Staffordshire Banking Co. (1865), 34 Beav. 332.

2226. —— Onus on principal to show he was prejudiced thereby.]—If one takes the security of the agent of the principal with whom he dealt, unknown to the principal, & gives the agent a receipt as for the money due from the principal, in consequence of which the principal deals differently with his agent on the faith of such receipt, the principal is discharged, although the security fail. It is otherwise if the principal does not show he was injured by means of such false voucher, & the omission of the party to inform him of the truth in due time.—WYATT *v.* HERTFORD (MARQUIS) (1802), 3 East, 147; 102 E. R. 553.

Annotations:—**Apld.** Robinson *v.* Read (1829), 9 B. & C. 448. **Distd.** Heald *v.* Kenworthy (1855), 10 Exch. 739.

2222 i. *Delay in demanding payment from agent—Goods sold for ready money.*]—ALMON *v.* TREMLET, 1 Thom. (1st ed.) 89, (2nd ed.) 117.—**CAN.**

PART IX. SECT. 3, SUB-SECT. 3.—C.

2225 i. *Creditor taking agent's bill.*]—A commission agent having purchased grain for his employer, but without mentioning the employer's name, & the seller having taken the agent's bill for the amount, & the commission agent having failed in debt to his principal before the bill for the grain became due:—*Held:* the seller had no recourse against the principal for the amount of the bill.—YOUNG *v.* SMART (1831), 7 Fac. 107.—**SCOT.**

2225 ii. ——.]—A factor instructed to pay £60 for work done, having funds of his principal to make the payment, induced a creditor to take £20 in cash & his note for £40. The creditor tendered an account on completion of the work for the balance due after giving credit for cash per the factor for £60. The factor again paid part in cash & gave his own note for the balance, & on his insolvency & failure to retire the notes:—*Held:* the principal not relieved of the debt by delegation, & the inaccurate statement by the creditor that he had received £60 cash, being innocently made & not operating to the loss of his debtor, was no bar to his recovery of the £40.—M'INTOSH & SON *v.* AINSLIE (1872), 10 M. 304.—**SCOT.**

2225 iii. —— *Voluntarily.*]—Voluntary acceptance of an agent's bill as payment discharges the principal.—POLE *v.* GORDON (1864), 2 Hyde, 239; Cor. 83.—**IND.**

2225 iv. —— *Payment of balance by principal.*]—A husband acting on behalf of his wife purchased goods from pltfs., who at the time of the purchase were not aware that the husband was acting as an agent, but on discovering the fact, their debt being overdue, brought an action for the price of the goods against the husband & his wife. Pltfs. stayed the action on receiving a promissory note for $150 from the husband & the balance in cash from the wife. The promissory note was not paid when it became due, & pltfs. brought an action & recovered judgment against both defts. for the residue of their debt with costs. On appeal:—*Held:* the proper inference was, in the opinion of the ct., that the promissory note was not taken in satisfaction of the debt, & that there was no election by pltfs. to look to the husband alone for the balance of the debt.—DAVIDSON *v.* MCCLELLAND (1900), 32 O. R. 282.—**CAN.**

Refd. Boyson *v.* Coles (1817), 6 M. & S. 14; Graves *v.* Key (1832), 3 B. & Ad. 313.

2227. ——.]—If a person, who supplies stores to a ship, of which there are several owners, takes in payment the bill of the ship's husband (a part-owner) only, & settles with him alone, he discharges the other owners, particularly if the bill be renewed.—REED *v.* WHITE (1804), 5 Esp. 122.

Annotations:—**Expld.** Bedford *v.* Deakin (1818), 2 B. & Ald. 210; Robinson *v.* Read (1829), 9 B. & C. 449. **Consd.** Thompson *v.* Percival (1834), 5 B. & Ad. 925; Mills *v.* Boyd (1842), 6 Jur. 943. **Dtd.** Whitwell *v.* Perrin (1858), 31 L. T. O. S. 86.

2228. —— **Drawn on third party—Bill taken for convenience of creditor.**]—Where there is a charter-party covenanting for payment of freight on right & true delivery of goods at a foreign port, the freighter is not discharged by the master there taking from the freighter's agent, who was furnished with funds to pay him the freight, a bill of exchange upon a third person, by whom it is accepted, if the bill is not duly honoured, although the agent fails with the amount of the freight in his hands, unless the master had the offer of cash payment & preferred the bill for his own convenience.—MARSH *v.* PEDDER (1815), 4 Camp. 257: Holt, N. P. 72.

Annotations:—**Distd.** Strong *v.* Hart (1827), 6 B. & C. 160. **Apld.** Robinson *v.* Read (1829), 9 B. & C. 449. **Folld.** Anderson *v.* Hillies (1852), 12 C. B. 499.

2229. ——.]—The manager of a colliery paying a creditor of the colliery with a bill which is not paid, the colliery remains liable to payment of the original debt.—TEMPEST *v.* ORD (1815), 1 Madd. 89; 56 E. R. 35.

For full anns., *see* RECEIVERS.

2230. ——.]—SMYTH *v.* ANDERSON, No. 2705, *post*.

For full anns., *see* S. C. No. 2705, *post*.

2231. —— **Bill renewed from time to time.**]—Where a creditor takes a bill from the agent of the debtor for the amount of the debt, & renews it from time to time at request of the agent, his so doing will not discharge debtor, unless the latter shows that he dealt with his agent upon the faith of the money being paid, or that in some other mode he has been prejudiced by the fact of the creditor so dealing with the agent.

Where a tradesman, who had supplied goods to a ship, sent in his account to the owner's agent & ship's husband, & took his acceptance at 3 months for the amount, deducting discount for that time, which was the usual credit, & when the bill became due consented to a renewal of it, adding interest, & in like manner took a third acceptance, which was dishonoured, & the agent soon afterwards failed, the balance in his hands in favour of his principal, the shipowner, having during all this time exceeded the amount of the bill which was unknown to the principal, who had never inspected the agent's accounts:—*Held*: (1) the tradesman might sue the shipowner for the amount of his claim; (2) it was not discharged by the acceptance of the agent.—ROBINSON *v.* READ (1829), 9 B. & C. 449; 4 Man. & Ry. K. B. 349; 7 L. J. O. S. K. B. 236; 109 E. R. 167.

Annotations:—**Apld.** The Huntsman, [1894] P. 214. **Refd.** Thompson *v.* Percival (1834), 3 L. J. K. B. 98.

2232. —— **Proper direction to jury.**]—Where the master & part-owner of a vessel carried a cargo from Newfoundland to Bilboa, & delivered it there to the consignees (he having signed bills of lading making the cargo deliverable to the consignees or their assigns, he or they paying freight for same), & took a bill for the freight, which was afterwards dishonoured, & an action was commenced against the consignors for the freight:—*Held*: (1) the jury were properly directed to find for defts., if they thought that the captain took the bill voluntarily & for his own convenience; (2) defts. were not bound to prove that an offer was made to pay in cash.—STRONG *v.* HART (1827), 6 B. & C. 160; 9 Dow. & Ry. K. B. 189; 5 L. J. O. S. K. B. 82; 108 E. R. 412.

Annotations:—**Distd.** Robinson *v.* Read (1829), 9 B. & C. 449. **Apld.** Anderson *v.* Hillies (1852), 12 C. B. 499; Lichfield Union Grdns. *v.* Greene (1857), 1 H. & N. 884.

2233. —— **Creditor having option of taking cash.**]—An agent for the seller of goods received from the buyer an order upon his banker for the price to be paid out of funds specifically deposited for that purpose with the banker. The banker offered to pay in cash, deducting discount, or by a bill upon a third person. The agent without buyer's knowledge took the bill, which was dishonoured.—*Held*: seller could not sue buyer for the price of the goods.—SMITH *v.* FERRAND (1827), 7 B. & C. 191; 9 Dow. & Ry. K. B. 803; 5 L. J. O. S. K. B. 335; 108 E. R. 632.

Annotation:—**Distd.** Baillie *v.* Moore (1846), 8 Q. B. 489.

2234. —— **Principal must plead that creditor took agent's bill in satisfaction.**]—To *assumpsit* for money paid, etc., deft. pleaded as to part that, after the accruing of the causes of action & before action brought, B. was indebted to deft. in a sum exceeding the sum pleaded to, by decree of a Scotch Ct., & was imprisoned to enforce payment, & that after the accruing, etc., & before action brought pltf. was authorised by deft. to receive from B. the amount pleaded to, part of the debt from B. to deft., & to retain & appropriate it in full satisfaction & discharge of the cause of action pleaded to, & to receive the residue from B. & hold it on behalf of deft.; that pltf., instead of receiving the amount pleaded to in satisfaction & discharge, elected to & did at the request of B., & without the knowledge or consent of deft., receive & take from B. a bill of exchange to the amount of the sum pleaded to, for & on account of that amount, parcel of the debt from B. to deft., & appropriated & obtained the bill to & for the liquidation & discharge of the moneys & causes of action pleaded to; & without the licence, etc., of deft. authorised & procured the discharge of B. from imprisonment without receiving the residue of the debt owing from B. to deft., & without any part of the residue being satisfied or discharged. On special demurrer objecting that the plea did not properly show accord & satisfaction, or set-off:—*Held*: (1) the plea alleged only that the bill was taken for & on account of the moneys in the declaration & appropriated & retained to & for the liquidation & discharge; (2) the plea should have alleged that the bill was given & accepted in accord & satisfaction; (3) the plea was bad.—BAILLIE *v.* MOORE (1846), 8 Q. B. 489; 15 L. J. Q. B. 169; 6 L. T. O. S. 366; 10 Jur. 592; 115 E. R. 960.

2235. —— **After every effort made to obtain cash.**]—The managing owner of a ship paid for repairs with bills which were dishonoured. In an action against the owners:—*Held*: (1) if it had been shown that pltfs. could have had cash from the agent, &, instead of taking it, elected to take bills from him, they would then have been in the position of practically having had, so far as the other owners were concerned, not what was really payment, but what was tantamount to it; (2) as they had not had the power to get cash, but had tried to get it & failed, & had merely taken bills on account, there was no election on their part to renounce any right they had which would in any way discharge the claim made upon defts.—THE HUNTSMAN, [1894] P. 214; 70 L. T. 386; 7 Asp. M. L. C. 431; 6 R. 698.

2236. Creditor renewing agent's bill.]—The purchaser of goods to be paid for by bill upon his agent is not discharged by the seller taking a renewal of

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the bill without giving him notice, if the agent had no funds in hand to pay the bill when due.—CLARKE *v.* NOEL (1813), 3 Camp. 411.

2237. Creditor taking agent's cheque—After offer of cash.]—If a creditor is offered cash in payment or a cheque upon a banker from an agent of his debtor, & he prefers the latter, this does not discharge debtor if the cheque is dishonoured, although the agent fails with a balance of his principal in his hands to a larger amount.—EVERETT *v.* COLLINS (1810), 2 Camp. 515.

Annotation :—Distd. Smith *v.* Ferrand (1827), 7 B. & C. 19.

2238. —— Failure to present same in due course.]—A creditor who takes from his debtor's agent on account of the debt the cheque of the agent is bound to present it for payment within a reasonable time ; & if he fails so to do, & by his delay alters for the worse the position of the debtor, debtor is discharged, although he was not a party to the cheque.—HOPKINS *v.* WARE (1869), L. R. 4 Exch. 268 ; 38 L. J. Ex. 147 ; 20 L. T. 668.

2239. Creditor requesting agent to open credit with banker—After offer of cheque.]—Where a balance is due from a broker to the owner of a vessel, & is settled between the broker & master, if the broker offers to pay it to the master by cash, but he prefers to take it by bill, such payment is good against the owner.

A broker who had received freight under a charterparty on account of the owners of the ship, offered to pay it to the captain, who was also managing owner, by a cheque. This the captain declined, preferring the broker should open a credit for him at a bank in N. in favour of H., which the broker did. The bank paid H. £250, for which H. gave a bill drawn by him in favour of the bank upon the broker, who accepted & paid it when due. The broker having sued the co-owners for the balance of his account :—*Held :* this was a good payment of £250 by the broker & binding on the co-owners.—ANDERSON *v.* HILLIES (1852), 12 C. B. 499 ; 21 L. J. C. P. 150 ; 19 L. T. O. S. 92 ; 16 Jur. 819 ; 138 E. R. 1002.

D. Effect of Book Entries in Books of Common Agent holding Funds for both Debtor and Creditor.

2240. Not payment without notice to transferee.]—Where a mercantile firm in England borrows money of another firm, & both have a common agent abroad, if that agent credit the lending firm with sums received for the borrowing firm, in pursuance of an agreement between them, that credit is not a payment. The transfer from one account to another in an agent's books is not payment as between agent & transferee of such account, & the entry is not an acknowledgment, unless the transferee is informed of the fact.—MCLARTY *v.* MIDDLETON (1858), 6 W. R. 379 ; *varied* on another point, 6 W. R. 853, C. A.

2241. —— Funds misappropriated.]—A debtor to the estate of a deceased person, who places money in the hands of his agent for purpose of paying the debt, is not discharged by the fact that such agent is one of the exors. of deceased.

Pltf. was indebted to the estate of a deceased person of whom defts. A. & D. were exors. A. was also solr. to pltf., & held money belonging to pltf., out of which pltf. directed him to pay off the debt. A. informed pltf. by letter that he had done so, & in an account between pltf. & himself as solr. he credited himself with such payment ; but he misapplied the money. D. knew nothing of the transaction, & thought the debt was still owing by pltf., though in the residuary account of the estate of deceased, which was made out & signed by both exors., this debt was scheduled as money received & property converted into money. It appeared D. had signed the account without examination :—*Held :* (1) the letter & account delivered by A. were not evidence against D. ; (2) D. was not bound by the residuary account, as he did not know what he was signing ; (3) as A. alone had received the money merely as agent for pltf., his receipt could not discharge pltf. from his liability to the estate.—MILLER *v.* DOUGLAS (1886), 56 L. J. Ch. 91 ; 55 L. T. 583 ; 35 W. R. 122.

E. Other Cases.

2242. In what capacity money received.]—Pltfs., sharebrokers, sold shares for H. Before the settling day H. applied for the purchase-money, which pltfs. agreed to advance, if H. would procure defts.' acceptance for the amount, promising to appropriate the purchase-money, when received, to its discharge. The bill was drawn for a period beyond the settling day, & was for a large amount to cover the accruing interest. Defts. consented to this

2237 i. *Creditor taking agent's post-dated cheque—Receipt given for payment.*]—Pltfs., through L., their local agent, received from W., defts.' agent, his personal post-dated cheque for freight charges, & gave him receipted bills therefor, though L. knew similar cheques of W.'s had been dishonoured :—*Held :* (1) the loss must fall on pltfs. & not on defts., though defts. knew of the untrustworthiness of W. & did not communicate their knowledge ; (2) pltfs. were estopped from denying receipt of payment. *Graves* v. *Key*, 3 B. & Ad. 313 ; *Hearne* v. *Rogers*, 9 B. & C. 577 ; *Wyatt* v. *Hertford*, 3 East, 147 ; *Lloyd* v. *Grace, Smith*, [1912] A. C. 716 ; *Irvine* v. *Watson*, 5 Q. B. D. 414 ; *Davison* v. *Donaldson*, 9 Q. B. D. 623 ; *Jorden* v. *Money*, 5 H. L. Cas. 185 ; *Balkis Consolidated Co.* v. *Tomkinson*, [1893] A. C. 396, cited.—CONTINENTAL OIL CO. *v.* CANADIAN PACIFIC RY. CO. (1915-6), 52 S. C. R. 606.—CAN.

PART IX. SECT. 3, SUB-SECT. 3.—D.

2240 i. *Not payment without notice to transferee—Bill drawn on common agent.*]—A. ordered coffee of B. R. & Co. were the general agents of both buyer & seller. The coffee was to be paid for by bill drawn by B. on R. & Co. A bill of exchange for the amount was accordingly drawn by B. on & accepted by R. & Co. The coffee was received by the buyer. R. & Co. on receipt of the bill of exchange credited the account of B. in their books with the amount, & debited the account of A. with a like sum. Before the bill of exchange arrived at maturity R. & Co. stopped payment :—*Held :* entry of the amount of the bill to the credit of B. in books of mutual agents was not payment for the coffee ; & B. did not, by such entry, accept in satisfaction of his demand the credit opened by the purchaser with R. & Co.—MAXWELL *v.* DEARE (1853), 23 L. T. O. S. 1 ; 1 C. L. R. 776, P. C.—S. AF.

PART IX. SECT. 3, SUB-SECT. 3.—E.

2242 i. *In what capacity money received—Drawee as agent of drawer.*]—Deft. drew two bills on England for the accommodation of pltfs.' bankers, who indorsed & sold them in Canada, giving deft. a draft payable in England to meet them, which deft. transmitted to the drawee of the bills, an officer in the customs, by whom it was discounted before it became due, & the money placed by him with the public moneys left in his charge, from whence part of it was stolen ; & in consequence one of deft.'s bills came back protested & was paid by pltfs. :—*Held :* although it was an accommodation transaction, the drawee was deft.'s, not pltfs.', agent, & deft. was responsible.—TRUSCOTT *v.* BILLINGS (1836), 5 O. S. 529.—CAN.

u. *In what capacity money paid.*]—Pltf. was the first mtgee. of a certain property upon which deft. held a second mtge. C. acted as agent for pltf. in investing her money, & also acted as agent for the owners of the equity of redemption in collecting the rentals of the property for a certain length of time, & afterwards he collected the rents for pltf. *qua* mtgee. in possession. These rentals having proved insufficient to pay pltf.'s interest in full, C. from time to time advanced moneys to make up the deficiency, & remitted to pltf. the full amount of interest. Pltf. asserted that the advances made by C. were still due & owing as arrears of interest upon her mtge., & deft. maintained that C.'s payments extinguished pltf.'s claim for interest & that only the principal moneys were outstanding :—*Held :* the advances made by C. were never intended to be payments in satisfaction of pltf.'s claim for interest upon the mtge. *Simpson* v. *Eggington*, 10 Exch. 845 ; *Williamson* v. *Goold*, 1 Bing. 171, cited.—GLASCOTT *v.* CAMERON (1905), 6 O. W. R. 36 ; 10 O. L. R. 399.—CAN.

arrangement & on the faith of it accepted the bill. The purchase-money was received in due time:—*Held:* (1) the effect of the arrangement was that, when H.'s money was received by pltfs., it was money paid to them by H. on their account & as their agent; (2) defts. were discharged.—HILLS *v.* MESNARD (1847), 10 Q. B. 266; 16 L. J. Q. B. 306; 116 E. R. 103.

2243. ——.]—In an action for illegal distress it appeared, on the rent falling due, that H., who acted as agent for both landlord & tenant, paid the rent to the landlord without any previous authority or subsequent ratification from the tenant. The landlord subsequently distrained for the rent:—*Held:* it was a question for the jury whether the payment was made on behalf of the tenant, or by way of advance to the landlord.—GRIFFITHS *v.* CHICHESTER (1850), 7 Exch. 95 n.; 21 L. J. Ex. 292 n.; 155 E. R. 871.

Annotation:—Folld. Parrott *v.* Anderson (1851), 7 Exch. 93.

2244. ——.]—A tenant being indebted to his landlord for rent, the agent of the landlord, without his authority or knowledge, took a bill of exchange from the tenant for the amount of the rent & paid over the amount to the landlord in his settlement of account. The bill was afterwards dishonoured whilst in the hands of a third person, & the rent was not paid by the tenant, whereupon the landlord distrained:—*Held:* (1) it was a question for the jury, whether the bill was discounted for, or the money lent to, the tenant by the agent, or whether it was an advance by the agent to the landlord; (2) if the bill was discounted for, or the money so lent to, the tenant, the landlord was not entitled to distrain; otherwise he was entitled.—PARROTT *v.* ANDERSON (1851), 7 Exch. 93; 21 L. J. Ex. 291; 155 E. R. 870; *sub nom.* PERROTT *v.* ANDERSON, 18 L. T. O. S. 172.

SUB-SECT. 4.—FRAUD AND MISREPRESENTATION.

Concealment & non-disclosure on sales of goods or land. *See* SALE OF GOODS; SALE OF LAND.

Liability for fraud & misrepresentation of sub-agents. *See* Part VI., Sect. 4, *ante*.

A. General Principles.

2245. Principal liable for fraud of agent in course of business.]—A principal is liable to an action for the fraudulent misrepresentation of his agent acting in the course of his business.

Pltf. having for some time, on a guarantee of defts., supplied D., a customer of theirs, with oats on credit for carrying out a Govt. contract, refused to continue so to do unless he had a better guarantee. Deft.'s manager thereupon gave him a written guarantee to the effect that the customer's cheque on the bank in pltf.'s favour in payment for the oats supplied should be paid, on receipt of the Govt. money, in priority to any other payment, "except to this bank." D. was then indebted to the bank to the amount of £12,000, but this fact was not known to pltf., nor was it communicated to him by the manager. Pltf. supplied the oats to the value of £1,217; the Govt. money, amounting to £2,676, was received by D. & paid into the bank; but D.'s cheque for the price of oats drawn on the bank in favour of pltf. was dishonoured by defts., who claimed to retain the whole sum of £2,676 in payment of D.'s debt to them. Pltf. having brought an action for false representation, & for money had & received:—*Held:* (1) there was evidence to go to the jury that the manager knew & intended the guarantee should be unavailing & fraudulently concealed from pltf. the fact which would make it so; (2) defts. would be liable for such fraud in their agent; (3) the fraud was properly charged in the declaration as the fraud of defts. *Qu.:* whether pltf. could have recovered under the count for money had & received.—BARWICK *v.* ENGLISH JOINT STOCK BANK (1867), L. R. 2 Exch. 259; 36 L. J. Ex. 147; 16 L. T. 461; 15 W. R. 877, Ex. Ch.

Annotations:—**Apld.** Swift *v.* Winterbotham & Goddard (1873), L. R. 8 Q. B. 244. **Distd.** Swift *v.* Jewsbury (1874), L. R. 9 Q. B. 301, Ex. Ch. **Consd.** Mackay *v.* Commercial Bank of New Brunswick (1874), L. R. 5 P. C. 394. **Distd.** Weir *v.* Barnett (1877), 3 Ex. D. 32. **Apld.** Chapleo *v.* Brunswick Benefit Bldg. Soc. (1880), 5 C. P. D. 331. **Distd.** Chapleo *v.* Brunswick Bldg. Soc. (1881), 6 Q. B. D. 696, C. A.; British Mutual Banking Co. *v.* Charnwood Forest Ry. Co. (1887), 18 Q. B. D. 714, C. A.; Thorne *v.* Heard, [1894] 1 Ch. 599, C. A. **Apld.** Spooner *v.* Browning, Todd & Whish (1897), 77 L. T. 685; Taff Vale Ry. Co. *v.* Amalgamated Soc. of Railway Servants, [1901] A. C. 426; Whitechurch *v.* Cavanagh, [1902] A. C. 117. **Consd.** Hamlyn *v.* Houston, [1903] 1 K. B. 81, C. A. **Distd.** Hambro *v.* Burnand, [1903] 2 K. B. 399. **Apld.** Giblan *v.* National Amalgamated Labourers' Union of Great Britain & Ireland, [1903] 2 K. B. 600, C. A. **Consd.** Ruben *v.* Great Fingall Consolidated, [1904] 1 K. B. 650. **Apld.** Kettlewell *v.* Refuge Assce., [1908] 1 K. B. 545, C. A.; Malcolm, Brunker *v.* Waterhouse (1908), 24 T. L. R. 854. **Consd.** Burdett *v.* Horne (1911), 27 T. L. R. 402. **Consd. & Expld.** Lloyd *v.* Grace, Smith, [1912] A. C. 716. I agree with my noble and learned friend Lord Halsbury that the case of *Barwick* v. *English Joint Stock Bank* has been misunderstood in late years; I think it follows from the decision & the ground on which it is based that in the opinion of the ct. a principal must be liable for the fraud

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PART IX. SECT. 3, SUB-SECT. 4.—A.

2245 i. *Principal liable for fraud of agent in course of business.*]—N., defts.' agent, represented to pltf. that certain verbal warranties, made use of by him, were to be found in the written contract with defts., which pltf. was thus induced to sign. A copy of the written contract was handed over by N. to pltf. at the time of execution:—*Held:* it was not open to defts. to say that N.'s representations were made without authority as they were made in the course of his employment. *Barwick* v. *English Joint Stock Bank*, L. R. 2 Exch. 259; *Swift* v. *Jewsbury*, L. R. 9 Q. B. 301; *Swire* v. *Francis*, 3 App. Cas. 106; *Citizens' Life Assce. Co.* v. *Brown*, [1904] A. C. 423; *Lumby* v. *Faupel*, 88 L. T. 62, cited.—SAGER *v.* MANITOBA WINDMILL CO., LTD. (1913), 13 D. L. R. 203, Sask. S. C.; 24 W. L. R. 725; 4 W. W. R. 1078.—**CAN.**

2245 ii. ——.]—An officer of deft. co. fraudulently signed warehouse receipts against which there were no goods in the warehouse, & such receipts were previously signed negligently by another officer who had to be a party, both of whom were expressly authorised by a bye-law of the co. to sign such receipts. In an action by the holder:—*Held:* the receipts were valid as between the co. & the holder acting in good faith, the apparent authority being the real one, & the fact that other persons might be responsible for an offence did not diminish the liability of the co., which was jointly & severally liable.—WARD *v.* MONTREAL COLD STORAGE & FREEZING CO. (1901), Q. R. 26 S. C. 310.—**CAN.**

2245 iii. —— *Measure of damages.*]—A principal will be liable for misrepresentations made by his agent in the course of his agency to the full extent of the damages suffered by the party defrauded, & his liability will not be limited to the extent to which he actually profited by the transaction impeached. *Barwick* v. *English Joint Stock Bank*, L. R. 2 Exch. 259, cited.—GARDINER *v.* BICKLEY (1905), 2 W. L. R. 146.—**CAN.**

2245 iv. —— *Third party not estopped by subsequent conduct.*]—J., as agent for the sale of stock, sold on the instructions of M., president of a co., to deft., J. G., twenty-five shares in the co., representing that they were Treasury stock, whereas they were stock of G., a director of the co., & that the preferred stock of the co. had already paid an 8 per cent. dividend, which was not the fact. J. G. after discovering the stock was not Treasury stock gave in payment a note in favour of the co., & it was indorsed over to G. J. G. renewed the note, but refused to meet the renewal when due, the co. having meantime failed. G. sued on the note & J. G. counterclaimed for damages for misrepresentation & deceit. J. admitted making the misrepresentations, but denied that he did so fraudulently. G. denied knowledge of the deceit of M., in consequence of which J. made the representation. Judgment having been entered for G. on the note & for J. G. on the counterclaim, G. appealed on the ground that by giving the note & the renewal J. G.

Sect. 3.—*Contracts made by agent: Sub-sect.* 4, *A.*]

of his agent committed in the course of his agent's employment & not beyond the scope of his agency *whether the fraud be committed for the principal's benefit or not* (LORD MACNAGHTEN). **Refd.** The Thetis (1869), L. R. 2 A. & E. 365; Bolingbroke *v.* Swindon L. B. (1874), L. R. 9 C. P. 575; Swire *v.* Francis (1877), 3 App. Cas. 106, P. C.; Burmah Trading Corpn., Ltd. *v.* Mirza Mahomed Ally Sherazee (1878), L. R. 5 Ind. App. 130, P. C.; *Re* Collie, *Ex p.* Adamson (1878), 8 Ch. D. 867, C. A.; Weir *v.* Bell (1878), 3 Ex. D. 238, C. A.; Marsh *v.* Joseph (1896), 66 L. J. Ch. 128, C. A.; Ormerod *v.* Rochdale Corpn. (1898), 62 J. P. 153; Citizens' Life Assce. *v.* Brown, [1904] A. C. 423, P. C.; Ruben *v.* Great Fingall Consolidated, [1906] A. C. 439; Mair *v.* Rio Grande Rubber Estates (1908), 24 T. L. R. 692, H. L.; Wake *v.* Dyer (1911), 75 J. P. 210; Lloyd *v.* Grace, Smith, [1911] 2 K. B. 489, C. A.; Watkins *v.* Naval Colliery Co. (1912), 107 L. T. 321, H. L.; Dunlop Pneumatic Tyre Co. *v.* Maison Talbot (1903), 52 W. R. 254.

2246. —— Whether for principal's benefit or not.]—A principal is liable for the fraud of his agent acting within scope of his authority, whether the fraud is committed for the benefit of the principal or for the benefit of the agent.—LLOYD *v.* GRACE, SMITH, No. 2284, *post.*

Annotations:—**Expld. & Distd.** Radley *v.* L. C. C. (1913), 109 L. T. 162. **Refd.** Mair *v.* Rio Grande Rubber Estates, [1913] A. C. 853; Armstrong *v.* Jackson, [1917] 2 K. B. 822.

For full anns., *see* S. C. No. 2284, *post.*

2247. ——.]—A merchant is answerable for the deceit of his factor, though not *criminaliter*, yet *civiliter*, for, seeing that somebody must be a loser by this deceit, it is more reason that he who employs & puts trust & confidence in the deceiver should be a loser than a stranger (HOLT, C.J.).—HERN *v.* NICHOLS (1701), Holt, K. B. 462; 1 Salk. 289; 90 E. R. 1154.

Annotations:—**Distd.** Hartop *v.* Hoare (1743), 3 Atk. 44. **Apld.** Mitchell *v.* Torup (1766), Park. 227; Baring *v.* Corrie (1818), 2 B. & Ald. 137. **Distd.** Cornfoot *v.* Fowke (1840), 6 M. & W. 358. **Apld.** Wright *v.* Crookes (1840), 1 Scott, N. R. 685, Ex. Ch.; Atkinson *v.* Poocock (1848), 1 Exch. 796. **Distd.** Grant *v.* Norway (1851), 10 C. B. 665. **Apld.** Coleman *v.* Riches (1855), 16 C. B. 104; Udell *v.* Atherton (1861), 7 H. & N. 172; Barwick *v.* English Joint Stock Bank (1867), L. R. 2 Exch. 259; Mackay *v.* Commercial Bank of New Brunswick (1874), L. R. 5 P. C. 394; Weir *v.* Barnett (1877), 3 Ex. D. 32; Pearson *v.* Dublin Corpn., [1907] A. C. 351; Lloyd *v.* Grace, Smith, [1912] A. C. 716. **Mentd.** Maddick *v.* Marshall (1864), 17 C. B. N. S. 829.

2248. —— Pleading Fraud.]—Where one party has suffered, & another has profited, by the fraudulent representation of an agent of the latter made within scope of his authority, the former is entitled to recover damages.

In an action of deceit, whether against a person or against a co., the fraud of the agent may be treated for the purposes of pleading as that of the principal.

An officer of a banking corpn., whose duty was to obtain the acceptance of bills of exchange in which the bank was interested, fraudulently, but without the knowledge of the president or directors of the bank, made a representation to A. which, by omitting a material fact, misled A., & induced him to accept a bill in which the bank was interested; & A. was compelled to pay the bill:—*Held:* A. could recover from the bank the amount so paid.—MACKAY *v.* COMMERCIAL BANK OF NEW BRUNSWICK (1874), L. R. 5 P. C. 394; 43 L. J. P. C. 31; 30 L. T. 180; 38 J. P. 296; 22 W. R 473, P. C.

Annotations:—**Consd.** Bolingbroke *v.* Swindon L. B. (1874), L. R. 9 C. P. 575; Weir *v.* Barnett (1877), 3 Ex. D. 32; Swire *v.* Francis (1877), 3 App. Cas. 106, P. C.; Houldsworth *v.* City of Glasgow Bank (1880), 5 App. Cas. 317, H. L.; Ludgater *v.* Love (1881), 44 L. T. 694, C. A., Chapleo *v.* Brunswick Bldg. Soc. (1881), 6 Q. B. D. 696, C. A.; British Mutual Banking Co. *v.* Charnwood Forest Ry. Co. (1887), 18 Q. B. D. 714, C. A.; Hambro *v.* Burnand, [1903] 2 K. B. 399; Lloyd *v.* Grace, Smith, [1912] A. C. 716, H. L. **Refd.** Hogarth *v.* Wherley (1875), 32 L. T. 800; Burmah Trading Corpn. *v.* Mirza Mahomed Ally Sherazee (1878), L. R. 5 Ind. App. 130, P. C.; Bank of New South Wales *v.* Owston (1879), 4 App. Cas. 270, P. C.; Chapleo *v.* Brunswick Permanent Bldg. Soc. (1880), 5 C. P. D. 331; Mullens *v.* Miller (1882), 31 W. R. 559; Spooner *v.* Browning, Todd *v.* Whish (1897), 77 L. T. 685; Hirst *v.* West Riding Union Banking Co. (1901), 70 L. J. K. B. 828, C. A.; Citizens' Life Assce. *v.* Brown, [1904] A. C. 423, P. C.; Kettlewell *v.* Refuge Assce., [1907] 2 K. B. 242; Lloyd *v.* Grace, Smith, [1911] 2 K. B. 489, C. A. **Mentd.** *Re* Mutual Aid Permanent Benefit Bldg. Soc., *Ex p.* James (1883), 49 L. T. 530.

2249. —— Form of action.]—An action was brought against L. & H. for fraudulent conspiracy. The jury, negativing conspiracy, found pltf. had been induced to advance money to L. by certain misrepresentations, most of which were made by L. as agent for H., & with his authority:—*Held:* (1) H. could not retain the money received by his agent through false & fraudulent representations; (2) there was evidence that H. was himself party to the fraudulent representations; (3) pltf. was entitled to recover notwithstanding the form of action.—SHICKLE *v.* LAWRENCE (1886), 2 T. L. R. 776, C. A.

2250. —— Question discussed.]—A contractor having sued the other party to the contract (a public authority) in an action of deceit for damages for fraudulent representations made by the agent of the public authority as to the nature of the works to be executed, one defence was that by a provision in the contract pltf. must verify all representations for himself & not rely on their accuracy:—*Held:* the contract, truly construed, contemplated honesty on both sides, & protected only against honest mistakes. The question of the liability of a principal for the fraud of his agent discussed.—PEARSON & SON, LTD. *v.* DUBLIN CORPN., [1907] A. C. 351; 77 L. J. P. C. 1; 97 L. T. 645, H. L.

For full anns., *see* MISREPRESENTATION & FRAUD.

2251. —— Agent to contract.]—Any person who authorises another to act for him in the making of

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had precluded himself from counter-claiming for deceit:—*Held:* (1) G. was responsible for the misrepresentations of J.; (2) the giving of the note & renewal by J. G. did not preclude him from maintaining a claim for deceit. *Cornfoot* v. *Fowke*, 6 M. & W. 358; *Ludgater* v. *Love*, 44 L. T. 694; *Derry* v. *Peek*, 14 App. Cas. 337; *Houldsworth* v. *City of Glasgow Bank*, 5 App. Cas. 317; *Arnison* v. *Smith*, 41 Ch. D. 348; *Davidson* v. *Tulloch*, 3 Macq. 783; *Arkwright* v. *Newbold*, 17 Ch. D. 301; *Holmes* v. *Jones*, 3 C. L. R. 162, cited.—GOOLD *v.* GILLIES (1908), 40 S. C. R. 437.—**CAN.**

2246 i. —— *Whether for principal's benefit or not.*]—A principal is civilly liable for fraud committed by his agent while acting within scope & the ordinary course of his employment, whether the result is or is not for the benefit of the principal. — R. *v.* CANADIAN PACIFIC RY. CO. (1913), 12 E. L. R. 309; 11 D. L. R. 681; 14 Ex. C. R. 150. Appeal dismissed, S. C. of Canada being equally divided in opinion, Feb. 6, 1917.—**CAN.**

2247 i. ——.]—It seems more reasonable that where one of the two innocent persons must suffer from the wrongful act of a third person, the principal who has employed & retained a dishonest agent & has placed him in a position of trust & confidence should suffer for his misdeed rather than a stranger.—SHERJAN KHAN *v.* ALIMUDDI (1916), I. L. R. 43 Calc. 511.—**IND.**

2247 ii. ——.]—If an agent authorised to sell property commits a fraud against his principal, the principal is the person who ought to suffer, & not a stranger.—DOORGA NARAIN SEN *v.* RANEY MADHUB MOZOOMDAR (1881), I. L. R. 7 Calc. 199.—**IND.**

2251 i. —— *Agent to contract.*]—Every principal authorising his agent to sign a contract is liable for fraudulent acts of such agent. The case is stronger when the principal has secured a benefit by such fraudulent act.—NATIONAL, ETC., CO. *v.* MELOCHE (1916), Q. R. 26 K. B. 212.—**CAN.**

v. —— *Agent to borrow — Secret limitation as to amount.*]—Where an agent has authority to borrow money upon title deeds of his principal, the money he borrows is a charge upon the title deeds, even although he is guilty of fraud towards his principal in borrowing more than he was authorised to borrow, & in appropriating the portion borrowed by him. *Brocklesby* v. *Temperance Bldg. Soc.*, [1895] A. C. 173, cited.—HALL *v.* COMMERCIAL BANK OF AUSTRALIA, LTD. (1896), 22 V. L. R. 561.—**AUS.**

any contract undertakes that the authority so given shall not be executed fraudulently, as much as if he had made the contract himself.—MAIR *v.* RIO GRANDE RUBBER ESTATES, LTD., [1913] A. C. 853; 83 L. J. P. C. 35; 109 L. T. 610; 29 T. L. R. 692; 57 Sol. Jo. 728, H. L.

2252. Principal liable though morally innocent.] —The maxim that the principal is civilly responsible for the acts of his agent universally prevails in cts. both of law & of equity; & the fraud & misconduct of the agent is imputed to the principal, although he is personally free from blame. —DOE d. WILLIS *v.* MARTIN (1790), 4 Term Rep. 39; 100 E. R. 882.

Annotations:—**Apld.** Doe *d.* Tanner *v.* Dorvell (1794), 5 Term Rep. 518. **Expld.** Smith *v.* Camelford (1794-5), 2 Ves. 698. **Apld.** Owen *v.* Smyth (1796), 2 Hy. Bl. 594; Goodlittle d. Holford *v.* Otway (1796), 1 Bos. & P. 576; Roe d. Clemett *v.* Briggs (1812), 16 East, 406; Driver *v.* Frank (1814), 3 M. & S. 25. **Distd.** Roper *v.* Hallifax (1817), 8 Taunt. 845. **Apld.** Cholmeley *v.* Paxton (1825), 3 Bing. 207; Cockerell *v.* Cholmeley (1830), 10 B. & C. 564; Phipps *v.* Ackers (1835-42), 9 Cl. & Fin. 583, H. L. **Distd.** Cornfoot *v.* Fowke (1839), 9 L. J. Ex. 297. **Apld.** Lickbarrow *v.* Loftus (1849), 14 Q. B. 432. **Distd.** Watkins *v.* Williams (1851), 3 Mac. & G. 622. **Apld.** Hart *v.* Tulk (1853), 21 L. T. O. S. 174, C. A.; Udell *v.* Atherton (1861), 7 H. & N. 172. **Distd.** Dresser *v.* Norwood (1863), 11 W. R. 624. **Apld.** Wickham *v.* Wing (1865), 6 New Rep. 21; Lambert *v.* Thwaites (1866), L. R. 2 Eq. 151; *Re* Master's Settlement, Master *v.* Master, [1911] 1 Ch. 321. **Mentd.** Thornton *v.* Bright (1836), 2 My. & Cr. 230.

2253. Representation false to knowledge of agent but not of principal.]—A principal is liable, in an action of deceit, for the false & fraudulent representations of his agent as to the quality & value of an article, whereby a person has been induced to purchase it for more than its worth, notwithstanding that the principal neither authorised nor knew of the fraudulent conduct of his agent (POLLOCK, C.B., WILDE, B.; *diss.* MARTIN, BRAMWELL, BB.).—UDELL *v.* ATHERTON (1861), 7 H. & N. 172; 30 L. J. Ex. 337; 4 L. T. 797; 7 Jur. N. S. 777.

Annotations:—**Expld.** Barwick *v.* English Joint Stock Bank (1867), L. R. 2 Exch. 259. **Distd.** Brown *v.* Black (1873), L. R. 15 Eq. 363. **Consd.** Mackay *v.* Commercial Bank of New Brunswick (1874), L. R. 5 P. C. 394. **Apprvd.** Weir *v.* Bell (1878), 2 Ex. D. 238, C. A. **Distd.** Ludgater *v.* Love (1881), 44 L. T. 694, C. A. **Consd.** Arnold *v.* Armitage (1885), 1 T. L. R. 670. **Apld.** Baldry *v.* Bates (1885), 52 L. T. 620. **Expld.** Pearson *v.* Dublin Corpn., [1907] A. C. 351. **Apprvd.** Lloyd *v.* Grace, Smith, [1912] A. C. 716. **Refd.** Head *v.* Tattersall (1871), 25 L. T. 631; Twycross *v.* Grant (1877), 26 W. R. 586; Weir *v.* Barnett (1877), 3 Ex. D. 32; Houldsworth *v.* City of Glasgow Bank (1880), 5 App. Cas. 317. **Mentd.** Howard *v.* Sheward (1866), 15 W. R. 45.

2254. Principal knowing truth but agent innocent.]—Where a principal purposely employs an agent ignorant of the truth in order that such agent may innocently make a false statement believing it to be true, & may so deceive the party with whom he is dealing, the representation by the agent becomes a misrepresentation by the principal so as to vitiate the contract.

Deft.'s son, acting for deft., & with deft.'s authority, represented that certain sheep, which he sold to pltf., were all right. Deft. had fraudulently concealed from his son that the sheep had the rot, & fraudulently gave his son authority to sell them for the best price, intending that the son should represent that they were sound:—*Held:* deft. liable in an action to recover damages for fraudulent misrepresentation.—LUDGATER *v.* LOVE (1881), 44 L. T. 694; 45 J. P. 600, C. A.

2255. ——.] —To an action for not taking a ready furnished house of pltf., according to a written agreement, deft. pleaded that pltf. caused him to enter into the agreement, & deft. was induced to enter into it, by means of fraud, covin, & misrepresentation of pltf., & others in collusion with him. It appeared deft., being in want of a town residence for the purpose of educating his children, applied to C., who had been employed by pltf. to let the house, & to whom all persons making inquiries about it were referred. Deft. asked if there was "anything objectionable about the house," to which C. replied, "nothing whatever." Deft. afterwards agreed to take the house, & an agreement was drawn up by C. & signed by deft., & afterwards by pltf. The agreement did not embody the representation of C. On the day after signing the agreement, deft. discovered that the house next adjoining the house in question was a brothel. Pltf. was fully cognisant of this fact, but the agent was not, nor was pltf. aware that the agent had made any representation on the subject. Deft. on making the discovery declined to take the house: —*Held:* (1) as the agent's representation was not embodied in the contract, it was not enough to show it was untrue, but it was necessary to prove it was made fraudulently; (2) pltf.'s knowledge of the existence of the nuisance & the representation of the agent, who was ignorant of that fact, that it did not exist, were not sufficient to constitute fraud within the meaning of the plea (LORD ABINGER, C.B., *diss.*)—CORNFOOT *v.* FOWKE (1840), 6 M. & W. 358; 9 L. J. Ex. 297; 4 Jur. 919; 151 E. R. 450.

Annotations:—**Distd.** Gould *v.* Oliver (1840), 2 Man. & G. 208. **Consd.** Fuller *v.* Wilson (1842), 3 Q. B. 58. **Dbtd.** Elkin *v.* Janson (1845), 14 L. J. Ex. 201. **Distd.** Wilde *v.* Gibson (1848), 1 H. L. Cas. 605. **Consd. & Expld.** Bartlett *v.* Salmon (1855), 6 De G. M. & G. 33; National Exchange *v.* Drew (1855), 25 L. T. O. S. 223, H. L. **Distd.** Wheelton *v.* Hardisty (1857), 8 E. & B. 232. **Consd.** Udell *v.* Atherton (1861), 7 H. & N. 172. **Expld.** Brady *v.* Todd (1861), 9 C. B. N. S. 592; Barwick *v.* English Joint Stock Bank (1867), L. R. 2 Exch. 259. **Consd. & Distd.** *Re* Shackleton, *Ex p.* Whittaker (1875), 10 Ch. App. 447 n. **Consd. & Dbtd.** Ludgater *v.* Love (1881), 44 L. T. 694, C. A. **Consd.** Joliffe *v.* Baker (1883), 11 Q. B. D. 255. **Consd. & Distd.** R. *v.* Butt (1884), 51 L. T. 607, C. C. R. **Consd. & Dbtd.** Pearson *v.* Dublin Corpn., [1907] A. C. 351, H. L. One of the learned judges who decided the case of *Cornfoot* v. *Fowke* explained it by saying that it was only decided on a point of pleading, & another by saying that it was attempted to add a term to a written contract which was not in it; it is enough to say that the case is not law, if it is supposed to affirm the proposition that a principal & agent could be so divided in responsibility that the united principal & agent might commit fraud with impunity (EARL OF HALSBURY). **Refd.**

2253 i. *Representation false to knowledge of agent but not of principal.]* — In an action to set aside a sale induced by fraudulent representations as to the value of certain stock transferred as part of the price:—*Held:* where an agent in making a contract suppressed a material fact within his knowledge, his principal could not profit by the fraud, although he was himself ignorant of the fact suppressed.—CHRÉTIEN *v.* CROWLEY (1882), 5 L. N. 268.—**CAN.**

2253 ii. ——.]—C., tenant of A., was served with notice to quit by B., as agent of A., & evicted. He subsequently sued A. in tort, alleging that he had fraudulently concealed from him the existence of an agreement for a lease, & thereby succeeded in evicting him:—*Held:* such action could not be maintained by proof that, at the time of the proceedings in the ejectment, B. was aware of the existence of such agreement, & that C. had forgotten it, & that B. was aware of C.'s ignorance, & yet did not inform him of the agreement, B. being under no obligation to inform C. of his rights, & A. not being liable for the concealment, though fraudulent, of B. *Udell* v. *Atherton* (1861) 7 H. & N. 172, cited.—ARCHBOLD *v.* HOWTH (1866), I. R. 1 C. L. 608.—**IR.**

2253 iii. —— *Rights against principal.]* —An agent for the sale of land made representations to a prospective purchaser which were false to the knowledge of the agent, but the principal was personally innocent of the fraud:—*Held:* the purchaser was entitled as against the principal to rescission of the contract & repayment, with interest, of the purchase-money paid, together with the amount expended by the purchaser in the improvements, etc.—SIRLEY *v.* GROSVENOR (1916), V. L. R. 347.—**AUS.**

2254 i. *Principal knowing truth but agent innocent.]*—A principal is liable for a material representation, untrue to the knowledge of the principal, made by an agent in the course of a sale, even though such agent when he made the statement believed it to be true.—GIBSON *v.* COTTINGHAM (1917), 1 W. W. R. 496; 23 B. C. R. 392.—**CAN.**

Sect. 3.—Contracts made by agent: Sub-sect. 4, A.]

Wilson *v.* Fuller (1842), 3 Q. B. 1009; Hart *v.* Windsor (1844), 13 L. J. Ex. 129; Murray *v.* Mann (1848), 2 Exch. 538; Feret *v.* Hill (1854), 15 C. B. 207; Coddington *v.* Goddard (1860), 32 Mass. Rep. 436; Rogers *v.* Hadley (1861), 7 Jur. N. S. 733; Bolingbroke *v.* Swindon New Town L. B. of Health (1874), 43 L. J. C. P. 287; Mackay *v.* Commercial Bank of New Brunswick (1874), L. R. 5 P. C. 394; Dickson *v.* Reuter's Telegraph Co. (1877), 2 C. P. D. 62; Lloyd *v.* Grace, Smith, [1912] A. C. 716. **Mentd.** Atkinson *v.* Pocock (1848), 1 Exch. 796.

2256. ——.]—Deft., owner of a house, employed an agent to sell it. The agent described it as free from rates & taxes, & did not know it to be otherwise; but it was in fact liable to certain rates & taxes, as deft. knew. On the faith of the agent's description, pltf. bought the house:—*Held:* pltf. might maintain an action for deceit against deft., though it did not appear that deft. had instructed the agent to make any representation as to rates or taxes.—FULLER *v.* WILSON (1842), 3 Q. B. 58; 2 Gal. & Dav. 460; 11 L. J. Q. B. 251; 6 Jur. 799; 114 E. R. 429; *revsd.* on another point, 3 Q. B. 68, 1009.

Annotations:—**Consd.** Joliffe *v.* Baker (1883), 11 Q. B. D. 255. **Refd.** Taylor *v.* Ashton (1843), 11 M. & W. 401; Elkin *v.* Janson (1845), 14 L. J. Ex. 201; Thom *v.* Bigland (1853), 1 W. R. 290; Collins *v.* Cave (1859), 4 H. & N. 225; Slack *v.* Crewe (1860), 2 F. & F. 59; Mackay *v.* Commercial Bank of New Brunswick (1874), L. R. 5 P. C. 394.

2257. ——.]—In an action for fraudulent representation of the value of a term of years of a house on the assignment of it from deft. to pltf., the jury found a special verdict that deft. desired W., her attorney, to obtain the necessary information from a person who had a lien on the house, & to instruct pltf., an auctioneer, to prepare particulars for the sale of the premises by auction. W., on the information received, represented the premises to be let at a rent of £100 per annum. They were let at that rent, but deft., & not the tenant, paid the rates & taxes, but that was not known by W., & was not the usual practice in the district. On this instruction pltf., with the assent of W., who believed the description to be correct, & thought it pltf.'s duty to inquire, described the premises as let at £100 per annum, clear of rates & taxes. Pltf. purchased the premises himself, & for a larger sum than he would have given, if he had known that the landlord paid the rates & taxes:—*Held:* (1) this special verdict did not disclose any right of action against deft.; (2) there was no finding that pltf. was induced to purchase on the faith of any statement made by W.; (3) the immediate cause of the injury sustained by pltf. arose from his own misapprehension & not from any misrepresentation or concealment on the part of deft.

If deft. had knowingly referred to an ignorant agent, that would have been fraud (PARKE, B.).—WILSON *v.* FULLER (1843), 3 Q. B. 68, 1009; 3 Gal. & Dav. 570; 114 E. R. 432, 796, Ex. Ch.

Annotations:—**Consd.** Udell *v.* Atherton (1861), 7 H. & N. 172. **Refd.** Mackay *v.* Commercial Bank of New Brunswick (1874), L. R. 5 P. C. 394.

2258. ——.]—Where a principal, knowing a material objection to his property, employs an agent, who is ignorant of such objection, to sell or let his property, & the agent unconsciously makes a false representation to the purchaser, thereby inducing a contract, the principal is bound by such misrepresentation (LORD ST. LEONARDS).—NATIONAL EXCHANGE CO. *v.* DREW (1855), 2 Macq. 103; 25 L. T. O. S. 223, H. L.

Annotations:—**Apld.** Ludgater *v.* Love (1881), 44 L. T. 694, C. A. **Refd.** *Re* Royal British Bank, Brockwell's Case (1857), 4 Drew. 205; *Re* National Patent Steam Fuel Co., *Ex p.* Worth (1859), 4 Drew. 529; *Re* Home Counties & General Life Assce., *Ex p.* Woolaston (1859), 7 W. R. 540. **Mentd.** Bartlett *v.* Salmon (1855), 6 De G. M. & G. 33; Eastern Counties Ry. Co. *v.* Hawkes (1855), 25 L. T. O. S. 318, H. L.; *Re* North Shields Quay & Improvement Co., Davidson's Case (1858), 4 K. & J. 688; *Re* Royal British Bank (1859), 3 De G. & J. 387, C. A.; Smith *v.* Kay (1859), 7 H. L. Cas. 751, H. L.; Barry *v.* Croskey (1861), 2 J. & H. 1; *Re* Overend, Gurney, *Ex p.* Oakes & Peck (1867), L. R. 3 Eq. 576; Western Bank of Scotland *v.* Addie, Addie *v.* Western Bank of Scotland (1867), L. R. 1 Sc. & Div. 145; Cargill *v.* Bower (1878), 10 Ch. D. 502; Houldsworth *v.* City of Glasgow Bank (1880), 5 App. Cas. 317, H. L.; Symonds *v.* City Bank (1886), 2 T. L. R. 330; Hambro *v.* Burnand, [1903] 2 K. B. 399.

2259. Principal not liable for fraud outside scope of authority.]—Though a principal is civilly responsible for the fraud or negligence of his agent acting in the course of his employment, he is not responsible for an act of wilful fraud or negligence done by the agent outside scope of his authority, or inconsistent with the course of his employment.—COLEMAN *v.* RICHES (1855), 16 C. B. 104; 24 L. J. C. P. 125; 1 Jur. N. S. 596; 3 W. R. 453; 3 C. L. R. 795; 139 E. R. 695.

Annotations:—**Consd.** Udell *v.* Atherton (1861), 7 H. & N. 172. **Distd.** Ludgater *v.* Love (1881), 44 L. T. 694, C. A. **Refd.** Whitechurch *v.* Cavanagh, [1902] A. C. 117, H. L.

2259 i. *Principal not liable for fraud outside scope of authority.*]—A master is liable for the fraud of his servant committed in the course of his service & for the master's benefit, though it is not necessary that the benefit should accrue to the master; but a master is not liable for misconduct of the servant committed for the servant's own private benefit.

A cheque was given to pltf. by the district board for repairs done to certain roads. On presentation at the Govt. Treasury Office, the amount was not paid to pltf., but was misappropriated by the *poddar* & a *mohurer* employed in the Treasury. Pltf. brought a suit for recovery of the amount against those officers of the Treasury as well as the Secretary of State for India:—*Held:* the Secretary of State was not responsible for the misappropriation by his employees, the misappropriation not being within scope of the duties intrusted to them. The fraud & misappropriation were not committed either for the benefit of the Secretary of State or for purposes of the agency. *Barwick* v. *English Joint Stock Bank* (1867), L. R. 2 Exch. 259; *Houldsworth* v. *City of Glasgow Bank* (1880), 5 App. Cas. 317; *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* (1887), 18 Q. B. D. 714, cited.—GOPAL CHANDRA BHATTACHARJEE *v.* SECRETARY OF STATE FOR INDIA (1909), I. L. R. 36 Calc. 647.—**IND.**

2259 ii. ——.] — By arrangement between the Colonial Govt. & appit. bank the Registrar-General deposited daily in the bank, to the credit of an account in his own name, the amount of the fees, etc., received by him, & drew a cheque every week for the aggregate amount of such deposits, which was paid into the Treasury. By the fraud of a clerk employed to pay in the money the Registrar-General was led to overdraw his account:—*Held:* the Govt. having given no authority to overdraw the account, & such overdraft being outside scope of the dealings of the parties, the Govt. was not liable for such overdraft.—LONDON CHARTERED BANK OF AUSTRALIA *v.* MCMILLAN (1892), 61 L. J. P. C. 44; 66 L. T. 801; 8 T. L. R. 473, P. C.—**AUS.**

2259 iii. ——.]—C. was freight agent of defts., & pltfs. advanced money to him on bills of lading or shipping notes signed by him, & acknowledging the receipt by defts. of consignments of flour. Documents of this sort were signed by C. without the goods having been received by defts., to assist T. B. & Co., the supposed consignors, to raise money:—*Held:* the signature of such documents by C. was an act wholly outside scope of his authority & not binding on defts. *Grant* v. *Norway*, 10 C. B. 665; *Hubbersty* v. *Ward*, 8 Exch. 330; *Coleman* v. *Riches*, 16 C. B. 104, cited.—ERB *v.* GREAT WESTERN RY. CO. (1881), 5 S. C. R. 179; 3 A. R. 446; 42 U. C. R. 90.—**CAN.**

2259 iv. ——.]—On facts which showed that a freight agent of a railway co. by a series of fraudulent transactions issued receipts for goods which were never delivered to the co.:—*Held:* this was not an act within scope of his authority as the co.'s agent, & the co. was not liable.—OLIVER *v.* GREAT WESTERN RY. CO. (1877), 28 C. P. 143.—**CAN.**

2259 v. ——.]—The general proposition that a principal is liable for the fraud, mistake, or misstatement of his agent, where the latter has acted within scope of his authority, does not apply where there is authority to do a specific act, & that authority is exceeded by the agent, who alleges an authority he does not in fact possess: *Udell* v. *Atherton*, 7 H. & N. 172; *Barwick* v. *English Joint Stock Bank*, L. R. 2 Exch. 259; *Weir* v. *Bell*, 3 Ex. D. 245; *Plevins* v. *Downing*, 1 C. P. D. 220, cited.—HOLLAND CHINA TRADING CO. *v.* TONG TAI FIRM (1907), 2 Hong Kong, 54.—**HONG KONG.**

2260. ——.]—C. was in the habit of buying corn & directing the vendor to deliver it at R.'s wharf, to be conveyed by R. to X.; R.'s agent, B., gave receipts for all corn so delivered, & C., on production of the receipt by vendor, paid him the price. On one occasion, when C. had bought wheat of L., B. & L. conspired together, & B. gave L. a receipt for delivery of the wheat, though it had not been delivered; L. in B.'s presence gave C. the false receipt & received the price of the wheat from him. In an action by C. against R., B.'s principal, for the false representation:—*Held:* (1) even if R. must be taken to have known that it was the course of business of C. to pay the price on production of B.'s receipts, he did not contract with C. that he should give such receipts; (2) he was not answerable for B.'s fraud.—COLEMAN *v.* RICHES, No. 2259, *ante*.

Annotations:—**Distd.** Udell *v.* Atherton (1861), 7 H. & N. 172; Ludgater *v.* Love (1881), 44 L. T. 694, C. A. **Refd.** Whitechurch *v.* Cavanagh, [1902] A. C. 117, H. L.

2261. ——.]—In order to charge any person with a fraud which has not been personally committed by him, the agent who has committed the fraud must have committed it while acting within scope of his authority, while doing something & purporting to do something on behalf of his principal. If the person is doing something within scope of his authority & purporting to do it for his principal, although in doing it he commits a wrong which his principal neither sanctioned nor intended, the principal may be liable. If the person, although he has been employed as agent, is not, in the transaction which is the wrongful act, acting for or purporting to be acting for his principal, it is impossible to treat that as the fraud of the principal (LORD HERSCHELL, C.).—THORNE *v.* HEARD & MARSH, No. 2304, *post*.

Annotations:—**Expld.** *Re* McCallum, McCallum *v.* McCallum, [1901] 1 Ch. 143, C. A. **Distd.** Hambro *v.* Burnand, [1903] 2 K. B. 399. **Apld.** Lloyd *v.* Grace, Smith, [1912] A. C. 716, H. L. **Refd.** How *v.* Winterton, [1896] 2 Ch. 626, C. A.

2262. Representation within implied authority—Agent employed to let property.]—Where a principal employs an agent to let or to find a purchaser for a house, he authorises the agent to state any fact or circumstance which may relate to the value of the property.

Where an agent for sale of a house untruly represented to an intending purchaser that a third person was prepared to buy the house at a high price, & if he could not buy he would rent it at a high rent:—*Held:* the principal was answerable for the representation by the agent, & could not enforce the contract.—MULLENS *v.* MILLER (1882), 22 Ch. D. 194; 52 L. J. Ch. 380; 48 L. T. 103; 31 W. R. 559.

Annotation:—**Refd.** *Re* Consort Deep Level Gold Mines, *Ex p.* Stark, *Ex p.* Elliston (1896), 45 W. R. 227.

2263. ——**Bank manager—As to security.**]—Pltf.'s wife kept a deposit account at a joint-stock bank. The manager of the bank represented to her that the bank had an equitable mtge. on some houses of a third person, subject to a mtge. of £400, & advised her to purchase the houses for £595, £400 to be paid in discharge of the mtge. & £195 to the bank. Pltf.'s wife consented, & took her deposit receipts to the manager at the bank, who, on presenting them to a clerk, obtained from her £595. The manager then gave her a receipt in his own name, stating that £195 was the balance of purchase-money of the houses, & that £400 was deposited with him to pay off the mtge. He afterwards absconded with the £595. Pltf. having brought an action against the bank to recover the money, the jury found that the manager intended to make the wife believe, & she did believe, that the manager was acting in this transaction as agent for the bank:—*Held:* the bank was responsible for the money.—THOMPSON *v.* BELL, No. 2299, *post*.

2264. —— **As to accommodation of railway company.**]—An agent employed to obtain custom for a ry. co. does not bind the co. by his representations as to the ry. accommodation.—KIRBY *v.* GREAT WESTERN RY. CO. (1868), 18 L. T. 658.

For full anns., *see* CARRIERS.

2265. Scope of authority—Auctioneer's statement as to extent of property sold.]—To a claim for specific performance of a contract for the purchase of land, deft. pleaded that he was deceived as to the extent of the property by a parol declaration of the auctioneer, as agent of pltfs., to his (deft.'s) agent, at the time of the sale:—*Held:* evidence of the auctioneer's representation was admissible to show that deft. was induced by fraud to enter into the contract, so as to get rid of the contract altogether, but not for the purpose of obtaining performance of the contract with an abatement of price.

J. conveyed the estate in question to trustees, pltfs., on trust to sell for the payment of his debts. Representations made by J. to deft. prior to the sale as to the extent of the estate:—*Held:* not binding on pltfs., as it did not appear that J. was employed by them to show or describe the lands, or was in any way their agent.—WINCH *v.* WINCHESTER (1812), 1 Ves. & B. 375; 35 E. R. 146.

For full anns., *see* AUCTION & AUCTIONEERS.

2266. Authority inferred from subsequent conduct.]—In an action for false representations on the sale of a ship, such having been made by an agent without any express authority from deft.:—*Held:* the judge was warranted in leaving it to the jury to infer from the subsequent conduct of deft., *e.g.* from his not having repudiated them when apprised of them, that he was privy to, or impliedly assented to, the misrepresentations of his agent.—WRIGHT *v.* CROOKES (1840), 1 Scott, N. R. 685; 9 L. T. 53.

2267. Principal not liable where act unauthorised & made for agent's own benefit.]—A principal is not liable in an action of deceit for the unauthorised & fraudulent act of an agent committed, not for

2262 i. *Representation within implied authority.*]—LAMARCHE *v.* BEAVER STOVE, ETC., CO. (1916), 23 R. L. N. S. 104 (Que.).—**CAN.**

2267 i. *Principal not liable where act unauthorised & made for agent's own benefit.*]—Where a person is acting outside scope of his apparent authority, & for his own private ends, representations made in furtherance thereof cannot be said to be made on behalf of the principal, & the belief of the person acting upon such representations is immaterial as against an obvious want of authority. *Barwick v. English Joint Stock Bank*, L. R. 2 Exch. 259; *Wyllie v. Pollen*, 32 L. J. Ch. 782; *Mackay v. Commercial Bank of New Brunswick*, L. R. 5 P. C. 394; *British Mutual Banking Co. v. Charnwood Forest Ry. Co.*, 18 Q. B. D. 714, cited.—RICHARDS *v.* BANK OF NOVA SCOTIA (1896), 26 S. C. R. 381.—**CAN.**

2267 ii. ——*Or of others.*]—In an action to set aside a chattel mtge. made by C. in favour of deft., it appeared that C. being insolvent was introduced by a creditor to the latter's solr., who brought about the mtge. in question, the money raised thereby being applied by the solr. at C.'s direction in satisfaction of the creditor's claims. Deft. had no notice of any intention on the part of C. or the solr. to prefer any creditor of C. Subsequently C. made an assignment for the benefit of creditors to pltf., who brought an action against deft. on the ground that the latter was responsible for the fraud of his agent, the solr.:—*Held:* the solr. was agent of deft. only in the matter of effecting the mtge.; in paying over the money after it was advanced the solr. was acting for another principal, & this act not being one from which deft. derived any benefit or of which he had any knowledge, he was not liable.—GIBBONS *v.* WILSON (1889), 17 O. R. 290; 17 A. R. 1.—**CAN.**

2267 iii. ——.]—Statements fraudulently made by an agent for his own

Sect. 3.—Contracts made by agent: Sub-sect. 4, A. & B.]

the general or special benefit of the principal, but for the agent's private ends.

The secretary of a co. answered questions which were put to him as secretary as to the validity of certain debenture stock of the co. The answers were untrue & were fraudulently made by the secretary for his own benefit. In an action against the co. for loss arising from the representations, the jury found that the secretary was held out by the co. as a person to answer such inquiries on its behalf:—*Held:* the co. not liable.—BRITISH MUTUAL BANK CO., LTD. *v.* CHARNWOOD FOREST RY. CO. (1887), 18 Q. B. D. 714; 56 L. J. Q. B. 449; 57 L. T. 833; 52 J. P. 150; 35 W. R. 590; *sub nom.* MUTUAL BANKING CO. *v.* CHARNWOOD FOREST RY. CO., 3 T. L. R. 498, C. A.

Annotations:—**Distd.** Crapp *v.* East Stonehouse L. B. (1889), 5 T. L. R. 501, C. A.; Tomkinson *v.* Balkis Consolidated Co. (1891), 60 L. J. Q. B. 558, C. A. **Foll.** Thorne *v.* Heard, [1894] 1 Ch. 599, C. A. **D'std.** Spooner *v.* Browning, Todd & Whish (1897), 77 L. T. 685, N. P.; Trott *v.* National Discount Co. (1900), 17 T. L. R. 37. **Consd. & Apld.** Hambro *v.* Burnand, [1903] 2 K. B. 399. **Consd. & Distd.** Ruben *v.* Great Fingall Consolidated, [1904] 1 K. B. 650. **Apld.** Anglo-American Oil Co. *v.* Manning, [1908] 1 K. B. 536. **Consd.** Lloyd *v.* Grace, Smith, [1912] A. C. 716. With the most profound respect for Lord Bowen I cannot think that the opinion expressed by him in *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* in reference to the question under discussion can be supported either on principle or on authority (LORD MACNAGHTEN). **Refd.** Whitechurch *v.* Cavanagh, [1902] A. C. 117; Malcolm, Brunker *v.* Waterhouse (1908), 24 T. L. R. 854. **Mentd.** Bishop *v.* Balkis Consolidated Co. (1890), 25 Q. B. D. 77; Moss S.S. Co. *v.* Whinney, [1912] A. C. 254.

2268. ——.]—Where the secretary of a co. is acting fraudulently for his own illegal purposes, no representation made by him relating to the matter binds the co.; for a representation made in such circumstances, whether express or implied, is also part of the same fraud, & cannot rightly be considered to be made by the servant as agent or on behalf of his master (LORD DAVEY).—RUBEN & LADENBURG *v.* GREAT FINGALL CONSOLIDATED, [1906] A. C. 439; 75 L. J. K. B. 843; 95 L. T. 214; 22 T. L. R. 712; 13 Mans. 248, H. L.

Annotations:—**N.F.** Lloyd *v.* Grace, Smith, [1912] A. C. 716. I cannot think that the opinion expressed by Lord Davey in *Ruben* v. *Great Fingall Consolidated* in reference to the question under discussion can be supported either on principle or on authority; the opinion was not necessary for the decision in that case & I dissent most respectfully from it (LORD MACNAGHTEN). **Mentd.** Russo-Chinese Bank *v.* Li Yau Sam, [1910] A. C. 174, C. A.

2269. Application to companies & corporations.]—Strictly speaking, a corpn. cannot itself be guilty of fraud. But where a corpn. is formed for the purpose of carrying on a trading or other speculation for profit, such as forming a ry., these objects can only be accomplished through the agency of individuals; & if the agents conduct themselves fraudulently, so that if they had been acting for private employers the persons for whom they were acting would have been affected by their fraud, the same principles must prevail where the principal under whom the agent acts is a corpn. (LORD CRANWORTH, C.).—RANGER *v.* GREAT WESTERN RY. CO. (1854), 5 H. L. Cas. 72; 24 L. T. O. S. 22; 18 Jur. 795; 10 E. R. 824, H. L.

Annotations:—**Apprvd.** *Re* Royal British Bank, *Ex p.* Nicol (1859), 3 De G. & J. 387. **Consd.** Western Bank of Scotland *v.* Addie, Addie *v.* Western Bank of Scotland (1867), L. R. 1 Sc. & Div. 145. **Apprvd.** Mackay *v.* Commercial Bank of New Brunswick (1874), L. R. 5 P. C. 394. **Refd.** Scott *v.* Liverpool Corpn. (1858), 3 De G. & J. 334; New Brunswick & Canada Ry. Co. *v.* Conybeare (1862), 9 H. L. Cas. 711; Wildes *v.* Russell (1866), Har. & Ruth. 689; Phillips *v.* Eyre (1870), 10 B. & S. 1004, Ex. Ch.; Taff Vale Ry. Co. *v.* Amalgamated Soc. of Railway Servants, [1901] A. C. 426; Lodder *v.* Slowey, [1904] A. C. 442, P. C. **Mentd.** *Re* London, Birmingham & Buckinghamshire Ry. Co., *Ex p.* Curzon (1857), 6 W. R. 141; Thornhill *v.* Neats (1860), 8 C. B. N. S. 831; Thames Iron Works & Shipbuilding Co. *v.* Royal Mail Steam Packet Co. (1862), 13 C. B. N. S. 358; Hill *v.* South Staffordshire Ry. Co. (1865), 11 Jur. N. S. 192; Stegmann *v.* O'Connor (1899), 81 L. T. 627, C. A.

2270. ——.]—If an incorporated co., acting by an agent, induces a person to enter into a contract for the benefit of the co., the co. can no more repudiate its fraudulent agent than an individual can repudiate his; the co. is bound by the misrepresentations of its agent (LORD CRANWORTH).—NEW BRUNSWICK & CANADA RY. & LAND CO. *v.* CONYBEARE, No. 2273, *post*

Annotations:—**Refd.** Western Bank of Scotland *v.* Addie, Addie *v.* Western Bank of Scotland (1867), L. R. 1 Sc. & Div. 145; Houldsworth *v.* City of Glasgow Bank (1880), 5 App. Cas. 317.

For full anns., *see* S. C. No. 2273, *post*.

2271. —— Corporation taking benefit.]—A co. cannot retain any benefit which they have gained through the fraud of their agents (LORD CHELMSFORD, C.).

Corporate bodies may be made responsible for the frauds of agents, to the extent to which the cos. have profited by those frauds (LORD CRANWORTH).—WESTERN BANK OF SCOTLAND *v.* ADDIE, ADDIE *v.* WESTERN BANK OF SCOTLAND (1867), L. R. 1 Sc. & Div. 145.

Annotations:—**Consd.** Mackay *v.* Commercial Bank of New Brunswick (1874), L. R. 5 P. C. 394. **Apld.** Blake *v.* Albion Life Assce. Soc. (1878), 4 C. P. D. 94. **Consd.** Houldsworth *v.* City of Glasgow Bank (1880), 5 App. Cas. 317. Lord Cranworth's words "to the extent to which the cos. have profited by those frauds" may perhaps

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benefit are not binding on the principal.—JOWAHIR LALL *v.* POOKURAM SINGH (1866), 6 W. R. 252.—**IND.**

2267 iv. ——.]—A principal is liable for the wrongs of his agent committed within scope of his authority & purporting to be for the benefit of the principal, although no express order of the principal can be shown; but, where the fraud is committed by the agent when he was acting, not in the interest of his employer, but entirely in his own interests, the principal cannot be held responsible for the consequences of his fraudulent conduct. *Barwick* v. *English Joint Stock Bank*, L. R. 2 Exch. 259; *Houldsworth* v. *City of Glasgow Bank*, 5 App. Cas. 317; *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.*, 18 Q. B. D. 714, cited.—MORRISON *v.* VERSCHOYLE (1901), 6 C. W. N. 429.—**IND.**

2267 v. ——.]—It is not within scope of an agent's authority to bind his principals by a contract which, although made ostensibly on their behalf, is, to the knowledge of the other party, really made for his own benefit even though the contract is of a kind which he has a general authority to make. *Howard* v. *Braithwaite*, 1 Ves. & B. 202; *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.*, 18 Q. B. D. 714; & *Shipway* v. *Broadwood*, [1899] 1 Q. B. 369, cited.—LYSAGHT BROTHERS & CO., LTD. *v.* FALK (1905), 2 C. L. R. 421.—**AUS.**

2269 i. *Application to companies & corporations.*]—The ordinary doctrines of agency are as applicable to corpns. as to private persons, whether they arise in questions of contract or tort & fraud. A corpn. is therefore liable for the tort of its agent when the agent is acting in the course of & within scope of his employment. *Western Bank of Scotland* v. *Addie* (1867), L. R. 1 Sc. & Div. 145, cited.—CITIZENS' LIFE ASSURANCE CO., LTD. *v.* BROWN, [1904] A. C. 423; 73 L. J. P. C. 102; 90 L. T. 739; 53 W. R. 176; 20 T. L. R. 497, P. C.—**CAN.**

2269 ii. ——.]—If a co. are negligent in the appointment of an agent & appoint a rascal they must be responsible for his rascality in dealing with the co.'s affairs. *Hunter* v. *Walters*, 7 Ch. App. 75; *King* v. *Smith*, [1900] 2 Ch. 425; *Howatson* v. *Webb*, [1907] 1 Ch. 537; *Bagot* v. *Chapman*, [1907] 2 Ch. 222, cited.—DOM. PERM. LOAN CO. *v.* MORGAN (1910), 16 W. L. R. 7; 17 B. C. R. 366; 50 S. C. R. 485.—**CAN.**

2271 i. ——*Corporation taking benefit.*]—A co. cannot retain a benefit obtained through the fraud of its agent.—NATIONAL BANK *v.* NATIONAL MTGE. & AGENCY CO., VINCENT (1885), L. R. 3 S. C. 257.—**N.Z.**

2271 ii. —— ——.]—Where the president of an incorporated co. made a promissory note in the co.'s name without authority, & discounted it with the co.'s bankers, the proceeds being credited to the co.'s account & paid out by cheques in the co.'s name to its creditors, whose claims should have been paid by the president out of funds which he had previously misappropriated:—*Held:* the bankers, who had taken the note in good faith, were entitled to charge the amount thereof at maturity against the co.'s account.—BRIDGEWATER CHEESE FACTORY CO. *v.* MURPHY (1896), 26 S. C. R. 413.—**CAN.**

require some enlargement or explanation; but subject to that qualification I am of opinion that this doctrine is in principle right (LORD SELBORNE). **Refd.** Chapleo *v.* Brunswick Benefit Bldg. Soc. (1880), 5 C. P. D. 331; Adam *v.* Newbigging (1888), 13 App. Cas. 308; Capel *v.* Sims Ships' Compositions Co. (1888), 57 L. J. Ch. 713; Citizens Life Assce. *v.* Brown, [1904] A. C. 423, P. C.; Lloyd *v.* Grace Smith, [1912] A. C. 716; Armstrong *v.* Jackson, [1917] 2 K. B. 822. **Mentd.** *Re* Overend, Gurney, Oakes *v.* Turquand (1867), L. R. 2 H. L. 325; Swift *v.* Winterbotham (1873), 42 L. J. Q. B. 111; Weir *v.* Bennett (1877), 3 Ex. D. 32; Erlanger *v.* New Sombrero Phosphate Co. (1878), 3 App. Cas. 1218, H. L.; Lewlands *v.* National Employers' Accident Assocn. Co. (1885), 54 L. J. Q. B. 428, C. A. Peek *v.* Derry (1887), 37 Ch. D. 541, C. A.; Derry *v.* Peek (1889), 14 App. Cas. 337; Lynde *v.* Anglo-Italian Hemp Spinning Co., [1896] 1 Ch. 178; Salomon *v.* Salomon, [1897] 2 A. C. 22; Hambro *v.* Burnand, [1903] 2 K. B. 399.

2272. —— ——.]—An action for deceit will lie against a corpn. for the fraud of their agent, acting within scope of his authority, where the corpn. take any benefit from such fraud.—MACKAY *v.* COMMERCIAL BANK OF NEW BRUNSWICK, No. 2248, *ante*.

Annotations:—**Expld.** Bolingbroke *v.* Swindon L. B. (1874), L. R. 9 C. P. 575. **Consd.** Weir *v.* Barnett (1877), 3 Ex. D. 32. **Apprvd.** Swire *v.* Francis (1877), 3 App. Cas. 106, P. C. **Expld.** Houldsworth *v.* City of Glasgow Bank (1880), 5 App. Cas. 317, H. L. **Consd.** Ludgater *v.* Love (1881), 44 L. T. 694, C. A.; British Mutual Banking Co. *v.* Charnwood Forest Ry. Co. (1887), 18 Q. B. D. 714, C. A.; Citizens' Life Assce. *v.* Brown, [1904] A. C. 423, P. C.; Lloyd *v.* Grace, Smith, [1912] A. C. 716, H. L. **Refd.** Hogarth *v.* Wherley (1875), 32 L. T. 800; Burmah Trading Corpn. *v.* Mirza Mahomed Ally Sherazee (1878), L. R. 5 Ind. App. 130, P. C.; Bank of New South Wales *v.* Owston (1879), 4 App. Cas. 270, P. C.; Chapleo *v.* Brunswick Bldg. Soc. (1881), 6 Q. B. D. 696, C. A.; Mullens *v.* Miller (1882), 31 W. R. 559; Spooner *v.* Browning, Todd & Whish (1897), 77 L. T. 685; Hambro *v.* Burnand, [1903] 2 K. B. 399; Kettlewell *v.* Refuge Assce., [1907] 2 K. B. 242; Lloyd *v.* Grace, Smith, [1911] 2 K. B. 489, C. A.

For full anns., *see* S. C. No. 2248, *ante*.

See, further, COMPANIES; CORPORATIONS.

Representations made by directors & secretaries of public companies—Authority.]—*See* COMPANIES.

2273. Restitution of property acquired through false representation of agent.]—Where a claim is made for restitution of property acquired through false representations made by an agent, though the principal was no party to the representations & did not distinctly authorise them, nevertheless it is inconsistent with natural justice to permit property acquired through the medium of the representations to be retained by the principal (LORD WESTBURY, C.).—NEW BRUNSWICK & CANADA RY. & LAND CO. *v.* CONYBEARE (1862), 9 H. L. Cas. 711; 31 L. J. Ch. 297; 6 L. T. 109; 8 Jur. N. S. 575; 10 W. R. 305; 11 E. R. 907, H. L.

Annotations:—**Refd.** Houldsworth *v.* City of Glasgow Bank (1880), 5 App. Cas. 317, H. L.; Hambro *v.* Burnand, [1903] 2 K. B. 399. **Mentd.** Kisch *v.* Central Ry. Co. of Venezuela (1865), 3 De G. J. & Sm. 122, L.JJ.; *Re* Leeds Banking Co., *Ex p.* Barrett (1865), 5 New Rep. 460; Western Bank of Scotland *v.* Addie, Addie *v.* Western Bank of Scotland (1867), L. R. 1 Sc. & Div. 145; A.-G. & National Debt Reduction Comrs. *v.* Ray (1874), 9 Ch. App. 402 n.; Gover's Case (1875), L. R. 20 Eq. 114; McKeown *v.* Boudard, Peveril Gear Co. (1896), 74 L. T. 310.

B. Particular Instances.

Representations inducing subscriptions for or purchases of shares in public companies.]—*See* COMPANIES.

Representations as to insurances.]—*See* INSURANCE.

Representations as to credit or reputation of third parties.]—*See* Nos. 87, 88, 89, *ante*.

2274. Appointment obtained by fraud.]—If an agent be employed to obtain an appointment, & he procure it by fraud, the principal cannot take advantage of any agreement such agent may have entered into for the purpose of securing the appointment.—RICHARDSON *v.* MELLISH (1824), 9 Moore, C. P. 435.

2275. Purchase of business—As to turnover.]—A baker was desirous of disposing of his shop & the goodwill of his business, & an advertisement stating that the house was doing twelve sacks a week was inserted in a newspaper by a broker in consequence of a conversation with the baker's wife, who managed the business for him, in which conversation she told the broker that they did between nine & ten sacks a week, upon which he said, "We must make it twelve for the paper." In consequence of the advertisement, a person desirous of purchasing went to the wife, & said to her, "Are you really doing anything like this business?" to which she replied, "Yes, we are doing eleven sacks," & appealed to the man in the shop, who confirmed her statement. The baker himself did not appear at all in any part of the transaction, except that he received the purchase-money, & paid the broker his commission. In an action brought by purchaser on the representation contained in the advertisement:—*Held:* the baker was personally & individually answerable in damages, inasmuch as, though he did not make any representation himself, yet he made the wife his agent, & was bound by her statements.—TAYLOR *v.* GREEN (1837), 8 C. & P. 316.

2276. Lease induced by — As to nature of contract submitted for signature.]—Deft., possessed of a leasehold estate for the residue of a 75 years' term, & desirous of underletting same for the whole term, save a few days, at an increased reserved rent, advertised as for sale by private contract "the residue of a long leasehold estate, at a moderate ground rent," with various encomiastic expressions of the investment, & a reference to himself for further information, but not stating he was himself the vendor. This advertisement was seen by pltf. the day before the last day fixed for the sale. He immediately saw deft., & was by him referred to an agent near the premises, who induced pltf. not to inspect the premises closely, & to sign a contract, which the agent stated to be a usual & proper form for the purchase of leasehold estates at a ground rent. This contract, in fact, was an agreement to pay a considerable premium for an underlease from deft., at a rent which appeared to be a full rack rent. The agent at the same time dispensed with payment of the deposit, taking an I.O.U. from pltf., a perfect stranger:—*Held:* pltf. entitled to have the I.O.U. & the contract delivered up to be cancelled, on the ground of fraudulent misrepresentation. — BARTLETT *v.* SALMON (1855), 1 Jur. N. S. 277; *revsd.* on another point, 6 De G. M. & G. 33.

2277. Lloyd's certificate—Complicity of vendor principal.]—B. induced a Lloyd's surveyor to report that a ship had been repaired & hung (*i.e.*, held up so as to show the state of her bottom), & on that report obtained an A1 certificate. In fact, the repairs had not been done, nor had the ship been hung, but B. promised at the time he induced the surveyor to make his report that the repairs would be done, & the ship would be hung:—*Held:* (1) at the time the report was given on the faith of which the certificate was

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2273 i. *Restitution of property acquired through false representation of agent.*]—A principal cannot retain a profit made by the fraud of his agent, whether the principal authorised the fraud or not.—CANADIAN FINANCIERS, LTD. *v.* HONG WO (1912), 17 B. C. R. 8; 19 W. L. R. 843; 1 D. L. R. 38; 1 W. W. R. 677.—**CAN.**

2273 ii. ——.]—Pltf. was induced to subscribe money by the fraudulent misrepresentations of deft.'s agent:—*Held:* whether the misrepresentations were made wilfully or not, deft. was bound by them, & pltf. entitled to recover back his money.—EVANS *v.* MACMICKING (1909), 2 Alt. L. R. 5.—**CAN.**

2273 iii. ——.]—A person, though himself innocent, cannot retain a benefit obtained by the fraud of another, unless a valuable consideration has been given.—CLYDESDALE BANK *v.* PAUL (1877), 4 R. 626.—**SCOT.**

Sect. 3.—Contracts made by agent: Sub-sect. 4, B. Sect. 4: Sub-sect. 1, A.]

obtained no fraud had actually been committed, however it might have been contrived by the agent, for the surveyor knew the repairs had not then been done, nor the ship hung, & he relied on the agent's promise that these things should be done; (2) if the principal, the vendor, was an accomplice in a contrivance by the agent fraudulently to get the report, in order to get the certificate, he was liable in an action by the vendee; (3) if not, & if vendor was not a party to any fraudulent representation, he was entitled to succeed.—TINDALL *v.* BASKETT, BASKETT *v.* TINDALL (1861), 2 F. & F. 644.

2278. Goods obtained by fraud—Complicity of principal.]—A., agent for sale of manures on commission, had been employed in that capacity by deft., a manure dealer, & being indebted to deft. on balance of account in a sum which he was unable to pay, it was arranged he should obtain manures from other persons & send them to deft. in discharge of his debt. He purchased of pltf. a quantity of manure "at 3 months' credit to sell again," which by A.'s direction was sent by pltf. to A. at F. station, where they were received & taken away by deft., to whom A. had forwarded the delivery note. On the trial of an action by pltf. against deft. to recover the value of the goods the judge stopped deft.'s counsel from calling deft. as a witness, & told the jury if they thought A. represented himself to pltf. as an ordinary buyer on sale for profit, & he was not so, but he procured the goods for the purpose of handing them over to deft., that would be a fraud upon pltf., & he would be entitled to the verdict, even though deft. was no party to the fraud:—*Held:* (1) that was a misdirection; (2) the question of deft.'s *bona fides* in the matter ought to have been left to the jury.—DANTEC *v.* ASHWORTH (1866), 14 L. T. 488; 30 J. P. 695.

2279. Statement as to existence of restrictive covenants—Fact not law.]—W. entered into negotiations with deft.'s agent for the purchase of a house for the purpose of carrying on a boys' school, & was induced to enter into a contract to purchase the house by his representing that there was no covenant which would interfere with W.'s carrying on his school there. W. subsequently discovered the house was subject to a covenant which on its true construction, though not in express terms, prohibited the carrying on of the school. He brought an action for rescission of the contract & return of the deposit made by him, with interest:—*Held:* (1) the agent's representation was as to a fact, & not a mere statement of law; (2) pltf. was entitled to succeed in his action.—WAUTON *v.* COPPARD, [1899] 1 Ch. 92; 79 L. T. 467; 47 W. R. 72; 43 Sol. Jo. 28.

2280. Misstatement as to identity of purchaser.]—If, in negotiations for a contract, an agent make a false representation as to the name of his principal, knowing that if he disclosed the true name the other party would not enter into the contract, the ct. will not order specific performance of the contract.

A. signed a contract for the sale of a house to B. Before signing he asked, "Are you buying for C. or his nominees?" B. answered "No." He was, in fact, buying for nominees of C., to whom he afterwards assigned his contract. He & they brought an action for specific performance:—*Held:* the contract could not be specifically performed.—ARCHER *v.* STONE (1898), 78 L. T. 34.

Annotation:—**Distd.** Nash *v.* Dix (1898), 78 L. T. 445.

2281. Representation by purchaser's agent that no commission payable.]—Defts. agreed with pltf., an estate agent, to pay him commission if he introduced a purchaser for certain property. P. communicated with pltf. for purchase of the property by A., but as A. would not pay the price named by defts., negotiations were broken off. Subsequently P. under the name of N. communicated direct with defts., & assuring them that he had not been introduced by any agent, so that no commission would be payable by defts., induced them to sell the property to A. at a price below pltf.'s limit. Pltf. thereupon claimed commission. Defts. claimed to be indemnified by A. who had been added as third party:—*Held:* (1) A. was responsible for the representation of his agent, P., that no commission would be payable; (2) he was liable to indemnify defts.—WARMAN *v.* NEWMANS, LTD. (1901), 17 T. L. R. 509.

SECT. 4.—PRINCIPAL'S LIABILITY FOR TORTS COMMITTED BY AGENT.

Fraud & misrepresentation. *See* Sect. 3, Sub-sect. 4, *ante*.

Liability for torts committed by sub-agents. *See* Part VI., Sect. 4, *ante*.

SUB-SECT. 1.—IN GENERAL.

A. General Rules as to Principal's Liability.

2282. General rule—Principal liable.]—The general rule is that the principal is answerable for

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PART IX. SECT. 3, SUB-SECT. 4.—B.

2280 i. *Misstatement as to identity of purchaser.*]—Pltfs., land agents, were instructed by a railway to purchase certain land, & M., their clerk, saw deft., the owner, who said he would take £1,500, which was the price M. when asked said he thought it was worth. Subsequently M. told deft. he had found a purchaser, A., & M. paid £25 deposit, & deft. acknowledged receipt for this from pltfs. & signed a document containing the terms agreeing to pay pltfs.' commission:—*Held:* pltfs. were not bound to inform deft. that the railway co. were buying his land, but they were liable for the misrepresentation of M., & specific performance must be refused.—LOWES *v.* NICHOLLS (1911), 19 W. L. R 646.—**CAN.**

w. *Misstatement as to identity of partner.*]—A. was induced by the representations of C. to enter into partnership with B., believing him to be proprietor of certain works. D., for whom C. was general agent, was in reality the proprietor:—*Held:* A. was entitled to recover sums *bonâ fide* expended upon the property from D. to extent to which he was *lucratus* thereby.—DUFF, MOSS & CO. *v.* KIPPEN (1871), 8 Sc. L. R. 299.—**SCOT.**

PART IX. SECT. 4, SUB-SECT. 1.—A.

2282 i. *General rule—Principal liable.*]—A principal is liable for the misfeasance or tort of his agent, when such misfeasance or tort has been done or committed with the subsequent assent, adoption, or ratification of the principal. When it is found that a principal was cognisant of & countenanced the act of his agent it may be inferred that he assented to it.—RAI KISHAN CHAND *v.* SHEO BARAM RAI (1875), 7 N. W. 121.—**IND.**

2282 ii. —— ——.]—Defts.' account at the bank being overdrawn, a resolution of the council was passed authorising the mayor to borrow from some banking institution a sum not exceeding £2,000 to meet current liabilities until the taxes were available, & authorising him & the town clerk to sign the necessary documents therefor, & to affix the corpn. seal. A promiscory note, in accordance with this resolution, was made, & was discounted at the bank of M., the proceeds being placed to defts.' credit. On a later date a similar note was made & discounted at pltfs.' bank, where defts. had kept an account which was now virtually closed, though there was a small balance still remaining to their credit. The last note was in fact fraudulently procured to be made & discounted by T., who was defts.' clerk & treasurer, but of his misdoings pltfs. knew nothing. T., as treasurer, then chequed out of pltfs.' bank £1,656 of the amount, & this he deposited to defts.' credit at the bank of M., making payments out of it for authorised corpn. purposes,

every such wrong of the agent as is committed in the course of his employment & for the principal's benefit, though no express command or privity of the principal is proved. It is true, he has not authorised the particular act, but he has put the agent in his place to do that class of acts, & he must be answerable for the manner in which the agent has conducted himself in doing the business in which his principal placed him.—BARWICK *v.* ENGLISH JOINT STOCK BANK, No. 2245, *ante*.

Annotations :—**Apprvd.** The Thetis (1869), L. R. 2 A. & E. 365. **Apld.** Swift *v.* Winterbotham & Goddard (1873), L. R. 8 Q. B. 244. **Consd.** Swift *v.* Jewsbury (1874), L. R. 9 Q. B. 301, Ex. Ch. **Apprvd.** Mackay *v.* Commercial Bank of New Brunswick (1874), L. R. 5 P. C. 394 ; Swire *v.* Francis (1877), 3 App. Cas. 106, P. C. **Distd.** Weir *v.* Bell (1878), 3 Ex. D. 238, C. A. **Apld.** Chapleo *v.* Brunswick Benefit Bldg. Soc. (1880), 5 C. P. D. 331. **Distd.** Chapleo *v.* Brunswick Benefit Bldg. Soc. (1881), 6 Q. B. D. 696, C. A. **Apprvd.** British Mutual Banking Co. *v.* Charnwood Forest Ry. Co. (1887), 18 Q. B. D. 714, C. A. ; Thorne *v.* Heard, [1894] 1 Ch. 599, C. A. **Apld.** Spooner *v.* Browning, Todd & Whish (1897), 77 L. T. 685 ; Ormerod *v.* Rochdale Corpn. (1898), 62 J. P. 153 ; Taff Vale Ry. Co. *v.* Amalgamated Soc. of Railway Servants, [1901] A. C. 426 ; Whitechurch *v.* Cavanagh, [1902] A. C. 117. **Consd.** Hamlyn *v.* Houston, [1903] 1 K. B. 81, C. A. **Apld.** Giblan *v.* National Amalgamated Labourers Union of Great Britain & Ireland, [1903] 2 K. B. 600, C. A. **Consd.** Hambro *v.* Burnand, [1903] 2 K. B. 399 ; Ruben *v.* Great Fingall Consolidated, [1904] 1 K. B. 650. **Apprvd.** Ruben *v.* Great Fingall Consolidated, [1906] A. C. 439. **Apld.** Malcolm, Brunker *v.* Waterhouse (1908), 24 T. L. R. 854. **Apprvd.** Wake *v.* Dyer (1911), 75 J. P. 210. **Consd.** Burdett *v.* Horne (1911), 27 T. L. R. 402. **Apprvd.** Lloyd *v.* Grace, Smith, [1911] 2 K. B. 489, C. A. **Refd.** Bolingbroke *v.* Swindon L. B. (1874), L. R. 9 C. P. 575 ; Weir *v.* Barnett (1877), 3 Ex. D. 32 ; *Re* Collie, *Ex p.* Adamson (1878), 8 Ch. D. 807, C. A. ; Citizens' Life Assce. *v.* Brown, [1904] A. C. 423, P. C. ; Kettlewell *v.* Refuge Assce., [1908] 1 K. B. 545, C. A. ; Lloyd *v.* Grace, Smith, [1912] A. C. 716.
For full anns., *see* S. C. No. 2245, *ante*.

2283. —— ——.]—A person is liable for the tortious act of another if he expressly directs him to do it, or if he employs the other as his agent & the act complained of is within scope of the agent's authority (JESSEL, M.R.).—SMITH *v.* KEAL (1882), 9 Q. B. D. 340 ; 47 L. T. 142 ; 31 W. R. 76.
For full anns., *see* EXECUTION.

2284. —— —— **Whether for principal's benefit or not.**]—A principal is liable for the tort of his agent committed in the course of his employment & not beyond scope of his agency, whether the tort is committed for the principal's benefit or not.—LLOYD *v.* GRACE, SMITH & CO., [1912] A. C. 716 ; 81 L. J. K. B. 1140 ; 107 L. T. 531 ; 28 T. L. R. 547 ; 56 Sol. Jo. 723, H. L.

Annotations :—**Distd.** Radley *v.* L. C. C. (1913), 109 L. T. 162. **Refd.** Mair *v.* Rio Grande Rubber Estates, [1913] A. C. 853 ; Armstrong *v.* Jackson, [1917] 2 K. B. 822. **Mentd.** Smith *v.* Martin, [1911] 2 K. B. 775, C. A.

2285. —— —— **Act amounting to felony.**]—It is no defence to an action against a principal for a tort committed by his agent that the act complained of amounted to a felony on the part of the agent, if the act is otherwise within scope of his authority.—OSBORN (OSBORNE) *v.* GILLETT (1873), L. R. 8 Exch. 88 ; 42 L. J. Ex. 53 ; 28 L. T. 197 ; 21 W. R. 409.

Annotations :—**Consd.** Appleby *v.* Franklin (1886), 17 Q. B. D. 93 ; Clark *v.* London General Omnibus Co., [1906] 2 K. B. 648, C. A. ; Berry *v.* Humm, [1915] 1 K. B. 627, C. A. **Refd.** Jackson *v.* Watson, [1909] 2 K. B. 193, C. A. ; Smith *v.* Selwyn, [1914] 3 K. B. 98, C. A. ; The Amerika, [1914] P. 167, C. A.

2286. —— —— **Though act expressly forbidden.**]—The law is not so futile as to allow a principal, by giving secret instructions to his agent, to discharge himself from liability : if an unlawful act is done by an agent in the course of his employment, it is immaterial that the principal directed the agent not to do the act.—LIMPUS *v.* LONDON GENERAL OMNIBUS CO., LTD. (1862), 1 H. & C. 526 ; 32 L. J. Ex. 34 ; 7 L. T. 641 ; 27 J. P. 147 ; 9 Jur. N. S. 333 ; 11 W. R. 149 ; 158 E. R. 993, Ex. Ch.

Annotations :—**Distd.** Tobin *v.* R. (1864), 16 C. B. N. S. 310. **Consd.** Grill *v.* General Iron Screw Collier Co. (1866), 12 Jur. N. S. 727. **Consd.** & **Distd.** Poulton *v.* L. & S. W. Ry. Co. (1867), L. R. 2 Q. B. 534. **Consd.** & **Expld.** Wigan Borough Petn. (1869), 1 O'M. & H. 188. **Consd.**

In an action for money had & received ; —*Held :* plffs. were entitled to recover the $1,656, for T., though acting fraudulently, had acted in a matter within scope of his authority, & defts. had received the benefit of the fraud.—MOLSONS BANK *v.* BROCKVILLE TOWN (1880), 31 C. P. 174.—**CAN.**

2282 iii. —— ——.]—Where the owners of goods passed at the custom-house had benefited by an under-valuation of such goods on false invoices by taking possession of part of the goods :—*Held :* they could not set up ignorance or want of authority in the party entering them.—LYMAN *v.* ROUTHILLIER (1863), 7 L. C. J. 169.—**CAN.**

2282 iv. —— ——.]—A firm wrote a letter to a bank authorising their agent to sign *per procuration* of their firm all bills, "cheques, cash orders, & other documents necessary to the conducting of our business," & added, "& all vouchers so subscribed will be equally binding as if signed by any member of our firm." The firm thereafter granted to their agent a regularly stamped letter of procuration, in which, after repeating the above authority, they bound themselves "to ratify, homologate, & confirm the actings & doings" of the agent "in respect of all such cheques, orders, drafts, bills, promissory-notes, & negotiable documents." The agent handed these letters to the bank. In the course of his transactions he forged acceptances on several bills which he drew *per procuration* of his principals, & discounted with the bank & applied the proceeds to his own purposes :—*Held :* his principals were liable to the bank for the amounts so advanced, as what the agent had done fell under the authority granted to him by his principal, & within the department of business in which he was specially authorised to transact with the bank.—MAKIN & SONS *v.* UNION BANK (1873), 45 J. 323. —**SCOT.**

2282 v. —— ——.]—A principal is liable for the fraud of his agent if acting within scope of his employment, & the principal is also liable to the extent he has benefited, even if the agent is acting without scope of his employment.—HOCKEY *v.* CLYDESDALE BANK (1898), 1 F. 119 ; 36 Sc. L. R. 119 ; 6 S. L. T. 210.—**SCOT.**

2282 vi. —— ——.]—A principal is liable for wrong done to third parties by his agent, provided that the act is done on his behalf & with the intention of serving his purposes. — ISWAR CHUNDER SANTRA *v.* SATISH CHUNDER GIRI (1902), I. L. R. 30 Calc. 207 ; 7 C. W. N. 126.—**IND.**

2284 i. —— —— *Whether for principal's benefit or not.*]—A principal is liable for the fraud of his agent acting within scope of his authority, whether the fraud be committed for the benefit of the principal or for the benefit of the agent. *Lloyd v. Grace, Smith,* [1912] A. C. 716, cited.—SHERJAN KHAN *v.* ALIMUDDI (1915), 20 Calc. W. N. 268.—**IND.**

2285 i. —— —— *Act amounting to felony.*]—In an action of trover against a landlord for goods distrained for rent by his bailiff :—*Qu :* whether if the taking had been felonious it would have been a defence to the action.—MYERS *v.* SMITH (1858), 4 All. 203.—**CAN.**

2285 ii. —— —— ——.]—The doctrine that a person injured by a felonious act cannot seek civil redress without prosecuting the felon does not apply where a principal is sued in respect of the wrongful acts of his agent.—TALUK BOARD PRESIDENT *v.* BURDE LAKSHMINARAYANA KAMPTHI (1908), 1 L. R. Mad. 51.—**IND.**

2286 i. —— —— *Though act expressly forbidden.*]—The principal is civilly liable to third persons for frauds, deceits, concealments, misrepresentations, torts, negligence & other malfeasances or misfeasances & omissions of duty of his agent in the course of his employment, although the principal did not authorise or participate in, or, indeed, know of, such misconduct, or even if he forbade the acts. The principal is not liable for the torts or negligence of his agent in matters beyond scope of the agency unless he has expressly authorised them to be done, or has subsequently adopted them for his own use & benefit.—SHERJAN KHAN *v.* ALIMUDDI (1916), I. L. R. 43 Calc. 511.—**IND.**

2286 ii. —— —— ——.]—If a servant of a co. commits a tort in the course of his employment, & for the benefit of his employers, whether by their direct orders or not, the employers are liable, even if the act was unknown to or actually forbidden by them.—HARRIS *v.* BRUNETTE SAW MILL (1894), 3 B. C. R. 172.—**CAN.**

Sect. 4.—Principal's liability for torts committed by agent: Sub-sect. 1, A. & B.]

& Distd. Ward *v.* General Omnibus Co. (1873), 42 L. J. C. P. 265, Ex. Ch. **Consd.** Harding *v.* Barker (1888), 53 J. P. 308. **Consd. & Distd.** Vickery *v.* G. E. Ry. Co. (1898), 79 L. T. 121. **Consd.** Whitechurch *v.* Cavanagh, [1902] A. C. 117. **Folld.** Giblan *v.* National Amalgamated Labourers' Union of Great Britain & Ireland, [1903] 2 K. B. 600, C. A. **Consd.** Boyle *v.* Smith (1905), 94 L. T. 30. **Consd. & Distd.** Harris *v.* Fiat Motors (1906), 22 T. L. R. 556. **Consd.** Malcolm, Brunker *v.* Waterhouse (1908), 24 T. L. R. 854. **Expld.** Lloyd *v.* Grace, Smith, [1911] 2 K. B. 489, C. A. **Refd.** Splents *v.* Lefevre (1864), 11 L. T. 114,; Burns *v.* Poulsom (1873), L. R. 8 C. P. 563; British Mutual Banking Co *v.* Charnwood Forest Ry. Co. (1887), 18 Q. B. D. 714, C. A.; Dyer *v.* Munday, [1895] 1 Q. B. 742, C. A.; Flood *v.* Jackson, [1895] 2 Q. B. 21, C. A.; Smith *v.* Martin, [1911] 2 K. B. 775, C. A. **Mentd.** Williams *v.* Jones (1854), 3 H. & C. 256; Submarine Telegraph Co. *v.* Dickson (1864), 33 L. J. C. P. 139; Brown *v.* Foot (1892), 66 L. T. 649; Ruben *v.* Great Fingall Consolidated, [1906] A. C. 439; Anglo-American Oil Co. *v.* Manning, [1908] 1 K. B. 536.

2287. Principal not liable when act outside scope of authority.]—It is consistent with reason & natural justice that a man should be responsible for the skill, diligence & honesty of the agent whom he employs in the transaction of his business, & whom he holds out to the world as worthy of confidence. But the general rule does not apply to a case of particular malice where the acts done are outside scope of the agent's employment, as in the case of the master of a ship doing piratical acts. The principle upon which the cases have been decided appears to be this, fraud may be incidental to the employment of an agent, whereas force can never be (DR. LUSHINGTON).—THE DRUID (1842), 1 Wm. Rob. 391; 1 Notes of Cases, 444; 6 Jur. 441.

Annotations:—**Distd.** The Bold Buccleugh (1850), 3 Wm. Rob. 220; The Seine (1859), Sw. 411. **Consd.** The Ida (1860), Lush. 6. **Distd.** The James Seddon (1866), 35 L. J. Adm. 117. **Consd.** The Lemington (1874), 32 L. T. 69; The Tasmania (1888), 13 P. D. 110; The Ripon City, [1897] P. 226. **Refd.** The Charkieh (1873), L. R. 4 A. & E. 59; The Leon (1881), 6 P. D. 148. **Mentd.** The Castlegate, [1893] A. C. 38.

2288. —— Or where wrongful act for agent's own benefit.]—Where an agent commits a wrong within scope of his employment, & in the interests, or supposed interests, of the principal, & not for his own private & fraudulent purposes, the principal is liable. On the other hand, if the wrong is committed by an agent, not for his principal's purposes or interests, but to carry out the agent's own private ends, the principal is not liable.—MALCOLM, BRUNKER & CO., LTD. *v.* WATERHOUSE & SONS (1908), 24 T. L. R. 854.

B. Principal's Liability for Agent's Conversion, Misappropriation, or Failure to Deliver Goods and Funds of Third Parties.

2289. Baskets with salesman's trade mark sent to consignor of goods—Sent by consignor's agent to other salesmen.]—The name of pltf., a Covent Garden salesman, was registered as an old mark, & was marked upon baskets belonging to him & used by growers of the vegetables consigned to him for sale on commission for the purpose of packing & forwarding their goods to him. Some of the baskets sent by him to one of such growers for such purposes were made use of to send vegetables to other salesmen, & the vegetables were exposed for sale in the baskets by the other salesmen. The business of the grower had been assigned to deft. as trustee for the grower's creditors, & at the time of the wrongful use of the baskets the grower was carrying on the business as agent for deft.:—*Held:* pltf. was entitled to damages (*inter alia*) for conversion of the baskets against deft., notwithstanding that the wrongful acts had been committed contrary to his orders.—MUNRO *v.* HUNTER (1904), 21 R. P. C. 296

2290. Bill paid by one principal—Proceeds converted by agent drawing same on behalf of another principal.]—S., employed by resp. to carry on his business, credited resp. in account with applts. with the sum of 5,800 taels, which he falsely represented to have been advanced in the ordinary course of business on certain goods intended for shipment. He then drew a bill in the name of resp's. firm on applts. for the balance of account, & having received the proceeds of such bill, including the 5,800 taels, appropriated them to his own use. On a special case submitted whether resp. was liable to applts. in the sum with interest from the date of receipt by S.:—*Held:* (1) the proceeds of the bill having been received as above by S., acting throughout within scope of his authority, belonged to resp.; (2) he having thus been paid 5,800 taels without consideration, applts. were entitled to recover back same.—SWIRE *v.* FRANCIS (1877), 3 App. Cas. 106; 47 L. J. P. C. 18; 37 L. T. 554, P. C.

Annotations:—**Apld.** Citizens' Life Assce. *v.* Brown, [1904] A. C. 423, P. C. **Consd.** Lloyd *v.* Grace, Smith, [1912] A. C. 716. **Refd.** Houldsworth *v.* City of Glasgow Bank (1880), 5 App. Cas. 317; Hambro *v.* Burnand, [1903] 2 K. B. 399.

2291. Bonds deposited with agent for custody—Sold & proceeds converted—Similar bonds of another principal substituted.]—Pltfs. & deft. lodged their respective Indian bonds with the same bankers, who afterwards privily & without deft.'s authority sold his bonds. Upon his demand of them they delivered up to him the Indian bonds of pltfs. to the same total amount, & payable to the same obligee (being always the treasurer of the co., who indorsed such bonds in blank before they were circulated), but having different numbers & for different separate sums, & manifestly distinguishable from his own bonds. Deft. did not know they were the property of another, but was told by the bankers that they had exchanged his original bonds for these:—*Held:* deft., having sold pltfs.' bonds so received from his own agents, who had acted *malâ fide* in passing them to him, was liable to *assumpsit* for money had & received to their use.—GLYN *v.* BAKER (1811), 13 East, 509; 104 E. R. 468.

Annotations:—**Distd.** Gorgier *v.* Mieville (1824), 3 B. & C. 45. **Consd. & Distd.** Crouch *v.* Crédit Foncier of England (1873), L. R. 8 Q. B. 374. **Refd.** Partridge *v.* Bank of England (1846), 9 Q. B. 396; Goodwin *v.* Robarts (1875), L. R. 10 Exch. 337.

2292. Deeds & conveyance obtained by managing clerk's fraud—Property sold & converted by him.]—A widow who owned two cottages & a sum of money secured on a mtge., being dissatisfied with the income derived therefrom, consulted a firm of solrs., & saw the managing clerk, who conducted the conveyancing business of the firm without supervision. Acting as the representative of the firm, he induced her to give him instructions to sell the cottages & call in the mtge. money, & for that purpose to give him her deeds (for which he gave a receipt in the firm's name), & also to sign two documents, which were neither read over nor explained to her, & which she believed she had to sign in order to effect the sale of the cottages. These documents were, in fact, a conveyance to him of the cottages & a transfer to him of the mtge. He then dishonestly disposed of the property for his own benefit:—*Held:* the firm was responsible for the fraud committed by its representative in the course of his employment.—LLOYD *v.* GRACE, SMITH, No. 2284, *ante*.

Annotations:—**Distd.** Radley *v.* L. C. C. (1913), 109 L. T. 162. **Refd.** Muir *v.* Rio Grande Rubber Estates, [1913] A. C. 853; Armstrong *v.* Jackson, [1917] 2 K. B. 822. For full anns., *see* S. C. No. 2284 *ante*.

2293. Funds advanced on mortgage—Misappropriated by secretary of mortgagor granting mortgage under forged power of attorney.]—Pltfs., trustees of a society, entered into negotiations with C., clerk of deft. board, for a loan to defts. on the security of the rates. Pltfs. advanced £500 & paid the money to C., who affixed the board's seal to a mtge. of the rates. C. had no authority to seal & issue the mtge., but when asked for his authority, he forged an authority from the chairman of the board to raise the money. C. embezzled the money, absconded & was eventually convicted:—*Held:* (1) the fraud of C., & not defts.' negligence, was the cause of the loss; (2) the act of C. not being done for his employers' benefit, defts. were not bound by it; (3) defts. had not held out C. as having authority to borrow, & the action must fail.—CRAPP *v.* EAST STONEHOUSE LOCAL BOARD (1889), 5 T. L. R. 501, C. A.

2294. Funds received by scrivener in repayment of loan—Not paid over to lender.]—Pltf. having an annuity & having occasion to borrow a sum of money, procured same of R., a scrivener, who was employed to let out money for defts.; the security given for it was out of this annuity, a proportion whereof was set apart to be yearly applied towards this debt, till the whole principal & interest were discharged. R. had received £2,900 for the use of defts. & gave his receipts & had accounted to defts. for above £1,700, but about £1,100 remained in his hands unaccounted for, & he died insolvent. R. was agent for defts., not only in this but in other affairs, & he transacted this matter on their behalf. On a bill by pltf. to redeem:—*Held:* the sum paid to R. should be allowed to pltf. on account.—CLEVELAND (DUCHESS) *v.* DASHWOOD (1701), Freem. Ch. 249; 22 E. R. 1189.

2295. Funds received by servant.]—Where money is paid to the servant & he misapplies it, the party has his remedy against the master or servant at election.—CARY *v.* WEBSTER (1721), 1 Stra. 480; 93 E. R. 647.

2296. Funds paid to clerk of bound bailiff—Not paid over by same.]—J., a bound bailiff of the sheriff, received from the attorney of an execution creditor a writ of *fi. fa.* to levy on the goods of pltf., the execution debtor. L., son & clerk of J., who managed the business of J. at his office, got the warrant from the sheriff directed to J. to execute the writ, & by authority of J. (in J.'s absence) himself seized pltf.'s goods, & put a man in possession. A day or two afterwards the attorney of pltf. paid the amount due to L. at the office of J., & L. received the sum by J.'s authority. The money not being paid over by L. or J., the sheriff treated the first levy as a nullity, & seized pltf.'s goods again. In an action by pltf. against the sheriff, evidence was given that it was the practice of sheriff's officers, either personally or by some representative at their office, to receive the amount due from deft. & to direct the man in possession to withdraw; that it was the usual course when the execution was paid out for the party whose goods were seized to pay the amount at the bailiff's office, who paid it over to the execution creditor:—*Held:* (1) the sheriff was responsible for the seizure made by L., under colour of the *fi. fa.*; (2) as far as pltf. was concerned, the payment to L. was a payment to the sheriff; (3) evidence of the practice was properly admitted.—GREGORY *v.* COTTERELL & SWIFT (1855), 5 E. & B. 571: 25 L. J. Q. B. 33; 26 L. T. O. S. 125; 2 Jur N. S. 16; 4 W. R. 48; 119 E. R. 593, Ex. Ch.

Annotations:—**Expld.** Boulton *v.* Reynolds (1859), 29 L. J. Q. B. 11. In *Gregory* v. *Cotterell* a payment to the assistant of a bailiff was held good on the ground that, the sheriff having power to delegate his authority to his officer, an act good against the officer was good against the sheriff (BLACKBURN, J.). **Distd.** Toms *v.* Wilson (1862), 4 B. & S. 442; Baker *v.* Wicks (1904), 73 L. J. K. B. 410. **Mentd.** Salisbury *v.* Gladstone (1859), 5 Jur. N. S. 369; Bagge *v.* Whitehead (1892), 66 L. T. 815, C. A.

2297. Funds obtained by fraud—Forged mortgage.]—Deft. employed S., his attorney, to obtain a loan of £100 for him on mtge., & placed his title-deeds in the hands of S. S. forged deft.'s signature to a mtge. deed to pltfs. for £420, received the money, & concealed the transaction from deft., to whom he afterwards advanced £198, in various sums, & took from him a mtge. to a third person to cover that advance:—*Held:* pltfs. had no cause of action against deft., even to the extent of £100.—PAINTER *v.* ABEL (ABIL) (1863), 2 H. & C. 113; 2 New Rep. 83; 33 L. J. Ex. 60; 8 L. T. 287; 9 Jur. N. S. 549; 11 W. R. 651; 159 E. R. 47.

Annotation:—**Distd.** Ellston *v.* Deacon (1866), L. R. 2 C. P. 20.

2298. —— With connivance of principal—Admissibility of evidence of similar frauds.]—In an action against a co. to recover a sum of money obtained by the co. from pltf. through a fraud of its agent committed with its knowledge & for its benefit, evidence of similar frauds committed on persons other than pltf. by the same agent, in the same manner, with the knowledge & for the benefit of the co., is admissible on behalf of pltf.—BLAKE *v.* ALBION LIFE ASSURANCE SOCIETY (1878), 4 C. P. D. 94; 48 L. J. K. B. 169; 40 T. L. 211; 27 W. R. 321; 14 Cox, C. C. 246.

Annotations:—**Distd.** R. *v.* Ollis, [1900] 2 Q. B. 758, C. C. R. **Foll.** R. *v.* Bond, [1906] 2 K. B. 389, C. C. R.

2299. Funds received for investment—Misappropriation by clerk—Belief that clerk acting for principal.]—The manager of a local branch of a bank suggested to a lady, who had a deposit account at the local branch, that she would have better interest for her money if she paid off a mtge. due to a third person & a lien held by the bank on two houses, & also purchased the two

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PART IX. SECT. 4, SUB-SECT. 1.—B.

2293 i. *Funds advanced on mortgage—Misappropriated by agent of mortgagee.*]—Pltf. applied to defts. for a loan through W., who styled himself as valuator for defts., & requested that the money should be paid to pltf. "by cheque addressed to W." Defts. remitted the money by a cheque payable to the order of W. & pltf. The cheque was indorsed by pltf., & W. absconded with the money. Pltf. swore that he did not know he was signing a cheque when he indorsed it. On appeal:—*Held:* from the evidence it was clear that W. was acting as agent of defts. & pltf. signed the cheque, supposing it to be a necessary step towards getting the money. W.'s duty was to indorse the cheque to pltf. or to see the money cached pltf.'s hand & W. fraudulently neglected that duty. Defts. who put it in W.'s power to commit the fraud must bear the loss.—FINN *v.* DOMINION SAVINGS & INVESTMENT SOCIETY (1880), 6 A. R. 20.—**CAN.**

x. *Funds received from sale of shares—By secretary of building society acting in private capacity as share broker.*]—Pltf.'s agent placed shares of pltf. in deft. society for sale with the secretary of the society, who was primarily a broker on his own account, & who having effected a sale misappropriated the proceeds:—*Held:* the secretary had been instructed not as secretary but as share broker, & the society was not responsible.—BLYTHE *v.* NAPIER STARR BOWKETT BUILDING SOCIETY (1907), 26 N. Z. L. R. 674.—**N.Z.**

2299 i. *Funds received for investment—Agent for both parties.*]—H., agent of P., managed her affairs generally; he also acted occasionally for L. in finding investments for her money, & on one occasion he represented to L. that P. required a loan of $20,000 for a certain purpose. This sum was handed H. by L., who received from him the receipt. H. paid over part of this sum for the purpose for which it was loaned, & applied the balance to his own use. On H. absconding L. brought an action against P. to recover the balance misappropriated:—*Held:* there was nothing on the face of the receipt to bind P., & she was not liable to L. for the amount in question.—LOW *v.* BAIN (1886), 31 L. C. J. 289.—**CAN.**

Sect. 4.—Principal's liability for torts committed by agent: Sub-sect. 1, B.]

houses. She agreed to carry out the suggestion, & for that purpose gave him her deposit note. He thereupon obtained the money, & misappropriated it:—*Held:* (1) the judge rightly asked the jury whether the manager intended & induced the lady to believe he was acting as agent for the bank in the receipt of the money; (2) the jury rightly answered in the affirmative; (3) the bank was liable to refund the amount.—THOMPSON (THOMSON) *v.* BELL (1854), 10 Exch. 10; 23 L. J. Ex. 321; 23 L. T. O. S. 178; 2 W. R. 559; 2 C. L. R. 1212; 156 E. R. 334.

2300. —— ——.]—Every member of a firm is personally responsible for the fraud of any person intrusted by the firm to represent & act for it in the business of the firm; & it is immaterial that the individual partner sought to be charged was free from blame or had ceased to be a member of the firm before the fraud was discovered.

Where a sum of money intrusted to a firm of solrs. was fraudulently misappropriated by the firm's confidential managing clerk:—*Held:* (1) Stat. Limitations did not begin to run until the discovery of the managing clerk's misconduct; (2) a former partner in the firm, having been partner at the time of the misappropriation, was personally liable.—HACKNEY *v.* KNIGHT (1891), 7 T. L. R. 254.

2301. —— ——.]—A co. undertook as part of its business to effect investments for intending investors. A clerk in its employment, whom the co. held out as having authority to negotiate investments & to receive the money, received a sum of money from an intending investor for the purchase of certain shares. The clerk appropriated the money to his own use, intending so to do from the beginning:—*Held:* the co. liable to refund the money.—TROTT *v.* NATIONAL DISCOUNT CO. (1900), 17 T. L. R. 37.

2302. —— ——.]—Where money was intrusted by a client for investment to the clerk of a firm of solrs.:—*Held:* the firm was not liable in respect of the fraudulent appropriation of the money by the clerk, as the client had failed to show (1) the clerk had actual authority to accept the client's money, or (2) there was a holding out of the clerk as having such authority, & the client reasonably believed the clerk to have authority & relied upon it.—TERRILL *v.* PARKER & THOMAS (1915), 32 T. L. R. 48.

2303. Funds received for telegrams—Embezzled by railway post-office clerk.]—A clerk employed in the telegraph office at a ry. station transmitted messages handed in by the public without using stamps, misappropriating the money paid by the public. By agreement with the Postmaster-General the ry. co. was to receive messages from the public for transmission by telegram & to transmit them at the Postmaster-General's sole risk & expense:—*Held:* (1) the loss arose out of breach of duty on the part of the clerk, in his character of agent for the Postmaster-General; (2) the co. was not liable.—NORTH EASTERN RY. CO. *v.* R. (1889), 6 T. L. R. 15, C. A.

2304. Funds remaining after payment of first mortgage—Misappropriated by common agent of first & second mortgagees.]—Resps. were first mtgees., & applt. was second mtgee., of the same property. In 1878 resps. sold under their power of sale. S., the mtgor.'s solr., acted for all parties, & the purchase-money was more than sufficient to pay off both mtges. After satisfying resps.' mtge. S. appropriated the balance of the purchase-money to his own use, & continued to pay interest to applt. as if his mtge. was still in existence, & concealed the fact of the sale from him. He gave resps. a receipt for the amount due to applt. as his agent. In 1892 applt. discovered the fraud, & brought an action against resps. for payment of what was due to him & for an account:—*Held:* (1) resps. were protected by Trustee Act, 1888 (c. 59), s. 8; (2) they were not "party or privy" to the fraud, & the proceeds were not "still retained" by them, so as to take the claim out of Stat. Limitations, since the money was not in their hands or under their control when the action was brought; (3) S. was not acting within scope of his authority as their agent in committing the fraud.—THORNE *v.* HEARD & MARSH, [1895] A. C. 495; 64 L. J. Ch. 652; 73 L. T. 291; 44 W. R. 155; 11 T. L. R. 464; 11 R. 254, H. L.

Annotations:—**Consd.** Hambro *v.* Burnand, [1903] 2 K. B. 399. **Refd.** *Re* McCallum, McCallum *v.* McCallum, [1901] 1 Ch. 143, C. A.; Lloyd *v.* Grace, Smith, [1912] A. C. 716, H. L. **Mentd.** How *v.* Winterton, [1896] 2 Ch. 626, C. A.

2305. Funds paid to one agent for disbursement on certificate of another agent—Failure of latter to give certificate.]—Pltf., under a contract with the French Govt., was entitled to receive payment out of a fund deposited by that Govt. with defts., bankers, on production of certificates issued by agents of the French Govt. These agents withheld the certificates, & in so doing were guilty of unfair dealing:—*Held:* pltf. entitled to payment without the certificates.—LARIVIERE *v.* MORGAN (1872), 26 L. T. 339; 20 W. R. 480; *affd.* with a variation, 7 Ch. App. 550; *revsd.* on another point, *sub nom.* MORGAN *v.* LARIVIERE (1875), L. R. 7 H. L. 423, H. L.

Annotations:—**Mentd.** The Charkieh (1873), L. R. 4 A. & E. 59; Foreign Bondholders Corpn. *v.* Pastor (1874), 23 W. R. 109; Twycross *v.* Dreyfus (1877), 5 Ch. D. 605, C. A.; The Parlement Belge (1880), 5 P. D. 197, C. A.

2306. Goods detained by servants of corporation not appointed under seal.]—Trover lies against a corpn.; & if it be essential to their conversion of the property (*e.g.*, the detainer of bank notes by the Governor & Co. of the Bank of England) that they should have authorised it under their seal, such authority will be presumed after verdict; but it does not seem necessary that the act of detention, done by their servants within scope of their employment, should be authorised under their seal.—YARBOROUGH *v.* BANK OF ENGLAND (1812), 16 East, 6; 104 E. R. 991.

Annotations:—**Apld.** Smith *v.* Birmingham & Staffordshire Gas Light Co. (1834), 1 Ad. & El. 526; Hall *v.* Swansea Corpn. (1844), 5 Q. B. 526. **Refd.** East London Waterworks Co. *v.* Bailey (1827), 5 L. J. O. S. C. P. 175; Dunston *v.* Imperial Gas Light & Coke Co. (1832), 3 B. & Ad. 125; Maund *v.* Monmouthshire Canal Co. (1842), 4 Man. & G. 452; R. *v.* Birmingham & Gloucester Ry. Co. (1842), 3 Q. B. 223; Eastern Counties Ry. Co. *v.* Broom (1851), 15 Jur. 297, Ex. Ch.; Green *v.* London General Omnibus Co. (1859), 7 C. B. N. S. 290; Mill *v.* Hawker (1874), L. R. 9 Exch. 309; Edwards *v.* Midland Ry. Co. (1880), 6 Q. B. D. 287; Lawford *v.* Billericay R. C., [1903] 1 K. B. 772, C. A. **Mentd.** Stuart *v.* Anglo-Californian Gold Mining Co. (1852), 19 L. T. O. S. 62.

2307. Goods distrained after tender of rent to bailiff—Bailiff authorised to accept same.]—Where a bailiff, authorised to distrain for rent, is, by the terms of the warrant, authorised to receive the rent, if tendered, the bailiff cannot refuse a tender on the ground that he was forbidden by the landlord's attorney to receive it; & if he subsequently proceeds to sell the tenant's goods, he & his landlord are liable to trover.—HATCH *v.* HALE (1850), 15 Q. B. D. 10; 19 L. J. Q. B. 289; 15 L. T. O. S. 65; 14 Jur. 459; 117 E. R. 361.

2308. Goods deposited—As security for loan from principal—Failure of agent to deliver.]—In an action of trover against deft., for not delivering some wine deposited with her by way of security for an advance of money:—*Held:* (1) it was not sufficient evidence of conversion to show that her son, who acted as her general agent, refused to give it up; (2) it was necessary to prove that such agent acted under a special direction, in order to make

deft. liable.—POTHONIER *v.* DAWSON (1816), Holt, N. P. 383.

Annotations :—**Consd.** Smart *v.* Sanders (1846), 3 C. B. 380. **Refd.** Martin *v.* Reid (1862), 11 C. B. N. S. 730; Donald *v.* Suckling (1866), L. R. 1 Q. B. 585; Burdick *v.* Sewell (1883), 10 Q. B. D. 363.

2309. —— With harbour board—Delivery on delivery warrant falsified by owner's agent.]—A harbour board furnised owners of goods lying at their warehouses with delivery order forms, which were printed & had three columns, the first headed "Ship," the second "New numbers," & the third "Quantity in words at length." At the bottom of the sheet was a ruled line for signature. In Aug., 1898, N. presented a form to pltfs. for signature referring to one hogshead of tobacco out of 18 pledged by him with pltfs. In column 2 he placed the number 246, but the third was left blank for N. to fill up, as he told pltfs.' manager he did not know whether it was a tierce or hogshead. After the signature had been placed on the form he drew a line after the number 246 & wrote in the figures 263, & in the third column put the words "eighteen hogsheads." In an action against the harbour board for conversion of the 17 hogsheads :—*Held :* (1) pltfs. could not recover, as N. was their agent to complete the form; (2) they were responsible for his fraudulent act.—UNION CREDIT BANK *v.* MERSEY DOCKS & HARBOUR BOARD, UNION CREDIT BANK *v.* MERSEY DOCKS & HARBOUR BOARD & NORTH & SOUTH WALES BANK, [1899] 2 Q. B. 205; 68 L. J. Q. B. 842; 81 L. T. 45; 4 Com. Cas. 227.

Annotation :—**Refd.** Colonial Bank of Australasia *v.* Marshall, [1906] A. C. 559.

2310. Goods intrusted—Company—Refusal of clerk to deliver except on conditions.]—A clerk of a co. authorised to act in the matter of delivering up pltf.'s goods to him, refused to deliver them up, on being applied to by pltf. for them, without a written order for the delivery :—*Held :* (1) he had no right to attach such condition before delivering them up; (2) this was such refusal to deliver as would bind the co.—BARNETT *v.* CRYSTAL PALACE CO. (1861), 4 L. T. 403.

—— Master of ship—Sold by him bonâ fide.]—*See* SHIPPING & NAVIGATION.

2311. Goods obtained by fraud for one principal—Deposited as security for loan to another principal.]—In trover for wool which pltfs. alleged that defts. had obtained by fraud, it appeared it had been purchased of pltfs. by D. as agent for W. & Co. They pledged it two days afterwards to defts. for an advance made by them to W. & Co. through the intervention of D., who acted as the agent of defts. as well as of W. & Co. Pltfs., in order to show that W. & Co. had obtained the wool without intending to pay for it, they being insolvent to D.'s knowledge at the time of purchase, offered certain contracts in evidence, signed by D. The jury having found that the transaction between D. & W. & Co. was fraudulent, that defts. were not cognisant of the fraud, & that D. was their agent, as well as the agent of W. & Co. :—*Held :* (1) the contracts were admissible, without calling D. as a witness; (2) defts. were liable for the fraudulent acts & misconduct of their own agent.—IRVING *v.* MOTLY (1831), 7 Bing. 543; 5 Moo. & P. 380; 9 L. J. O. S. C. P. 161; 131 E. R. 210.

Annotation :—**Consd. & Dbtd.** Dantec *v.* Ashworth (1866), 14 L. T. 488.

2312. Goods shipped—By clerk without authority—Wrong goods shipped by mistake.]—Pltfs. & defts. were forwarding agents. Owing to a mistake of defts.' clerk on the quay, certain goods, which had been intrusted to pltfs. for shipment, were shipped amongst goods intrusted to defts. In an action for conversion :—*Held :* (1) it was not within the clerk's authority to take the goods of others; (2) defts. were not liable for their clerk's unauthorised act.—HURST *v.* DUNKERLEY (1856), 6 L. T. 754.

2313. —— On fraudulent bill of lading—Delivery to bonâ fide indorsee of bill of lading.]—The principal is liable for a conversion committed by his agent under his own express personal order.

Where the master of a ship, who had been induced by fraud to sign bills of lading without production of the mate's receipt, refused, on the express orders of the shipowner, to deliver the goods to the holder of the mate's receipt, being the owner of the goods, but delivered them to a *bonâ fide* indorsee of the fraudulent bill of lading :—*Held :* shipowner liable for the misdelivery.—SCHUSTER *v.* MCKELLAR (1857), 7 E. & B. 704; 26 L. J. Q. B. 281; 29 L. T. O. S. 225; 3 Jur. N. S. 1320; 5 W. R. 656; 119 E. R. 1407.

Annotations :—**Distd.** The St. Cloud (1862), 1 New Rep. 244; Sandemann *v.* Scurr (1866), 8 B. & S. 50; Hathesing *v.* Laing, Laing *v.* Zeden (1873), L. R. 17 Eq. 92. **Apld.** Omoa & Cleland Coal & Iron Co. *v.* Huntley (1877), 2 C. P. D. 464. **Distd.** Wagstaff *v.* Anderson (1879), 4 C. P. D. 283; Baumvoll Manufactur von Scheibler *v.*

2309 i. *Goods deposited—In warehouse—Sold on authority of warehouseman fraudulently obtained.]*—Pltfs. stored grain at S in the warehouse of T., from whom defts. held warehouse receipts as security for certain notes. T. having left the country, R., defts.' agent at S., followed T. to the United States, & obtained a written authority to sell all the grain in the warehouse belonging to him. Pltfs. alleged that, acting under colour of this authority, he converted wheat belonging to them in the warehouse, for which they brought trover against defts. :—*Held :* if so, there was evidence to go to the jury to make defts. responsible for R.'s acts.—GILPIN *v.* ROYAL CANADIAN BANK (1867), 26 U. C. R. 445.—**CAN.**

y. *Goods retained as against provisional trustee—Agent acting on definite instructions.]*—A., a creditor, instructed his agent to obtain & retain valid & effectual possession of certain goods of his debtor B. by way of pledge. After the agent had taken possession, B.'s estate was provisionally sequestrated, & the agent refused to hand over the goods to the provisional trustee before the order was made final :—*Held :* A.'s agent acted in the course of his employment & A. was therefore liable.—SAGORSKY'S TRUSTEE *v.* JOFFE, S. A. L. R. (1916), Trans. Prov. Div. 661.—**S. AF.**

2312 i. *Goods shipped—Delivery refused to indorsee of bill of lading.]*—H. & M. entered into an agreement under which M. was to supply H. with tinplates, money, etc., to carry on the business of packing lobsters, & H. was to forward to M. all goods which he should pack, in order that the supplies might be paid for out of the proceeds of the sales of the goods, M. being paid a commission for selling. This agreement was acted upon for six years, not only in relation to lobsters, but also in relation to beef. At the end of 1882, H. was indebted to M. from $7,000 to $9,000 on account between them. In Dec. of that year, H. shipped one hundred & eighty cases of beef, of the value of $1,000, consigned to the freight agent of the Intercolonial Ry. at Pictou, but addressed to M. He wrote M., forwarding a bill of lading, on which M.'s name was indorsed. M. transferred the bill of lading to pltf. as security for accommodation indorsements, & pltf. brought replevin against the stationmaster of the Intercolonial Ry. at Halifax, who, at the instance of H., refused to deliver the goods :—*Held :* the goods were sent to the agent at Pictou to be forwarded, & he had no other interest in them, or right or duty connected with them, than to forward them to their destination, & could not authorise the agent at Halifax to retain them.—MCPHERSON *v.* MCDONALD (1886), 6 R. & G. 242; 6 C. L. T. 443; 12 S. C. R. 417.—**CAN.**

z. *Where agent is agent of both parties.]*—Pltfs. contracted with defts. to perform certain works, to be paid for monthly in debentures made by defts. on the estimate of their engineer, payments to be made by orders on the debentures or proceeds thereof to be deposited in the hands of B. & Co. Pltfs. completed their work, & defts. delivered to pltfs. orders to the amount of the certificates of the engineer, etc., upon B. & Co., in whose hands debentures had been deposited, but B. & Co., being their agents, wrongfully refused for an unreasonable time to deliver the debentures or proceeds. In an action on contract defts. pleaded B. & Co. were agents of pltfs. as well as of themselves :—*Held :* a good defence, for neither party was liable to the other for their common agents' tortious acts.—WILLSON *v.* HURON & BRUCE (COUNTIES) (1861), 10 C. P. 498.—**CAN.**

a. ——.]—LOW *v.* BAIN, No. 2299 i., *ante*.—**CAN.**

Sect. 4.—Principal's liability for torts committed by agent: Sub-sect. 1, B. & C.]

Gilchrist, [1891] 2 Q. B. 310. **Refd.** Dalyell *v.* Tyrer (1858), E. B. & E. 899.

2314. —— For freight per ton delivered—Delivery refused except for freight on shipping weight.]—Bark was shipped abroad under a bill of lading describing it to be of a certain weight, & making it deliverable to the consignees in London on payment of freight at a certain rate per ton of 20 cwt. "nett weight delivered." On arrival in London, the agent appointed by the managing owner demanded freight on the weight mentioned in the bill of lading, & refused to deliver the bark unless the consignees would pay according to that weight, or (under an alleged custom) incur the expense of weighing over the ship's side or at a legal quay. The consignees paid the money under protest, & brought an action against deft.—one of the joint-owners—to recover back the excess. The jury having negatived the alleged custom:—*Held:* deft. was liable, notwithstanding he had not interfered or in any way assented to the appointment of the agent by the managing owner & no part of the money had come to his hands.

Money had & received is only a short form which pltfs. are entitled to adopt instead of suing for the conversion (WILLES, J.).—COULTHURST *v.* SWEET (1866), L. R. 1 C. P. 649.

Annotations:—**Refd.** The Freedom (1870), 22 L. T. 175. **Mentd.** Buckle *v.* Knoop (1867), L. R. 2 Exch. 125; Frazer *v.* Cuthbertson (1880), 6 Q. B. D. 93; The Skandinav (1881), 50 L. J. P. 46; Gulf Line *v.* Laycock (1901), 7 Com. Cas. 1.

2315. Growing plants stopped by rail—Planted to keep them alive—Delivery refused.]—Pltf. sent a quantity of quicks by a ry. co. & paid for their carriage to A. station; when they arrived there the general superintendent of the co. gave pltf. permission to plant them on land there belonging to the co., for the purpose of keeping them alive. Some time afterwards pltf. wanted to remove them, & on demand to do so the superintendent refused to permit him:—*Held:* (1) there was evidence from which the jury might infer that what the superintendent did was authorised by the co., & so find in favour of pltf. in an action of trover against the co., as it was the duty of a ry. co. to have some person at their stations authorised to act as the exigency of the traffic might require; (2) the jury might infer that the superintendent was the person so authorised; (3) it might be inferred that the allowing of the quicks to be planted was only another mode of warehousing them by the co.—GILES *v.* TAFF VALE RY. CO. (1853), 2 E. & B. 822; 22 L. T. 157; 18 Jur. 510; 2 C. L. R. 132; 118 E. R. 975; *sub nom.* TAFF VALE RY. CO. *v.* GILES, 23 L. J. Q. B. 43, Ex. Ch.

Annotations:—**Apld.** Moore *v.* Metropolitan Ry. Co. (1872), L. R. 8 Q. B. 36. **Apprvd.** The Apollo, [1891] A. C. 499. **Refd.** Slim *v.* G. N. Ry. Co. (1854), 2 C. L. R. 864; Goff *v.* G. N. Ry. Co. (1861), 3 E. & E. 672.

C. Principal's Liability for Agent's Negligence.

See, also, MASTER & SERVANT.

2316. Agent causing accident — Employed to drive—Wanton act distinguished.]—If a servant driving a carriage, in order to effect some purpose of his own, wantonly strikes the horses of another person & produces an accident, the master will not be liable. If, in order to perform his master's orders, he strikes, but injudiciously, & in order to extricate himself from a difficulty, that will be negligent & careless conduct, for which the master will be liable, being an act done in pursuance of the servant's employment.—CROFT *v.* ALISON (1821), 4 B. & Ald. 590; 106 E. R. 1052.

Annotations:—**Apld.** Seymour *v.* Greenwood (1861), 7 H. & N. 355, Ex. Ch.; Udell *v.* Atherton (1861), 7 H. & N. 172; Limpus *v.* London General Omnibus Co. (1862), 1 H. & C. 526, Ex. Ch. **Refd.** Laugher *v.* Pointer (1826), 5 B. & C. 547; Freeman *v.* Rosher (1849), 18 L. J. Q. B. 340.

2317. —— Requested or allowed to drive.]—Where the owner of a vehicle, being himself in possession & occupation of it, requests or allows another person to drive, this will not of itself exclude his right & duty of control; &, in absence of further proof that he has abandoned that right by contract or otherwise, the owner is liable as principal for damage caused by the negligence of the person actually driving.—SAMSON *v.* AITCHISON, [1912] A. C. 844; 82 L. J. P. C. 1; 107 L. T. 106; 28 T. L. R. 559, P. C.

2318. —— ——.]—Deft. borrowed of D. a horse & chaise, & permitted C. to drive. By C.'s misconduct injury was done to pltf.'s horse:—*Held:* (1) the declaration properly charged deft. with being possessed of, & driving, the horse & chaise; (2) the injury was occasioned by his negligent driving.—WHEATLEY *v.* PATRICK (1837), 2 M. & W. 650; Murp. & H. 183; 6 L. J. Ex. 193.

Annotation:—**Refd.** Samson *v.* Aitchison, [1912] A. C. 844, P. C.

2319. Agent selling in error—Authorised to sell at fixed price.]—Commission agents having a chattel to sell at a fixed price, their salesman by mistake

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PART IX., SECT. 4, SUB-SECT. 1.—C.

2316 i. *Agent causing accident—Employed to sell—Using principal's horse & vehicle.*]—A co. employing an agent on commission to sell goods which hires a horse & waggon & rehires them to the agent, is liable, in damages to a pedestrian who is injured by the horse & waggon when driven by the agent, where the jury finds that the agent was acting within scope of his employment & there is evidence to support such finding.—DUFFIELD *v.* PEERS (1916), 27 O. W. R. 183.—**CAN.**

2316 ii. ——— ———.]—A shopman engaged to effect sales out of his employer's premises, & who for such purpose uses his employer's horse & carriage, binds himself in the exercise of his employment to the responsibilities of his employer, & where a passer-by was run over & killed by the horse owing to the servant's fault, although he was not at the time acting in his employment:—*Held:* the employer & shopman were both jointly & severally liable.—TURCOTTE *v.* RYAN (1906), Q. R. 15 K. B. 472; *affd.* 39 S. C. R. 8.—**CAN.**

2317 i. —— *Requested or allowed to drive.*]—Applt. was the owner of a horse & gig in which a stepdaughter of his habitually drove out his wife, with his knowledge & consent:—*Held:* his stepdaughter was the agent of applt., &, if she was guilty of negligence in driving, applt. was responsible.—LEARY *v.* OSBORNE (1901), 20 N. Z. L. R. 416.—**N.Z.**

2317 ii. —— ——.]—Where the owner of an automobile allows his brother, who is incompetent & inexperienced as a chauffeur, to drive his automobile, he will be liable jointly & severally with the latter for any damages caused by a collision with the automobile.—LEBEAU *v.* COLAS (1917), Q. R. 51 S. C. 335.—**CAN.**

2317 iii. —— *Driving outside scope of employment—Motor Vehicles Act, s. 35.*]—Pltf. suffered injury through negligence of the driver of a motor vehicle, who was an employee of the owner of the vehicle, & was permitted to use it; he was not using it in connection with the owner's business, but solely for his own purposes:—*Held:* although not otherwise liable, the owner was made liable by the above sect.—WITSOE *v.* ARNOLD (1914), 27 W. L. R. 259; 6 W. W. R. 4; 15 D. L. R. 915.—**CAN.**

2319 i. *Agent selling in error—Authorised to sell certain lands—Sale of different lands.*]—Deft. placed several separate lots of land in the hands of N., an agent, with instructions to effect a sale. The correspondence regarding the matter was carried on by F., deft.'s son-in-law, who acted on her behalf. N., having received an offer for all the lands from pltf., communicated it to F., who, acting under deft.'s instructions, telegraphed to N. to accept it. Deft. subsequently refused to complete the sale on the ground that she was misled by F. into believing that the offer was only for a few of the lots:—*Held:* the terms of the offer being clear, & F. having accepted it by the direction of deft., the latter was liable for the negligence of her agent & was responsible for the damage caused to pltf., an innocent person, by her refusal to carry out the contract, even though she was induced to enter into it by the negligence or misrepresentation of her agent.—

agreed to sell it at one third of that price. The mistake was explained, & the contract repudiated, before the chattel was delivered:—*Held:* purchaser could not enforce delivery.—ISAAC *v.* BOULNOIS (1863), 11 W. R. 341.

2320. Bailiff allowing prisoner to escape.]—Action lies upon 44 Geo. 3, c. 13, s. 4, by a common informer, suing for himself & the King, to recover a penalty against the sheriff for the misconduct of his bailiff in wilfully suffering a seaman to go at large who had been taken out of the King's service by arrest on civil process, on which he was afterwards bailed, instead of delivering him over to the charge of a proper naval officer, the Act which speaks of sheriffs, gaolers, or other officers arresting, apprehending, or taking in execution such seamen, or in whose custody they may be, & who are made liable for their escape, meaning by "other officers" such as may be charged with the execution of criminal warrants against such seamen, or to whom any process may properly be directed for their arrest, detention, or discharge, & not the inferior officers of the sheriff; & the sheriff may be charged in such action for wrongfully & wilfully permitting the escape.—STURMY *v.* SMITH (1809), 11 East, 25; 103 E. R. 912.

Annotations:—**Consd.** Dewhirst *v.* Pearson (1833), 1 Cr. & M. 365. **Distd.** Bagge *v.* Whitehead (1892), 66 L. T. 815, C. A. **Mentd.** Terry *v.* Hutchinson (1868), 18 L. T. 521.

2321. Foreman injuring person while unloading cart—Employed to ship goods.]—A stevedore employed to ship iron rails had a foreman, whose duty it was (assisted by labourers) to carry the rails from the quay to the ship after the carman had brought them to the quay & unloaded them there. The carman not unloading the rails to the foreman's satisfaction, the latter got into the car & threw out some of them so negligently that one fell upon & injured pltf., who was passing by:—*Held:* there was evidence for the jury that the foreman was acting within scope of his employment, so as to render the stevedore responsible for his acts.—BURNS *v.* POULSOM (1873), L. R. 8 C. P. 563; 42 L. J. C. P. 302; 29 L. T. 329; 37 J. P. 776; 22 W. R. 20.

Harbour-master causing damage to ship.]—*See* SHIPPING & NAVIGATION.

Master of ship negligently navigating vessel or failing to take care of cargo.]—*See* SHIPPING & NAVIGATION.

Prize master causing damage to captured ship.]—*See* PRIZE LAW & JURISDICTION.

JENKINS *v.* MURRAY (1898), 31 N. S. R. 172.—**AUS.**

b. *Agent causing fire.*]—Deft.'s son lit a smudge to keep mosquitoes away from his father's horses. The fire spread to the stable & burnt some wheat pltf. had stored there:—*Held:* deft. liable.—DOWN *v.* LEE (1887), 4 Man. L. R. 177.—**CAN.**

c. —— *Adopting usual method of carrying out instructions.*]—Deft. verbally employed E. to destroy rabbits, telling him to supervise the work, to dig out the burrows, block holes & employ diggers. E. was subsequently authorised in writing as overseer of two gangs of men & generally to supervise them as already verbally instructed. The men adopted what was proved to be the usual method of rabbit destruction, viz., the lighting of logs & timber, & the fire so caused spread to pltf.'s land, causing considerable damage:—*Held:* E. had implied authority to adopt the usual method & deft. was liable for negligence of E.—MACKENZIE *v.* TRUSTEES, EXORS. & AGENCY CO., LTD. (1900), 26 V. L. R. 442.—**AUS.**

d. *Agent authorising acts causing overflow of water.*]—Pltf. sued a school board & two individuals for damages caused by the individual defts., who were contractors with the board for certain excavations, placing some of the earth taken from this excavation upon the highway, whereby water was turned back so as to fill the cellar in pltf.'s house & seriously damage it. G. had been appointed by the board overseer of the excavation, & had instructed the two individual defts. to place the earth where it was in fact placed:—*Held:* G. was acting within scope of his general authority as an agent of the board, & the board were bound by what he did, & liable to pltf.—RENWICK *v.* VERMILLION CENTRE S. D. No. 1446 TRUSTEES (1910), 15 W. L. R. 244.—**CAN.**

e. *Agent negligently conducting wharf.*]—An absentee owner & manager of a public wharf in the island of Jamaica is liable in law, having reference to 7 Vict. c. 57, to be sued as a public wharfinger for the negligence of his agent in the conduct of such wharf.—LINDO *v.* BARRETT (1856), 4 W. R. 316, P. C.—**JAMAICA.**

f. *Agent supplying goods — Not according to order.*]—A., who had contracted to supply goods to B., & had done so through C., was found to be the party liable to B. on account of the articles which C. had sent not being according to order.—BUCHANAN & SON *v.* ATHYA & CO. (1872), 10 Sc. L. R. 18.—**SCOT.**

g. *Agent of sheriff failing to keep & produce accounts of sales.*]—Where a sheriff placed a stranger as his agent in possession of goods on which he was instructed to levy, with authority to sell them in the shop as theretofore, who gave no satisfactory evidence of such sales, & who lost or mislaid or neglected to preserve the books of account which would have explained all these transactions:—*Held:* he was responsible for the consequences of his agent's misconduct, & was entitled to no advantage or consideration because the books could not be or were not produced.—HOBBS *v.* HALL (1864), 14 C. P. 479.—**CAN.**

h. *Agent interpreter misinterpreting contract.*]—A Chinese broker acting as intermediary between a European firm & a Chinese merchant ignorant of English has implied authority to interpret the terms of the contract which have been written in English by his principal. If his interpretation is erroneous his principal will be liable. A notice in Chinese, that the English words shall alone be proof, will not free the European principal from liability to the Chinese buyer, who is entitled to look to the vendor's agent to translate correctly the English terms.—HOLLAND CHINA TRADING CO. *v.* TONG TAI YINN (1907), 2 Hong Kong, 54.—**HONG KONG.**

j. *Deputy returning officer guilty of misfeasance—Injury to voter.*]—Pltf. was injured while going into a compartment for marking his ballot when voting on a money bye-law:—*Held:* the deputy returning officer was the agent of defts., a municipal corpn., who on the principle of *respondent superior* were responsible, it being misfeasance, not nonfeasance.—GARBUTT *v.* WINNIPEG (1908), 9 W. L. R. 550.—**CAN.**

k. *Purchasing agent of two firms losing funds supplied by one firm.*]—Pltfs. & defts. carried on business in the same place, & when a member of either firm was sent to Calcutta to make purchases, the other firm took advantage of the opportunity to get the same person to purchase goods on their behalf. A member of defts.' firm, who was sent to Calcutta, through his own negligence lost a sum of money given by pltfs. to defts. for purchase of goods:—*Held:* defts.' firm, & not only the particular member of the firm by whose negligence the money was lost, was responsible.—SEKUNDER MONDUL *v.* NOCOWRI BISWAS (1882), 11 C. L. R. 547.—**IND.**

l. *Telegraph operator wrongly transmitting telegram.*]—Defts., a telegraph co., on receiving 25 cents for the first ten words & a cent for every additional word were to be held bound to transmit the telegram in due course & correctly. Having in place of the word "one" transmitted the word "ten":—*Held:* the co. was liable.

Pltf., having given his message orally through the operator employed by defts., who accepted the message, the operator writing it on an ordinary blank form & putting the name of pltf. at the bottom:—*Held:* (1) not bound by the conditions printed at the head of the blank form, to which his attention was not drawn, pltf. being unable to read or write; (2) the operator was not pltf.'s agent.—BERUBE *v.* GREAT NORTH WESTERN TELEGRAPH CO. (1898), Q. R. 14 S. C. 178.—**CAN.**

m. ——.]—A contract may be made, through the medium of an agent, with a telegraph co. for the transmission of a message; & where the principal sustains loss through the negligence of the co., he may maintain an action against them therefor; & a person to whom a telegram has been sent by his agent may sue the telegraph co. for negligence in the transmission of it.—FEAVER *v.* MONTREAL TELEGRAPH CO. (1874), 21 C. P. 258.—**CAN.**

n. ——.]—A telegraph operator received from pltf. a telegram with regard to certain sheep, which ran "Can't move," but which he transmitted as "Can move." In consequence of this error certain sheep were, contrary to pltf.'s wishes, parted with by a depositary to whom the telegram as transmitted was shown by a third party to whom it was addressed. In an action by pltf. against the depositary:—*Held:* pltf. was not responsible for the mistake of the operator inasmuch as the latter was only the agent of pltf. to transmit the message in the terms in which it was handed in.—MARAIS *v.* ANDERSON (1909), E. D. C. 76.—**S. AF.**

Sect. 4.—Principal's liability for torts committed by agent: Sub-sect. 1, D. & E. (a), (b) & (c).]

D. Principal's Liability for Agent's Malicious Prosecution or False Imprisonment of Third Parties.

See, further, MASTER & SERVANT.

2322. Agent instructing arrest.]—A. was indebted to B., whose agent C. requested the sheriff to arrest A. without any writ or warrant. The sheriff arrested A., & subsequently he & C. procured a *ca. sa.* to warrant the arrest. The sheriff & C. were fined; the ct. held B. innocent of the wrongful arrest & committed A. for the debt.—THURLAND'S CASE (1564), 2 Dyer, 244 b; 73 E. R. 540.

Annotations:—**Dbtd.** Hooper *v.* Lane (1857), 6 H. L. Cas. 443. **Refd.** Ockford *v.* Freston (1861), 6 H. & N. 466.

2323. —— No special authority.]—In an action for maliciously arresting pltf., & taking him in execution at deft.'s suit:—*Semble:* deft. is liable although pltf. was taken in execution at the instance of deft.'s attorney, & without the knowledge or assent of deft.—JONES *v.* NICHOLLS (1829), 3 Moo. & P. 12; 7 L. J. O. S. C. P. 167.

Annotation:—**Expld.** R. *v.* Lands (1855), Dears. C. C. 567.

2324. —— —— Sum on writ greater than sum due.]—Judgment having been entered up against pltf. on a warrant of attorney for £60, given to deft. to secure the payment of a debt by instalments of which less than £20 was due, deft.'s attorney caused pltf. to be arrested under a *ca. sa.* indorsed to levy £21 10*s.* Deft., having been informed by a person who had joined in the warrant of attorney that pltf. had been arrested, wrote a letter in answer, not denying that such arrest had taken place by her authority. The writ was afterwards set aside. In an action for false imprisonment:—*Held:* deft. was liable for the act of her attorney in improperly causing pltf. to be arrested.—COLLETT *v.* FOSTER (1857), 2 H. & N. 356; 26 L. J. Ex. 412; 29 L. T. O. S. 229; 5 W. R. 790; 157 E. R. 147.

Annotations:—**Consd.** Smith *v.* Keal (1882), 9 Q. B. D. 340, C. A.; Keal *v.* Smith (1882), 51 L. J. Q. B. 487.

2325. Agent instructing prosecution—Institution & continuance distinguished.]—There is a material distinction, as to liability for malicious prosecution, between the institution of the prosecution & its continuance, after it has been already instituted, without authority, by an agent. The absence of reasonable & probable cause, which might be evidence of malice in the first case, will not be so in the second.—WESTON *v.* BEEMAN (1857), 27 L. J. Ex. 57; 22 J. P. 115.

Annotation:—**Refd.** Harris *v.* Dignum (1859), 29 L. J. Ex. 23.

2326. Bank manager arresting & prosecuting offenders—Authority as such.]—In an action for malicious prosecution against an incorporated banking co. the jury found that same had been authorised on behalf of the bank by W., the acting manager, & were directed by the judge that it was to be inferred from W.'s position as manager that he had sufficient power in the circumstances for directing a prosecution:—*Held:* (1) assuming the prosecution to have been authorised by W., the above direction to the jury was on the evidence incorrect; (2) there must be a new trial.

The arrest, & still less the prosecution, of offenders is not within the ordinary routine of banking business, & not within the ordinary scope of a bank manager's authority. Evidence is required to show that such arrest or prosecution is within scope of the duties & class of acts such manager is authorised to perform. That authority may be general, or it may be special & derived from the exigency of the particular occasion on which it is exercised. In the former case it is enough to show commonly that the agent was acting in what he did on behalf of the principal; but in the latter case evidence must be given of a state of facts which shows that such exigency is present, or from which it might reasonably be supposed to be present (*per* CUR.).—BANK OF NEW SOUTH WALES *v.* OWSTON (OUSTON) (1879), 4 App. Cas. 270; 48 L. J. P. C. 25; 40 L. T. 500; 43 J. P. 476; 14 Cox, C. C. 267, P. C.

Annotations:—**Consd.** Abrahams *v.* Deakin, [1891] 1 Q. B. 516, C. A. In *Bank of New South Wales* v. *Owston* Sir Montague Smith came to the conclusion that the mere fact that a man was the manager of a bank did not confer on him an implied authority to give a man into custody for stealing a bill of exchange, when the act was past & gone & the arresting the offender was not necessary for the protection of the property of the bank, but was made only for the purpose of punishing him & vindicating the law; though not bound by that decision, I adopt it in every respect (LORD ESHER, M.R.). Ashton *v.* Spiers & Pond (1893), 9 T. L. R. 606, C. A.; Hanson *v.* Waller, [1901] 1 K. B. 390. **Mentd.** Edwards *v.* Midland Ry. Co. (1881), 45 J. P. 374; Dyer *v.* Munday (1895), 64 L. J. Q. B. 448, C. A.; Cornford *v.* Carlton Bank, [1899] 1 Q. B. 392.

2327. General manager of company arresting employee—Authority as such.]—Pltf., a workman employed in defts.' factory, was discharged with others in consequence of slackness of work. He carried away with his own tools one belonging to defts., which, when he found inquiry was made for it, he returned to the foreman of the factory. When he afterwards called about it at the factory, a detective was present, who asked the foreman if he gave pltf. in charge for stealing the tool, to which the foreman replied he must see defts.' managing director first. Pltf. & the detective went together to the police station, & the foreman afterwards appeared, charged pltf., & signed the charge sheet. The next morning, pltf. having been locked up all night, defts.' managing director gave evidence against pltf., but the charge was dismissed. Upon that the managing director made a remark impugning the magistrate's decision, for

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PART IX. SECT. 4, SUB-SECT. 1.—D.

2323 i. *Agent instructing arrest—No special authority.*]—An action for a malicious arrest will not lie against a principal on an arrest made on his agent's affidavit of his own apprehension that the debtor would leave the Province, the affidavit & arrest both being made without the principal's knowledge, privity, or procurement.—SMITH *v.* THOMPSON (1842), 6 O. S. 325.—CAN.

o. *Agent of corporation—Authority as such.*]—A corpn. may be liable for false imprisonment under an order by its agent within scope of his authority.—LYDEN *v.* MC'GEE (1888), 16 O. R. 105.—CAN.

p. —— —— *Arrest of defaulting ratepayer.*]—The secretary-treasurer of a corpn. sent to a collecting justice the name of pltf. as having made default in payment of a rate which had been illegally imposed on him, & instructed the justice to enforce payment. Pltf., for want of goods whereon to levy execution issued by the justice, was lodged in prison:—*Held:* the corpn. liable for the act of its official.—MELLON *v.* KING'S COUNTY (1900) 35 N. B. R. 153.—CAN.

q. *Manager of business—Authority as such.*]—In an action against a limited co. for damages for malicious arrest & prosecution without reasonable & probable cause, through depositions made by the manager & a clerk carrying on a small branch business of the co., defts., at the close of pltf.'s case, applied for absolution from the instance on the ground, *inter alia*, that there was no proof that the alleged proceedings had been at the instance of the co. or that the employees in question had authority to take such proceedings:—*Held:* (1) as there was nothing in pltf.'s evidence to show any emergency, or any general authority in the employees to institute criminal proceedings, pltf. had failed to prove an essential part of his declaration, viz., that the arrest & prosecution were acts of deft. co. or of their agents authorised thereto or acting in the course of their employment; (2) in the circumstances disclosed, the declarations of the agent could not be accepted as even *primâ facie* evidence of the fact of agency so as to bind his principals.—KING *v.* LANE & CO., LTD., 33 N. B. R. 325.—S. AF.

which he was called to order. Pltf. brought an action in a county ct. for false imprisonment; at the end of pltf.'s case the judge refused to nonsuit, & the jury found a verdict of £50 for pltf.:—*Held:* in the circumstances, the managing director had no power to render defts. liable in the action.—ROWE *v.* LONDON PIANOFORTE CO., LTD. (1876), 34 L. T. 450; 13 Cox, C. C. 211.

2328. Official of society for protection of animals giving offender into custody—Authority as such under Cruelty to Animals Act, 1849 (c. 92).]—Pltf. was given into the custody of a constable by an inspector of the Royal Society for the Prevention of Cruelty to Animals, & brought an action for false imprisonment against the society & the inspector, who did not appear. In the rules of deft. society its inspectors were described as "constables," & there were directions for giving offenders into the custody of policemen, where within reach, under the supposed provisions of the above Act, which, however, only entitled the public to complain & the police to take into custody:—*Held:* the inspector was acting within scope of his authority as defined by the rules, & the society was liable.—LINE *v.* ROYAL SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS & MARSH (1902), 18 T. L. R. 634.

2329. Restaurant manager arresting customer—Authority as such.]—The manager of a restaurant has authority to give into custody persons acting in a riotous manner, & his employers are responsible for the wrongful exercise of such authority.—ASHTON *v.* SPIERS & POND (1893), 9 T. L. R. 606.

2330. ——— ———.]—The manager of a restaurant gave pltf., who had partaken of refreshments there, into custody for refusing to pay the amount of the bill, the accuracy of which pltf. *bonâ fide* disputed. In an action against the proprietors of the restaurant for false imprisonment, the jury found the manager gave pltf. into custody to make him pay the bill:—*Held:* the proprietors were not liable for the act of the manager.—STEDMAN *v.* BAKER & CO. (1896), 12 T. L. R. 451, C. A.

Annotation:—**Folld.** Hanson *v.* Waller, [1901] 1 K. B. 390.

E. Principal's Liability for Agent's Trespass.

(*a*) *To Goods.*

Where principal is corporation.]—*See* CORPORATIONS.

Wrongful distress.]—*See* DISTRESS.

Wrongful execution.]—*See* EXECUTION.

(*b*) *To Land.*

2331. Farm manager while scouring stream—Authority as such.]—A farm manager, however extensive his powers may be, has no implied authority to trespass upon a neighbouring farm for the benefit of his employer.

Defts. owned a "sewage farm," & intrusted the entire management thereof to A. Between the sewage farm & certain land occupied by a tenant of pltf. there flowed a stream, for the purpose of scouring which A. trespassed upon the bank occupied by pltf.'s tenant & cut down brushwood growing thereon. The time occupied by the scouring of the brook was eleven days, during which period none of defts. was or could be aware of the trespass; A.'s disbursements for wages on account of the scouring were repaid by defts. in the same manner as his ordinary disbursements. The motive of A. in scouring the brook thus was to improve the property of defts. & the neighbourhood generally:—*Held:* there was no evidence that the trespass of A. was within scope of his authority.—BOLINGBROKE (VISCOUNT) *v.* SWINDON NEW TOWN LOCAL BOARD (1874), L. R. 9 C. P. 575; 43 L. J. C. P. 287; 30 L. T. 723; 23 W. R. 47.

Annotation:—**Refd.** Flood *v.* Jackson, [1895] 2 Q. B. 21, C. A.

2332. Person sporting over land—Distinction between authority & licence.]—If A. gives B. leave to go on a field in which A. has no right, & B. goes there, this will not make A. liable as a co-trespasser with B.; but if A. orders & authorises B. to go on the field, & he does so, A. is a joint trespasser with B., the latter being an authority, the former a leave & licence only.—ROBINSON *v.* VAUGHTON (1838), 8 C. & P. 252.

(*c*) *To Person.*

2333. Soldiers preventing egress from house—Authority to search for refugee.]—Deft., Lieutenant-Governor of Gibraltar, wishing to obtain possession of T., a Spanish refugee, whom he thought to be harboured in pltf.'s house, adjoining the house of an English merchant residing at Gibraltar, placed a party of soldiers under the command of his military secretary, who ordered them to surround pltf.'s house; & in the course of their duty one of the soldiers prevented pltf.'s egress. In an action for assault & false imprisonment:—*Held:* (1) there was sufficient evidence to go to the jury that the various proceedings were under the direction & carried on by the authority of deft.; (2) the soldiers being directed to search for T., whose person they did not know, the military secretary in command of them was only carrying out his orders in directing them to prevent all persons from leaving the house; (3) deft. was liable for this particular act.—GLYNN *v.* HOUSTON (1841), 2 Man. & G. 337; 4 State Tr. N. S. 1368; 2 Scott, N. R. 548; 5 Jur. 195; 133 E. R. 775.

For full anns., *see* TRESPASS.

2334. Assault by broker—Authority to execute distress warrant.]—A water co. having power under a private Act to distrain for arrears of water rate is not responsible for an assault committed by a broker or his assistants when executing a distress warrant.—RICHARDS *v.* WEST MIDDLESEX WATERWORKS CO. & NEWTON (1885), 15 Q. B. D. 660; 54 L. J. Q. B. 551; 49 J. P. 631; 33 W. R. 902.

2335. Assault by constables & steward of meeting—On instructions of chairman.]—In an action for assault pltf. proved that he was present in the gallery of a large hall where there was a meeting convened by members of an assocn., & that deft. acted as chairman. There was an interruption in

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PART IX. SECT. 4, SUB-SECT. 1.—E. (b).

r. Diamond diggers felling trees—Authority from company to search for diamonds.]—On the invitation of a mining co. many diggers settled on the property, which had been conceded to the co. by B. M. Society, & took out claims, for which they paid the co. 5*s.* per month each. The diggers were not registered claim-holders & could not themselves legally sell, but brought all diamonds found by them to the offices of the co. which sold the diamonds & paid the diggers a percentage of the proceeds:—*Held:* the co. worked the estate by means of the diggers as its agents or servants, & was responsible for the acts of such agents in the course of their employment, such as the felling of trees.—PNIEL D. M. CO. *v.* BERLIN MISSION SOCIETY (1909), 10 H. C. 210; 3 Buch. A. C. 391; 19 C. T. R. 301.—S. AF.

s. Mortgagee's agent taking possession.]—A. mtged. a sheep run to B. The deed stipulated that if the mtgor. should make default in payment of the amount on demand, the mtgee. should be at liberty to enter. It was the intention of the parties that the mtgor. should remain in possession until default was made; but there was no express stipulation to that effect. During the absence of A., B. sent an agent to the station with a demand in writing for repayment, which was served on A.'s wife, & in default of payment B.'s agent immediately took possession of the run & the sheep on it:—*Held:* there was no default which justified P. in entering into possession & seizing the property, & A. was entitled to substantial damages.—MOORE *v.* SHELLEY (1883), 48 L. T. 918, P. C.—AUS.

Sect. 4.—Principal's liability for torts committed by agent: Sub-sect. 1, E. (c) & F.; sub-sects. 2 & 3. Sect. 5: Sub-sect. 1, A. & B.]

the gallery near to the place where pltf. was standing, upon which deft. said, "I shall be obliged to bring those men to the front who are making the disturbance. Bring those men to the front." Pltf. was making no disturbance, but, according to his statement, he was seized by a man with a white ribbon in his coat & two policemen, & dragged over some benches to the front part of the gallery, & thereby injured. There was nothing to show the position or duty of those who seized him, or whether any instruction as to keeping order had been given them by deft. before the act complained of:—*Held:* there was no evidence to go to the jury of any liability on the part of deft., as there was not the ordinary relation of master & servant between him & those who assaulted pltf., but only a particular direction as to a particular matter, & the words used by deft. did not authorise the officers to act upon their judgment as to who were the persons making the disturbance.—LUCAS *v.* MASON (1875), L. R. 10 Exch. 251; 44 L. J. Ex. 145; 33 L. T. 13; 39 J. P. 663; 23 W. R. 924.

2336. Assault by manager of furniture business—Authority to remove furniture let under hire & purchase agreement.]—Deft., proprietor of a furniture business, appointed an agent to be manager of a local branch of his business. The agent, whilst engaged in removing from pltf.'s house some furniture which he had let under a hire & purchase agreement to a person who had been a lodger there, committed an assault on pltf., who was trying to resist the removal. For this assault the agent was convicted & fined. Pltf. then brought an action against deft. to recover damages for the assault:—*Held:* (1) the jury were justified in finding that the agent was acting within scope of his authority; (2) the conviction of the agent did not, by virtue of Offences against the Person Act, 1861 (c. 100), s. 45, operate so as to release deft. from liability to pay damages.—DYER *v.* MUNDAY, [1895] 1 Q. B. 742; 64 L. J. Q. B. 448; 72 L. T. 448; 59 J. P. 276; 43 W. R. 440; 11 T. L. R. 282; 14 R. 306, C. A.

Annotations:—**Refd.** Hamlyn *v.* Houston (1902), 87 L. T. 500, C. A.; Radley *v.* L. C. C. (1913), 109 L. T. 162.

2337. Trespass committed by infant.]—The relation of father & son, though the son is under age & living with his father as a member of the family, does not make the acts of the son more binding on the father than the acts of anybody else; the father is not liable for his son's trespasses committed without his authority (WILLES, J.).—MOON *v.* TOWERS (1860), 8 C. B. N. S. 611; 141 E. R. 1306.

Assault by servant of railway or tramway company.]—*See* MASTER & SERVANT.

F. Principal's Liability for Miscellaneous Torts of Agent.

Blockade — Breach of.] — *See* PRIZE LAW & JURISDICTION.

2338. Bribery by partner of third party's agent.]—Where it was in the course of the business of defts., a firm of grain merchants, which consisted of two partners, to obtain by legitimate means information in regard to contracts made or tendered for with brewers or with buyers of grain by competing firms, & one of the partners obtained such information by bribing a clerk of pltf., a competitor in business, to break his contract of service by dishonestly & improperly communicating to him knowledge obtained in the course of the clerk's employment:—*Held:* both partners were responsible in damages to pltf. for the action of one of them as aforesaid, on the ground that it was within general scope of authority given to him as partner to conduct the business of the firm.—HAMLYN *v.* HOUSTON (JOHN) & Co., [1903] 1 K. B. 81; 72 L. J. K. B. 72; 87 L. T. 500; 51 W. R. 99; 19 T. L. R. 66; 47 Sol. Jo. 90, C. A.

2339. Copyright—Infringement of—By singer employed by music-hall proprietor.]—Deft., proprietor of a music-hall, had engaged a singer, who on numerous occasions sang a song, of the copyright of which pltf. was assignee. Deft. at the trial denied that he had directed the song to be sung; he was in the hall when it was being sung, but had never heard the whole of it. The jury found a verdict for pltf., & awarded a penalty of £2 for each occasion on which the song was sung:—*Held:* (1) inasmuch as the singer was hired by deft. to sing what songs he liked, & no supervision or control was exercised as to copyright, there was evidence of agency & authority to sing the song complained of; (2) there was no ground for disturbing the verdict.—MONAGHAN *v.* TAYLOR (1886), 2 T. L. R. 685, D. C.

Annotation:—**Refd.** Kelly's Directories *v.* Gavin & Lloyd's (1901), 84 L. T. 581.

Libel.]—*See* LIBEL & SLANDER.

Patent—Infringement of.]—*See* PATENTS & INVENTIONS.

2340. Smuggled goods — Agent protecting.]—Where a trader harbours & conceals smuggled goods he is liable in penalties for the illegal act of a servant, done in the conduct of the business, with a view to protect the smuggled goods, though the master be absent at the time, & the act be done by the servant upon the exigency of the occasion when the goods are discovered.—A.-G. *v.* SIDDON (1830), 1 Cr. & J. 220; 2 Man. & Ry. M. C. 533; 1 Tyr. 41.

Annotations: — **Distd.** Lyons *v.* Martin (1838), 7 L. J. Q. B. 214; Harrison *v.* Leaper (1862), 26 J. P. 373. **Apld.** Searle *v.* Reynolds (1866), 14 L. T. 518. **Distd.** Newman *v.* Jones (1886), 17 Q. B. D. 132. **Refd.** A.-G. *v.* Riddell (1832), 2 Tyr. 523; Dewhirst *v.* Pearson (1833), 1 Cr. & M. 365; Coleman *v.* Riches (1855), 16 C. B. 104.

Trade name — Misuse & passing off of.]—*See* TRADE MARKS, TRADE NAMES & DESIGNS.

SUB-SECT. 2.—LIMITATIONS ON PRINCIPAL'S RESPONSIBILITY.

Crown.] — *See* CONSTITUTIONAL LAW; CROWN PRACTICE.

Corporation.]—*See* CORPORATIONS.

Trade union.]—*See* TRADE & TRADE UNIONS.

Local authority.]—*See* HIGHWAYS, STREETS & BRIDGES; MASTER & SERVANT; NEGLIGENCE.

Compulsory pilotage.]—*See* SHIPPING & NAVIGATION.

PART IX. SECT 4, SUB-SECT. 1.—F.

2340 i. *Smuggled goods—Agent protecting — Ignorance of principal.*] — In a suit to recover the value of bullocks hired by deft.'s gomastah to convey salt from Govt. golahs, which salt was in excess of the quantity in the Govt. pass owing to the fraud of the gomastah, & was seized by the salt officials as contraband, & the bullocks sold under Regulation X. of 1819:—*Held:* neither want of authority on the part of the gomastah nor ignorance of deft. could be pleaded to exonerate deft. from the consequences of his servant's fraudulent act. — SADHOOJUNNA *v.* RAMHURRY MUNDUL (1862), 1 Hay, 461.—**IND.**

t. *Quiet enjoyment of lease prevented by agent of lessor.*]—The agent of an insurance co. at T. granted a lease to pltfs., barristers, etc., of one flat of the co.'s offices, containing the usual covenant for quiet enjoyment, & received the rent. The caretaker of the whole building, who lived at a distance, locked the outer street door at 6 p.m., thus excluding pltfs. after that hour, & the agent refused to let them have a key unless they got the caretaker to be present:—*Held:* the co. were responsible for this act of their agent, which was clearly a denial of pltfs.' rights under the lease. — MACLENNAN *v.* ROYAL INSURANCE CO. (1876), 39 U. C. R. 515.—**CAN.**

SUB-SECT. 3.—MISREPRESENTATIONS.

See Sect. 3, Sub-sect. 4.

SECT. 5.—ADMISSIONS BY AGENT.

SUB-SECT. 1.—ADMISSIONS MADE BY AGENT TO PARTIES OTHER THAN PRINCIPAL.

A. In General.

2341. In course of employment.]—What is said by an agent respecting a contract or other matter in the course of his employment, which contract or matter is the foundation of the action, is good evidence to affect the principal; otherwise what is said by him on another occasion.—PETO *v.* HAGUE (1804), 5 Esp. 134.

2342. ——.]—The declarations of an agent are only evidence against his principal where they form part of the contract which he is employed to negotiate on the behalf of the principal.

Where B., through the medium of his agent, chartered a ship to A. & engaged by the charter-party that she was seaworthy, a letter written by the agent to a third person, previous to the charter-party being effected, tendering the ship for hire, was not admissible in evidence, since it did not form a part of the contract on which the action was founded; the agent himself must be called.—BETHAM *v.* BENSON (1818), Gow, 45.

2343. ——.]—An agent can only act within scope of his authority as such; & declarations made by him, as to a particular fact, are not admissible in evidence unless they relate to an act done by him in the course of his particular employment as such agent.—SCHUMACK *v.* LOCK (1824), 10 Moore, C. P. 39; 3 L. J. O. S. C. P. 57.

2344. ——.]—In an action against a sheriff, admissions by the under-sheriff are not evidence unless they accompany some official act of the latter or tend to charge himself.

In an action against the sheriff for taking illegal poundage, declarations of the under-sheriff, after he was out of office, were not admissible to prove that the bailiff charged with the extortion was the sheriff's authorised agent.

There is no difference between one agent & another if the observation relied on is merely a gratuitous one, & not made in the course of his duty (DENMAN, C.J.).—SNOWBALL *v.* GOODRICKE (1833), 4 B. & Ad. 541; 110 E. R. 559.

2345. —— **Casual conversation.**]—The rule that an admission made by an agent in the course of the execution of his agency is binding on the principal does not apply to a mere casual conversation.

Where a statement was made by pltf.'s attorney to deft.'s attorney in a conversation outside the ct. two days before the trial:—*Held:* the statement was not receivable in evidence against pltf.—PETCH *v.* LYON (1846), 9 Q. B. 147; 1 New Pract. Cas. 603; 15 L. J. Q. B. 393; 11 Jur. 37; 115 E. R. 1231.

See, further, SOLICITORS.

2346. Within scope of authority—Statements forming foundation of contract.]—Though an agent may within scope of his authority bind his principal by his agreement, & in many cases by his acts, evidence of his declarations is confined to what is, either by the statement itself, or as tending to determine the quality of contemporary acts, the foundation of, or inducement to, the agreement.—FAIRLIE *v.* HASTINGS (1804), 10 Ves. 123; 32 E. R. 791.

Annotations:—**Folld.** Betham *v.* Benson (1818), Gow, 45. **Apld.** Garth *v.* Howard (1832), 8 Bing. 451. **Refd.** Langhorn *v.* Allnutt (1812), 4 Taunt. 511; Meredith *v.* Footner (1843), 11 M. & W. 202; Udell *v.* Atherton (1861), 7 H. & N. 172.

2347. —— —— **Contract in writing.**]—Where the question is whether deft. was induced to sign the contract sued on by the fraud of pltf.'s agent, evidence of the representations made by the agent to induce deft. to enter into the contract is admissible, notwithstanding the contract was in writing.—HOTSON *v.* BROWNE (1860), 9 C. B. N. S. 442; 30 L. J. C. P. 106; 42 E. R. 174.

B. Admissibility in Evidence of Agent's Admissions.

2348. Agent of charterer—Words used by interpreter when interpreting between agent & shipmaster.]—When the communications between the captain of a ship & an agent of the charterer abroad take place through the medium of an interpreter in consequence of the inability of the agent to speak English, the words used by the interpreter for that purpose are admissible in evidence as if they were the words of the agent.—REID *v.* HOSKINS (1855), 5 E. & B. 729; 25 L. J. Q. B. 55; 26

PART IX. SECT. 5, SUB-SECT. 1.—A.

2341 i. *In course of employment.*]—An admission not on oath by an agent is only admissible when it is part of the *res gestæ* or is made in the course of making a contract for his principal. *Fairlie* v. *Hastings*, 10 Ves. 126, & *Biggs* v. *Laurence*, 3 Term Rep. 454, cited.—CASEY *v.* WENTWORTH (1877), KNOX, 16.—**AUS.**

2341 ii. ——.]—The statements of agents, made after the contract has been perfected, are inadmissible as evidence.—REDPATH *v.* SUN MUTUAL INSURANCE CO. & REDPATH (1869), 14 L. C. J. 90.—**CAN.**

2341 iii. ——.]—A principal is not bound by the statements of his agent after the happening of the act sued on unless the agent had authority to make such statements.—DOWN *v.* LEE (1887), 4 Man. L. R. 177.—**CAN.**

2341 iv. ——.]—The admission or declaration of an agent binds his principal only when it is made during the continuance of the agency in regard to a transaction then depending. The evidence of a person who has ceased to be agent is inadmissible to serve as a commencement of proof against his principal, to contradict the terms of a contract of loan made during the existence of the agency.—KNOX *v.* BOIVIN (1893), Q. R. 4 S. C. 311.—**CAN.**

2341 v. ——.]—Admissions by an agent of the vendee, made months after the transaction had taken place to a person who had nothing whatever to do with it, are no part of the *res gestæ* & are not admissible to establish a contract of sale of goods & their delivery.—LE BLANC *v.* LAPORTE, MARTIN & CO. (1911), 1 E. L. R. 261; 40 N. B. R. 468.—**CAN.**

2346 i. *Within scope of authority.*]—Declarations of members of a committee appointed by a corpn. to superintend the construction of a sewer, made while the work was in progress, & relative thereto, are evidence—being declarations of an agent relative to a matter within his authority.—RILEY *v.* ST. JOHN CORPN. (1865), 6 All. 264.—**CAN.**

2346 ii. ——.]—Declarations made by an agent beyond apparent scope of his authority cannot bind the principal.—THAYER *v.* STREET (1863), 22 U. C. R. 352.—**CAN.**

2346 iii. ——.]—The statements of the president of a bank, not being *res gestæ* nor within scope of his authority:—*Held:* not evidence against the bank.—BLACK *v.* BANK OF NOVA SCOTIA (1889), 21 N. S. R. 448.—**CAN.**

a. "*Without prejudice*"—*Limited to statements made in capacity in which person made same.*]—The words "without prejudice" used to guard admissions made by an agent as an agent do not guard same admissions on its being sought to use them in other proceedings against the agent as a principal.—GOODMAN *v.* HUGHES (1862), I. W. & W. 202.—**AUS.**

PART IX. SECT. 5, SUB-SECT. 1.—B.

b. *Agent of bank—Implicate deposit slip initialled by.*]—A duplicate bank deposit slip initialled by a clerk, & coming from the possession of pltfs. is admissible in evidence to prove a payment into a bank authorised by defts. to receive payments on their account.—CASEY *v.* WENTWORTH (1877), KNOX, 16.—**AUS.**

c. *Agent of occupier—Admissions as to occupancy for taxation purposes.*]—An authority to enter into occupancy does not include an authority to admit the fact of occupancy; & evidence of an admission by an agent of the principal's occupancy is not proof of such occupancy sufficient to fix the principal with payment of rates due only from an occupant.—LAING *v.* HERBERT (1862), I. W. & W. 155.—**AUS.**

Sect. 5.—Admissions by agent: Sub-sect. 1, B.]

L. T. O. S. 149; 2 Jur. N. S. 135; 4 W. R. 95; 119 E. R. 653.

2349. Agent of creditor—Receipt indorsed on writ.]—A receipt, given by the agent indorsed on the back of a writ as issuing it, for the sum claimed, is admissible to prove payment of that sum between the same parties without calling the agent.—WEARY *v.* ALDERSON (1838), 2 Mood. & R. 127.

2350. Agent of debtor—Letter containing admissions.]—Payments were made by A. purporting to be on account of deft., who took credit for them. A letter was written by pltf. to deft., which was answered by A. in a letter stating deft. had handed pltf.'s letter to him. A.'s letter contained an admission of the debt:—*Held:* there was evidence of A.'s authority to make the admission. —MOREL *v.* HARBOROUGH (LORD) (1835), 1 Gale, 146.

2351. Agent of partnership — Statement after change of partners.]—A., B., C., & D. carried on business under the name of L. Co. A. & B. retired. After their retirement, which was not publicly notified, C. & D., who continued to carry on business under the name of L. Co., appointed an agent, who wrote a letter containing admissions:—*Held:* the letter was not admissible against A. & B.—JONES *v.* SHEARS (1836), 4 Ad. & El. 832; 2 Har. & W. 43; 6 Nev. & M. K. B. 428; 5 L. J. K. B. 153; 111 E. R. 997.

Annotations:—**Apld.** Finlay *v.* Bristol & Exeter Ry. Co. (1852), 7 Exch. 409. **Mentd.** Simpson *v.* Ingleby (1872), 26 L. T. 543.

2352. —— Statements made acting under instructions of individual partner.]—Defts., being in partnership as ry. contractors under the name of W., A. & Co., contracted with a ry. co. to do certain works. U. & R. made a sub-contract with defts. to do part of the work, &, for that purpose requiring coals to make bricks, A., without the knowledge or assent of his co-partners, signed in the name of the firm & delivered to pltfs. a guarantee, not addressed to any person, for payment of coals to be supplied to U. & R. Pltfs. having pointed out the omission, a clerk of W., A. & Co., by the direction of A., wrote to pltfs. stating that the guarantee was intended for them. The clerk, also without knowledge of the other partners, wrote to pltfs. certain letters amounting to evidence of an account stated in respect of the amount due on the guarantee. The ct. having held that the guarantee did not bind the firm:—*Held:* as the firm was not bound by the guarantee, the letters of the clerk respecting it were not evidence of an account stated as against the other partners.—BRETTEL *v.* WILLIAMS, AYKROYD & PRICE (1849), 4 Exch. 623; 19 L. J. Ex. 121; 14 L. T. O. S. 255.

Annotations:—**Distd.** *Re* West of England Bank, *Ex p.* Booker (1880), 14 Ch. D. 317. **Apprvd.** Small *v.* Smith (1884), 10 App. Cas. 119.

2353. Agent of person employing contractor—Statements as to payment.]—A. sent B.'s agent a list of prices at which he would do work. B. wrote a letter to his agent, stating he would agree to the prices, if A. would consent to be paid at stated periods, the first payment to be "in Nov." The agent showed this letter to A., & said to him he might consider the £100 to be payable on "Nov. 1." A. afterwards did the work for B. It was left to the jury to say whether that which the agent said to A formed part of the actual contract between the parties, or whether it was a mere observation by the agent himself.—KNAPP *v.* HARDEN (1835), 6 C. & P. 745; 1 Gale, 47, Ex. Ch.

Annotation:—**Refd.** Hayselden *v.* Staff (1836), 5 Ad. & El. 153.

2354. Agent of seller—Statements made at time of sale.]—Where a principal employs an agent or servant to sell for him, what such agent says as a warranty or representation at the time of sale, respecting the thing sold, is evidence against the principal; not what he said at another time.—HELYEAR *v.* HAWKE (1803), 5 Esp. 72.

Annotation:—**Distd.** Brady *v.* Todd (1861), 9 C. B. N. S. 592.

2355. —— Statement as to warranty.]—In an action on the warranty of a horse sold by deft.'s son as his father's agent, a part of the defence being that the son had no authority to warrant, it was proposed to ask a witness whether, on the day on which the sale took place, deft.'s son did not, in answer to a question put by the witness as to the price of the horse, say he would warrant the horse:—*Held:* this evidence was inadmissible, as being a conversation with a stranger; if deft.'s son in offering the horse for sale had offered a warranty, it might have been otherwise, as that would have been a statement accompanying an act done in the course of his agency.—ALLEN *v.* DENSTONE (1839), 8 C. & P. 760.

2356. Agent employed to buy—Acknowledgment of receipt of goods.]—Where an agent is employed to buy goods, his acknowledgment of having received them is evidence of a delivery to the buyer.—BIGGS *v.* LAWRENCE (1789), 3 Term Rep. 454; 100 E. R. 673.

For full anns., *see* CONTRACT.

2357. —— Waiver of conditions of purchase.]—Pltfs., through their agent, M., purchased cattle from deft. on c.i.f. terms, the terms as to insurance in the contract being that it was to be "against all risks." On the form of policy, which the ct. held not to comply with the terms of the contract, being submitted to him, M. asked if the policy covered foot & mouth disease, to which deft. replied, "I

2354 i. *Agent of seller—Statements made when delivery due.*]—Defts. by their agent contracted to deliver oil to pltf.'s customers on receipt of orders from pltf.; on complaint by pltf. of irregularity in delivery the agent stated they had no oil to give him:—*Held:* this statement by defts.' agent of their inability to perform was a breach of contract upon which pltf. might sue.—LEPSON *v.* NORTH BRITISH OIL CO. (1874), I. R. 8 C. L. 309.—**IR.**

2354 ii. —— *Casual conversation.*]—Representations were made by pltf.'s agent for sale of lands to deft., a friend, in the course of social intercourse, not for the purpose of advancing pltf.'s interests or of assisting in the disposal of the property, but for the purpose of giving that friend information by which they both might profit:—*Held:* such representations were not binding upon pltf.—C. P. R. *v.* AITKEN (1916), 34 W. L. R. 999; 10 W. W. R. 1052; 29 D. L. R. 357.—**CAN.**

d. *Land agent—Letters to lessee.*]—A lessor will be affected by letters written to a lessee, by his land agent, who had the key of the chamber in which his title-deeds were, that being sufficient to constitute him an agent for the purpose, & protect the tenants in their fair transactions with such agent.—FIRMAN *v.* ORMONDE (1829), BEAT. 347.—**IR.**

e. *Manager — Acknowledgments by.*]—The partners of a concern are bound by the acknowledgments of their manager as their avowed agent.—MASSEYK *v.* GRISH CHUNDER CHUCKERBUTTY (1875), 24 W. R. 34.—**IND.**

f. *Manager conducting business for liquidator—Statements as to value of assets.*]—H. made an offer for the assets of a business, which offer was accepted, & a purchase agreement executed. With some delays the purchase was carried out & the purchase-money paid. H. claimed that he had been grossly deceived by S., acting for the liquidator & vendor of the business, as to the extent & value of the assets of the business, & claimed repayment of part of the purchase-money. S. was the manager appointed by the liquidator to manage the business as a going concern, but he had nothing to do with the negotiation of the sale of the business, although he had furnished H., at his request, with a statement of its assets:—*Held:* S. had no authority to give information, & H.'s claim for repayment of any of the purchase-money failed.—*Re* HAMILTON MANUFACTURING CO., LTD., HALL'S CASE (1912), 23 O. W. R. 473; 4 O. W. N. 421.—**CAN.**

think it does." Thereupon M. said, "Then it will do":—*Held:* pltfs. were not estopped from saying the policy was not in accordance with the contract.—YUILL & Co. *v.* ROBSON (SCOTT-ROBSON), [1908] 1 K. B. 270; 77 L. J. K. B. 259; 98 L. T. 364; 24 T. L. R. 180; 52 Sol. Jo. 192; 11 Asp. M. L. C. 40; 13 Com. Cas. 166, C. A.

For full anns., *see* INSURANCE.

2358. Broker—Letter written by.]—A letter written by an agent or broker, by whom a contract has been made for sale of goods, is not evidence where such agent or broker can be called as a witness.—MAESTERS *v.* ABRAHAM (1795), 1 Esp. 375.

Annotation:—**Refd.** Fairlie *v.* Hastings (1804), 10 Ves. 123.

2359. Clerk—Conversation & threats of overseer.]—An agent cannot bind his principal by any act or declaration which is out of scope of his authority.

In an action in a cty. ct. by a collier against his employer (one of the directors of a co.) to recover wages upon the ground that they had been paid in goods in violation of Truck Act, 1831 (c. 37), it appeared that the co. kept a shop for the sale of goods, adjoining their office, where the wages were paid; that the workmen (including pltf.) were paid their wages monthly, but were often paid advances in cash at the office during the currency of the month, & that pltf. had received & expended such at the shop in goods subsequently to Jan., 1851, & that was the amount now sought to be recovered. There was a coal clerk, whose duty it was to ascertain the amount of each man's earnings. It was proposed on the part of pltf. to give evidence of a conversation between H. (the overman under whom pltf. worked) & pltf. in order to show that some constraint was used to induce him to deal at the shop. The judge at first rejected the evidence, but it afterwards appeared that at the time of the conversation a paper was produced by H. containing a list of names of men working in his level, including that of pltf., & H., on being examined respecting it, said, "I had the list from the office from W. H. [the coal clerk]. He is a clerk under B. [the coal agent] in the office. I had the paper from W. H. to remember the names that did not deal at the shop." The judge thereupon held that what was said by H. when he produced the list to pltf. was admissible against deft. On appeal:—*Held:* (1) the evidence was not admissible, as H. had no authority to bind deft. by any act or declaration relating to the disposal of the men's wages.—OLDING *v.* SMITH (1852), Cox, M. & H. 620; 19 L. T. O. S. 140; 16 J. P. 600; 16 Jur. 497.

For full anns., *see* FACTORIES & SHOPS.

2360. Master of ship—Declaration based on hearsay.]—Declarations of the master of a vessel are admissible evidence against the owners because he is their agent. The declaration of the master cannot be rejected on the ground that his knowledge of the fact of which he spoke was derived from hearsay, though it may have but little weight.—THE ACTÆON (1853), 1 Ecc. & Ad. 176; 3 L. T. 123.

2361. —— Evidence before receiver of wrecks.]—In an action for a collision the examination of the master of pltf.'s ship, taken by the receiver of wrecks under M. S. Act, 1854 (c. 104), s. 448, is not admissible for deft. under s. 449, for the purpose of proving that the damage to pltf.'s ship from the collision was on her starboard bow, such fact being offered for the purpose of showing that pltf.'s ship was in fault, since the question which ship caused the damage to the other is not a matter which the receiver has power under s. 448 to inquire into.—NOTHARD (NORTHARD) *v.* PEPPER (1864), 17 C. B N. S. 39; 4 New Rep. 331; 10 L. T. 782; 10 Jur. N. S. 1077; 2 Mar. L. C. 52; 144 E. R. 16.

Annotations:—**Consd.** The Emperor, The Zepher (1864), 12 W. R. 890. **Folld.** The Little Lizzie (1870), L. R. 3 A. & E. 56; *Re* the Harry Coxon (1878), 3 P. D. 156. **Distd.** The Solway (1885), 10 P. D. 137.

2362. Mate or members of crew—Declaration.]—The principle of declarations by agents does not extend to the mate of a ship, even when he is in charge of it, or to the crew, so as to make declarations by the mate or members of the crew admissible against the owners of the ship.—THE ACTÆON, No. 2360, *ante*.

2363. Officers of company—Secretary—Letters promising payment.]—In an action upon an agreement to do work for a ry. co. to the satisfaction of a sub-committee & of the general board of directors, letters written by the secretary promising payment:—*Held:* admissible evidence to prove the work had been so done.—BUSH *v.* WEISS (1846), 8 L. T. O. S. 137.

2364. Pawnbroker's shopman—Statement relating to transactions within employer's business.]—Statements made by the shopman of a pawnbroker who is left in the shop to answer in his master's absence, can only be received in evidence in an action against the master when they relate to transactions which are strictly within the business of a pawnbroker, & are not receivable if they relate to an advance of money not within the terms of Pawnbrokers Act, 1800 (c. 99).—GARTH *v.* HOWARD & FLEMING (1832), 8 Bing. 451; 1 Moo. & S. 628; 1 L. J. C. P. 129; 131 E. R. 468.

Annotations:—**Distd.** G. W. Ry. Co. *v.* Willis (1865), 18 C. B. N. S. 748. **Mentd.** Udell *v.* Atherton (1861), 7 H. & N. 172.

2365. Railway officials—Night inspector—Admissions as to loss of goods.]—In an action against a ry. co. for not conveying cattle to market within a reasonable time, a cty. ct. judge allowed evidence to be given of a conversation, which took place a week after the alleged cause of action arose, between pltf. & a "night inspector" at one of the co.'s stations, whose duty it was to forward the cattle, in which conversation the latter, in answer to a question as to why he did not send the cattle on, stated "he had forgotten them":—*Held:* such evidence was improperly admitted, it not being within scope of the man's authority to make admissions as to bygone transactions.—GREAT WESTERN RY. CO. *v.* WILLIS (1865), 18 C. B. N. S. 748; 34 L. J. C. P. 195; 144 E. R. 639; *sub nom.* WILLIS *v.* GREAT WESTERN RY. CO., 12 L. T. 349.

Annotation:—**Distd.** Johnson *v.* Lindsay (1889), 53 J. P. 599.

2366. —— Stationmaster—Statement to police as to loss of goods.]—In an action against a ry. co. for the loss of a parcel containing money, defts. pleaded Carriers Act, 1830 (c. 68), & pltfs. replied that the parcel was lost by the felonious act of one of the co.'s servants. It was proved the parcel was sent on July 27, by defts.' ry., addressed to a clerk of pltfs. at U., where there was a station on defts.' ry., that the parcel was not delivered, & that on the same day H., a porter in defts.' service at U. station, disappeared. A superintendent of police at U. gave, after objection by defts., the following evidence: "I know P., the stationmaster at defts.' ry. station at U. In consequence of a communication I went to him on July 30. He told me that H., a parcel porter, had absconded from the service; that a money parcel was missing, & he, P., suspected H. had taken it; would I [the witness] make inquiries after him?" A verdict having passed for pltfs.:—*Held:* the evidence was rightly admitted; for it must be taken that the stationmaster, being the person in charge there, had authority from defts. to set the police in motion, & what he said pertinent to the occasion, when acting within scope of his authority, was evidence against

Sect. 5.—Admissions by agent: Sub-sect. 1, B.; sub-sect. 2, A. & B.]

defts.—KIRKSTALL BREWERY CO. *v.* FURNESS RY. CO. (1874), L. R. 9 Q. B. 468; 43 L. J. Q. B. 142; 30 L. T. 783; 38 J. P. 567; 22 W. R. 876.

Annotation:—**Consd.** Johnson *v.* Lindsay (1889), 53 J. P. 599.

2367. Referee — Statements concerning matter referred.]—If A. refers B. for information upon any particular subject to C., what C. says concerning it, when applied to by B. or his agent, is evidence for B. in an action against A.—WILLIAMS *v.* INNES (1808), 1 Camp. 364.

Annotations:—**Apld.** Sybray *v.* White (1836), Tyr. & Gr. 746. **Refd.** R. *v.* Mallory (1884), 50 L. T. 429, C. C. R.

2368. Solicitor—Admissions before litigation.]—A letter written to pltf.'s attorney before action brought by the attorney who afterwards appeared in the cause for deft., is not evidence of a fact admitted therein without further proof that deft. authorised the communication.—WAGSTAFF *v.* WILSON (1832), 4 B. & Ad. 339; 1 Nev. & M. K. B. 2; 110 E. R. 483.

Annotation:—**Apld.** Ley *v.* Peter (1858), 3 H. & N. 101.

2369. —— Admissions made fraudulently.]—Where a solr. had put in a fraudulent defence for his client without the knowledge of the client, making admissions in which judgment was obtained against the client:—*Held:* the ct. had jurisdiction to set aside the judgment & to permit the client to withdraw the defence & put in a fresh defence.—WILLIAMS *v.* PRESTON (1882), 20 Ch. D. 672; 51 L. J. Ch. 927; 47 L. T. 265; 30 W. R. 555.

Annotation:—**Distd.** *Re* Youngs, Doggett *v.* Revett, *Re* Youngs, Vollum *v.* Revett (1885), 30 Ch. D. 421, C. A.

2370. —— Admissions made casually.]—Where, in an action for use & occupation, pltf. proved his case in the ordinary way, but it was elicited, in cross-examination by deft.'s counsel, pltf.'s attorney had stated to a witness that the premises were let under a written agreement:—*Held:* such statement was not admissible in evidence.

What pltf.'s attorney says is not evidence against pltf., unless he states it as an admission for the purposes of the cause (MAULE, J.).—WATSON *v.* KING (1846), 3 C. B. 608; 8 L. T. O. S. 118; 136 E. R. 243.

2371. —— ——.]—PETCH *v.* LYON, No. 2345, *ante*.

2372. —— Admissions made to person other than opposite party.]—An offer made by pltf.'s attorney in the hearing of a third person to do an act relative to deft. which lay within scope of his authority, is not admissible evidence to affect pltf. with such offer; it is otherwise if the offer had been made to deft.

"I am not aware that any conversation of an attorney, not spoken upon oath nor proved to be authorised by his client, can bind the client" (MANSFIELD, C.J.).—WILSON *v.* TURNER (1808), 1 Taunt. 398; 127 E. R. 888.

2373. Solicitor's clerk—Admissions made when having costs taxed.]—Where an attorney's clerk admitted, on the taxation of costs before the master, that the suit in which the costs were taxed was conducted by his employer from motives of charity on behalf of pltf.:—*Held:* the clerk was such an agent as to bind his master by such admission.

A direct & positive agency exists on the part of an attorney's clerk attending to tax costs of an action conducted by his employer. In this case the clerk was clothed with a full & immediate agency by & for the attorney; he appeared & acted as his representative, by his instructions, for his benefit & convenience. Standing in that close & intimate connection with him, the declaration of the one was, in effect, the declaration of the other, & was admissible in evidence (ABBOTT, C.J.).—ASHBOURNE *v.* PRICE (1823), Dow. & Ry. N. P. 48; *sub nom.* ASHFORD *v.* PRICE (1823), 3 Stark. 185.

2374. Traveller—Entry in books by seller's traveller.]—In an action for goods sold & delivered, deft., in order to prove payment by him of a sum of £10 11*s.* 6*d.*, produced a book containing an entry debiting deft. with £26 2*s.* for goods supplied by pltf., &, immediately thereunder, another entry giving deft. credit for £10 11*s.* 6*d.* To the first entry there was a date, & underneath that date, before the second entry, there were two inverted commas. Both entries were in the handwriting of a person who had formerly been pltf.'s traveller, & the book was such as pltf.'s travellers usually kept:—*Held:* the entry was admissible to prove the payment without calling the traveller or giving independent evidence that it was made by the traveller during the time he was in pltf.'s service.

I admitted the book, because, upon the face of it, the entry appeared to me to be made by pltf.'s agent during his agency (ERLE, J.).—BASS *v.* WELLS (1849), 13 L. T. O. S. 70.

2375. Waywarden of parish—Admissions as to repair of highway.]—Where proceedings are taken under Highways Act, 1862 (c. 61), s. 18, before JJ. for non-repair of a highway forming part of a highway district, the *bonâ fide* admission by a waywarden of a parish that the road is a highway which the parish is bound to repair is binding on the highway board, for that sect. has not been repealed, either expressly or by implication, by Highways Act, 1878 (c. 77), s. 10, or otherwise.—LOUGHBOROUGH HIGHWAY BOARD *v.* CURZON (1886), 17 Q. B. D. 344; 55 L. J. M. C. 122; 55 L. T. 50; 50 J. P. 788; 34 W. R. 621; 2 T. L. R. 678, C. A.

Annotation:—**Refd.** R. *v.* Poole Corpn. (1887), 19 Q. B. D. 602.

2376. Wife—Admissions made while carrying on husband's business.]—Where a husband permits his wife to act for him in any department or business, her admissions or acknowledgments are evidence to charge the husband.—EMERSON *v.* BLONDEN (1794), 1 Esp. 141.

Annotation:—**Consd.** Clifford *v.* Burton (1823), 8 Moore, C. P. 16.

2377. —— ——.]—Where the wife of deft. alone transacts the business at home, & purchases all the articles used in their trade, her admission as to the state of the accounts between pltf., who has supplied goods to her to be used in the trade, & her husband, is evidence against the husband.—ANDERSON *v.* SANDERSON (1817), 2 Stark. 204; Holt, N. P. 591.

2378. —— ——.]—Where a wife served in her husband's shop, & carried on the business of it in his absence:—*Held:* admissions made by her on application to pay for goods before delivered at the shop were receivable against her husband.—CLIFFORD *v.* BURTON (1823), 1 Bing. 199; 8 Moore, C. P. 16; 1 L. J. O. S. C. P. 61; 130 E. R. 81.

Annotation:—**Refd.** G. W. Ry. Co. *v.* Willis (1865), 18 C. B. N. S. 748.

2379. —— ——.]—Where a wife carried on in her husband's absence the business of a shop, & by his authority attended to all the receipts & payments, in an action of replevin by the husband:—*Held:* a statement made by the wife to the landlord, on the occasion of her paying him rent for another person, that she would pay the rent of the shop on a future day, & admitting its amount, was not evidence against the husband of the terms of the tenancy.—MEREDITH *v.* FOOTNER (1843), 11 M. & W. 202; 12 L. J. Ex. 183; 152 E. R. 775.

SUB-SECT. 2.—ADMISSIBILITY IN EVIDENCE OF STATEMENTS BY AND LETTERS, ETC., FROM AGENT TO PRINCIPAL.

A. Statements.

2380. Officer of company—Chairman—Statement made at statutory meeting.]—A statement made by an agent to his principal cannot be used against the principal by a third party, nor where the agent is common agent of a body of persons, such as chairman of a co., can a statement by him to the members of the body, *e.g.*, at a statutory meeting, be used against the body by one of its own members, *e.g.*, a shareholder.

A. applied to have his name removed from the list of members of a co. on the ground that he had been induced to take shares by false representations contained in a prospectus. At the hearing of the application he sought to use, in support of his contention as to the falsity of the prospectus, a statement made by the chairman of the co. (after the issue of the prospectus) in course of explaining the co.'s affairs at a statutory meeting:—*Held:* he could not be allowed to do so.—*Re* DEVALA PROVIDENT GOLD MINING CO. (1883), 22 Ch. D. 593; 52 L. J. Ch. 434; 48 L. T. 259; 31 W. R. 425.

Annotation:—**Apld.** *Re* Djambi Rubber Estates (1912), 107 L. T. 631, C. A.

2381. Servant of carrier—Admissions of loss on return to carrier's office.]—Where goods are delivered to a ry. co. as common carriers to London, & in London the goods are handed over to their agent's servant for distribution, the co. receiving the charge for such distribution:—*Held:* the statement of the servant, when making known the loss of the goods, on his return to the offices of the co. where his employers had an establishment on the night of the loss, was admissible in evidence against the co.—MACHIN *v.* SOUTH-WESTERN RY. CO. (1847), 10 L. T. O. S. 288.

B. Letters, Accounts, etc.

2382. Agent—Account rendered.]—The question being whether rent paid by pltf. to B. had been received by B. on his own account, or as agent of deft., it was proposed by deft. to give in evidence certain accounts which had been rendered to him by B., in which he charged himself, as deft.'s agent, with the receipt of those rents:—*Held:* the accounts were not admissible in evidence, B. being alive & capable of being a witness, & not being identified in interest with pltf.—SPARGO *v.* BROWN (1829), 9 B. & C. 935; 4 Man. & Ry. K. B. 638; 8 L. J. O. S. K. B. 67; 109 E. R. 348.

Annotation:—**Apld.** *Re* Holland, Gregg *v.* Holland, [1902] 2 Ch. 360, C. A.

2383. —— Letters written when rendering account.]—Letters of an agent to his principal in which he is rendering him an account of the transactions, which he has performed for him, are not admissible in evidence against the principal.—LANGHORN *v.* ALLNUTT (1812), 4 Taunt. 511; 128 E. R. 429.

Annotations:—**Apld.** Kahl *v.* Jansen, Kahl *v.* Cologan (1812), 4 Taunt. 565; Reyner *v.* Pearson (1812), 4 Taunt. 662; Coates *v.* Bainbridge (1828), 2 Moo. & P. 142. **Consd.** Udell *v.* Atherton (1861), 7 H. & N. 172. **Mentd.** Palmer *v.* Marshall (1832), 8 Bing. 317; Palmer *v.* Fenning (1833), 2 Moo. & S. 624

2384. —— Letters detailing conversations with third party.]—Letters written by a deceased agent to his principal subsequently to the date of an agreement alleged to have been made by him on behalf of the principal, detailing conversations with the other party, are not admissible on behalf of the principal to prove that no such agreement was entered into, or that the agent was not authorised to make it, & that the principal never knew of nor ratified it. Although the alleged agreement was verbal only, & the agent, & after the writing of the letters, signed a written agreement confirming the verbal one, the letters are inadmissible to prove that the agent was not authorised to sign the written agreement. It makes no difference that the agent is dead, unless the letters were written at the time of the conversations detailed & it was the agent's duty to communicate them to his principal at that time.—TURNER *v.* HUTCHINSON (1861), 3 L. T. 815; 25 J. P. 149.

For full anns., *see* EVIDENCE.

2385. Agent of assured—Letters summarising reports from agents.]—The letters of an agent of the assured in a foreign country written to the assured, & stating the contents of letters from another agent of the assured, are not evidence against the principal.—KAHL *v.* JANSEN, KAHL *v.* COLOGAN (1812), 4 Taunt. 565; 128 E. R. 451.

Annotation:—**Folld.** Reyner *v.* Pearson (1812), 4 Taunt. 662.

2386. —— Letters written by agent or continental correspondent.]—Letters written to the assured by his agent or correspondent on the Continent are not admissible as evidence against him.—REYNER *v.* PEARSON (1812), 4 Taunt. 662; 128 E. R. 491.

Annotation:—**Folld.** Reyner *v.* Hall (1813), 4 Taunt. 725.

2387. Agent of vendor—Letters between principal & agent.]—In cross-actions between the vendor & vendee of a ship, the question in both being fraud in his obtaining a classification as A1, which had been obtained by trickery on the part of the vendor's agent:—*Held:* (1) the jury must, to find against the vendor, believe him to have been a party to the fraud; (2) letters passing between him & the agent were admissible on his behalf to show *bona fides*, since the question being as to the principal's complicity, what was conveyed to the principal's mind by his agent was material.—TINDALL *v.* BASKETT, BASKETT *v.* TINDALL, No. 2277, *ante*.

2388. Agent to present bill—Letters acknowledging receipt of payment.]—Defts. sent bills of exchange to their agents abroad, who presented them to the drawees, & wrote defts. that they had received the amount. Defts. afterwards acknowledged the receipt of the letter, & directed the agents to remit the amount to them:—*Held:* as the letter written by the agents, while acting within scope of their authority as such, was recognised, & its terms adopted by defts., it was admissible in evidence to charge the latter with the receipt of the money.—COATES *v.* BAINBRIDGE (1828), 5 Bing. 58; 2 Moo. & P. 142; 6 L. J. O. S. C. P. 220; 130 E. R 981.

PART IX. SECT. 5, SUB-SECT. 2.—A.

2380 i. *Officer of company — Statements indicating dismissal of employee.*]—Statements made by officers of a co. to pltf., indicating that he was dismissed from its service, are admissible in evidence upon an issue raised by a denial of the dismissal, without proof that the co. authorised same, or by resolution authorised the dismissal of pltf.—VARRELMANN *v.* PHŒNIX BREWING CO., LTD. (1894), 3 B. C. R. 135.—**CAN.**

PART IX. SECT. 5, SUB-SECT. 2.—B.

g. *Agent—Books kept by.*]—Resp., by notarial agreement, leased to applt. the right to mine for asbestos on property of resp. Subsequently resp. agreed to reduce the amount of royalty he was to receive; but to what extent applt. & resp. did not agree. Applt. kept no regular books, but his son-in-law & agent, at all events for some purposes, kept full accounts, & applt. was in the habit of referring those who dealt with him to this agent, & he had even paid resp. on the statements of this agent:—*Held:* applt. was bound by the statement of account of such agent, the amount so fixed being less than resp. would be entitled to under the original agreement.—JEFFERY *v.* WEBB (1886) 3, M. L. R. 147; 10 L. N. 365.—**CAN.**

Sect. 5.—Admissions by agent: Sub-sect. 2, B.; sub-sect. 3. Sect. 6: Sub-sect. 1, A. & B.]

2389. Master of ship—Letters as to facts of voyages.]—In an action against a shipowner to recover damages for non-delivery of a cargo laden on board deft.'s ship, letters written by the master of the ship to deft., as to facts occurring on the voyage on which the cargo was carried, are admissible as evidence against deft. The opinion of the master stated in such letters is not evidence.—THE SOLWAY (1885), 10 P. D. 137; 54 L. J. P. 83; 53 L. T. 680; 34 W. R. 232; 5 Asp. M. L. C. 482.

SUB-SECT. 3.—ADMISSIBILITY OF AGENT'S EVIDENCE IN REGARD TO INSTRUCTIONS FROM PRINCIPAL.

2390. Question which agent may be asked.]—When the directions which have been given by deft. to his agent cannot be read on the ground of public policy, the agent may be asked whether he did not act under the direction of deft.—COOKE *v.* MAXWELL (1817), 2 Stark. 183.

2391. ——.]—An indictment for perjury charged that in a suit in Ch. it became material to ascertain whether an annuity granted by H. to deft., or by H. to B., as trustee for deft., had been paid up to the year 1828, & deft. falsely swore that it had not been paid, whereas in truth the annuity had been paid by H. to B., & B. had paid it to deft. With a view to showing that B., who had been abroad since 1832, had paid the money to deft., it was proved B. had sent money to his bankers by his clerk, & it was proposed to ask the clerk the following question: "At the time you received this money from B. to pay in at the bankers, what did he say about the money?":—*Held:* (1) the question might be put; (2) the answer was receivable in evidence against deft.—R. *v.* HALL (1838), 8 C. & P. 358.

2392. When insolvent purchaser instructs agent to unship but not to accept goods—Preservation of vendor's right of stoppage in transitu.]—Goods were consigned to A. deliverable in the river Thames; on the arrival of the vessel in the river the master pressed A. to have them landed immediately; A. in consequence sent B., his son, with directions to land them at a wharf where he was accustomed to have goods landed for him & kept until he carted them away to his customers in his own carts, but A. (being then insolvent) at the same time told B. he would not meddle with the goods, he did not intend to take them, & the vendor ought to have them. The goods were, by B.'s direction, landed at the wharf, & there stopped *in transitu* by vendor. In trover for the goods by the assignees in bkpcy. of A. against the wharfinger:—*Held:* (1) the declarations so made by A. to B. were admissible in evidence, although they were not communicated to vendor or to the wharfinger; (2) they showed A. had not taken possession of the goods as owner; (3) the *transitus* was not determined.—JAMES *v.* GRIFFIN (1837), 2 M. & W. 623; 6 L. J. Ex. 241; 150 E. R. 906.

Annotations:—**Follid.** Bolton *v.* L. & Y. Ry. Co. (1866), L. R. 1 C. P. 432. **Consd.** Fraser *v.* Witt (1868), L. R. 7 Eq. 64; *Re* Worsdell, *Ex p.* Barrow (1877), 46 L. J. Bcy. 71; *Re* Cock, *Ex p.* Rosevear China Clay Co. (1879), 11 Ch. D. 560, C. A. **Refd.** Dodson *v.* Wentworth (1842), 4 Man. & G. 1080; Bushel *v.* Wheeler (1844), 15 Q. B. 442; Heinecke *v.* Earle (1858), 31 L. T. O. S. 357.

Payments made by agent so as to take debt out of Statute of Limitations.]—*See* Part V., Sect. 3, Sub-sect. 14, *ante*.

SECT. 6.—NOTICE.

See, generally, EQUITY; MORTGAGE; SALE OF LAND; SOLICITORS.

SUB-SECT. 1.—NOTICE TO AGENT IMPUTED TO PRINCIPAL.

A. In General.

2393. Actual notice & constructive notice—Definitions & distinctions.]—Notice is of two sorts: actual notice, which must be proved as any other fact; & notice by construction of law, as, where notice to an agent is notice to the principal; if the agent comes to the knowledge of the fact, while he is concerned for the principal, & in the course of the very transaction, which becomes the subject of the suit (LORD ERSKINE, C.).—HIERN *v.* MILL (1806), 13 Ves. 114; 33 E. R. 237.

Annotations:—**Apprvd.** Kennedy *v.* Green (1834), 3 My. & K. 699. **Consd.** Dresser *v.* Norwood (1863), 32 L. J. C. P. 201. **Refd.** Robinson *v.* Carrington (1833), 1 Mont. & A. 1; Dryden *v.* Frost (1838), 3 My. & Cr. 670; Jones *v.* Smith (1841), 1 Hare, 43; West *v.* Reid (1843), 2 Hare, 249; Fuller *v.* Benett (1843), 2 Hare, 394; Hewitt *v.* Loosemore (1851), 9 Hare, 449. **Mentd.** Jones *v.* Jones (1837), 8 Sim. 633; Cockerell *v.* Dickens (1840), 3 Moo. P. C. C. 98; Lang *v.* Purves (1862), 15 Moo. P. C. C. 389.

2394. —— —— In regard to solicitor.]—Although the notice which a principal is supposed to receive through a solr. is generally treated as constructive notice, it is more properly to be considered as actual notice.—ESPIN *v.* PEMBERTON (1859), 3 De G. & J. 547; 28 L. J. Ch. 311; 32 L. T. O. S. 345; 5 Jur. N. S. 157; 7 W. R. 221; 44 E. R. 1380.

Annotations:—**Distd.** Austin *v.* Tawney (1867), 15 W. R. 463, C. A. **Refd.** Eastham *v.* Wilkinson (1859), 33 L. T. O. S. 234; Bradley *v.* Riches (1878), 9 Ch. D. 189; Cave *v.* Cave (1880), 15 Ch. D. 639; Manners *v.* Mew (1885), 29 Ch. D. 725; Brown *v.* Stedman (1896), 44 W. R. 458, C. A.; Davis *v.* Hutchings (1907), 96 L. T. 293.

See, further, SOLICITORS.

Notice to company officials.]—*See* COMPANIES.
Notice to insurance agents.]—*See* INSURANCE.
Notice to solicitors & solicitors' clerks.]—*See* SOLICITORS.

B. When Agent's Knowledge imputable to Principal.

2395. In general.]—In order to affect a principal with constructive notice of facts within the knowledge of an agent, it is necessary not only that the knowledge should be derived from the same transaction, but it must be knowledge of facts which are material to that transaction & which it was the duty of the agent to communicate.

W. was transferee of a mtge., the draft having been perused & approved by L., his solr. L. employed C., another solr., to procure mtgors.'

PART IX. SECT. 6, SUB-SECT. 1.—B.

2395 i. *In general.]*—DRIFFILL *v.* GOODWIN (1876), 23 Gr. 431.—**CAN.**

2396 i. *In course of employment—Agent to whom notice given succeeded by another without knowledge.]*—H. assigned to a bank by way of security a chattel mtge. in his favour & delivered to them a duplicate original. Pltfs. granted a lease to H., & lent him $300 for improvements: the lease contained a clause that the chattel mtge., subject to the bank's prior claim, should be security for the $300. Pltfs. deposited this lease with the bank, informing the manager of this clause. On C., to whom H. had sold the mtge., paying off H.'s liability to the bank, a new manager who had been appointed, not having notice of the clause, delivered up the duplicate original & the copy of the lease:—*Held:* the bank was chargeable with notice of the debt of H. to pltfs.—AULD *v.* TRADERS BANK (1910), 16 W. L. R. 24.—**CAN.**

signatures:—*Held:* notice to C. was not notice to W.—WYLLIE *v.* POLLEN (1863), 3 De G. J. & Sm. 596; 2 New Rep. 500; 32 L. J. Ch. 782; 9 L. T. 71; 11 W. R. 1081; 46 E. R. 767, C. A.

Annotation:—**Refd.** Blackburn, Low *v.* Vigors (1887), 57 L. J. Q. B. 114, H. L.

2396. In course of employment.]—Constructive knowledge of an agent, or knowledge acquired by him otherwise than as agent for the sale, of a fact the non-communication of which is made the ground for relief against the purchase, does not at all affect the contract.—WILDE *v.* GIBSON (1848), 1 H. L. Cas. 605; 12 Jur. 527; 9 E. R. 897, H. L.

Annotations:—**Distd.** Marshall *v.* Sladden (1849), 7 Hare, 428. **Consd. & Expld.** Espey *v.* Lake (1852), 10 Hare, 260. **Consd. & Distd.** Reynell *v.* Sprye (1852), 1 De G. M. & G. 660. **Distd.** Chadwick *v.* Chadwick (1854), 23 L. T. O. S. 108. **Consd.** Barnard *v.* Hunter (1856), 5 W. R. 92, C. A. **Apld.** Robson *v.* Devon (1857), 29 L. T. O. S. 300. **Consd.** Udell *v.* Atherton (1861), 7 H. & N. 172; Brett *v.* Clowser (1880), 5 C. P. D. 376; Brownlie *v.* Campbell (1880), 5 App. Cas. 925; Joliffe *v.* Baker (1883), 11 Q. B. D. 255; Seddon *v.* North Eastern Salt Co., [1905] 1 Ch. 326. **Refd.** Price *v.* Berrington (1851), 3 Mac. & G. 486; Blisset *v.* Daniel (1853), 18 Jur. 122; Parr *v.* Jewell (1855), 1 K. & J. 671; Traill *v.* Baring (1864), 4 De G. J. & Sm. 318; Lagunas Nitrate Co. *v.* Lagunas Syndicate, [1899] 2 Ch. 392, C. A.; Debenham *v.* Sawbridge, [1901] 2 Ch. 98. **Mentd.** Griggs *v.* Staples (1848), 2 De G. & Sm. 572.

2397. ——.]—A principal is not obliged to ask or to answer as to any knowledge which his agents had happened to acquire outside the course of their employment by him (RIGBY, L.J.).—WELSBACH INCANDESCENT GAS LIGHTING CO. *v.* NEW SUNLIGHT INCANDESCENT CO., [1900] 2 Ch. 1; 69 L. J. Ch. 546; 83 L. T. 58; 48 W. R. 595; 44 Sol. Jo. 483, C. A.

Annotation:—**Refd.** Wells *v.* Smith, [1914] 3 K. B. 722.

2398. ——.]—I am not satisfied that knowledge of the agent not acquired in the course of his employment for the principal should be imputed to the principal (SCRUTTON, J.).—WELLS *v.* SMITH, No. 2415, *post.*

2399. —— In same transaction.]—Notice to an agent, in order to bind his principal, must be in the same transaction, & this though the agent acted as attorney for vendor & vendee.

The agent stands in place of the principal; & notice therefore to the agent is notice to the principal; but he cannot stand in the place of the principal until the relation of principal & agent is constituted; & as to all information which he has previously acquired the principal is a mere stranger (LEACH, M.R.).—MOUNTFORD *v.* SCOTT (1818), 3 Madd. 34; 56 E. R. 422; *affd.* (1823), Turn. & R. 274; 37 E. R. 1105.

Annotations:—**Consd.** Kennedy *v.* Green (1834), 3 My. & K. 699. **Consd. & Expld.** Hargreaves *v.* Rothwell (1836), Donnelly, 38. **Consd.** Fuller *v.* Benett (1843), 2 Hare, 394. **Refd.** Perkins *v.* Bradley (1842), 1 Hare, 219; *Re* Smallman's Estate (1867), 16 W. R. 419; Bulpett *v.* Sturges (1870), 22 L. T. 739.

2400. —— At time of the transaction.]—P., a conveyancer, perused a settlement, & afterwards drew another of the same lands, but at such a distance of time that he had forgotten the contents of the former settlement; upon a plea of a purchaser without notice on the latter settlement, the question was whether this notice to P. of a thing which he had forgotten was sufficient to affect the principal:—*Held:* it was not; when the thing had slipped out of his memory, he was as if he never had any notice at all of the thing.—*Re* PIGOTT (undated), 2 Eq. Cas. Abr. 682; 22 E. R. 573.

Annotation:—**Apld.** Brine *v.* Featherstone (1813), 4 Taunt. 869.

2401. *S. P.* A.-G. *v.* GOWER (1736), 2 Eq. Cas. Abr. 685; 22 E. R. 576.

2402. —— ——.]—The rule of affecting a person with notice of the title of another by reason of his agent's having notice of it has not been carried so far as to affect him with such notice unless where the agent has it at the time of his transaction with him.

Where the notice which the attorney had of a settlement was two years before the mtge.:—*Held:* mtgee. could not be affected by it.—STEED *v.* WHITAKER (1740), Barn. Ch. 220; 27 E. R. 621.

Annotation:—**Refd.** Fuller *v.* Benett (1843), 2 Hare, 394.

2403. —— By person to whom it is sought to impute notice.]—Notice to the agent or counsel who was employed in the thing by another person, or in another business, & at another time, is no notice to his client who employs him afterwards. WORSLEY *v.* SCARBOROUGH (EARL) (1746), 3 Atk. 392; 26 E. R. 1025.

Annotations:—**Consd.** Kinsman *v.* Kinsman (1831), 1 Russ. & M. 617. **Expld.** Bellamy *v.* Sabine (1857), 1 De G. & J.

2399 i. —— *In same transaction.*]—Notice to an agent so as to affect his principal must be given in one & the same transaction; all the knowledge which the agent acquires in same transaction is properly notice to the principal, as it is the duty of the agent to communicate that knowledge; but if the knowledge be acquired by the agent in another transaction, such is not his duty, but, on the contrary, it is his duty not to disclose it.—SMITH *v.* SMITH (1834), 2 Ir. L. Rec. N. S. 157.—**IR.**

2399 ii. —— ——.]—Pltf. sued for rescission of an agreement for sale of land on the ground of misrepresentation. C., who had acted as pltfs.' agent in negotiating the sale, had previously acted as deft.'s agent:—*Held:* (1) knowledge acquired by him in such former transaction was not imputable to pltf.; (2) pltf. entitled to rescission. *Waldy* v. *Gray*, L. R. 20 Eq. 238; *Re Hampshire Land Co.*, [1896] 2 Ch. 743; *Re Payne*, [1904] 2 Ch. 608; *Re Fenwick Stobart*, [1902] 1 Ch. 507; *The Birnam Wood*, [1907] P. 1; *Lloyd* v. *Grace, Smith*, [1912] A. C. 716; *Wells* v. *Smith*, [1914] 3 K. B. 722; *United Shoe Manufacturing Co.* v. *Brunet*, [1909] A. C. 330 at p. 338, cited.—STEWART *v.* CANADIAN FINANCIERS (1915), 23 D. L. R. 707; 32 W. L. R. 121; 9 W. W. R. 82; 22 B. C. R. 133.—**CAN.**

2399 iii. —— —— *Transactions closely connected.*]—Though the general rule is that notice to an agent, to affect the principal, must be in the same transaction, yet if, from the one transaction being so recent, or so closely connected with the other, that the party must be presumed to have remembered the previous one, the notice, though not in same transaction, will bind.—MARJORIBANKS *v.* HOVENDEN (1843), Drury *temp.* Sug. 11; 6 I. Eq. R. 238.—**IR.**

2403 i. —— *By person to whom it is sought to impute notice.*]—Knowledge acquired by an agent acting in one capacity cannot be taken against him when acting in a different capacity at another time, so as to bind his principal on the subsequent occasion.—COLONIAL MUTUAL LIFE ASSURANCE SOCIETY, LTD. *v.* DE BRUYN (1911), Cape Provincial Division, 103.—**S. AF.**

2403 ii. —— ——.]—A contractor being in difficulties, his sureties took an assignment of the contract & assumed financial control of the business which was carried on as usual, the only account thereof being kept by the contractor's book-keeper, through whom the disbursement of all moneys was made, & who appeared from the evidence to have been acting in the most confidential relations with the sureties, at least in so far as concerned the carrying on of that contract:—*Held:* in the circumstances, the book-keeper must be regarded as the agent of the sureties in respect of the contract in question, & they were bound by his knowledge of an assignment & admission of a debt accruing due to a sub-contractor.—SCOULLAR *v.* MCCOLL, March 24th, 1896; Cout. Dig. 1153.—**CAN.**

2403 iii. —— ——.]—Every act of an agent within scope of his employment is the act of his principal; & all knowledge acquired by the agent, when acting within scope of his authority, is the knowledge of his principal; but knowledge acquired by the agent antecedent to his becoming agent to the principal ought not be imputed to the latter, & the recollection or forgetfulness of the agent of matters known to him previous to that relation ought not to affect the liability of the principal, except in cases where the principal purchases the previously obtained knowledge of the agent in relation to a particular subject-matter, or where, from his position & relationship to the principal, the agent is the agent of his principal to "know or to inquire." *Dresser* v. *Norwood*, 17 C. B. N. S. 466, cited.—TAYLOR *v.* YORKSHIRE INSURANCE CO., [1913] 1 I. R. 1.—**IR.**

Sect. 6.—Notice: Sub-sect. 1, B. & C.]

566. **Refd.** Fuller *v.* Benett (1843), 2 Hare, 394; Dresser *v.* Norwood (1863), 14 C. B. N. S. 574; Price *v.* Price (1887), 35 Ch. D. 297.

2404. —— Mere casual conversation.]—The assignee of a policy of assurance sent an agent to the office to pay the annual premium, & in the course of conversation he mentioned the assignment to a clerk of the co.:—*Held:* not sufficient notice to the co.—*Re* CROGGON, *Ex p.* CARBIS (1834), 4 Deac. & Ch. 354; 1 Mont. & A. 693 n.

Annotation:—**Consd.** *Re* Barr's Trusts (1858), 4 K. & J. 219.

2405. In ordinary course of business.]—A principal is not bound to answer as to that which was only known to his agents accidentally, & not in the ordinary course of business (BRETT, L.J.).—BOLCKOW *v.* FISHER (1882), 10 Q. B. D. 161; 52 L. J. Q. B. 12; 47 L. T. 724; 31 W. R. 235; 5 Asp. M. L. C. 20, C. A.

Annotations:—**Expld.** Rasbotham *v.* Shropshire Union Rys. & Canal Co. (1883), 24 Ch. D. 110. **Consd.** Vivian *v.* Little (1883), 11 Q. B. D. 370. **Distd.** Grumbrecht *v.* Parry (1883), 49 L. T. 570; L., T. & S. Ry. Co. *v.* Kirk & Randall (1884), 51 L. T. 599. **Consd.** Alliott *v.* Smith, [1895] 2 Ch. 111; Welsbach Incandescent Gas Lighting Co. *v.* New Sunlight Incandescent Co., [1900] 2 Ch. 1, C. A. **Refd.** Wells *v.* Smith, [1914] 3 K. B. 722.

2406. ——.]—Notice to a co.'s secretary not as agent of the co. or whilst transacting its business, but at a funeral he attended as a mourner:—*Held:* not binding on the co.—SOCIÉTÉ GÉNÉRALE DE PARIS *v.* TRAMWAYS UNION CO. (1884), 14 Q. B. D. 424; 54 L. J. Q. B. 177; 52 L. T. 912, C. A.; *affd. sub nom.* SOCIÉTÉ GÉNÉRALE DE PARIS *v.* WALKER (1886), 11 App. Cas. 20, H. L.

Annotations:—**Apld.** Wells *v.* Smith, [1914] 3 K. B. 722. **Mentd.** Colonial Bank *v.* Whinney (1885), 30 Ch. D. 261, C. A.; Bradford Banking Co. *v.* Briggs (1886), 12 App. Cas. 29, H. L.; *Re* Seymour, Fielding *v.* Seymour, [1913] 1 Ch. 475, C. A.; Mackereth *v.* Wigan Coal & Iron Co., [1916] 2 Ch. 293.

See, further, COMPANIES.

2407. —— While acting for person to whom it is sought to impute notice.]—C. was a clerk in the employment of Messrs. W., bankers, with whom testator kept an account, & as such was aware of the insolvent circumstances of Messrs. W. before their actual bkpcy. Defts., W. & B., exors. of testator, continued after testator's death to employ C. in the management of the property, & pltf. was the tenant for life under the will of the real & personal estate, & he sought to make defts. liable for continuing the account at the bank:—*Held:* (1) C. did not acquire his knowledge of the insolvency of the bank in the character of defts.' agent; (2) notice to him was not notice to them.—FRANCE *v.* WOODS (1829), Taml. 172; 48 E. R. 69.

2408. —— Where no duty to communicate.]—In an action by charterers against the owner for breach of the charterparty, it appeared that one of pltfs. resided at Q.; that timber was loaded at a place about 3 miles distant from Q., where it was furnished by J., superintendent or agent of pltfs.:—*Held:* the knowledge & assent of resident pltf. to a portion of the cargo being stowed on deck were not to be inferred from the fact of J. having such knowledge & offering no objection to that mode of stowage.—GOULD *v.* OLIVER (1840), 2 Man. & G. 208; 2 Scott, N. R. 241; 133 E. R. 723.

For full anns., *see* SHIPPING & NAVIGATION.

2409. —— Where duty to communicate.]—From 1863 down to Mar., 1874, B. was employed by pltf. as his traffic manager to settle & adjust his carriage & freightage with defts. B. was aware that defts. were carrying goods for certain firms on terms which amounted to undue preference, but, contrary to his duty, concealed such knowledge from his employer:—*Held:* pltf. was bound by the acts of B., & was not entitled to recover back from defts. overcharges made by defts. during any portion of this period.—EVERSHED *v.* LONDON & NORTH-WESTERN RY. CO. (1877), 2 Q. B. D. 254; 46 L. J. Q. B. 289; 36 L. T. 12; 41 J. P. 3; 25 W. R. 411; *affd.* (1877), 3 Q. B. D. 134, C. A.; (1878), 3 App. Cas. 1029, H. L.

Annotations:—**Consd.** Denaby Main Colliery Co. *v.* M. S. & L. Ry. Co. (1885), 55 L. J. Q. B. 181, H. L.; Phipps *v.* L. & N. W. Ry. Co., [1892] 2 Q. B. 229, C. A. **Refd.** Budd *v.* L. & N. W. Ry. Co. (1877), 4 Ry. & Can. Tr. Cas. 373; Murray *v.* Glasgow & S. W. Ry. Co. (1883), 4 Ry. & Can. Tr. Cas. 456; M. S. & L. Ry. Co. *v.* Denaby Main Colliery Co. (1884), 13 Q. B. D. 674; Charrington, Sells, Dale *v.* Midland Ry. Co. (1901), 11 Ry. & Can. Tr. Cas. 222; Stone *v.* Midland Ry. Co. (1903), 72 L. J. K. B. 377; A.-G. *v.* Long Eaton U. D. C., [1914] 2 Ch. 251; Chance & Hunt *v.* G. W. Ry. Co., L. & N. W. Ry. Co., Midland Ry. Co. & North Staffordshire Ry. Co. (1914), 15 Ry. & Can. Tr. Cas. 241.

2410. —— ——.]—Pltf. prepared a manuscript which contained certain defamatory statements, & entered into a contract with defts. through their agent whereby defts. agreed to print a certain number of copies of the manuscript, & pltf. paid them £50 on account, & gave them an indemnity against any damages which they might be liable to owing to the printing of the manuscript. Pltf. & defts.' agent knew, but defts. did not know, the manuscript contained libellous matter. Defts. had the manuscript set up in type, & several proofs were struck, but they refused to perform the contract upon the ground that the manuscript contained libellous matter. Pltf. claimed the return of the £50, & defts. counterclaimed for the cost of the printing already done:—*Held:* (1) the contract, being one to print & publish libellous matter, was illegal; (2) as it had been partly performed, pltf. was not entitled to recover back the money paid under it; (3) as the knowledge of defts.' agent must be taken to be the knowledge of defts., defts. were not entitled to recover on the counterclaim.—APTHORP *v.* NEVILLE & CO. (1907), 23 T. L. R. 575.

2411. —— Where reasonable certainty agent will not communicate.]—Though notice to the agent is *primâ facie* notice to the principal, yet where in the circumstances it is certain that the agent will not communicate the information, notice is not to be imputed.—KENNEDY *v.* GREEN (1834), 3 My. & K. 699; 40 E. R. 266.

Annotations:—**Distd.** Hewitt *v.* Loosemore (1851), 9 Hare, 449; Robinson *v.* Briggs (1853), 1 Sm. & G. 188. **Consd.**

2408 i. *In ordinary course of business—Where no duty to communicate.*]—Notice to a person, who is employed only for some specific purpose, & is under no obligation to communicate the knowledge which he possesses, does not bind his principal where that principal employs another agent who really transacts the business.—*Re* BURMESTER (1859), 9 Ir. Ch. Rep. 41.—**IR.**

2409 i. —— *Where duty to communicate.*]—Notice to an agent is notice to his principal whenever the agent is bound by his duty to his principal to communicate the notice to him.—MAGRATH *v.* COLLINS (1917), 3 W. W. R. 677; 37 D. L. R. 611.—**CAN.**

2411 i. —— *Where reasonable certainty agent will not communicate.*]—A bank sued on three promissory notes for $1,000, $4,000 & $1,000 given by M. as collateral security of the debt of S., an indorser of one of the notes & a joint maker with S. of the other two. It was known to the bank's agent that M. agreed to sign only on condition that S. also signed, & the agent took subject to this condition:—*Held:* the bank was bound by the condition & M. was not liable, S. not having signed. *Pym* v. *Campbell*, 6 E. & B. 1, 370, cited. The fact that M. could not have recovered if he had sued in his own name, & thus he was interested in not communicating the condition to his principal, was not enough to exclude the doctrine of constructive notice. Fraud by the agent on the principal must be shown. *Kettlewell* v. *Watson*, 21 Ch. D. 685, cited.—COMMERCIAL BANK OF WINDSOR *v.* SMITH (1901), 34 N. S. R. 426; *sub nom.* COMMERCIAL BANK OF WINDSOR *v.* MORRISON, 32 S. C. R. 98.—**CAN.**

Greenslade *v.* Dare (1855), 20 Beav. 284. **Distd.** Atterbury *v.* Wallis (1856), 8 De G. M. & G. 454; Spencer *v.* Topham (1856), 22 Beav. 573. **Apld.** Eastham *v.* Wilkinson (1859), 33 L. T. O. S. 234. **Consd.** Espin *v.* Pemberton (1859), 3 De G. & J. 547; *Re* Cartwright, Thompson *v.* Cartwright (1863), 2 New Rep. 569. **Apld.** Thompson *v.* Cartwright (1863), 33 Beav. 178; *Re* European Bank, *Ex p.* Oriental Commercial Bank (1870), 5 Ch. App. 358. **Consd.** Rolland *v.* Hart (1871), 40 L. J. Ch. 345. **Apld.** Waldy *v.* Gray (1875), L. R. 20 Eq. 238. **Consd.** Kettlewell *v.* Watson (1882), 21 Ch. D. 685; Berwick *v.* Price, [1905] 1 Ch. 632. **Refd.** Frail *v.* Ellis (1852), 16 Beav. 350; Ogilvie *v.* Jeaffreson (1860), 2 Giff. 353; Willes *v.* Greenhill (1860), 29 Beav. 387; *Re* Carew's Estate Act (1862), 31 Beav. 39; Greenfield *v.* Edwards (1865), 2 De G. J. & Sm. 582; Cave *v.* Cave, Chaplin *v.* Cave (1880), 42 L. T. 730; Gordon *v.* James (1885), 53 L. T. 641, C. A. **Mentd.** Jones *v.* Smith (1841), 1 Hare, 43; Fuller *v.* Benett (1843), 2 Hare, 394; Hiorns *v.* Holtom, Fortnum *v.* Holtom (1852), 16 Beav. 259; Jones *v.* Williams (1857), 24 Beav. 47; Perry *v.* Holl (1860), 2 De G. F. & J. 38; Hunter *v.* Walters, Curling *v.* Walters, Darnell *v.* Hunter (1870), 7 Ch. App. 75; Agra Bank *v.* Barry (1874), L. R. 7 H. L. 135; Lee *v.* Clutton (1875), 45 L. J. Ch. 43; *Re* Mount Morgan West Gold Mine, *Ex p.* West (1887), 56 L. T. 622; Favell *v.* Wright (1891), 64 L. T. 85; Bagot *v.* Chapman, [1907] 2 Ch. 222; Howatson *v.* Webb, [1907] 1 Ch. 537.

2412. —— ——.]—The knowledge of the agent is not to be imputed to the principal where, from the circumstances of the case, it is clear that the agent intended a fraud which would require the suppression of the knowledge in question from the principal, since the act done by the agent cannot be said to be done by him in his character as agent, but is done by him in the character of a party to an independent fraud on the principal.—ROLLAND *v.* HART (1871), 6 Ch. App. 678; 40 L. J. Ch. 701; 25 L. T. 191; 19 W. R. 962, L.C.

Annotations:—**Consd.** Bradley *v.* Riches (1878), 9 Ch. D. 189; *Re* Southampton's Estate, Roper's Claim (1880), 50 L. J. Ch. 155. **Refd.** Lee *v.* Clutton (1875), 45 L. J. Ch. 43; Cave *v.* Cave (1880), 15 Ch. D. 639; Berwick *v.* Price, [1905] 1 Ch. 632.

2413. —— ——.]—The presumption that notice to directors is notice to the co. is rebutted by circumstances showing that the directors would withhold the information from the shareholders.—*Re* FITZROY BESSEMER STEEL CO., LTD. (1884), 50 L. T. 144; 32 W. R. 475.

See, further, COMPANIES.

2414. —— **Where agent states he will not communicate.**]—Notice to the agent is not notice to the principal, where the agent tells the third party he shall not inform his principal.—SHARPE *v.* FOY (1868), 4 Ch. App. 35; 19 L. T. 541; 17 W. R. 65, L.JJ.

Annotations:—**Distd.** Rolland *v.* Hart (1871), 40 L. J. Ch. 701. **Expld.** Cave *v.* Cave (1880), 15 Ch. D 639. **Mentd.** Bateman *v.* Faber (1897), 77 L. T. 576, C. A.

2415. —— **Where third party & agent conspire to conceal notice.**]—Deft. made a statement to pltf.'s agent, which was untrue to the knowledge of deft. & of the agent, in order to induce pltf., whom deft. did not believe to know the untruth, to act upon it. The agent communicated deft.'s statement to pltf., who, relying on the truth of the statement, acted on it to her damage. In an action by pltf. against deft. to recover damages for false & fraudulent misrepresentation:—*Held*: (1) the knowledge of pltf.'s agent of the untruth of deft.'s statement could not be imputed to pltf.; (2) pltf. was entitled to recover damages from deft.—WELLS *v.* SMITH, [1914] 3 K. B. 722; 83 L. J. K. B. 1614; 111 L. T. 809; 30 T. L. R. 623.

C. Whether Knowledge of Principal presumed.

2416. From agent's knowledge—Of breach of trust.]—Where a local agent of a banking co. in that character advances money of the co. by way of loan, & the borrower, to the agent's knowledge, is obtaining the money for the sole purpose of misapplying it, the co. acquires no better title than the agent would have had, had the case been his own, or than the borrower.

An exor. borrowed money from a banking co., of which he was local agent, for the purpose of making a further advance to a mtgor. of a ship, on security of which the testatrix had lent the money, on the pretence that such further advance was made to pay off a prior charge, but really to assist the mtgor., & the security proved ultimately wholly insufficient:—*Held*: (1) the co. had no claim upon the testatrix's assets; (2) a mtge. of the ship made by the exor. to the co. to secure the advance was invalid.—COLLINSON *v.* LISTER (1855), 7 De G. M. & G. 634; 25 L. J. Ch. 38; 26 L. T. O. S. 132; 2 Jur. N. S. 75; 4 W. R. 133; 44 E. R. 247, L.JJ.

For full anns., *see* EXECUTORS & ADMINISTRATORS.

2417. —— **Of fraud inducing contract.**]—In a case of concealed fraud, if the agent of purchaser,

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PART IX. SECT. 6, SUB-SECT. 1.—C.

2416 i. *From agent's knowledge—Of breach of trust.*]—Notice to an agent in a transaction is notice to the principal, otherwise it would be in the power of any one, by employing an agent, to practise with impunity the grossest frauds. An agent receiving notes from an exor. payable to him as exor., as security for advances by the principal to him on his own account, & not as exor., affects his principal with notice that it is a dealing with the exor. of the assets for a purpose foreign to the trusts he was to discharge: the principal is thereby a party to the *devastavit* & liable to its consequences, & he cannot retain the notes against those claiming under the will.—DOWNES *v.* POWER (1814), 2 Ball & B. 491.—**IR.**

2416 ii. —— ——.]—An extrix. held certain lands in trust for pltfs. with power to sell but not to mtge. same. Wishing to borrow money on the land, a pretended sale was made to M., who then raised $2,000 for the extrix. by mtging. the land to defts., & immediately reconveyed the land to the extrix. for a nominal consideration. This scheme was carried out mainly by pltfs.' father, who swore at the trial that defts. agent was aware of the plan adopted, if he did not himself suggest it:—*Held*: defts. were affected through their agent with notice of the fraud & breach of trust committed, & the mtge., together with two subsequent mtges. taken from the extrix. on same lands, should be declared to be fraudulent & void as against pltfs.—GRAHAM *v.* BRITISH CANADIAN LOAN & INVESTMENT CO (1898), 12 Man. L. R. 244.—**CAN.**

h. —— *State of disrepair.*]—A child was killed by falling through the railing of a common stair, where one of the banisters was wanting:—*Held*: the proprietor of the property was liable in damages to the father of the child, in respect that warning of the state of the stair had been given to the factor appointed to look after the property.—M'MARTIN *v.* HANNAY (1872), 10 M. 411.—**SCOT.**

2417 i. —— *Of fraud inducing contract.*]—In an action upon a mtge. of land against a married woman, upon the covenant for payment in the deed executed by her, it appeared the land had been conveyed to her by an agent of pltfs., the mtgees., but she did not know of the conveyance to her, &, if the signature to the mtge. deed was hers, she was fraudulently induced by the agent to make it; in the same way she executed an authority to the agent to receive the mtge. moneys which he received & did not pay over to her:—*Held*: the knowledge of the agent was constructively the knowledge of pltfs., who must be taken to have known all about the transaction.—DOMINION PERMANENT LOAN CO. *v.* MORGAN (1910), 16 W. L. R. 7; 50 S. C. R. 485.—**CAN.**

k. *From notice given to agent—Of trust.*]—Notice to a purchaser's agent:—*Held*: constructive notice to his principal, so as to fix the latter with a trust, or a burden relative to the subject of purchase which without notice he would have escaped.—SEEDEE NAZEER ALI KHAN *v.* OJOODHYA RAM KHAN, MUNSOOR ALI KHAN *v.* OJOODHYA RAM KHAN (1867), 8 W. R. 399.—**IND.**

l. —— *Of unregistered lease.*]—A lease of lands unregistered, is not void against a registered conveyance of the estate to a party whose agent had notice of the lease.—FORBES *v.* DENISTON (1722), 4 Bro. Parl. Cas. 425.—**IR.**

m. *From notice given to agent of remainderman—Of lease by tenant for life.*]—A tenant contracted with a tenant for life for a lease. The contract did not bind the remainderman. The tenant entered into possession, &, after the death of the tenant for life, having sent a copy of the contract to the land agent of the remainderman, expended a large sum on the lands, of which expenditure the remainderman knew:—*Held*: notice of the contract to the land agent did not affect the remainderman, so as to give the tenant an equity against him, by reason of his acquiescence in the expenditure.—O'FAY *v.* BURKE (1858), 8 I. Ch. R. 225; *affd.* 8 I. Ch. R. 511, C. A.—**IR.**

Sect. 6.—Notice: Sub-sect. 1, C.; sub-sect. 2, A. & B.]

at the time he negotiated the purchase, had actual knowledge of the fraud, or had reason to believe the fraud had been committed, a *bonâ fide* purchaser for valuable consideration, who had not assisted in the commission of the fraud, is affected by his agent's knowledge, & is thereby deprived of the protection of the proviso at the end of Real Property Limitation Act, 1833 (c. 27), s. 26.—VANE *v.* VANE (1873), 8 Ch. App. 383; 42 L. J. Ch. 299; 28 L. T. 320; 21 W. R. 252, L.JJ.

Annotations:—**Consd.** Willis *v.* Howe, [1893] 2 Ch. 545, C. A.; *Re* McCallum, McCallum *v.* McCallum, [1901] 1 Ch. 143, C. A. **Refd.** Vane *v.* Vane (1876), 24 W. R. 453; Lawrence *v.* Norreys (1888), 39 Ch. D. 213, C. A.

2418. —— Of fellow-agent taking secret commission.]—Where the vendor of land agrees to pay commission on the purchase-money to purchaser's agent, knowledge of the fact acquired by purchaser's solrs., whilst acting on his behalf in the purchase, binds purchaser.—ROWLAND *v.* CHAPMAN (1901), 17 T. L. R. 669; 45 Sol. Jo. 691.

2419. —— Of apparent principal being in fact agent.]—DRESSER *v.* NORWOOD, No. 2144, *ante*.

For full anns., *see* S. C. No. 2144, *ante*.

2420. From agent's suspicions—In regard to fraudulent inception of bill.]—In an action upon a bill of exchange by an indorsee, notice to the agent of the indorsee in the transaction is notice to the indorsee. If the indorsee's agent knows or suspects that there was fraud in the inception of the bill, or, having the means of knowing, wilfully shuts his eyes, the indorsee is affected with notice of the fraud & cannot recover.—OAKELEY *v.* OODDEEN (1860), 2 F. & F. 656; 2 L. T. 357.

Annotation:—**Apld.** Oakley *v.* Boulton (1888), 4 T. L. R. 379.

2421. From clerk's search in records actually disclosing facts.]—A clerk who searches the register for judgments against A. will, in the absence of proof to the contrary, be presumed to have seen a judgment which was at the time registered against A. *Qu.:* whether this is notice to his principal, if it is proved or can be inferred that the clerk did not communicate to him the result of his search.—PROCTER (PROCTOR) *v.* COOPER (1855), 3 Eq. Rep. 364; 1 Jur. N. S. 149; 3 W. R. 224, C. A.

2422. ——.]—M., being desirous of taking shares in the H. Co., employed G., his confidential clerk, to investigate its financial position. G. thus ascertained that the shares were not fully paid up in cash, but M. believed they were & subsequently sent P., another clerk, to get the transfers effected: —*Held:* M. was affected by the knowledge of G. that the shares were not fully paid up, & his exors. were rightly placed on the list of contributories in winding up.—*Re* HALIFAX SUGAR REFINING CO. (1891), 7 T. L. R. 293.

2423. From notice given to agent in similar transactions on previous occasions.]—A. bought goods of B., who delivered them to a ry. co. to be carried. B. on former occasions had received notice that the co. would not be liable for damage done to or loss of such articles, but in this case no notice was given: —*Held:* as B. was A.'s agent in the transaction, A. must be held to have received notice.—TURTON *v.* LONDON & NORTH WESTERN RY. CO. (1850), 15 L. T. O. S. 92.

2424. From notice given to regimental agents.]—A lieutenant in the army applied for permission to sell his commission. The purchase-money was paid by the intending purchaser to the regimental agent:—*Held:* notice to the agent of an assignment of the purchase-money before such money was received was of no avail. *Semble:* such notice would be of no avail unless given after the retirement of the lieutenant had been published in the *Gazette*.—SUFFOLK & BERKSHIRE (EARL) *v.* COX (1867), 36 L. J. Ch. 591; 16 L. T. 374; 15 W. R. 732.

2425. From notice given to solicitor—In respect of purchase of estate.]—After the commencement of a treaty for the sale of an estate by A., & the purchase of it by B., A. agreed to give C. a mtge. on the estate as a security for an antecedent debt, & notice of the agreement was given to B.'s solrs. The treaty for the sale afterwards ceased to be prosecuted for upwards of 5 years, during part of which time the suit of an adverse claimant of the estate was pending. A. then died & B. purchased the estate at a lower price from the heir & devisee of A. B. conveyed the estate in mtge. to D. The same solrs. were concerned for B. from the commencement of the treaty with A. until the final purchase of the estate, & for D. in the business of the mtge.:—*Held:* (1) in the circumstances B. & D. had, through their solrs., constructive notice of the agreement with C.; (2) the estate in their hands was subject to the lien of C. for the amount agreed to be secured by the proposed mtge.—FULLER *v.* BENETT (1843), 2 Hare, 394; 12 L. J. Ch. 355; 7 Jur. 1056; 67 E. R. 162.

Annotations:—**Consd.** Dresser *v.* Norwood (1863), 14 C. B. N. S. 574. **Refd.** Bulpett *v.* Sturges (1870), 18 W. R. 796.

2426. —— In respect of mercantile transaction.]—The disclosure of a material fact by an intending assured to the solr. of an underwriter is not disclosure to the underwriter so as to prevent the policy being avoided by reason of concealment.

A solr. is not a standing agent for one who has been or may be his client to receive a mercantile notice in respect of mercantile business (BRETT, M.R.).—TATE *v.* HYSLOP (1885), 15 Q. B. D. 368; 54 L. J. Q. B. 592; 53 L. T. 581; 5 Asp. M. L. C. 487, C. A.

Annotations:—**Distd.** The Bedouin, [1894] P. 1, C. A. **Refd.** Price *v.* Union Lighterage Co. (1903), 8 Com. Cas. 155.

Whether notice given to agent is sufficient notice to principal, *see* titles *passim* in which the subject-matter of the notice is dealt with.

Whether knowledge of directors or officers of companies is imputable to the company, *see* COMPANIES.

Notice as affecting the right of the third party to set off as against the principal a debt due by the agent, *see* Sect. 3, Sub-sect. 2, E., *ante*.

SUB-SECT. 2.—NOTICE TO THIRD PARTY OF LIMITATION OF AGENT'S AUTHORITY.

A. Where Agent acts under ostensible Authority.

2427. General rule.]—Where an agent is clothed with ostensible authority no private instructions

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2425 i. *From notice given to solicitor—In respect of registration of instrument.*]—In cases of registry direct notice is requisite. So, as between a registered & an unregistered instrument, the party who has the legal priority by casual circumstances, which in other cases might be considered as constructive notice, will not be bound. But notice to the agent is notice to the principal, &, as the foundation of the rule is knowledge, & as the solr. of the party is to be deemed possessed of that knowledge, although he is also the owner of the property, notice to him is notice to his client. —MARJORIBANKS *v.* HOVENDEN (1843), Drury *temp.* Sug. 11; 6 I. Eq. R. 238.—IR.

2427 i. *General rule.*]—Where an agent is vested with general authority, & such

prevent his acts within scope of that authority from binding his principal (LORD BLACKBURN).—NATIONAL BOLIVIAN NAVIGATION CO. *v.* WILSON (1880), 5 App. Cas. 176 ; 43 L. T. 60, H. L.

Annotations: — **Mentd.** Collingham *v.* Sloper, Foreign, American, & General Investment Trust Co. *v.* Sloper (1893), 41 W. R. 550 ; Royal Bank of Canada *v.* R., [1913] A. C. 283, P. C. ; Sinclair *v.* Brougham, [1914] A. C. 398, H. L.

Effect of secret limitations of agent's ostensible authority, *see* Part V., Sect. 6, *ante*.

B. Where Agent is known to act under formal or written Instructions.

2428. General rule.]—Where an agent's authority depends, & is known to those who deal with him to depend, on a written mandate, it may be necessary to produce or account for the non-production of that writing in order to prove what was the scope of the agent's authority (LORD BLACKBURN).—NATIONAL BOLIVIAN NAVIGATION CO. *v.* WILSON, No. 2427, *ante*.

For full anns., *see* S. C. No. 2427, *ante*.

2429. ——.]—If an agent be held out as having only a limited authority to do on behalf of his principal acts of a particular class, then the principal is not bound by an act done outside that authority, even though it be an act of that particular class, because, the authority being thus represented to be limited, the party prejudiced has notice, & should ascertain whether or not the act is authorised (LORD ATKINSON).—RUSSO-CHINESE BANK *v.* LI YAU SAM, [1910] A. C. 174 ; 79 L. J. P. C. 60 ; 101 L. T. 689 ; 26 T. L. R. 203, P. C.

Annotations :—**Apld.** Lloyd *v.* Grace, Smith, [1911] 2 K. B. 489, C. A. **Refd.** Willis, Faber *v.* Joyce (1911), 104 L. T. 576.

2430. *S. P.* LEVY *v.* RICHARDSON (1889), 5 T. L. R. 236.

2431. Agent acting professedly under power of attorney.]—It is incumbent on all who deal with persons professing to act under powers of attorney to see that the power be substantially followed ; & at their own risk to notice all the qualifications & restrictions of the power.—ATTWOOD (ATWOOD) *v.* MUNNINGS (1827), 7 B. & C. 278 ; 1 Man. & Ry. K. B. 66 ; 6 L. J. O. S. K. B. 9 ; 108 E. R. 727.

Annotations :—**Consd.** Withington *v.* Herring (1829), 5 Bing. 442 ; Smith *v.* M'Guire (1858), 3 H. & N. 554. **Refd.** *Re* Acraman, *Ex p.* Bushell (1844), 3 Mont. D. & De G. 615 ; Alexander *v.* Mackenzie (1848), 6 C. B. 766 ; Bank of Bengal *v.* Macleod (1849), 5 Moo. Ind. App. 1, P. C. ;

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authority is subsequently sought to be limited by writing, notice of such limitation must be conveyed to third parties having dealings with the agent. In the absence of such notice the principal is estopped from setting up the limitation as against a third party acting *bonâ fide*. —SAYWARD *v.* DUNSMUIR & HARRISON (1905), 11 B. C. R. 375 ; 2 W. L. R. 319. —**CAN**

2427 ii. ——.]—If any limitation be made in the terms of a special agency, third parties who have dealt with the agent on the basis of his previous authority should have clear notice of such limitation, otherwise the principal will be bound as regards them to the extent of the agent's previous authority.—FLETCHER *v.* YOUL (1870), 1 V. R. L. 61.—**AUS.**

2427 iii. ——.]—Every act done by an agent in the course of his employment on behalf of his principal, & within apparent scope of his authority, binds the principal, unless the agent is in fact unauthorised to do the particular act & the person dealing with him has notice that in doing so he is exceeding his authority.—KATYAYANI DEBI *v.* PORT CANNING & LAND IMPROVEMENT CO. (1914), 19 C. W. N. 56.—**IND.**

PART IX. SECT. 6, SUB-SECT. 2.—B.

2428 i. *General rule.*]—If a third party is put on inquiry as to an agent's representations & authority, but relies on the agent's statements, he is liable as though he knew the facts.—BANK OF NOVA SCOTIA *v.* RICHARDS (1895), 33 N. B. R. 412 ; *affd.* 26 S. C. R. 381.—**CAN.**

2428 ii. ——.]—A party dealing with an agent is put upon inquiry as to the extent of the agent's powers ; if the agent's authority to sign cheques or notes is limited "to a certain business," the principal is not liable for such as have been subscribed by him & of which he has misapplied the proceeds.—VIGAUD *v.* DE WERTHEIMER (1909), Q. R. 30 S. C. 229 ; Q. R. 35 S. C. 436 ; 6 E. L. R. 173.—**CAN.**

2428 iii. ——.]—Where G. Co. represented by B. induced pltf. to subscribe for shares of deft. co., the price of which pltf. paid by cheque to the order of G. Co. as being authorised to receive it for deft. co., but stock was never delivered, whereupon pltf. made a composition with B. & G. Co. taking the notes of G. Co. for the amount represented by his shares, on pltf.'s subsequently suing deft. co. for delivery to him of the stock :—*Held :* while G. Co. was the agent of deft. co. for the sale of the stock, the subsequent transaction was one which pltf. must have or should have understood to be not within scope of B.'s agency ; he must have understood at same time that B. was not dealing fairly either with him or the co. ; it was his duty, if he did not look exclusively to B. thereafter, to give notice to the officers of the co. ; not having done this he was guilty of laches ; the action must be dismissed. —ADAIR *v.* BRITISH CROWN, ETC. CO., LTD. (1915), 3 W. L. R. 652 ; 24 D. L. R. 905 ; 9 W. W. R. 340.—**CAN.**

n. *Position of public agent.*]—When contracting with a Govt. official or public agent it is the duty of third parties to make inquiries whether the agent has authority to pledge the credit of the Govt.—SECRETARY OF STATE FOR INDIA *v.* SULEMANJI MORSAJI (1902), I. L. R. 26 Bom. 801.—**IND.**

o. *Agent drawing draft as such.*]—Where an agent draws drafts as agent for a principal & person taking these drafts without inquiry as to the agent's authority does so at his own risk.—FLETCHER *v* YOUL (1870), 1 V. R. L. 61.—**AUS.**

p. *Bank manager transferring shares as "manager in trust."*]—Resp. transferred shares as security to brokers who raised loans on them by transfer to a bank, whose manager transferred them to applts. The transfer being as "manager in trust" :—*Held :* these words meant in trust for the bank, & not a fiduciary relation to any other person, & were not so ambiguous as to cast on applts. the duty of making inquiry.—LONDON & CANADIAN LOAN & AGENCY CO., LTD. *v.* DUGGAN (1893), 63 L. J. P. C. 14, P. C.—**CAN.**

q. *Description as "Calcutta agent" in directory.*]—SPINK *v.* MORAN (1873), 21 W. R. 161.—**IND.**

r. *Express notice to third party of limited authority.*]—A purchaser from an agent known to him to be an agent with authority only to sell subject to acceptance by his principal & at prices subject to change, cannot hold the principal, when the latter has refused to accept the sale.—CLARK *v.* BAIRD & PETERS (1917), 44 N. B. R. 413 ; 34 D. L. R. 265.—**CAN.**

s. *Express notice to transferee of condition against registration.*]—Pltf. executed a transfer of land to A., his solicitor, stipulating that A. should not register it, to enable A. to obtain a loan for him. B. took a transfer from A., obtaining also the transfer from pltf. to A., & with notice of the stipulation made an advance. B. subsequently registered the transfers & obtained a certificate of title :—*Held :* the certificate of registration must be set aside, but B. was entitled to hold the transfers as securities.—BEERE *v.* NORTHERN BANK (1908), 7 W. L. R. 432 ; 1 Alta. L. R. 228.—**CAN.**

t. *Express notice to transferee of trust.*]—R., partner in M. W. & Co., received £2,000 of pltf.'s money to invest, & he invested it in M. Mills Co. in trust for pltf., the transaction appearing in the co.'s books as "R. in trust." He subsequently sent over to pltf. in England the stock certificates & paid her the dividends. Becoming indebted to deft. bank, R. transferred to the bank three hundred & fifty shares of M. Mills Co., the transfer disclosing his fiduciary character. R. became insolvent & pltf. ceased to get her dividends, the bank retaining them :—*Held :* the bank had notice that R. was pltf.'s agent & was accountable to her for the dividends, having failed to show any authority in R. to sell or pledge the stock. *Mangles v. Dixon*, 3 H. L. Cas. 702 ; *City Bank v. Barrow*, 5 App. Cas. 664, consd. — SWEENY *v.* BANK OF MONTREAL (1885), 12 S. C. R. 661 ; *affd.* 12 App. Cas. 617.—**CAN.**

u. *Actual knowledge of breach of trust.*] —Where the president of a co. indorsed notes with the name of the co. in favour of a bank, which knew that the notes were given for the benefit of the person indorsing, & not on account of the co. :—*Held :* the co. was not bound.—MECHANICS BANK *v.* BRAMLEY (1879), 2 L. N. 389, Q. B. 1879 ; *affd.*, 14 E. L. R. 420 ; 15 D. L. R. 375. —**CAN.**

v. *Actual knowledge that agent acting in own interest.*]—A person, dealing with the manager of a bank professing to bind his principal, who knows that in fact he is acting in his own interests, is thereby put on inquiry as to the actual extent of the agent's authority. —MACKINTOSH *v.* BANK OF NEW BRUNSWICK (1913), 13 E. L. R. 249.—**CAN.**

w. *Bill discounted without notice — Renewed after notice of absence of authority.*]—UNION BANK OF LOWER CANADA *v.* BULMER (1887), 23 C. L. J. 390 ; 10 L. N. 361.—**CAN.**

Sect. 6.—*Notice: Sub-sect.* 2, *B.; sub-sect.* 3.]

Re Disputed Adjudication (1859), 33 L. T. O. S. 348; Perry *v.* Holl (1860), 2 De G. F. & J. 38; Danby *v.* Coutts (1885), 29 Ch. D. 500; Lewis *v.* Ramsdale (1886), 55 L. T. 179; Bryant *v.* La Banque du Peuple, [1893] A. C. 170, P. C.; Jacobs *v.* Morris, [1901] 1 Ch. 261; Morison *v.* London County & Westminster Bank (1913), 108 L. T. 379. **Mentd.** Charrington *v.* Johnson (1845), 4 L. T. O. S. 398; *Re* Land Credit Co. of Ireland, *Ex p.* Overend, Gurney (1869), 4 Ch. App. 460.

2432. ——.]—Pltf. was sole partner in an Australian firm. Defts. had dealt with his firm since 1889. In Jan., 1899, pltf. gave to his agent in England a power of attorney to purchase goods in connection with pltf.'s business, & either for cash or on credit, "& for me & on my behalf, & where necessary in connection with any purchases made on my behalf as aforesaid or in connection with my business," to make, draw, sign, accept, or indorse any bills of exchange or promissory notes which should be requisite or proper, & to sign pltf.'s name, or his trading name, to any cheques on his banking account in London. The attorney, purporting to act under the power, obtained from defts. a loan of £4,000, & accepted bills of exchange for that amount in the name of the firm *per pro.* himself. He represented to defts. that he had full power to borrow, & produced the power, but they accepted his word, & did not read the power. The £4,000 was paid by two cheques of defts. in favour of pltf.'s firm. The attorney indorsed these cheques & paid them into the London banking account of pltf.'s firm. He afterwards drew out the whole sum, & applied it to his own purposes. Pltf. brought an action to restrain negotiation of the bills. Defts. counterclaimed for payment of the money due on the bills, or, in the alternative, for the £4,000 as money had & received by pltf. to their use. The judge found that pltf. had no knowledge of the borrowing by the attorney, & got no benefit from it:—*Held:* (1) the power of attorney conferred no general power to borrow, & the claim for the money due on the bills of exchange failed; (2) defts. must be taken to have had notice of the terms of the power & that the attorney had no general power to borrow; (3) they could not recover the £4,000 as money had & received by pltf. to their use.—JACOBS *v.* MORRIS, [1902] 1 Ch. 816; 71 L. J. Ch. 363; 86 L. T. 275; 50 W. R. 371; 18 T. L. R. 384; 46 Sol. Jo. 315, C. A.

2433. ——.]—P. gave A., his solr., a power of attorney to manage his property in England while he was abroad & generally to do all other acts, deeds, matters or things whatsoever in or about the estates as amply as P. himself could do. A., purporting to act under the power, borrowed £500 from H., another client, & misapplied it:—*Held:* the omission of H. to call for the power was not such negligence as would be attended with the same consequences as actual notice of A.'s authority, supposing that authority did not extend to the borrowing of money.—PERRY *v.* HOLL (1860), 2 De G. F. & J. 38; 29 L. J. Ch. 677; 2 L. T. 585; 6 Jur. N. S. 661; 8 W. R. 570; 45 E. R. 536.

For full anns., *see* No. 279, *ante*.

2434. —— **& letter of credit—Secret letter of instructions.**]—Defts. entered into an agreement with C. to carry on for them certain mining speculations in America, & furnished him with instructions, a letter authorising him to draw on them for £10,000, & a power of attorney of the most extensive description, "to take & work mines, to purchase tools & materials & erect the necessary buildings, & to execute any deeds or instruments he might deem necessary for the purpose." C., after he had raised £10,000 under the letter of authority, obtained of pltf. in America £1,500, which he applied to defts.' use, & for the amount drew bills on defts., which he indorsed to pltf. He did not show the letter of authority to pltf., & there were no indorsements on it of sums previously raised, & it did not appear that pltf. knew that any money had been raised before by C. Defts. refused to accept the bills:—*Held:* pltf. was entitled to recover £1,500 from defts. as money had & received to his use.

The jury have found that it is the duty of a party advancing money to an agent to look at his power of attorney & letter of credit; negativing, thereby, the necessity of calling for his letter of instructions; & properly, too, because the agent's letter of instructions may contain communications which it may be neither safe nor convenient to divulge (BEST, C.J.).

I presume that persons in the situation of pltf. would look at the power before they advanced money, & it would be prejudicial to mercantile interests to restrain a power where the object in view requires an extensive authority. As to the inquiries which it is alleged pltf. ought to have made touching any sums advanced upon the letter of credit, it would have been useless to make them of C., who, of course, would not disclose anything to defeat his own purpose, & impossible to make them with success elsewhere, as, for aught that could be learned in the absence of indorsements, C. might have raised the money before he reached America (GASELEE, J.).—WITHINGTON *v.* HERRING (1829), 5 Bing. 442; 3 Moo. & P. 30; 7 L. J. O. S. C. P. 172; 130 E. R. 1132.

Annotations:—**Expld.** Britten *v.* Hughes (1829), 3 Moo. & P. 77. **Distd.** Katsch *v.* Schenck (1849), 13 Jur. 668. **Refd.** *Re* Acraman, *Ex p.* Bushell (1844), 3 Mont. D. & De G. 615; Alexander *v.* Mackenzie (1848), 6 C. B. 766.

2435. —— **Containing recitals not disclosing full circumstances.**]—The operative part of a power of attorney appointed X. & Y. to be the attorneys of pltf. without in terms limiting the duration of their powers, but it was preceded by a recital that pltf. was going abroad, & was desirous of appointing attorneys to act for him during his absence. During pltf.'s absence from England, & again after his return, X. & Y., without his knowledge & purporting to act under the power which empowered them to borrow money on mtge., borrowed moneys from a bank upon the security of charges on pltf.'s property, which moneys they afterwards misappropriated. Upon the occasion of the first advance the power was produced to the bankers & registered by their clerk, but it was not examined by them, nor were they aware that pltf. was in England when they made the second advance. Pltf. went abroad a second time, & before going gave a fresh power to X. & Y., by which, after referring to the former power, & reciting that he had been in England for a short time, & was returning abroad, he appointed X. & Y. his attorneys, giving them power to borrow money for him with or without giving security. During his second absence, & without his knowledge, X. & Y., who themselves had an overdrawn account with the bankers, borrowed from them further moneys, alleging that it was to enable them to make payments for pltf.; & under the second power of attorney they charged pltf.'s property as a security for the loan, applying the borrowed moneys in reduction of their own debt to the bank. Upon this occasion the second power was produced to the solr. of the bank, but he was unacquainted with the former transactions, & neither the bankers nor any of their clerks were aware that pltf. had been in England:—*Held:* (1) in order to make out that the bankers were so put upon inquiry as to invalidate the transaction, pltf. must show that the recitals in the second power were seen by some agents of theirs who knew of the previous transactions, & would by those recitals have been rendered

suspicious of the good faith of X. & Y.; (2) there having been no such notice or knowledge on the part of the bankers, wilful blindness could not be imputed to them, & the last-mentioned charge was valid.—DANBY *v.* COUTTS & Co. (1885), 29 Ch. D. 500; 54 L. J. Ch. 577; 52 L. T. 401; 33 W. R. 559; 1 T. L. R. 313.

Annotation:—**Distd.** Hawksley *v.* Outram, [1892] 3 Ch. 359, C. A.

2436. Agent acting professedly under letter of credit.]—A letter of credit was addressed by defts. to K. & Co., merchants in Batavia, in which defts. undertook to open in favour of K. & Co. a credit for £5,000 "to be availed of by drafts on us . . . against produce bought & paid for by you, but not immediately ready for shipment." Acting under the letter of credit, K. & Co. drew bills on defts., without having bought & paid for produce, & negotiated them with pltfs., a firm of bankers. Pltfs. were aware of the terms of the letter of credit. Defts. declined to accept the bills. In an action against defts. for the amount of the bills:—*Held:* (1) the letter of credit must be construed according to its ordinary meaning; (2) no goods having been "bought & paid for" by K. & Co., defts. were not liable.—CHARTERED BANK OF INDIA, AUSTRALIA & CHINA *v.* MACFAYDEN & Co. (1895), 64 L. J. Q. B. 367; 72 L. T. 428; 43 W. R. 397; 11 T. L. R. 289; 39 Sol. Jo. 365; 1 Com. Cas. 1; 15 R. 333.

Agent dealing with instruments signed or accepted in blank.]—*See* BILLS OF EXCHANGE, PROMISSORY NOTES & NEGOTIABLE INSTRUMENTS; ESTOPPEL; STOCK EXCHANGE.

2437. Agent delivering goods with ticket attached showing true seller.]—If an agent employed to sell coals make a bargain in his own name with a tradesman to furnish him with coals on credit, for which, in return, he is to receive goods on credit, & coals & goods are both delivered, the real seller of the coals may recover the price of the tradesman if his name is on the ticket sent with the coals as seller, because the tradesman after that is bound to inquire into the nature of the agent's situation, & should not continue to treat him as a principal.—PRATT *v.* WILLEY (1826), 2 C. & P. 350.

Annotation:—**Refd.** Ramazotti *v.* Bowring & Arundell (1859), 7 C. B. N. S. 851.

2438. Agent executing charterparty as principal.]—Where an agent executes a charterparty as principal, being in reality agent for a merchant abroad, a consignee or purchaser of cargo from him is not put on inquiry as to his title to dispose of the cargo & is not affected by constructive notice of the concealed principal (LORD COTTENHAM).—ZULUETA *v.* SIEVEKING (1848), cited 15 Beav. at p. 584; 51 E. R. at p. 665.

Agent signing cheques & bills of exchange "per pro."]—*See* BANKERS & BANKING; BILLS OF EXCHANGE, PROMISSORY NOTES & NEGOTIABLE INSTRUMENTS.

2439. Express notice of charterparty showing goods consigned to party other than seller.]—A. chartered a ship in his own name, & consigned it to B. in Cuba, under an agreement that B. should ship goods & consign them to A., & that A. should accept B.'s bills for the value. After B. had accepted the bills on the faith of the agreement, B. sold the cargo to C., who had notice of the terms of the charterparty, & it was consigned to another person:—*Held:* assuming that the fact of A.'s appearing principal on the charterparty made it incumbent on C. to ascertain the relations between A. & B., yet as B. was actually the principal, & not the agent of A., C. could safely deal with him for the cargo, & the circumstance that B. had committed a fraud on A. did not prevent C. from obtaining a good title to the goods.—ZULUETA *v.* TYRIE (1851), 15 Beav. 577; 51 E. R. 662.

2440. Express notice of shipmaster's limited authority given by local agent of shipowner.]—Deft.'s vessel arrived at G. on Sunday, Jan. 27. On Jan. 28, a clerk of deft.'s local agents made a communication to pltf. advising him not to advance moneys or supplies to the master:—*Held:* an ample notice to pltf. putting him on his guard not to make any advances till he had made an investigation.—THE FAITHFUL (1862), 31 L. J. P. M. & A. 81.

For full anns., *see* SHIPPING & NAVIGATION.

2441. Partner of one firm pledging bills of another firm having common partner.]—A., being in partnership with B., entered, without the knowledge of B., into partnership with C., an agent of the firm of A. & B., for sale of timber. The firm of A. & C. employed R., F. & Co. as their bankers, & C. brought cheques & bills to the bankers with the names of A. & B. attached to them, which the bankers held as collateral security to cover C.'s overdrafts. Upon A.'s death C. failed & B. became bkpt.:—*Held:* (1) the bankers were not in a position to prove their collateral security against B.'s partnership estate, as they neglected to ascertain the extent of either A.'s or C.'s authority to pledge B.'s credit, &, no account being produced, it was impossible to distinguish any agency transactions from the general dealings of A. & C. with the bankers, whose title could not be higher than that of the persons with whom they dealt.—*Re* CROUDACE (1866), 15 L. T. 19.

Duty of third parties to inquire when dealing with companies or directors or officers of companies. *See* COMPANIES.

Duty of bankers to inquire into the sources of funds deposited by their customers or of securities pledged or deposited as collateral by them. *See* BANKERS & BANKING.

SUB-SECT. 3.—NOTICE TO THIRD PARTY OF REVOCATION OF AGENT'S AUTHORITY.

2442. Agent without credit accustomed to buy for foreign principal.]—Deft., a merchant residing in Russia, carried on business in London through H., who had himself no capital or credit, & was universally known to represent deft., though H.'s name was always used. Deft. gave notice to H. that he purposed to cease employing him, after

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PART IX. SECT. 6, SUB-SECT. 3.

x. *In general.*]—*Semble:* an act done by an agent within scope of his authority, & before any notification of its revocation, is good, although it may be entirely revoked at the time.—KERR *v.* LEFFERTY (1859) 7 Gr. 412.—**CAN.**

y. *Agent executing deed of sale after power of attorney revoked—Mala fides.*]—There being evidence of bad faith on the part of the parties to a deed of sale signed by an agent under a power of attorney, which power had been revoked prior to the deed; in an action to set aside the deed:—*Held:* as to third parties ignorant of the revocation the acts of the agent would bind both agent & principal, but in the circumstances of the case the action could be maintained & the deed set aside.—AYLMER *v.* MAHER (1878), 1 L. N. 232.—**CAN.**

z. *Agent settling action after revocation before notice thereof.*]—D., an attorney, sued H., his client, on a bill of costs. D. lived at O., & as security for a loan gave the bank manager of O. written authority to settle the action with H. at C. The O. manager with D.'s consent authorised the C. manager to settle with H. The authority was communicated to H., who settled with the C. manager. Unknown to H. & the C. manager the authority had been revoked at O. on the morning of the settlement:—*Held:* as the revocation had not been communicated to H. the settlement was binding.—DWYER *v.* HERMAN (1881), 2 N. S. W. 280.—**AUS.**

Sect. 6.—*Notice: Sub-sects.* 3, 4 & 5. *Sects.* 7 & 8.]

which H. contracted with pltf. to sell him tallow (of more than £10 value), & H.'s name was used as before. H. intended to make the contract on his own account, but pltf. did not know this, & believed that H. represented deft., as usual. The contract was made by a broker, W., acting for both parties. He signed bought & sold notes, the former beginning "Bought for T." (pltf.); & the latter, "Sold for H. to my principals," no buyer or seller being further named:—*Held:* deft. was liable for the non-delivery of the tallow, pltf. having no notice that the name H. ceased to mean deft.—TRUEMAN *v.* LODER (1840), 11 Ad. & El. 589; 3 Per. & Dav. 267; 9 L. J. Q. B. 165; 4 Jur. 934; 113 E. R. 539.

Annotations:—**Apld.** Beckham *v.* Drake (1841), 9 M. & W. 79. **Consd.** Humfrey *v.* Dale (1857), 7 E. & B. 266. **Apld.** Royal Exchange Insce. *v.* Moore (1863), 11 W. R. 592; Calder *v.* Dobell (1871), L. R. 6 C. P. 486. **Folld.** Willis, Faber *v.* Joyce (1911), 104 L. T. 576. **Refd.** *Re* Oriental Bank Corpn., *Ex p.* Guillemin (1884), 28 Ch. D. 634; Durant *v.* Roberts & Keighley, Maxsted, [1900] 1 Q. B. 629, C. A. **Mentd.** Furze *v.* Sharwood (1841), 2 Q. B. 388.

2443. Agent of underwriter continuing to underwrite after expiry of agency agreement.]—An underwriter employed A. as his agent to underwrite for him by a written authority which expired on Dec. 31, 1909. Prior to this date the underwriter had paid many losses on policies effected through A., but neither at the end of 1909, nor at any time, had he ever given any notice to those with whom he had done such underwriting business that A.'s authority to act for him had been determined, nor had he given any notice of the fact at Lloyd's. In an action by pltfs. in respect of certain policies ostensibly underwritten by deft. through the agency of A. after Dec. 31, 1909:—*Held:* deft. was estopped from denying A.'s authority to act on his behalf.—WILLIS, FABER & CO., LTD. *v.* JOYCE (1911), 104 L. T. 576; 27 T. L. R. 388; 55 Sol. Jo. 443; 11 Asp. M. L. C. 601; 16 Com. Cas. 190.

2444. Servant continuing to act after discharge.]—A master who has authorised a servant to act is bound by acts done subsequent to his discharge, unless notice be given.— —— *v.* HARRISON (1699), 12 Mod. Rep. 346; 88 E. R. 1369.

Annotation:—**Refd.** *Re* Oriental Bank Corpn., *Ex p.* Guillemin (1884), 28 Ch. D. 634.

2445. Horse-dealer selling & receiving price in own name after revocation.]—Pltf. having sent horses to a licensed horse-dealer for sale in horse-dealer's own name, the dealer sold them to deft. Pltf., unknown to deft., revoked the dealer's authority to sell, or receive the price, & deft. afterwards paid the dealer:—*Held:* unless he had received notice of revocation of authority the payment was good as against pltf., he having allowed the dealer to appear as owner.—CURLEWIS *v.* BIRKBECK (1863), 3 F. & F. 894.

2446. Broker authorised to buy under agent's supervision continuing to buy after agency determined.]—L., a broker, was introduced to P. & Co. by A., & was at the interview directed by P. & Co. to make purchases under the superintendence of A. L. made large purchases under the sole order & direction of A., sending him the bought & sold notes & contracts & receiving from him the necessary moneys for payments, & generally treating him as principal, no direct communication taking place between L. & P. & Co. Such course of dealing was admitted by P. & Co. to have been according to their intentions up to a certain period; & no notice having been given by them to L. of any determination of the authority of A.:—*Held:* L. had a right from what took place at the interview, & the uniform course of action on A.'s part, to consider him as the authorised agent, or a partner of P. & Co., until expressly informed of determination of his authority or the partnership.—POLE *v.* LEASK (1863), 33 L. J. Ch. 155; 8 L. T. 645; 9 Jur. N. S. 829, H. L.

2447. Servant continuing to purchase in master's name after leaving employment.]—Corn was ordered from pltf. in deft.'s name by a livery-stable keeper, who had been deft.'s coachman, & continued to wear his livery. Deft. had given no notice to pltf. of the employment being at an end:—*Held:* deft. liable.—ASTE *v.* MONTAGUE (1858), 1 F. & F. 264.

2448. Wife continuing to purchase as agent for husband before receiving notice of his death abroad.]—Where a man, who had been in the habit of dealing with pltf. for meat supplied to his house, went abroad, leaving his wife & family resident in England, & died abroad:—*Held:* the wife was not liable for goods supplied to her after his death, but before information of his death had been received, she having had originally full authority to contract, & having done no wrong in representing her authority as continuing, & not having omitted to state any fact within her knowledge relating to it; the revocation itself being by the act of God, & the continuance of the life of the principal being equally within the knowledge of both parties.—SMOUT *v.* ILBERY, No. 2761, *post.*

Annotations:—**Expld.** Jenkins *v.* Hutchinson (1849), 13 Jur. 763. **Dbtd.** Campanari *v.* Woodburn (1854), 15 C. B. 400. **Distd.** Randell *v.* Trimen (1856), 18 C. B. 786. **Consd.** Collen *v.* Wright (1857), 8 E. & B. 647. **Distd.** Bradbury *v.* Morgan (1862), 7 L. T. 104. **Expld.** *Re* Oriental Bank Corpn., *Ex p.* Guillemin (1884), 28 Ch. D. 634. **Consd. & Expld.** Salton *v.* New Beeston Cycle Co., [1900] 1 Ch. 43. **Dbtd.** Halbot *v.* Lens, [1901] 1 Ch. 344. **Expld.** Oliver *v.* Bank of England, Starkey, Leveson & Cooke, [1901] 1 Ch. 652. **Consd. & Expld.** Yonge *v.* Toynbee, [1910] 1 K. B. 215, C. A. **Refd.** Weedon *v.* Woodbridge (1849), 13 L. T. O. S. 159; *Re* Pearce, Roberts *v.* Stephens (1894), 8 R. 805.

For full anns., *see* S. C. No. 2761, *post.*

SUB-SECT. 4.—WHEN KNOWLEDGE OF PRINCIPAL IMPUTABLE TO AGENT.

2449. Where communication impossible.]—Pltf. was assignee in Calcutta of an insolvent there who was tenant for life without impeachment of waste of lands in England, with remainder to defts. successively. Pltf.'s agents here, acting on his instructions, applied on Aug. 6 to deft. D., manager of the estates, for particulars of the property, upon which there was much valuable timber. Through the delay of defts. nothing was done till Oct. 22, when some information was given in consequence of which pltf.'s agents took possession; & upon their threatening to cut down the trees an agreement, dated Oct. 23, was entered into between them & defts. which provided that pltf. should be deemed as fully entitled to the timber, as if it had been cut & removed on Aug. 15 preceding, that defts. as to their present & future interest would carry the agreement into effect, that pltf. should have no right or interest save such as he had on Aug. 15 or since, & that none of the timber should be felled before Dec. 1. The insolvent had died on Sept. 24. Pltf. himself became aware of this on the next day, but the news did not reach England until Nov. 4. Defts. then repudiated the agreement:—*Held:* the agreement was wholly void as having been entered into without consideration, & under a total mistake as to the facts existing at its date. *Semble:* the knowledge possessed by the principal was not knowledge on the part of the agents in this country, who signed the agreement in actual ignorance of the death.—COCHRANE *v.* WILLIS (1865), 1 Ch. App.

58 ; 35 L. J. Ch. 36 ; 13 L. T. 339 ; 11 Jur. N. S. 870 ; 14 W. R. 19.

Annotations :—**Refd.** Jones *v.* Clifford (1876), 3 Ch. D. 779 ; Scott *v.* Coulson, [1903] 1 Ch. 453. **Mentd.** Huddersfield Banking Co. *v.* Lister (1895), 72 L. T. 703, C. A.

2450. Knowledge of principal not proved.]—A deed had been executed between A. & B., the negotiation for which on A.'s behalf had been carried on by C., his solr. B. filed a bill to set aside the deed on the ground that C. had not disclosed certain material circumstances, the knowledge of which would have prevented B. from executing the deed : —*Held :* unless it could be shown that A. was at the time aware of the circumstances, B. was not entitled to relief.—SOLOMON *v.* HONYWOOD (1864), 3 New Rep. 605 ; 10 L. T. 186 ; 12 W. R. 572.

SUB-SECT. 5.—WHERE AGENT ACTS FOR BOTH PARTIES.

2451. Agent acting for—Creditor & insurance company—Company issuing policy forming part of security.]—D., having agreed to lend £1,000 to W. upon a policy of insurance on his life, gave directions for effecting it to his attorney, L., the local agent of the W. Insurance Co. L. accordingly transmitted proposals for a policy to the head office without mentioning that D. was the beneficial owner, & obtained a policy therefrom, & delivered it to D. L. was authorised by the co. to receive notices of assignments of policies on their behalf. W. became bkpt. :— *Held :* there was sufficient notice to take the policy out of the order & disposition of W., & to give the assignment validity as against his assignees, inasmuch as notice to L. was notice to the co., & notice communicated to him in his character of attorney to D. for the purpose of being transmitted to the co. was effectual as a notice to him in his capacity as the co.'s agent.—GALE *v.* LEWIS (1846), 9 Q. B. 730 ; 16 L. J. Q. B. 119 ; 8 L. T. O. S. 158 ; 11 Jur. 730 ; 115 E. R. 1455.

Annotations :—**Folld.** Alletson *v.* Chichester (1875), L. R. 10 C. P. 319. **Distd.** *Re* Hampshire Land Co., [1896] 2 Ch. 743.

2452. —— Lessor & lessee—Lessee not relying on agent.]—Notice of prior settlements in the confidential agent of lessees who is negotiating a lease will affect the lessees ; but where it appeared that no confidence was placed in the agent by the lessees, & that he negotiated the lease as the agent of the lessor only :—*Held :* the lessees were not affected by notice, actual or constructive, which the agent certainly had.—CHANDOS (DUCHESS) *v.* BROWNLOW (1791), 2 Ridg. Parl. Rep. 345, at p. 392.

2453. —— Vendor & purchaser.]—If the same person is agent for both vendor & purchaser, or is himself vendor & agent for purchaser, whatever notice he may have will affect purchaser.—DRYDEN *v.* FROST (1837), 3 My. & Cr. 670 ; 8 L. J. Ch. 235 ; 1 Jur. 330 ; 40 E. R. 1084.

Annotations :—**Consd.** Hewitt *v.* Loosemore (1851), 9 Hare, 449. **Mentd.** Woods *v.* Woods (1840), 12 Jur. 994 ; Watson *v.* Allcock (1853), 4 De G. M. & G. 242 ; Wilkes *v.* Saunion (1877), 7 Ch. D. 188 ; National Provincial Bank of England *v.* Games (1886), 31 Ch. D. 582, C. A. ; Wales *v.* Carr, [1902] 1 Ch. 860.

2454. Broker acting for—Vendor & purchaser—Usage—Failure to communicate.]—Defts., London merchants, employed a broker at Liverpool to purchase some wool. The broker negotiated a sale by pltf. to defts. of certain bales deliverable at Odessa, "the names of the vessels to be declared as soon as the wools are shipped." In this transaction the broker acted for both pltf. & defts. By the custom of Liverpool, where a contract contained a stipulation that notice of an event should be given by the seller to the buyer, it was usual for the seller to give notice to the broker, who communicated it to the buyer :—*Held :* (1) defts. were bound by such usage ; (2) notice by pltf. to broker of the names of vessels on which the wools were shipped was a performance of that stipulation, although the broker omitted to communicate them to defts.—GRAVES *v.* LEGG (1857), 2 H. & N. 210 ; 26 L. J. Ex. 316 ; 29 L. T. O. S. 145 ; 3 Jur. N. S. 519 ; 5 W. R. 597 ; 157 E. R. 88, Ex. Ch.

Annotations :—**Consd.** Sweeting *v.* Pearce (1859), 7 C. B. N. S. 449. **Mentd.** Kidston *v.* Monceau Ironworks Co. (1902), 86 L. T. 556 ; Metropolitan Water Board *v.* Dick, Kerr, [1917] 2 K. B. 1, C. A.

2455. Company director or officer of—Two contracting companies—General rule.]—Where one co. is promoted by another & the same persons are directors of both, after the promotion is ended neither co. can be regarded as to future acts unconnected with the promotion as in any fiduciary relation to the other ; they are distinct commercial bodies with the same persons as directors, & cannot be regarded as two firms with common partners ; & what the directors do as agents of the one co. cannot be properly treated as done by them for the other, & the knowledge which they have acquired as directors of the one co. cannot be imputed to the other co. when they have not disclosed their knowledge to anyone.—LAGUNAS NITRATE CO. *v.* LAGUNAS SYNDICATE, [1899] 2 Ch. 392 ; 68 L. J. Ch. 699 ; 81 L. T. 334 ; 48 W. R. 74 ; 15 T. L. R. 436 ; 43 Sol. Jo. 622 ; 7 Mans. 165, C. A.

Annotations :—**Apld.** *Re* National Bank of Wales, [1899] 2 Ch. 629, C. A. **Distd.** Merchants' Fire Office *v.* Armstrong (1901), 17 T. L. R. 709, C. A. **Refd.** Exploring Land & Minerals Co. *v.* Kolckmann (1904), 94 L. T. 234, C. A.

See, further, COMPANIES.

2456. Solicitor acting for—Lender & borrower—Not acting for lender in particular transaction.]—A customer, desirous of obtaining an advance from his bankers on the credit of a surety, for that purpose employed solrs., who were also the ordinary solrs. of the bankers, but were not employed by them in the transaction in question. The solrs. gave information to the bankers as to the sufficiency of the surety, & debited them with the costs of preparing the instrument of suretyship :—*Held :* they could not be regarded as having acted for the bankers from the beginning, so as to affect the bankers with notice of any concealment or misrepresentation on the part of the customer towards the surety.—WYTHES *v.* LABOUCHERE (1859), 3 De G. & J. 593 ; 33 L. T. O. S. 30 ; 5 Jur. N. S. 499 ; 7 W. R. 271 ; 44 E. R. 1397, L.C.

Annotations :—**Distd.** London General Omnibus Co. *v.* Holloway, [1912] 2 K. B. 72, C. A. **Mentd.** Dresser *v.* Norwood (1863), 14 C. B. N. S. 574 ; National Provincial Bank of England *v.* Glanusk, [1913] 3 K. B. 335.

Priorities where solicitor acting for both parties.] —*See* EQUITY.

SECT. 7.—CORRUPTION OF AGENT.

See Part VIII., Sect. 2, Sub-sect. 15, *ante*.

SECT. 8.—CRIMINAL LIABILITY OF PRINCIPAL FOR ACTS OR DEFAULTS OF AGENT.

See CRIMINAL LAW & PROCEDURE.

Part X.—Relations between Agent and Third Parties.

SECT. 1.—IN REGARD TO CONTRACTS.

SUB-SECT. 1.—IN GENERAL.

A. Agent's Right to sue and Liability to be sued.

(a) Where Agent contracts for disclosed and named Principal.

See, further, Nos. 2526-2612, *post.*

i. Right to sue.

2457. Agent cannot sue.]—K., who carried on business at Riga, entered into a contract through the agency of J. & Co., to sell certain timber to defts. c.i.f. London. Payment was to be "by approved acceptances to seller's or authorised agent's draft." The contract was signed by J. & Co., as agents for K. In accordance with the practice of the Riga timber trade K. sent the bill of lading for the goods to J. & Co., & at same time drew upon J. & Co. for the price. J. & Co. accepted the draft on May 24, 1911, & paid it in due course on May 30, 1911. On May 25, 1911, J. & Co. sent the shipping documents to defts., together with a draft for the price of the goods drawn upon defts., & asked them to accept & return the draft. Defts. kept the shipping documents & took delivery of the goods, but refused to accept the draft as the goods were not in accordance with the contract, & claimed to reject the goods. It was admitted that the goods were not in accordance with contract, & they were sold by order of the ct. for about one-third of their invoice price. An action was thereupon brought against defts. by K. for the price of the goods & by J. & Co. to recover the amount of the draft which defts. had failed to accept:—*Held:* (1) as J. & Co. were merely agents & not parties to the contract of purchase they were not entitled, in the absence of a contract personally with them by defts. that the draft would be accepted, to maintain an action against defts. for the amount of the draft; (2) the fact that J. & Co. had themselves paid K. did not make any difference, inasmuch as that fact could not be relied upon by defts. as an answer to an action against them by K. on the contract.—JORDESON (T. P.) & Co. & KAHN *v.* LONDON HARDWOOD CO., LTD. (1913), 110 L. T. 666; 19 Com. Cas. 161.

2458. —— Attorney.]—A mere attorney has no right to sue in equity in his own name.—SPAIN (KING) *v.* MACHADO (1827), 4 Russ. 225; 6 L. J. O. S. Ch. 61; 38 E. R. 790.

Annotations:—**Refd.** Wade *v.* Cox (1835), 4 L. J. Ch. 105; Davies *v.* Quarterman (1840), 4 Y. & C. Ex. 257; Gloucester Corpn. *v.* Wood (1844), 14 L. J. Ch. 122; Doyle *v.* Muntz (1846), 5 Hare, 509; Clay *v.* Rufford (1849), 8 Hare, 281. **Mentd.** Gloucester Corpn. *v.* Wood (1843), 3 Hare, 131; Goodwin *v.* Robarts (1876), 1 App. Cas. 476, H. L.

2459. —— Broker contracting "in my own name for your account."]—F., a broker having some rum for sale, made a contract with L., & gave him a sale note in these terms: "L., London, Jan. 13, 1861.—I have this day bought in my own name for your account of T. 259 puncheons of Cuba rum, sold at 1*s.* 9*d.* per gallon. Landing charges 5*s.* per puncheon, to be paid by buyer; landing gauge; prompt Mar. 23; brokerage ½ per cent.; money on delivery or £5 per cent.—F., broken." A portion of the price was afterwards paid to T.:—*Held:* (1) F. could not maintain an action for goods sold & delivered against L. for residue of the price; (2) the action should be brought by T., the principal.—FAWKES *v.* LAMB (1862), 31 L. J. Q. B. 98; 8 Jur. N. S. 385; 10 W. R. 348.

Annotations:—**Apld.** Bramwell *v.* Spiller (1870), 21 L. T. 672; Fairlie *v.* Fenton (1870), 39 L. J. Ex. 107.

2460. —— Broker contracting "on account of" named principal.]—A broker who entered into a contract in the form, "I have this day sold you on account of M. one hundred bales of cotton, etc.—F., broker," is not entitled to sue on the contract, it being clear on the face of the instrument that he does not intend to bind himself as principal. The right of a broker to sue differs from that of a factor or an auctioneer, who have rights of possession or property in goods intrusted to them, & special interests in performance of contracts entered into by them for their principals.—FAIRLIE *v.* FENTON (1870), L. R. 5 Exch. 169; 39 L. J. Ex. 107; 22 L. T. 373; 18 W. R. 700.

Annotations:—**Distd.** Paice *v.* Walker (1870), L. R. 5 Exch. 173. **Apprvd.** Fleet *v.* Murton (1871), L. R. 7 Q. B. 126. **Distd.** Hutchinson *v.* Tatham (1873), L. R. 8 C. P. 482; Harper *v.* Vigers, [1909] 2 K. B. 549. **Refd.** Mollett *v.* Robinson (1870), L. R. 5 C. P. 646; Sharman *v.* Brandt (1871), L. R. 6 Q. B. 720; Southwell *v.* Bowditch (1876), 1 C. P. D. 374, C. A.

2461. Del credere agent.]—An agent upon *del credere* commission is in the same position with regard to a buyer as any other agent, & cannot sue the buyer in his own name for a debt contracted between the principal & buyer.—BRAMWELL (BRAMBLE) *v.* SPILLER (1870), 21 L. T. 672; 18 W. R. 316.

Annotation:—**Folld.** Fairlie *v.* Fenton (1870), 39 L. J. Ex. 107.

2462. Manager of mutual insurance company signing policy as such.]—Pltf. was manager of an unincorporated mutual assurance assocn. of which deft. was a member. Deft. entered into a policy of insurance signed by pltf. on the part of the assocn. In this policy were incorporated the rules of the assocn., by which the manager was authorised to levy contributions & sue defaulting members. In an action by the manager against deft. on the policy, the declaration averred that, in consideration of deft. agreeing to comply with the rules, pltf. subscribed the policy. On demurrer:—*Held:* (1) inasmuch as pltf. incurred no liability by subscribing the policy, the declaration showed no consideration, as between pltf. & deft. for deft.'s promise; (2) the action was not maintainable.—EVANS *v.*

PART X. SECT. 1, SUB-SECT. 1.—A. (a) i.

a. *Agent—Right to sue extends to executor of deceased agent.*]—Certain land belonged to the estate of S., who went abroad about 1815, & had not been heard of. B. & his father had managed the property as agents for many years, & deft. had held the land under & paid rent to them in succession; but the evidence showed that they had never claimed the land as their own, & had received & credited the rent as on account of the S. estate, not knowing who were the owners:—*Held:* the exors. of B. were entitled to recover, for use & occupation, though the money when received would not form part of the assets of B.'s estate.—BALDWIN *v.* FOSTER (1891), 21 U. C. R. 152.—**CAN.**

b. —— *Principal not interfering.*]—W. sold land under power of sale to F., who paid part of the price, the balance to be paid in notes. Shortly after A. brought a deed to F. & demanded the notes. The deed was left with F. on his delivering to A. a writing as follows: "Received from A. a deed given by W. for a certain piece of land bought at auction. . . . The above mentioned deed I receive only to be examined, & if lawfully & properly executed to be kept, if not lawfully & properly executed to be returned to A. When the deed is lawfully & properly executed to the satisfaction of my attorney, I will pay the amount of balance due on the deed, $572, provided I am given a good warranted deed, & the mtge., which is on record, is properly cancelled if required." The deed was not returned & A. brought an action for the balance:—*Held:* if A. was merely an agent of W. in the transaction, he could still sue, as his principal had not interfered.—FAWCETT *v.* ANDERSON (1885), Cass. Dig. (2nd ed.) 8; Cout. Dig. 348.—**CAN.**

HOOPER (1875), 1 Q. B. D. 45 ; 45 L. J. Q. B. 306 ; 33 L. T. 374 ; 24 W. R. 226, C. A.

2463. Mayor contracting "on behalf of himself & rest of borough."]—The highest bidder for lands sold by auction & pltf., mayor of a corpn., on behalf of himself & the rest of the borough, vendors of the lands, signed a contract in which they mutually promised to fulfil the conditions of sale, which stated the title of the corpn. to the premises & stipulated they should convey & might resell on default. The only act therein mentioned to be done by pltf. was receiving the deposit :—*Held :* pltf. could not maintain an action in his individual capacity against purchaser for breach of this contract.—BOWEN *v.* MORRIS (1810), 2 Taunt. 374 ; 127 E. R. 1122.

Annotations :—**Apld.** Laythoarp *v.* Bryant (1836), 2 Bing. N. C. 735. **Consd.** Fishmongers' Co. *v.* Robertson (1843), 5 Man. & G. 131. **Refd.** Spittle *v.* Lavender (1821), 2 Brod. & Bing. 452.

2464. Person contracting "for himself & also under letter of attorney for & on behalf of" named principals.]—C. & Co., merchants in Spain, possessed of mines, gave J. a power of attorney authorising him to sell them for a sum not less than £40,000, J.'s remuneration being a moiety of any sum he might obtain beyond that price. J. contracted to sell the mines to deft. co. by an agreement which professed to be made "between J., acting for himself & also under a letter of attorney for & on behalf of A., B., & C., all three of them co-proprietors with him of various mines in Spain, & carrying on business in co-partnership with him under the style of C. & Co., of the one part, & the co. of the other part." In the body of the agreement C. & Co. were described as the "vendors." There was a stipulation that the mines were to be delivered by vendors to the co. with a good title. The agreement was signed by J. "for self & partners," & was sealed with the seal of the co. :—*Held :* (1) J. alone could not maintain an action against the co. for breach of this agreement ; (2) A., B., & C., being parties to the contract, must be joined as pltfs.—JUNG *v.* PHOSPHATE OF LIME CO., LTD. (1868), L. R. 3 C. P. 139 ; 37 L. J. C. P. 73 ; 17 L. T. 541.

2465. Person selling as agent—When entitled to part of price as commission.]—The owner of a colliery placed it in the hands of an agent to sell at a minimum price of £12,000, on the understanding that he should be entitled to the difference between £12,000 & any greater sum which the colliery might fetch. The agent treated with R. & Co., who agreed, in the event which happened, to purchase the colliery for £12,000 & pay the agent £2,000 for his expenses & commission. R. & Co. afterwards declined to purchase the colliery, & the agent filed a bill against them & the owner for specific performance of the agreement. On demurrer by R. & Co. :—*Held :* the bill was not maintainable.—GLASSBROOK *v.* RICHARDSON (1874), 23 W. R. 51.

2466. Person contracting "as chairman & on behalf of" named principal.]—A contract was made between pltf., "as chairman & on behalf of the T. Assocn.," & deft. ; pltf. brought an action in his own name against deft. for breach of the agreement :—*Held :* (1) there was nothing to show that deft. contracted with pltf. personally ; (2) deft. was entitled to judgment.

If an agent professes to contract in the name & on behalf of an alleged principal, & without using language expressing he contracts personally, no rule of law can convert his position into that of a contracting party by reason only of there not having been at the time any principal in existence who could be bound (VAUGHAN WILLIAMS, J.).—HOLLMAN *v.* PULLIN (1884), Cab. & El. 254.

2467. Agent real principal—Part performance by third party after notice.]—Where pltf. made a written contract for sale of goods in which he described himself as agent of A., & the buyer accepted & paid for a portion of the goods, & had then notice that pltf. was the real principal in the transaction, & not the agent of A. :—*Held :* pltf. might sue in his own name for non-acceptance of & non-payment for the residue of the goods.—RAYNER *v.* GROTE (1846), 15 M. & W. 359 ; 16 L. J. Ex. 79 ; 8 L. T. O. S. 474 ; 153 E. R. 888.

Annotations :—**Refd.** Cox *v.* Hubbard (1847), 4 C. B. 317 ; Schmaltz *v.* Avery (1851), 16 Q. B. 655 ; Gillett *v.* Offor (1856), 18 C. B. 905 ; Tetley *v.* Shand (1871), 25 L. T. 658.

2468. ——.]—Plf. who has made a contract as agent for a third person cannot sue as principal without giving notice to deft. before action brought that he is the party really interested.—BICKERTON *v.* BURRELL (1816), 5 M. & S. 383 ; 105 E. R. 1091.

Annotations :—**Distd.** Rayner *v.* Grote (1846), 15 M. & W. 359 ; Schmaltz *v.* Avery (1851), 16 Q. B. 655. **Apprvd.** Bramble *v.* Spiller (1870), 18 W. R. 316.

2469. —— Third party must show he was prejudiced by deception.]—It is no defence to a bill for specific performance by the vendor that he falsely assumed the character of agent for another when he was dealing on his own behalf, & thereby deceived purchaser as to the person with whom the contract was made, provided the purchaser does not show the deception induced him to enter into the contract, or occasioned any loss or inconvenience to him otherwise.—FELLOWES *v.* GWYDYR (LORD) (1829), 1 Russ. & M. 83 ; 39 E. R. 32.

2470. Agent having interest—Third party's right to set up defences available against principal.]—A broker who has advanced money on goods may sue

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2465 i. *Person selling as agent—Possession but not property in article sold.*]—Deft. in writing acknowledged the receipt from pltf., described as assistant manager of H. Co., of a sewing machine on hire for nine months at $5 a month in advance. He agreed to hire the machine & in default of payment of the monthly rental, or the due fulfilment of the lease, or if the machine should be deemed by the lessor to be in jeopardy, pltf. or the co. might resume possession of it ; deft. waived all right of action for trespass, damages, or replevin, by reason of any action taken by pltf. or the co. in resuming such possession. Pltf. had possession of the machine before delivery to deft., but no property in it except as agent :—*Held :* pltf. under the agreement might maintain replevin in his own name for the machine, on non-fulfilment of the conditions.—COQUILLARD *v.* HUNTER (1875), 36 U. C. R. 316.—**CAN.**

2467 i. *Agent real principal.*]—A person who sells goods in reality for himself, but apparently as agent for another person, whom the agent, in the receipt signed by him, declares to be the owner & vendor, is not entitled to sue on the contract as principal.—HALL *v.* MCBEAN (1893), Q. R. 3 S. C. 242.—**CAN.**

2470 i. *Agent having interest.*]—When an agent enters into a contract, in which he has a direct pecuniary interest, he is entitled to sue.—HAY *v.* HOGG, C. L. J. 67 ; 1 J. R. N. S. S. C. 22.—**N.Z.**

2470 ii. —— *Contract with agent as owner.*]—A manufacturing co., acting through its agent, sold a fire engine to a corpn. :—*Held :* the agent entitled to sue, the contract being made with him not as factor but as owner.—L'ASSOMPTION CORPN. *v.* BAKER (1881), 4 L. N. 37*v.*—**CAN.**

2470 iii. —— *Liable for price & entitled to penalty.*]—Where a person "as agent for & on behalf of" a disclosed principal contracted as the first party for the building of certain vessels, & came under obligation to pay the price, while the second party, shipbuilders, agreed to pay to the first party certain penalties in the event of failure to implement his obligation by non-timeous delivery, or otherwise :—*Held :* the agent had a title to sue an action of damages against the shipbuilders.—LEVY & CO. *v.* THOMSON (1883), 10 R. 1134.—**SCOT.**

2470 iv. —— *Action for return of collateral.*]—H. C. & Co. being indebted to applt. drew bills of exchange in applt.'s favour on resp., who was trustee for H. C. & Co., & as collateral security transferred to applt. a Govt. subsidy payable to M. C. S. Ry. Co., which the latter had assigned to H. C. & Co. As additional security resp. delivered to applt. certain bonds of M. C. S. Ry. Co. belonging to H. C. & Co., applt. agreeing to return them together with the drafts held by him in the event of the subsidy being paid. In an action to recover the bonds, the amount secured by them having been paid, applt. contended that resp.

Sect. 1.—*In regard to contracts: Sub-sect.* 1, *A.* (*a*) *i. & ii.*]

as on a special contract respecting the sale of them as his own goods, although the sale note mentions the name of the principal, but the buyer can set up any defence available against the principal.—ATKYNS & BATTEN *v.* AMBER (1796), 2 Esp. 491.

Annotations :—**Distd.** Rayner *v.* Linthorne (1825), 2 C. & P. 124. **Dbtd.** Bramwell *v.* Spiller (1870), 21 L. T. 672.

ii. *Liability to be sued.*

2471. General rule.]—An agent is not responsible if he names his principal as the person to be responsible.—*Ex p.* HARTOP, No. 2472, *post.*

For full anns., *see* S. C. No. 2472, *post.*

2472. ——.]—No rule of law is better ascertained, or stands upon a stronger foundation, than this, that, when an agent names his principal, the principal is responsible, not the agent; but, for the application of that rule, the agent must name his principal as the person to be responsible (LORD ERSKINE, C.).—*Ex p.* HARTOP (1806), 12 Ves. 349; 33 E. R. 132.

Annotations :—**Mentd.** Hamber *v.* Hall (1851), 10 C. B. 780; Stubbs *v.* Twynam (1859), 7 C. B. N. S. 719.

2473. ——.]—It is clear the agent cannot be personally liable where the contract is peculiarly personal, otherwise this absurdity would follow, that if A., professing to have, but not having, authority from B., made a contract that B. should marry C., C. might sue A. for breach of promise of marriage, even though of the same sex (LORD CAMPBELL, C.J.).—LEWIS *v.* NICHOLSON, No. 2748, *post.*

Annotations :—**Distd.** Tanner *v.* Christian (1855), 4 E. & B. 591. **Apprvd.** Cherry *v.* Colonial Bank of Australasia (1869), 6 Moo. P. C. C. N. S. 235. **Reid.** Green *v.* Kopke (1856), 18 C. B. 549; Randall *v.* Trimen (1856), 18 C. B. 786; Parker *v.* Winlow (1857), 27 L. J. Q. B. 49; Collen *v.* Wright (1857), 8 E. & B. 647; Royal Albert Hall Corpn. *v.* Winchilsea (1891), 7 T. L. R. 362; Starkey *v.* Bank of England, [1903] A. C. 114; Yonge *v.* Toynbee, [1910] 1 K. B. 215.

For full anns., *see* S. C. No. 2748, *post.*

2474. ——.]—A., an auctioneer, being employed to sell an estate belonging to B., entered into & signed an agreement with C. for purchase in his own name, as agent of B., & B. shortly afterwards signed it, & added, "I hereby sanction this agreement & approve of A.'s having signed same on my behalf":—*Held*: A. was not personally responsible.—SPITTLE *v.* LAVENDER (1821), 2 Brod. & Bing. 452; 5 Moore, C. P. 270; 129 E. R. 1041.

Annotations :—**Consd.** Gaby *v.* Driver (1828), 2 Y. & J. 549; Tanner *v.* Chrisian (1855), 4 E. & B. 591. **Distd.** Paice *v.* Walker (1870), 22 L. T. 547. **Reid.** Bramwell *v.* Spiller (1870), 21 L. T. 672.

2475. Husband—No evidence that wife contracted "otherwise than as agent."]—Resp., a married woman living with her husband, ordered articles of dress from applts. with the husband's express authority, & gave applts. her married name. In an action by applts. against resp. for the price the jury could not agree upon the question whether applts. knew she was a married woman, & judgment was entered for applts. In the C. A. judgment was entered for resp. on the ground that there was no evidence that she had contracted "otherwise than as agent" so as to bring the case within Married Women's Property Act, 1893 (c. 63):—*Held*: (1) it was immaterial whether applts. did or did not know resp. was a married woman, having acted merely as agent the co. was not entitled to recover:—*Held*: (1) resp. being personally liable on the bills, which the subsidy was intended to pay, was not acting in the transaction merely as agent or servant of H. C. & Co., & the contract to return the bonds was with him personally; (2) the conditions of the contract having been fulfilled & H. C. & Co. having made no claim to the bonds as against resp., resp. was entitled to recover them.—DRUMMOND *v.* BAYLISS (1877), 2 S. C. R. 61.—**CAN.**

2470 v. —— *Contract induced by fraud.*]—An agent acting as such for a disclosed principal contracted in excess of his authority & was held liable in damages to his principal. The contract so entered into by the agent was induced by fraud on the part of the third party:—*Held*: title to sue for reduction of the contract on the ground that it had been induced by fraud was not limited to the principal, but extended to the agent, who was liable to relieve his principal of an action at the instance of the other party to the contract & founded upon it.—MILNE *v.* RITCHIE (1882), 20 Sc. L. R. 249.—**SCOT.**

2470 vi. —— *Contract between principal & third party.*]—A charterparty provided that the owners should employ at the ports of discharge the consignee nominated by the freighters to transact the ship business there inwards & outwards on the customary terms, not exceeding 2½ per cent. on amount of freight payable inwards, & 5 per cent. outwards. The freighters nominated pltfs. The owners refused to pay pltfs.' commission on the outward freight on the ground that, in the circumstances under which such freight was procured, pltfs. were not under the charterparty entitled to receive commission on it:—*Held*: pltfs. were sufficiently within the consideration of the charterparty to maintain a suit for the breach of such clauses of it as were inserted for their benefit.—BLACKWALL & CO. *v.* JONES & CO. (1870), 7 Bom. O. C. 144.—**IND.**

2470 vii. —— *Remuneration dependent on amount of profits insufficient.*]—In an action to recover damages for breach of a contract made by deft. with pltf., it appeared that, in making the contract, pltf. was merely acting as agent for W., & that he had no personal interest in the transaction beyond the fact that his remuneration was dependent upon the amount of profit:—*Held*: the understanding between pltf. & W., as to the mode in which pltf. was to be remunerated for his services, could not enable the latter to recover in his own name for a breach of the contract.—WURZBURG *v.* WEBB (1886), 7 R. & G. 414.—**CAN.**

PART X. SECT. 1, SUB-SECT. 1.—A. (a) ii.

2471 i. *General rule.*]—Where a party has acted professedly in the capacity of agent, a petitory action against him, & not against his principal, is incompetent.—KING *v.* SHIRRA (1827), 5 S. 231.—**SCOT.**

2471 ii. —— *Effect of agent identifying himself with contract.*]—H. agreed with a co. that they should have an option to purchase a mining lease for £40 up to a certain date, that the lease should meantime be transferred to W., as attorney for the co., & that in case the co. did not buy the lease should be re-transferred to H. The lease was duly transferred to W., but the co. did not complete the purchase, & owing to its cancellation for non-fulfilment of labour conditions the lease was never re-transferred. H. sued W. "as attorney of the co." for the £40, & obtained judgment:—*Held*: although the summons ought in law to have been dismissed on the ground that W. was not personally liable, yet he had so identified himself with the contract by becoming transferee of the lease that it could not be said that the order was against natural justice.—*Ex p.* WOOD (1904), S. R. (N. S. W.) 140.—**AUS.**

2471 iii. —— *Person described as agent on record.*]—SIROIS *v.* BELLEAU (1913), 20 R. de J. 312.—**CAN.**

2471 iv. —— *Administration society.*]—A general administration society, which leases a property for the owner thereof, is but the latter's agent & cannot be sued by the tenant for cancellation of the lease & in damages.—BERMAN *v.* GENERAL ADMINISTRATION SOCIETY (1916), Q. R. 51 S. C. 132.—**CAN.**

2471 v. —— *Person being broker or agent by profession.*]—Where a broker orders goods from a merchant on account of another, his employer, & declares that the goods are for his principal, & the merchant takes the bills of the principal for the goods, without insisting on the broker joining in them, the broker is not liable for payment, failing the person for whom they were commissioned.—COWAN & SLOAN *v.* DAVIDSON & CO. (1814), 17 F. C. 505.—**SCOT.**

c. Factor — Not liable except on contract entered into.]—Defts., factors of W., sold wheat to pltf., who subsequently obtained an award in his favour in an arbn. on a separate transaction between himself & W., to which defts. were not parties, although they actively intervened as W.'s agents. In an action by pltf. to recover the balance of account:—*Held*: he was not entitled to include in his debit against defts. the sum awarded to him as against W.—BRUNSKILL *v.* RIGNEY (1857), 6 C. P. 509.—**CAN.**

d. Partner—Acting as agent of co-partners.]—Defts., partners in a firm of which the estates of F. & B. were also partners, informed pltf. that the estates would pay him a pension. F. & B. had constituted the firm before defts. joined it, & during the greater part of pltf.'s period of service. Subsequently defts. informed pltf. by letter that they would remit the pension to him quarterly:—*Held*: on failure of payment of pension, pltf.'s remedy was against the estates of F. & B., & not against defts., who had merely acted as agents.—FICHARDT, LTD. *v.* FAUSTMANN (1910), A. D. 168.—**S. AF.**

she having contracted as agent for her husband; (2) resp. was not liable.—PAQUIN, LTD. *v.* BEAUCLERK, [1906] A. C. 148; 75 L. J. K. B. 395; 94 L. T. 350; 54 W. R. 521; 22 T. L. R. 395; 50 Sol. Jo. 358.

Annotation:—**Distd.** Lea Bridge District Gas Co. *v.* Malvern, [1917] 1 K. B. 803. **Mentd.** Skeate *v.* Slaters, [1914] 2 K. B. 429, C. A.; Cooke *v.* Wilson (1915), 85 L. J. K. B. 888, C. A.

2476. Inspectors under inspectorship deed.]—REDPATH *v.* WIGG, No. 2564, *post*.

For full anns., *see* S. C. No. 2564, *post*.

2477. Person described as agent in bill of lading.]—*Indebitatus assumpsit* for freight payable by deft. to pltfs. for & in respect of conveyance by them for deft. of goods in & on board a certain ship. At the trial it appeared pltfs. had received on board their vessel a quantity of coals from the B. Co., to be carried to London; that the master signed a bill of lading, by which the coals were made deliverable "to T. (deft.) for the L. Gas Co., or to his assigns, he or they paying freight for the goods 10*s.* per ton in cash on true delivery." On arrival of the vessel in London deft. produced the bill of lading & received the goods under it, & afterwards offered to pay freight by a bill at 2 months:—*Held:* deft. was not personally liable, inasmuch as on the face of the bill of lading he was a mere agent to receive the goods for the co., the property vesting in them.—AMOS *v.* TEMPERLEY (1841), 8 M. & W. 798; 11 L. J. Ex. 183; 151 E. R. 1263.

For full anns., *see* SHIPPING & NAVIGATION.

2478. Person contracting on behalf of principal.]—If a person enter into a contract in writing on behalf of his principal, he is not personally liable on such contract, unless he had no authority to make it, or in making it exceeded his authority.—DOWNMAN *v.* WILLIAMS (1845), 7 Q. B. 103; 115 E. R. 427; *sub nom.* DOWNMAN *v.* JONES, 14 L. J. Q. B. 226; 5 L. T. O. S. 77; 9 Jur. 454, Ex. Ch.

Annotations:—**Apld.** Carr *v.* Jackson (1852), 7 Exch. 382; Lewis *v.* Nicholson (1852), 18 Q. B. 503. **Distd.** Cooke *v.* Wilson (1856), 26 L. J. C. P. 15. **Consd.** Collen *v.* Wright (1857), 8 E. & B. 647, Ex. Ch. **Foll.** Allaway *v.* Duncan (1867), 16 L. T. 264. **Consd.** Cherry & McDougall *v.* Colonial Bank of Australasia (1869), L. R. 3 P. C. 24, C. A. **Distd.** Herald *v.* Connah (1876), 40 J. P. 567. **Refd.** Harper *v.* Williams (1843), 4 Q. B. 219; Jenkins *v.* Hutchinson (1849), 13 Q. B. 744; Bull *v.* Chapman (1853), 8 Exch. 444; Thöl *v.* Leask (1855), 1 Jur. N. S. 117; Paice *v.* Walker (1870), 22 L. T. 547.

2479. Person contracting in name of & expressly as agent for another.]—A person who executes an instrument in the name of, & expressly as agent for, another cannot be treated as a party to the instrument so as to be sued upon it, unless he is shown to be the real principal.

Assumpsit on a contract alleged to have been made by deft. to charter a ship to pltf. Plea, *non assumpsit*. Proof that deft. made a memorandum of charterparty in B.'s name & purporting to be signed by deft. as agent for B., that deft. had no authority to contract for B. & knew that he had none, & that B. refused to adopt the contract:—*Held:* deft. was not liable as principal in an action on the contract itself.—JENKINS *v.* HUTCHINSON (1849), 13 Q. B. 744; 18 L. J. Q. B. 274; 13 L. T. O. S. 401; 13 Jur. 763; 116 E. R. 1448.

Annotations:—**Distd.** Schmaltz *v.* Avery (1851), 16 Q. B. 655. **Apld.** Lewis *v.* Nicholson (1852), 18 Q. B. 503. **Foll.** Collen *v.* Wright (1857), 8 E. & B. 647. **Refd.** Randell *v.* Trimen (1856), 18 C. B. 786; Paice *v.* Walker (1870), 22 L. T. 547. **Mentd.** Wilson *v.* Zulueta (1849), 14 Jur. 366; Thöl *v.* Leask (1855), 1 Jur. N. S. 117; *Re* Leeds Banking Co., *Ex p.* Mallorie (1866), 36 L. J. Ch. 141.

2480. Person ordering goods for another.]—When a person gives an order for another & tells the tradesman for whose use the goods are, he is only to be considered as agent, & not liable himself, unless the tradesman refuse to deliver them to the order of the person for whom they are directed, but will deliver them only to his credit who ordered them.—OWEN *v.* GOOCH (1797), 2 Esp. 567.

2481. ——.]—Pltf., a stationer, sent goods to India on order of deft. On a bill being forwarded to deft., made out to the person to whom the goods had been sent, deft. said the goods were not for him, & he should not pay for them, as he was merely an agent in the matter. The money not being paid, a bill was afterwards made out to deft. Pltf.'s books were not produced, but his son stated that their custom was to insert in their book the name of the person to whom the goods were sent, not of the person who gave the order. The jury having found for pltf., the ct. ordered a new trial.—RICHARDSON *v.* DOYLE (1847), 8 L. T. O. S. 122, 369.

2482. Person purchasing "as agent of" named principal.]—Pltf. was inventor of a machine for rolling iron; deft. as the agent of J., his father, had purchased one of pltf.'s machines. The defence was that the action was brought against the wrong person, & should have been against J., the father; it was suggested that this had been done to prevent deft. giving evidence of non-completion of the contract. A verdict having been found for pltf., the ct. ordered a new trial, no objection to be made by deft. that the wrong party had been proceeded against.—BROWN *v.* JONES (1851), 18 L. T. O. S. 79, 279.

2483. Agent real principal.]—JENKINS *v.* HUTCHINSON, No. 2479, *ante*.

For full anns., *see* S. C. No. 2479, *ante*.

2484. ——.]—Goods were bought from pltf. by H., who had formerly been in the employment of S. & Co., & had afterwards set up in business for himself, having a counting-house in the house of S. & Co., as pltf. knew. The goods, by H.'s direction, were invoiced to S. & Co., & pltf. drew for the price upon S. & Co., without whose security H. could not have obtained credit. S. & Co. received a commission from H. In an action against H., H. contended that he purchased as agent of S. & Co., as he used to do when in their employment, but there was evidence that he bought as principal on his own account, & the jury found a verdict for pltf.:—*Held:* the verdict must stand.—RAILTON *v.* HODGSON, PEELE *v.* HODGSON (1804), 4 Taunt. 576 n.; 128 E. R. 456 n.

Annotations:—**Distd.** Addison *v.* Gandassequi (1812), 4 Taunt. 574. **Refd.** Smyth *v.* Anderson (1849), 7 C. B. 21; Armstrong *v.* Stokes (1872), L. R. 7 Q. B. 598. **Mentd** Thomas *v.* Edwards (1836), 2 M. & W. 215; Thöl *v.* Leask (1855), 1 Jur. N. S. 117.

2480 i. *Person ordering goods for another—Whether personally liable or liable qua agent a question of fact—Question for jury.*]—Pltf. sued deft. for lumber furnished on the occasion of the Provincial Agricultural Society's meeting at H. The defence was that the society, which was an incorporated body, was liable, & not deft. personally. The trial judge left it to the jury to find upon the evidence whether deft. had contracted with pltf. personally, or as one of a committee of gentlemen who undertook to superintend, in either of which events he held him to be personally liable; but the jury were told that if he contracted only as representing or on behalf of the corpn., then he would not be personally liable. On motion for a new trial, the verdict being for pltf.:—*Held:* the ruling was correct.—SIMPSON *v.* CARR (1849), 5 U. C. R. 326.—**CAN.**

2480 ii. —— *Principal ascertainable.*]—A. received an order from a firm of "steamship owners & brokers" in these terms: "Please supply the *S.* with the following stores." He delivered the goods, believing the firm were the owners of the vessel, & sued them for the price:—*Held:* the firm were not liable, in respect that they were acting as agents for the owners, &—since the latter could be discovered by reference to the Register of Shipping—as agents for a disclosed principal.—ARMOUR *v.* DUFF & CO., [1912] S. C. 120. —**SCOT.**

Sect. 1.—*In regard to contracts: Sub-sect.* 1, *A.* (*a*), *ii.* (*b*) *i.* & *ii.* (*c.*) *i.*]

2485. Agent contracting personally.]—DOWNMAN *v.* WILLIAMS, No. 2478, *ante.*

For full anns., *see* S. C. No. 2478, *ante.*

2486. —— Rule in equity.]—C. contracted, as agent of A. & B., to sell an estate to D., & received a deposit in part payment of the intended purchase-money. C.'s agency was denied by A. & B., & D. filed a bill against A., B., & C., praying specific performance, &, in the alternative, if he should be unable to obtain specific performance, that C. might be decreed to return the deposit, & reimburse to pltf. all the expenses of endeavouring to enforce the contract:—*Held:* the bill must be dismissed with costs, as against C. as well as A. & B.—SAINSBURY *v.* JONES (1839), 5 My. & Cr. 1; 4 Jur. 499; 41 E. R. 272.

Annotations:—**Consd.** Aberaman Ironworks *v.* Wickens (1868), L. R. 5 Eq. 485. **Refd.** Onions *v.* Cohen (1865), 13 W. R. 426.

2487. —— ——.]—Where contractors for works of a ry. co. agreed to accept preference shares in the co. in part payment, upon faith of representations made by the directors (who were acting *ultra vires*) that only £3 per share would be called up, or if more than £3 should be called up they would receive payment of the additional amount in preference shares, or exchange the £3 shares for paid-up shares, & the co. afterwards refused to comply with these terms:—*Held:* (1) there was no equitable relief against the directors personally, either by specific performance or on the misrepresentations; (2) the remedy, if any, was by action at law for damages.—ELLIS *v.* COLMAN (1858), 25 Beav. 662; 27 L. J. Ch. 611; 31 L. T. O. S. 144; 4 Jur. N. S. 350; 6 W. R. 360; 53 E. R. 790.

2488. Older rule not now law.]—Where an agent makes a contract in his principal's name, & it turns out that the principal is not liable for want of authority in the agent to make such contract, the agent is personally liable on the contract (BAYLEY, B.).—THOMAS *v.* HEWES (1834), 2 Cr. & M. 519, 530 n.; 4 Tyr. 335; 149 E. R. 866.

Annotations:—**Dbtd.** Lewis *v.* Nicholson (1852), 18 Q. B. 503. **Refd.** Collen *v.* Wright (1857), 8 E. & B. 647. **Mentd.** Swinfen *v.* Swinfen (1857), 24 Beav. 549.

2489. *S. P.* KENNEDY *v.* GOUVEIA, No. 2532, *post.*

For full anns., *see* S. C. No. 2532, *post.*

2490. *S. P.* ANON. (1834), cited 2 Cr. & M. 530 n.

2491. ——.]—*Semble*: if an attorney enters into an agreement professing to bind others, but which is inoperative by want of authority, he renders himself personally liable thereon.—WESTMINSTER IMPROVEMENT COMRS. *v.* FULLER (1849), 13 L. T. O. S. 264.

See Sub-sect. 7, *post.*

(*b*) *Where Agent contracts as such for unnamed Principal.*

See, further, Nos. 2526-2612, *post.*

i. *Right to sue.*

2492. Agent real principal.]—Declaration on a charterparty, alleging it to be made "between deft., therein described as owner of the ship called, etc., of the one part, & pltf., merchant & freighter, of the other part." Deft. pleaded *non assumpsit.* The charterparty, produced at the trial, was expressed to be made between deft. of the one part & pltf., "as agent of freighter," of the other part, & amongst other things stipulated that, "being concluded on behalf of another party, it is agreed all responsibility on the part of S. (pltf.) shall cease as soon as the cargo is shipped." No principal was named in the charterparty, & it appeared from other evidence that pltf. was himself the real freighter & not merely an agent in the matter:—*Held:* (1) pltf. was entitled to sue as principal for a breach of the charterparty, notwithstanding he had contracted as agent; (2) the above stipulation, applying only to his character of agent, had not the effect of limiting his responsibility as principal.—SCHMALZ (SCHMALTZ) *v.* AVERY (1851), 16 Q. B. 655; 20 L. J. Q. B. 228; 17 L. T. O. S. 27; 15 Jur. 291; 117 E. R. 1031.

Annotations:—**Distd.** Carr *v.* Jackson (1852), 7 Exch. 382. **Consd.** Dale *v.* Humfrey (1858), E. B. & E. 1004. **Apld.** Harper *v.* Vigers, [1909] 2 K. B. 549. **Refd.** Mollett *v.* Robinson (1870), 39 L. J. C. P. 290. **Mentd.** Collen *v.* Wright (1858), 4 Jur. N. S. 357, Ex. Ch.

2493. ——.]—By a contract in charterparty form, dated Feb. 3, 1908, between pltfs., shipbrokers, & defts., timber merchants, in which pltfs. were described as agents for owners of a ship to be named later & defts. as charterers, it was agreed that the ship should load at a foreign port, about the latter half of June, a cargo of timber from agents of the charterers & should deliver same in London on being paid freight at a certain rate. The contract was signed by pltfs., "by authority of & as agents for owners." Pltfs. were not acting for principals, nor had they made a contract for a ship to carry the cargo, but were themselves principals in the transaction. This was not known to defts. On May 22 pltfs. entered into a charterparty with shipowners for the charter of a ship to carry the cargo, pltfs. being described therein as agents for charterers, at a rate of freight less than that specified in the contract of Feb. 3. Defts.' names were inserted by pltfs. in the charterparty as charterers, & the charterparty was signed by pltfs., "as agents for merchants." In making the charter, pltfs. were not acting as agents for defts., but were themselves principals. The cargo was shipped under bills of lading reserving freight at the rate specified in the charter of May 22, & was duly delivered at the port of discharge, & the bills of lading freight was paid. In an action by pltfs. to recover the difference between the freight so paid & that reserved by the contract of Feb. 3 defts. contended that, as pltfs. had made that contract as agents, they were not entitled to sue upon it as principals:—*Held:* as pltfs. in making the contract of Feb. 3 had in fact no principals, but were themselves the principals, they were entitled to sue upon it & recover the freight reserved thereby.—HARPER & CO. *v.* VIGERS BROTHERS, [1909] 2 K. B. 549; 78 L. J. K. B. 867; 100 L. T. 887; 25 T. L. R. 627; 53 Sol. Jo. 780; 11 Asp. M. L. C. 275; 14 Com. Cas. 213.

Auctioneer.]—*See* AUCTION & AUCTIONEERS.

ii. *Liability to be sued.*

2494. Person contracting as "agents for charterers & merchants"—Foreign principal.]—Defts. had entered into a charterparty with pltf., by

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PART X. SECT. 1, SUB-SECT. 1.—A. (b) ii.

e. General rule.]—An agent for a debtor, who had made an offer on the part of a friend of the debtor, without disclosing his name, of a specific sum to stay caption against the debtor:—*Held:* personally liable for the sum so offered.—DOBLE *v.* HORNE & ROSE (1842), 4 D. 673—**SCOT.**

f. Person contracting "for client."]—DAGNAIS *v.* MODERN REALITY CO. (1912), Q. R. 41 S. C. 428; 5 D. L. R. 315.—**CAN.**

g. Person contracting as agent for shipowners.]—*Qu.*: whether a person who has expressly, as agent of the owners of a ship, contracted to tranship & deliver at a particular port, according to the terms of the bill of lading, will be personally liable. *Semble*: a contract made with express reference to a principal, though not by name, would not render the agent personally liable as the agent of an undisclosed principal.—COWIE *v.* DHURMSEE POONJABHOY, 2 Ind. Jur. N. S. 75.—**IND.**

which certain freight was to be paid to pltf., signed by them "O. & G., agents for charterers & merchants." There was a principal residing in Ireland. Pltf swore he never knew of the principal in Ireland till afterwards. The jury found a verdict for defts. On a motion for a rule on the ground that, the principal being undisclosed, pltf. might sue the agents, & also on the ground that the principal resided abroad, a rule *nisi* was granted.—GILLET *v.* OFFER & GAMMON (1855), 18 C. B. 905; 25 L. T. O. S. 55; 139 E. R. 1629.

2495. Credit given to principal.]—THOMSON *v.* DAVENPORT, FYNNEY *v.* PONTIGNY, DAVENPORT *v.* THOMSON, No. 2179, *ante*.

For full anns., *see* S. C. No. 2179, *ante*.

2496. —— Master of ship—Necessaries.]—The owners or master are in general liable for necessaries for use of a ship, if the master orders them; if credit has been given exclusively to the owners, & the master in giving orders acted merely as their servant, he will not be liable.—HOSKINS *v.* SLAYTON (1737), Lee *temp.* Hard. 376; 95 E. R. 244.

(c) *Where Agent contracts in his own Name for undisclosed Principal.*

See, further, Nos. 2526-2612, *post*.

i. *Right to sue.*

2497. General rule.]—A. & B. in 1797 assigned to pltf. all debts due to them, & gave him a power of attorney to receive & compound for same, under which pltf. in 1799 submitted to arbn. the matters in difference then subsisting between his principals & defts., & pltf. & defts. promised to each other to perform the award. The arbitrators having awarded a sum to be paid to pltf. as such attorney:—*Held:* he might maintain an action for it in his own name.—BANFILL *v.* LEIGH (1800), 8 Term Rep. 571; 101 E. R. 1552.

For full anns., *see* ARBITRATION.

2498. ——.]—Pltfs. purchased, by order of T. & Co., of R., to whom they were known as brokers, 110 bales of cotton. The contract was entered in pltfs.' books as a purchase & sale by brokers & brokerage charged to both parties. Bought & sold notes were de ivered, not disclosing names of principals, but charging brokerage to both. T. & Co. & R. were not known to each other as concerned in the dealings. Pltfs. paid R. for the cotton, & handed them to T. & Co. with a bill of parcels in their own name:—*Held:* pltfs. were principals in the purchase of R., & sale to T. & Co.—KILBY *v.* WILSON (1825), Ry. & M. 178.

2499. —— Effect of repudiation by principal.]—Pltfs., brokers, bought goods of deft. on account of H., & by his authority. The bought note was made out in their own names, but deft. was told that there was an unnamed principal. Pltfs. afterwards, under a general authority from H., contracted to sell same goods, which deft. had not yet delivered. H., on hearing of the latter contract, told pltfs. that he would have nothing to do with the goods, either as buyer or seller, & in this they acquiesced. Deft. refused to deliver the goods, & pltfs. sued him for damages sustained by them in consequence:—*Held:* renunciation of the contract by H. & pltfs.' acquiescence in it formed no objection to pltfs.' right to recover.—SHORT *v.* SPACKMAN (1831), 2 B. & Ad. 962; 109 E. R. 1400.

Annotations:—**Apld.** Calder *v.* Dobell (1871), 40 L. J. C. P. 224, Ex. Ch. **Reid.** Fawkes *v.* Lamb (1862), 31 L. J. Q. B. 98.

2500. ——.]—C. & N., members of a joint-stock co., entered into a written agreement with deft. for sale of goods to deft. by the co. The agreement was signed by L. "for C. & N." Goods were supplied from the premises of the co.:—*Held:* (1) C. & N. had themselves entered into the agreement with deft.; (2) they were entitled to sue deft. in their own names for a breach of it.—CLAY & NEWMAN *v.* SOUTHERN (SOUTHEN, SOUTHAN) (1852), 7 Exch. 717; 21 L. J. Ex. 202; 19 L. T. O. S. 67; 16 Jur. 1074; 155 E. R. 1137.

2501. —— Effect of misrepresentation as to being principal—Third party not prejudiced.]—At an interview with the vendor, before the date of contract of sale, the purchaser, with the view of inducing an abatement in price, represented that for special reasons he wished to purchase on his own account. Vendor refused to make an abatement in price. Afterwards purchaser, who had made up his mind not to purchase for himself, purchased the land at the full price asked by vendor on behalf of a co., & did not say for whom he was so purchasing. Vendor by his defence pleaded misrepresentation by purchaser, who had led him to believe that he was purchasing for himself:—*Held:* inasmuch as vendor had failed to show he was unwilling to enter into the contract on the same terms with anyone else, the defence failed.—SMITH *v.* WHEATCROFT (1878), 9 Ch. D. 223; 39 L. T. 103; 27 W. R. 42.

Annotations:—**Apld.** Nash *v.* Dix (1898), 78 L. T. 445. **Consd.** Gordon *v.* Street, [1899] 2 Q. B. 641, C. A.

2502. —— —— ——.]—In 1895 defts., trustees of a Congregational chapel, put up for sale by public auction a building, which had formerly been used as their chapel. The conditions of sale imposed no restrictions on the user of the building. After the sale C. made an offer for the building, but defts. declined to accept it, on the ground that it was made on behalf of a committee of Roman Catholics, who intended to use the building as a Roman Catholic place of worship, & defts. objected to sell for that purpose. The committee then told pltf., manager of a mineral water co., that if he could get the property they would buy it of him at £100 profit. Pltf.'s solrs. wrote to defts.' agent, making an offer for the property "on behalf of our client, manager of the E. Mineral Water Co." After some negotiations, a contract was signed by defts. for sale of the building to pltf. at £1,025, a price less than C.'s offer. No direct statement was made that pltf. was buying for the co., but it was admitted that defts., during the negotiations believed that he was, & that pltf. knew it. Pltf.

PART X. SECT. 1, SUB-SECT. 1.—* A. (c) i.

2497 i. *General rule.*]—An agent with whom a contract is made in his own name is entitled to sue upon it, & is a real, not a nominal, pltf.—WINNIFRITH *v.* FINKELMAN (1913), 25 O. W. R. 692; 5 O. W. N. 781.—**CAN.**

2497 ii. —— *Broker.*]—B. through his brokers sold shares to G., G. being himself a broker & acting for a principal, though at the time of the contract no principal was disclosed. In the "sold note" G. was named as purchaser:—*Held:* G., in his own name, could maintain an action against B. for non-transfer of the shares.—GARRETT *v.* BIRD (1872), 11 N. S. W. S. C. R. 97.—**AUS.**

2497 iii. —— *Farm bailiff.*]—A farm bailiff sued for the price of an ox, alleging he had sold it at his employer's home farm on behalf of his employer & as the servant of the owner, & that he had accounted to him for the price. He produced no assignment of the debt from the employer:—*Held:* he had a title to sue.—GRAHAM *v.* TAIT (1835), 22 Sc. L. R. 378.—**SCOT.**

2497 iv. —— *Proper course where defendant knows agency has been terminated.*]—Pltf. deposited, as security for the payment of a subsidy, certain bonds with deft., who gave a receipt undertaking to return them to pltf. on payment. The subsidy was paid, but deft. refused to deliver up the bonds, contending that pltf. had acted as agent for A. B. & Co., who alone could sue him for their return; also that pltf. was no longer employed by A. B. & Co.:—*Held:* if pltf. only held the bonds as an agent, he, having stipulated for their return to himself, was entitled to recover them on payment of the subsidy, & although pltf. had since ceased to be the agent of A. B. & Co., deft. could have notified them of pltf.'s claim, &, in the absence of any such proceeding, or of any claim by A. B. & Co., deft. had no right to retain the bonds against pltf.—DRUMMOND *v.* BAYLIS (1877), 2 S. C. R. 61.—**CAN.**

Sect. 1.—*In regard to contracts: Sub-sect.* 1, *A.* (*c*), *i. & ii.*]

signed the contract as principal without protest from defts.' agent. Defts. refused to complete on the ground that pltf. was buying as agent for the Roman Catholic committee, to whom he knew they would not sell, & had obtained the contract by misrepresentation:—*Held:* (1) pltf. was not buying as agent for the Roman Catholic committee, but for himself with a view to resell at a profit; (2) the misrepresentation as to the mineral water co. was immaterial because the vendors did not care whether they sold to the co. or pltf., & as between them no consideration of the person with whom they were contracting entered as an element into the contract.—NASH *v.* DIX (1898), 78 L. T. 445.

2503. —— Proof in bankruptcy.]—A factor who sells goods in his own name without a *del credere* commission is a good petitioning creditor against the purchaser, although he has merely communicated purchaser's name to his principal. But he ceases to be so when the principal has agreed with him to consider purchaser as his debtor, & has taken steps for recovering the debt directly from purchaser.—SADLER *v.* LEIGH (1815), 4 Camp. 195; 2 Rose, 286.

Annotation:—**Refd.** *Re* Gray, *Ex p.* Gray (1835), 4 Deac. & Ch. 778.

2504. Either agent or principal may sue.]—It is a well-established rule of law that, where a contract not under seal is made with an agent in his own name for an undisclosed principal, either the agent or the principal may sue upon it, deft. in the latter case being entitled to be placed in the same situation at the time of the disclosure of the real principal as if the agent had been the contracting party (*per* CUR.).—SIMS *v.* BOND, No. 2120, *ante*.

Annotations:—**Consd.** Cobb *v.* Becke (1845), 4 L. T. O. S. 394; New Zealand & Australian Land Co. *v.* Ruston (1880), 5 Q. B. D. 474. **Refd.** Brunton *v.* Thompson (1846), 7 L. T. O. S. 430; Humble *v.* Hunter (1848), 17 L. J. Q. B. 350; Cooke *v.* Seeley (1848), 2 Exch. 746; Walshe *v.* Howlett & Provan (1853), 1 C. L. R. 823; Cooke *v.* Eshelby (1887), 12 App. Cas. 271, H. L.; Soc. Coloniale Anversoise *v.* London & Brazilian Bank, [1911] 2 K. B. 1024.
For full anns., *see* S. C. No. 2120, *ante*.

2505. ——.]—An agreement for a loan of money with a member of a partnership may be treated by him, if there be no express stipulation to the contrary, either as a private or partnership transaction; & if the money be lent from the funds of the firm, a joint action may be maintained by all the partners.

Where a shareholder in a co. applied to the treasurer, who was also a partner in a bank, to advance money in the payment of instalments on his shares, & the money was advanced by crediting the co. in their accounts with the bank to the amount of such instalments:—*Held:* the action for money lent was properly brought against the borrower in the names of the partners.—ALEXANDER *v.* BARKER (1831), 2 Cr. & J. 133; 2 Tyr. 140; 1 L. J. Ex. 40; 149 E. R. 56.
For full anns., *see* PARTNERSHIP.

2506. ——.]—A., not wishing to appear as purchaser, procured B. to bargain for him. B. signed the contract, but not as agent, & paid with A.'s money:—*Held:* A. could maintain an action without showing any disclaimer by B.—BETHUNE *v.* FAIRBROTHER (undated), cited 5 M. & S. at pp. 385, 388, 391; 105 E. R. 1092, 1093, 1094.

Annotation:—**Consd.** Bickerton *v.* Burrell (1816), 5 M. & S. 383.

2507. —— Effect of principal's intervention.]—The master of a ship entered into a charterparty (not under seal), whereby the charterer agreed to pay freight generally, without saying to whom. The owner demanded & received the freight although the master had given the charterer notice not to pay it to anyone but himself. In an action by the master against the charterer for freight:—*Held:* the action was not maintainable.—ATKINSON *v.* COTESWORTH (1825), 3 B. & C. 647; 1 C. & P. 516; 5 Dow. & Ry. K. B. 552; 3 L. J. O. S. K. B. 104; 107 E. R. 873.

Annotations:—**Distd.** Bristow *v.* Whitmore (1858), Johns. 96. **Apld.** Bristow *v.* Whitmore (1861), 9 H. L. Cas. 391.

2508. —— ——.]—If an agent acts for & on behalf of a principal, but in his own name, then, inasmuch as he is the person with whom the contract is made, it is no answer to an action in his name to say he is merely an agent, unless it is also shown he is prohibited from carrying on that action by the person on whose behalf the contract was made (BAYLEY, J.).—SARGENT *v.* MORRIS (1820), 3 B. & Ald. 277; 106 E. R. 665.

Annotations:—**Consd.** Dunlop *v.* Lambert (1839), Macl. & Rob. 663. **Refd.** Coombs *v.* Bristol & Exeter Ry. Co. (1858), 27 L. J. Ex. 269.

2509. —— Interpleader by third party.]—Pltf. having contracted in his own name with deft. to do certain work, completed it, & was paid part of the price, when deft. received notice from C. that pltf. was C.'s agent in making the contract, & further payment to pltf. would be at deft.'s peril. Pltf. having brought an action for the balance admitted to be due to someone:—*Held:* an interpleader might be granted in favour of deft.—MEYNELL *v.* ANGELL (1862), 1 New Rep. 126; 32 L. J. Q. B. 14; 8 Jur. 1211; 11 W. R. 122.

Annotations:—**Apprvd.** Best *v.* Hayes (1863), 1 H. & C. 718. **Refd.** Attenborough *v.* London & St. Katherine Docks Co. (1878), 3 C. P. D. 450, C. A.

Principal's right to sue.]—*See* Part IX., Sect. 3, Sub-sect. 1, *ante*.

ii. *Liability to be sued.*

See also Part IX., Sect. 3, Sub-sect. 1, B. & C.

2510. General rule.]—A. agreed with B. by charterparty to ship fish on account of C. & to deliver the fish at Barcelona. C. covenanted to

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PART X. SECT. 1, SUB-SECT. 1.—A. (c) ii.

2510 i. *General rule.*]—Agents of a firm sold to pltf. a cargo to be shipped by sailing vessel at a price. In an action against them for breach of contract they set up their agency, & that, the principals being well known, they were not liable:—*Held:* an agent who contracts in his own name is personally responsible for a breach of the contract.—EVANS *v.* MCLEA (1879), 2 L. N. 370; 1 Q. L. R. 201; 4 L. N. 76.—**CAN.**

2510 ii. ——.]—In an action for not delivering certain cheese sold by deft. to pltf.:—*Held:* even though deft. acted merely as agent of certain cheese factories, he contracted in his own name without qualification & was personally liable.—BALLANTYNE *v.* WATSON (1880), 30 C. P. 529.—**CAN.**

2510 iii. ——.]—LEMIRE *v.* DIXON (1882), 11 R. L. 323.—**CAN.**

2510 iv. ——.]—Work was done on three houses forming one block at the request of applt., an architect, who was owner of one house, the other two being the property of his sister residing in Ireland. The work was all ordered in his own name:—*Held:* applt. was personally responsible for the cost of the work.—BROWNE *v.* WATMORE (1893), Q. R. 3 Q. B. 18.—**CAN.**

2510 v. ——.]—Deft. ordered goods which were intended for a co. in which he was a shareholder. The goods were supplied by pltfs., who were not aware that deft. was acting for a co. Pltfs. delivered the goods as deft. directed, charged the items to him, & sent him the bills, some of which were paid:—*Held:* deft., having allowed pltfs. to deliver goods under the conviction that he was the person liable, could not get rid of his liability by the contention that he was merely an agent.—STARK M. Co. *v.* SPIKE (1903), 40 N. S. R. 627.—**CAN.**

2510 vi. ——.]—A person who, in execution of a promise of sale, makes an appointment with the intending purchaser to effect the sale & sign the deed, but who is unable so to do on the day fixed, through legal hindrances & want of authorisation of part owners & sellers under age, is liable in damages to

pay freight on delivery. The fish was delivered to X. at Barcelona. The master demanded freight of X., but the latter claimed a deduction. The master took action in the ct. at Barcelona; the freight was paid into ct. & the hearing of the action was delayed a year for appeal. The master returned to England & A. sued C.:—*Semble:* A., having no notice that C. was only an agent, had no concern with X., the undisclosed principal.—NEWLAND *v.* HORSMAN (1681), 2 Cas. in Ch. 74; 22 E. R. 853.

2511. ——.]—HARPER *v.* WILLIAMS, No. 2528, *post.*

For full anns., *see* S. C. No. 2528, *post.*

2512. ——.]—The declaration in an action to recover freight for goods, which had been conveyed by pltf.'s vessel & received by deft., was a special one, setting out the charterparty & bill of lading & alleging that, in consideration of pltf.'s delivering the goods to deft. without his insisting upon his lien for freight, deft. promised to pay, etc. The goods were imported in deft.'s own name & delivered into his own barge. The jury found for pltf. On a motion for a new trial, the points raised being whether upon the evidence & some correspondence between the parties the special promise had been made out, & whether deft. who had received the goods as agent, & not as owner, was liable on general principles, the ct. made the rule absolute.—MERCER *v.* TEMPERLEY (1844), 3 L. T. O. S. 100.

2513. ——.]—Pltf. agreed to purchase certain premises & paid the deposit to deft., who signed a memorandum agreeing, on behalf of the vendors, that vendors should perform the conditions of sale:—*Held:* deft. was personally liable for non-delivery of an abstract.

Deft. expressly promised the vendors should perform the conditions, & there is nothing repugnant in supposing this was his intention (LORD DENMAN, C.J.).—CHAMBERLAIN *v.* HAMMOND (1846), 7 L. T. O. S. 226.

2514. ——.]—A. purchased through S., his broker, from M., also a broker & known to be acting for an undisclosed principal, certain ry. debentures. Immediately after the sale, S. received from M. a note, signed by him, in the following terms: "Sold to R. & J. S. £1,600 Eastern Counties Ry. 4½ per cent. debentures at 101/18 per cent., £1,618. Interest from 19 Jan. to Apr. 15, £18 14*s.* 10*d.* Stamp £1 15*s.*—£1,638 9*s.* 10*d.*" With this note were sent the debentures, & a supposed transfer of them, which was duly registered by the ry. co., but which was subsequently discovered to be forged:—*Held:* A. was entitled to recover from M. the sum paid for the debentures, with interest.—ROYAL EXCHANGE ASSURANCE CO. *v.* MOORE (1863), 2 New Rep. 63; 8 L. T. 242; 11 W. R. 592.

2515. ——.]—A quartermaster who has acted as owner of goods supplied for regimental purposes is liable for payment.—*Re* GARLAND (1868), 19 L. T. 444.

2516. ——.]—Deft., an estate agent, contracted to sell land to pltf., who paid a deposit. Deft. signed a receipt in his own name for the deposit, & pltf. signed an agreement containing the terms of purchase. The owner of the land refused to complete purchase, & pltf. sued deft. for damages for breach of contract to sell. At the trial the jury found deft. sold as principal:—*Held:* deft. personally liable.—LONG *v.* MILLAR (1879), 4 C. P. D. 450; 48 L. J. Q. B. 596; 41 L. T. 306; 43 J. P. 797; 27 W. R. 720, C. A.

Annotations:—**Consd. & Folld.** Cave *v.* Hastings (1881), 7 Q. B. D. 125. **Consd. & Apld.** Shardlow *v.* Cotterell (1881), 18 Ch. D. 280. **Consd.** Studds *v.* Watson (1884), 28 Ch. D. 305; Sidle *v.* Bond-Cabbell (1885), 2 T. L. R. 44; Oliver *v.* Hunting (1890), 44 Ch. D. 205. **Consd. & Distd.** Taylor *v.* Smith, [1893] 2 Q. B. 65, C. A. **Consd. & Apld.** Sheers & Serjeant *v.* Thimbleby (1897), 13 T. L. R. 451, C. A. **Refd.** Pearce *v.* Gardner, [1897] 1 Q. B. 688, C. A.; Dewar *v.* Mintoft, [1912] 2 K. B. 373; Last *v.* Hucklesby (1914), 58 Sol. Jo. 431, C. A. **Mentd.** Chapronière *v.* Lambert (1917), 117 L. T. 353.

2517. ——.]—Deft., acting as agent for L., consigned a cargo to pltf. for sale. Throughout the transaction deft. appeared to act as principal & was believed by pltf. to be principal:—*Held:* deft. was liable for loss on the sale.—TURNBULL *v.* ASTRUP (1886), 3 T. L. R. 134, C. A.

2518. ——.]—Defts. signed a contract in form of a letter for the charter of a ship. Defts. had made contracts with merchants for loading the ship, but pltf. had no notice of these contracts:—*Held:* defts. were liable as principals, as they had contracted in their own names without any qualification.—HICK *v.* TWEEDY, No. 2530, *post.*

2519. ——.]—Deft., an architect, engaged by building owners for rebuilding two public-houses, invited pltfs. to give estimates, referring in the letters to his "clients." Pltfs. sent him estimates & in their letters referred to "your clients." Afterwards deft. ordered the goods without stating that he did so as agent:—*Held:* (1) deft. by making the contract in his own name, without naming his principals, & without expressly excluding his liability, had made himself personally liable; (2) by endeavouring to get the money from the builders & the building owners to whom deft. had referred them, pltfs. had made no election exonerating him.—BEIGTHEIL & YOUNG *v.* STEWART (1900), 16 T. L. R. 177.

2520. —— **Rule in equity.**]—A solr. contracted in his own name to purchase a freehold; he resisted the performance of it on the ground that he had acted as agent of a client, &, it being a case of hard-

the purchaser for his travelling & other necessary expenses. Nor is he relieved therefrom by the fact that he is merely the agent of the owners, having acted in his own name, without disclosing the names of his principals.—LAURIN *v.* THIBAUDEAU (1908), Q. R. 34 S. C. 503. —**CAN.**

2510 vii. ——.]—DEMERS *v.* GAUTHIER (1911), 17 R. L. N. S. 482.—**CAN.**

2510 viii. ——.]—Pltf. sued deft. to recover possession of a house & for arrears of rent. Deft. pleaded that the house in question was occupied by a school of which he was honorary secretary, & that he had hired the house as secretary & not in his personal capacity, & that he had never paid the rent or expenses of the school out of his own pocket:—*Held:* deft. was liable for the rent, as there was nothing to show that the contract for the house was made on the personal credit of any one except deft., no principal having been disclosed.—BHOJABHAI ALLARAKHIA *v.* HAYEM SAMUEL (1898), I. L. R. 22 Bom. 754.—**IND.**

2510 ix. ——.]—Where deft. ordered articles of furniture to be fitted up in a room in a relative's house where he was working, & never at the time of the order definitely stated he was only his relative's agent:—*Held:* he was liable to pltf. for amount due.—O'KEEFE *v.* HORGAN (1897), 31 I. L. T. Jo. 429.—**IR.**

2510 x. —— *Without prejudice to principal's liability.*]—An agent, who has acted in his own name, is responsible toward third parties with whom he contracted without prejudice to the rights of these latter against the principal, who is responsible to them for all the acts of his agent done in the execution, & within the limits, of his commission.—WILSON *v.* BENJAMIN (1888), 5 M. L. R. 18.—**CAN.**

2510 xi. *S. P.* HNOT *v.* DUFRESNE (1890), 19 R. L. 360.—**CAN.**

2510 xii. —— *Not limited by subsequent acts of agent.*]—An agent who buys for his principal without disclosing the part of the agency is responsible personally; & when the principal carries on business under the name of the agent, the fact that this latter, after having bought, signed notes in the firm's name & given them to the vendor in payment, is not a declaration of his status sufficient to take away his personal responsibility. — PRATTE *v.* MAURICE (1885), 1 M. L. R. 364.—**CAN.**

2510 xiii. —— *Principal disclosed before delivery.*]—A. orally contracted with B., agent of an undisclosed principal, for the sale to B. of certain goods, but, before any delivery or part payment, the name of the principal was disclosed by B.:—*Held:* the contract was not binding before a part delivery or payment took place, &, as neither took place before the disclosure by B of his principal, he was not personally liable.—HAIGHT *v.* HOWARD (1862), 11 C. P. 137.—**CAN.**

Sect. 1.—*In regard to contracts: Sub-sect.* 1, *A.* (*c*) *ii. B.* (*a*), *i.*]

ship, damages at law would be an adequate remedy to vendor:—*Held:* he was bound to perform the contract.—SAXON *v.* BLAKE (1861), 29 Beav. 438; 54 E. R. 697.

2521. Where apparent principal pleads he was agent—Proper question for jury.]—In answer to an action for goods sold & delivered, it is not enough for deft. to prove he was agent for another person, without showing that pltf. knew, at the time of the sale, that he was so; but it is too narrow a direction to the jury to tell them that, unless the agency was disclosed at the time of purchase, the purchaser must be taken to be the principal, the proper way of leaving the question being whether pltf. knew at the time of contract that the purchase was made by deft. merely as agent.—SEABER *v.* HAWKES (1831), 5 Moo. & P. 549; 9 L. J. O. S. C. P. 217

2522. —— ——.]—A servant attended an auction & bid in his own name for certain goods, & after they were knocked down gave his name as bidder, the auctioneer not knowing him to be a servant, but the goods being sent without his order to his master, in his master's carts & used & consumed by his master's horses:—*Held:* (1) it was rightly left to the jury whether he was personally liable (POLLOCK, C.B., & BRAMWELL, B.); (2) it was not a question for the jury, &, in law, he was liable (CHANNELL & WILDE, BB.).—WILLIAMSON *v.* BARTON (1862), 7 H. & N. 899; 31 L. J. Ex. 170; 5 L. T. 800; 8 Jur. N. S. 341; 10 W. R. 321; 158 E. R. 733.

2523. —— **Form of pleading.**]—To a declaration for goods sold & delivered, & work done, & materials provided at deft.'s request, a plea that the goods were sold to deft. as agent & broker of F. & M., to whom pltf. consigned the goods, & that the work & materials were done & provided in & about the shipping & consigning of the goods to F. & M., is bad, as not showing that the work & materials were not done & provided on deft.'s credit.—CRAWSHAY *v.* BARRY (1840), 1 Man. & G. 235; 133 E. R. 320.

2524. Where contract void as against principal.]—Where deft., a promoter of a joint-stock co. provisionally registered under Cos. Act, 1844 (c. 110), entered into a written contract in his own name for rooms for use of the co., & the rooms were occupied by the co. after complete registration:—*Held:* although as against the co. this contract was illegal & void, yet deft., who had entered into it in his own name, was liable.—JOB *v.* LAMB (1856), 11 Exch. 539; 25 L. J. Ex. 87; 26 L. T. O. S. 204; 2 Jur. N. S. 93; 4 W. R. 290.

2525. Mistake in drawing agreement—Personal liability not intended.]—WAKE *v.* HARROP, No. 2567, *post.*

For full anns., *see* S. C. No. 2567, *post.*

Charterparty — Limitation of liability.] — *See* SHIPPING & NAVIGATION.

Committee of lunatic.]—*See* LUNATICS & PERSONS OF UNSOUND MIND.

Contract by trustee as such.]—*See* TRUSTS & TRUSTEES.

Contract to take shares.]—*See* COMPANIES.

Master of ship.]—*See* SHIPPING & NAVIGATION.

Person appointed under Lunacy Act, 1890 (c. 5), s. 116.]—*See* LUNATICS & PERSONS OF UNSOUND MIND.

Receiver & manager appointed by court.]—*See* RECEIVERS.

Solicitor — Liability to witnesses, shorthand writers, pho ographers, etc.]—*See* SOLICITORS.

—— **Undertaking personal liability.**] — *See* SOLICITORS.

B. Construction of Written Contracts as to Agent's Rights and Liabilities.

(a) In General.

i. *Where Signature unqualified.*

2526. Agent described in document—Without qualification.]—A., a broker employed by B. to sell certain ry. shares, agreed with C., D.'s broker, to sell him fifty shares, of which A. afterwards informed his clerk at his office, who made an entry in the book as of a sale from A. to C., & a contract note to the same effect was sent to C. A. subsequently saw the entry in the book, & altered it by writing the name of B. as seller, & directed another note to be sent to C., with the name of B. as seller. A fresh note was sent the same evening or the next morning, but C. received them both together the next morning. C. did not return the first note, nor did A. request to have it returned. In an action

PART X. SECT. 1, SUB-SECT. 1.—B. (a) i.

2526 i. *Agent described in document—Without qualification.*]—Defts. contracted with pltfs. as agents of the captain & owners of a ship, then in the M. Roads. Pltfs. were aware of this at the time when the contract was made. The captain was at the time in charge of his ship. At the time of the contract nothing was said by either party as to the person or persons on whose credit the contract was made—all that occurred being that defts., known by pltfs. to be acting as agents for the captain & owners of the ship, agreed with pltfs. to carry certain of their goods on board the ship to Calcutta. Defts. did not at the time of the contract in terms say that they contracted only as agents. Pltfs. did not know the names of the owners, nor the captain, nor had they any further or other knowledge of the latter than that which his designation by his office of master of the ship conveyed:—*Held:* in the absence of anything more than knowledge that defts. were acting as agents of the master & owners of a ship in the Roads, a decision declaring the agents liable was strictly in accordance with English law.—PATER *v.* GORDON (1872), 7 Mad. 82.—**IND.**

2526 ii. —— —— *Notepaper headed with principal's name.*]—Defender, S., was appointed sales manager for two cos., under separate agreements, in which each co. respectively authorised him to appoint travellers at its expense. Thereafter defender employed pursuer by a letter in the following terms: "I beg to confirm arrangement made with you this day, & appoint you as representative for the two cos. Yours truly, S." The letter was written on notepaper bearing as a heading the trade name & address of one of the cos. Pursuer having raised an action against defender for payment of commission:—*Held:* defender was personally liable, in respect that the letter was signed by defender in his own name without qualification, & that it contained no indication that he did not intend to bind himself as principal.—STEWART *v.* SHANNESSY (1900), 2 F. 1288.—**SCOT.**

2526 iii. —— —— *Indorsement that agent was "agent" for named principal.*]—Deft., being indebted to pltf., by an indenture reciting his indebtedness, & that he had agreed with pltf. for the repayment of the sum due within six months from date, with interest, conveyed to pltf. certain lands, *habendum* in fee. Proviso that pltf., if the debt was duly paid, would reconvey, but there was no covenant for payment by deft. Indorsed on the indenture was a deed poll executed by pltf., stating the debt thereby secured to be the proper money of L., & that pltf.'s name was only introduced therein as agent for L., & in consideration of the trust, & of 5*s.*, he absolutely assigned all interest in the lands in the indenture, as well as the indenture, to L.:—*Held:* it was not open to deft. to deny that he was at the date of the indenture indebted to pltf., who could sue in his own name.—ALLNUTT *v.* RYLAND (1861), 11 C. P. 300.—**CAN.**

h. —— *As agreeing "for owners of"—Named ship.*]—Pltfs. by charterparty contracted to let a ship to defts. upon certain terms. The first clause of the charterparty stated that pltfs. "agreed as agents for owners of the ship," & subsequent clauses provided that the owners should bind themselves to receive the cargo on board, & that the master on behalf of the owners should have a lien on the cargo for freight, etc. The charterparty was signed by pltfs. & defts. in their own names. Pltfs. sued defts. for breach of the charterparty in refusing to load the ship:—*Held:* pltfs. had contracted as agents, & were not entitled to sue. If a contract made by a person who is an agent is worded so as, when taken as a whole, to convey to the other contracting party the notion that the agent is contracting in that character, he cannot sue or be sued on the contract.—MACKINNON, MACKENZIE & CO. *v.* LANG, MOIR & CO. (1881), I. L. R. 5 Bom. 584.—**IND.**

k. —— *As "authorised by"—Named principal.*] — Pltf. signed in his own name an agreement to transfer his

brought by D. against A. for breach of the agreement in not completing the sale the judge who tried the cause left it to the jury to say whether the second note was a correction of a mistake in the first, & told the jury that if deft. entered into a written contract in his own name, he could not afterwards set up that he was acting as broker merely & that, although known to be a broker, if he signed the contract in his own name he was liable :—*Held :* (1) this was no misdirection ; (2) evidence that it was the custom in Liverpool to send in brokers' notes without disclosing the principal's name was properly rejected.—MAGEE *v.* ATKINSON & TOWNLEY (1837), 2 M. & W. 440 ; Murph. & H. 115 ; 6 L. J. Ex. 115 ; 150 E. R. 830.

Annotations :—**Consd.** Johnston *v.* Usborne (1840), 3 Per. & Dav. 236. **Folld.** Higgins *v.* Senior (1841), 8 M. & W. 834. **Refd.** Trueman *v.* Loder (1840), 4 Jur. 934 ; Humble *v.* Hunter (1848), 12 Q. B. 210 ; Spatali *v.* Benecke (1850), 10 C. B. 212 ; Holding *v.* Elliott (1860), 5 H. & N. 117.

2527. —— ——.]—Where brokers sold goods by auction, & being under advances to their principal, gave an invoice in their own name, & received the price :—*Held :* they were concluded by their invoice, & were not at liberty to set up that they only sold as brokers & that the buyer knew, or had the means of knowing, that they did not sell as principals.—JONES *v.* LITTLEDALE (1837), 6 Ad. & El. 486 ; 1 Nev. & P. K. B. 677 ; Will. Woll. & Dav. 240 ; 6 L. J. K. B. 169 ; 112 E. R. 186.

Annotations :—**Folld.** Higgins *v.* Senior (1841), 8 M. & W. 834. **Dbtd. & Distd.** Holding *v.* Elliott (1860), 5 H. & N. 117. **Apprvd.** Fleet *v.* Murton (1871), L. R. 7 Q. B. 126. **Apprvd. & Apld.** Corless *v.* Sparling (1873), 21 W. R. 876, C. A. **Refd.** Johnston *v.* Usborne (1841), 11 Ad. & El. 549 ; Royal Exchange Assce. *v.* Moore (1863), 2 New Rep. 63 ; Southwell *v.* Bowditch (1876), 45 L. J. Q. B. 630, C. A.

2528. —— ——.]—Attorneys, assignees of a mtge. of lands, brought an action in the name of the mtgee. against W., the mtgor., for the principal & interest, & W. pleaded. The attorneys had obtained from E., their client, a loan to W. on further mtge. of same lands, & had brought an action for E. against W. for the principal & interest due on that mtge., & W. had pleaded. They had also obtained a verdict against W. & a certificate for execution in an action of debt at their own suit. D., an attorney, but not employed as such by mtgor. (the brother of D.'s professional agent), wrote to pltfs. promising that, if they would not issue execution for two months, the pleas should be withdrawn & judgment suffered by default in the first two actions, & further undertaking as follows : "I shall pay all the principal, interest, & costs through a friend of mine in London, to whom a transfer of all the securities you have will have to be made. The cash will be ready, if the securities will, on the 16th inst." Pltfs. agreed, & forbore issuing execution, but the party referred to by D. did not advance the money :—*Held :* (1) D. was personally liable in *assumpsit* on the above undertaking for the amount claimed by pltfs. in the first two actions ; (2) they were sufficiently interested in the recovery of the sum due to E., their client, to sue on D.'s agreement in respect of it in their own names.—HARPER *v.* WILLIAMS (1843), 4 Q. B. 219 ; 12 L. J. Q. B. 227 ; 114 E. R. 880.

Annotations :—**Distd.** Jenkins *v.* Hutchinson (1849), 18 L. J. Q. B. 274. **Refd.** Lewis *v.* Nicholson (1852), 18 Q. B. 503. **Mentd.** Duncombe *v.* Brighton Club & Norfolk Hotel Co. (1875), L. R. 10 Q. B. 371.

2529. —— ——.]—B. became the purchaser of premises at an auction, declaring himself agent of C. in C.'s presence. The vendors' solr. required B. to sign the agreement, & declined to substitute the name of C. Communications afterwards took place between vendors' solr. & C. with reference to the title. Vendors afterwards brought their bill against B. & C. for specific performance of the contract :—*Held :* supposing B. to be the agent of C., yet the signature of B. to the contract made him personally liable to perform it.—CHADWICK *v.* MADEN (1851), 9 Hare, 188 ; 21 L. J. Ch. 876 ; 68 E. R. 469.

Annotations :—**Distd.** Wollaston *v.* Osborn (1853), 20 L. T. O. S. 274. **Apld.** West Midland Ry. Co. *v.* Nixon (1863), 1 Hem. & M. 176. **Distd.** Hacker *v.* Mid Kent Ry. Co. & S. E. Ry. Co. (1865), 12 L. T. 699.

2530. —— ——.]—In an action for damages for loss of freight & for demurrage it was proved that defts., who carried on business at O., made a contract with pltf.'s agent in L., in the form of a letter signed by defts. & containing these clauses : "Steamer to load end of Nov. or early Dec., charterers having the option of cancelling if she is not ready to receive cargo by Dec. 12 next. Steamer to be loaded on usual berth terms, 2 per cent. commission to us " :—*Held :* defts. were liable as principals, as they had contracted in their own names without any qualification.—HICK *v.* TWEEDY & Co. (1890), 63 L. T. 765 ; 7 T. L. R. 144 ; 6 Asp. M. L. C. 599.

2531. —— **As acting "on the part of "—Named principal.**]—A written agreement was expressed to be made "Between C., for & on behalf of N., of the first part, & T. of the second part." By it "C., on the part of " N., agreed to let to T. certain premises for a term of years, T. paying rent to "C. for the use of " N. ; no auction to be held on the premises without the consent in writing of "C. on the part of " N. ; T. to take a lease & execute a counterpart thereof "when called upon to do so by C. on the part of " N. C. signed this in his own name. N. did not sign it. In an action by T. against C. for not completing the lease :—*Held :* (1) it sufficiently appeared to be the intention of the parties that C. should himself contract ; (2) he was personally liable.—TANNER *v.* CHRISTIAN (1855), 1 E. & B. 591 ; 24 L. J. Q. B. 91 ; 1 Jur. N. S. 519 ; 3 W. R. 204 ; 3 C. L. R. 1366 ; 119 E. R. 217.

Annotations :—**Apld.** Gadd *v.* Houghton (1876), 33 L. T. 811 ; Ogden *v.* Hall (1879), 40 L. T. 751. **Refd.** Lennard *v.* Robinson (1855), 5 E. & B. 125 ; Paice *v.* Walker (1870), L. R. 5 Exch. 173 ; Chapman *v.* Smith, [1907] 2 Ch. 97.

2532. —— **As "consignee & agent " of named ship "on behalf of "—Named principal.**]—The consignee & agent of a vessel chartered for a specific voyage entered into an agreement with the captain, describing himself as "consignee & agent of the above brig & cargo, on behalf of M., merchant, of L.," the agreement stating that "it is witnessed that the said parties agreed that the vessel should go to another port, there discharge the remainder of her cargo, & receive a full & complete homeward cargo at the same freight as she would have got had she proceeded on the voyage stipulated in the charterparty," & then signed the agreement in his

interests in certain premises, etc., to deft. for a certain consideration. As deft. failed to complete the consideration, pltf. brought an action. In the agreement, following pltf.'s name, the words "as authorised by J. S." appeared, & deft. contended that pltf. was agent of a disclosed principal, & not entitled to sue :—*Held :* the evidence showed that the words in question merely meant that the concurrence of J. S. might be necessary to the transfer, he being the licensee of the hotel, & were not intended to limit the rights or liabilities of pltf., who was entitled to sue.—WOOD *v.* CUTTS (1879), 5 V. L. R. 275.—**AUS.**

L. —— *As "attorney " for—Named principal.*]—L., who held an irrevocable power of attorney from R. to sell his land, agreed in writing reciting that he was R.'s attorney to pay a charge of $1,200 out of the proceeds of sale, being the amount of a mtge. created subsequent to the execution of the power. R. subsequently conveyed the equity of redemption to L. In an action against L. on his undertaking to pay the charge :—*Held :* he was not personally liable.—ARMSTRONG *v.* LYE (1897), 24 A. R. 543.—**CAN.**

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own name, without describing himself as agent :—*Held :* he made himself personally liable for the freight of the homeward voyage.—KENNEDY *v.* GOUVEIA (1823), 3 Dow. & Ry. K. B. 503.

Annotation :—**Mentd.** Thöl *v.* Leask (1855), 1 Jur. N. S. 117.

2533. —— **As acting "on behalf of"—Named principal.**]—Deft. by a written agreement expressed to be made by himself on behalf of A. of the one part, & pltf. of the other part, stipulated to execute a lease of certain premises to pltf. These premises were proved to belong to A. :—*Held :* deft. personally liable.—NORTON *v.* HERRON (1825), 1 C. & P. 648 ; Ry. & M. 229.

Annotations :—**Folld.** Tanner *v.* Christian (1855), 4 E. & B. 591. **Refd.** Burton *v.* Langham (1848), 5 C. B. 92.

2534. ——————.]—DOWNMAN *v.* WILLIAMS, No. 2478, *ante.*

For full anns., *see* S. C. No. 2478, *ante.*

2535. —— —— **"The London creditors."**]—A., the solr. of the London creditors of a bkpt. in the country, wrote to B., the solr. of the country creditors of same bkpt., the following letter : "I am willing, on behalf of the London creditors, to bear two-thirds of the expense of Messrs. B. & B. or such barrister as you may think fit for resisting Mr. K.'s proof under the commission, & of investigating the accounts of the assignees at the meeting of the 18th inst. I hereby undertake to bear & pay on behalf of these creditors two-thirds of the expenses incident thereto accordingly." The meeting being afterwards adjourned, A. wrote to B. another letter, in which he said, "I shall have no objection to bear as before the proportion of expense of the barrister attending the meeting stated in your letter" :—*Held :* A. personally liable for the proportion of the expenses.—HALL *v.* ASHURST (1833), 1 Cr. & M. 714 ; 3 Tyr. 420 ; 2 L. J. Ex. 295 ; 149 E. R. 586.

Annotations :—**Distd.** Downman *v.* Jones (1845), 5 L. T. O. S. 77 ; Lewis *v.* Nicholson (1852), 18 Q. B. 503. **Apld.** *Re* C. (1908), 53 Sol. Jo. 119.

2536. —— —— **Unnamed foreign principal.**]—A charterparty contained the following clause : "This charterparty being concluded by J. (deft.) on behalf of another party resident abroad, it is agreed that all liability of the former ceases as soon as he has shipped the cargo" ; it was shown that deft. had paid for the goods in his own name, & that, at the port of destination, they had been claimed by & delivered to a person who produced an unsigned bill of lading, which the captain had delivered to deft. :—*Held :* there was no evidence that deft. acted as principal, so as to render him liable for the freight.—CARR *v.* JACKSON (1852), 7 Exch. 382 ; 21 L. J. Ex. 137 ; 18 L. T. O. S. 279 ; 155 E. R. 996.

Annotation :—**Mentd.** Dale *v.* Humfrey (1858), E. B. & E. 1004, Ex. Ch.

2537. —— —— **Named principal.**]—A contract for the conveyance of goods from Liverpool to Australia was entered into as follows : "It is this day mutually agreed between J. & R. W., owners of the ship *J.*, of the first part, & C. on behalf of the G. & M. Ry. Co. of the other part," that the ship should be ready by a given day to take on board certain specified goods, & should proceed therewith "to G., in the colony of Victoria," & there deliver same : "the rates of freight determined upon by the parties to this agreement are as under," etc., one-third to be paid in London, on receipt of bills of lading, & the remainder by the G. & M. Ry. Co., at G., goods to be taken on board at Liverpool at ship's expense," & the agreement was signed, "J. & R. W., C." :—*Held :* C. personally bound by this contract, & entitled to sue for a breach of it.—COOKE *v.* WILSON (1856), 1 C. B. N. S. 153 ; 26 L. J. C. P. 15 ; 28 L. T. O. S. 103 ; 2 Jur. N. S. 1094 ; 5 W. R. 24 ; 140 E. R. 65.

Annotations :—**Distd.** Oglesby *v.* Yglesias (1858), E. B. & E. 930. **Apld.** Paice *v.* Walker (1870), L. R. 5 Exch. 173. **Folld.** Hough *v.* Manzanos (1879), 4 Ex. D. 104. **Mentd.** Brandt *v.* Morris, [1917] 2 K. B. 784, C. A.

2538. —— —— ——.]—Deft., an ironfounder & machinest at Bury, having set up some mill machinery at R., in France, for a French millowner there, was requested by him to engage an overlooker to manage the machinery, & a written agreement was drawn up & signed by deft. & pltf. at Bury, in the following terms : "I hereby agree on behalf of P., R., France, to engage O. (pltf.) overlooker, at the rate of £4 per week with travelling expenses there & back. The sum of 30*s.* per week to be paid to his wife every 14 days. (Signed) R. H." (deft.), "per J. H., O." Thereupon pltf. proceeded to R., receiving £10 at starting from deft., & entered on his duties as overlooker at the mill there, & continued there in that capacity until, in consequence of a misunderstanding with P., the French millowner, he left & returned to England. During pltf.'s stay in France the 30*s.* was paid to his wife every fortnight by deft. at Bury, & upon his leaving France a sum of £12 was paid to him by deft.'s agent at R. to enable him to return to England. The remainder of his wages under the contract, except a balance of some £17, was regularly paid to him from time to time by the French millowner. For this balance he now sued deft. :—*Held* (KELLY, C.B., *diss.*) : (1) the case was governed by *Gadd* v. *Houghton* (No. 2546, *post*), there being no distinction between the words "on account of" in that case & "on behalf of" in the present one ; (2) these words being in the body of the contract it was immaterial that deft. signed the document in his own name without qualification, & he did not thereby render himself personally liable ; (3) (KELLY, C.B.) there was a difference between the words "on account of" & "on behalf of," &, looking at the terms of the contract & the facts of the case, deft. was personally liable.—OGDEN *v.* HALL (1879), 40 L. T. 751.

2539. —— —— **Unnamed principal.**]—A charterparty entered into by a broker for a foreign principal provided that the loading was to take place in 14 days, or the master to receive £5 a day, & further provided for "demurrage" at the port of discharge at £5 a day. The charterparty contained a cesser clause as follows : "This charter being concluded by A. (the broker) on behalf of another party, it is agreed that all liability of the former shall cease as soon as he has shipped the cargo, the owners & master agreeing to rest solely on their lien on the cargo for freight & demurrage." The ship was delayed beyond the 14 days at the port of loading :—*Held :* the broker was liable, as, on the true construction of contract, the word "demurrage" in the cesser clause applied only to demurrage at the port of discharge.—PEDERSON *v.* LOTINGA (1857), E. B. & E. 933 n. ; 2 Saund. & M. 172 ; 28 L. T. O. S. 267 n. ; 21 J. P. Jo. 84 ; 5 W. R. 290 ; 120 E. R. 757 n.

Annotations :—**Consd.** Oglesby *v.* Yglesias (1858), E. B. & E. 930. **Apld.** Chr. Toffersen *v.* Hansen (1872), L. R. 7 Q. B. 509. **Consd.** Francesco *v.* Massey (1873), L. R. 8 Exch. 101 ; Rederi Akt. Superior *v.* Dewar & Webb, [1909] 2 K. B. 998, C. A. **Refd.** French *v.* Gerber (1876), 1 C. P. D. 737 ; Dunlop *v.* Balfour, Williamson, [1892] 1 Q. B. 507, C. A.

2540. —— —— **"The Thimble League."**]—In considering whether an agent is liable the whole document must be examined. The signature is only an element to be considered.

H., on behalf of a charitable society called the

Thimble League, signed an agreement, without qualification, for the hire of a public hall for one week for a bazaar. In an action against a member of the Thimble League to recover the rent:—*Held:* (1) on the construction of the whole agreement, pltfs. did not contract with H.; (2) the fact that his signature was unqualified was not sufficient to show that H. contracted personally.—ROYAL ALBERT HALL CORPN. *v.* WINCHILSEA (1891), 7 T. L. R. 362, C. A.

2541. —— —— **Company.**]—Pltfs. recovered judgment against a co., & the chairman of the co. signed a document stating that in consideration of pltfs. suspending proceedings against the co. he agreed "on behalf of" the co. to pay £75 in 3 days & the balance, including costs, in 3 months:—*Held:* (1) this agreement was made by the chairman as agent for the co.; (2) he was not personally liable upon it.—AVERY (W. & T.), LTD. *v.* CHARLESWORTH (1914), 31 T. L. R. 52, C. A.

2542. —— **"For & on behalf of"—Named principals.**]—Pltfs., who carried on business in Manchester, gave to defts., chemical manufacturers in Manchester, a bought note dated Sept. 3, 1914, addressed to defts. & headed "From B. & Co., Manchester. For & on behalf of S. Bleacheries, Rhode Island, U.S.A." The note stated "We have this day bought from you 60 tons pure aniline oil," & was signed "B. & Co." There was evidence that during war time the destination of goods intended for export must be made known. Pltfs. having sued for non-delivery of the oil:—*Held:* pltfs. were contracting parties & were entitled to sue upon the contract.—BRANDT (H. O.) & Co. *v.* MORRIS (H. N.) & Co., LTD., [1917] 2 K. B. 784; 87 L. J. K. B. 101; 117 L. T. 196, C. A.

2543. —— **As "agent for"—Named principal.**]—A memorandum of charterparty was expressed to be made "between P., of the good ship *C.*, & W., agent for E. W. & Son," to whom the ship was to be addressed. It was signed by W. without any restriction:—*Held:* W. personally liable as charterer.—PARKER *v.* WINLOW (WINLO) (1857), 7 E. & B. 942; 27 L. J. Q. B. 49; 119 E. R. 1497.

Annotations:—**Consd.** Concordia Chemische Fabrik auf Actien *v.* Squire (1876), 34 L. T. 824, C. A. **Apprvd.** Gadd *v.* Houghton (1876), 35 L. T. 222, C. A. **Apld.** Rapkins *v.* Hall (1894), 10 T. L. R. 466, C. A. **Refd.** Williamson *v.* Barton (1862), 7 H. & N. 899; Southwell *v.* Bowditch (1876), 45 L. J. Q. B. 374. **Mentd.** Bastifell *v.* Lloyd (1862), 1 H. & C. 388; Gibson *v.* Hillstrom (1869), 21 L. T. 302; Tapscott *v.* Balfour (1872), 42 L. J. C. P. 16; Nelson *v.* Dahl (1879), 12 Ch. D. 568, C. A.; Dahl *v.* Nelson, Donkin (1880), 6 App. Cas. 38; Horsley *v.* Price (1883), 11 Q. B. D. 244; Allen *v.* Coltart (1883), 11 Q. B. D. 782; Leonis S.S. Co. *v.* Rank (1907), 24 T. L. R. 128, C. A.

2544. —— **"As agent for the freighter."**]—A memorandum for a charterparty, made between pltfs., shipowners, & deft., "as agent for the freighter" (no principal being named), after providing for "demurrage over & above the said lying days at £7 per day," stated that "it is further agreed that this charter being concluded by" deft. "for another party, the liability of the former in every respect, & as to all matters & things, as well before as after the shipping of the cargo, shall cease as soon as they have shipped the cargo":—*Held:* deft. not liable upon this memorandum for demurrage at the port of discharge.—OGLESBY *v.* YGLESIAS (1858), E. B. & E. 930; 27 L. J. Q. B. 356; 31 L. T. O. S. 234; 6 W. R. 690; 120 E. R. 756.

Annotations:—**Consd.** Milvain *v.* Perez (1861), 3 E. & E. 195; Bannister *v.* Breslauer (1867), L. R. 2 C. P. 497; Christoffersen *v.* Hansen (1872), L. R. 7 Q. B. 509; Francesco *v.* Massey (1873), L. R. 8 Exch. 101; Kish *v.* Cory (1875), L. R. 10 Q. B. 553, Ex. Ch. **Apld.** Manzanos (1879), 4 Ex. D. 101. **Refd.** French *v.* Gerber (1876), 1 C. P. D. 737; Dunlop *v.* Balfour, Williamson, [1892] 1 Q. B. 507, C. A.

2545. —— **"As agents for"—Named principal.**]—A person signing a contract in his own name without qualification is not exempted from liability on the contract by merely describing himself in the body of the contract as agent for a named principal, without words expressly or by necessary implication showing that he only signs as agent.

Defts. signed a contract for the sale of wheat in the following form: "Sold A. J. P., Esq., London, about 200 quarters wheat (as agents for John S. & Co., of Danzig), etc. (Signed) W. & S.":—*Held:* they were personally liable upon the contract.—PAICE *v.* WALKER (1870), L. R. 5 Exch. 173; 39 L. J. Ex. 109; 22 L. T. 547; 18 W. R. 789.

Annotations:—**Consd.** Southwell *v.* Bowditch (1876), 1 C. P. D. 100. **Distd.** Gadd *v.* Houghton (1876), 1 Ex. D. 357, C. A. **Expld.** Concordia Chemische Fabrik auf Actien *v.* Squire (1876), 34 L. T. 824, C. A.; Adams *v.* Hall (1877), 37 L. T. 70. **Consd. & Distd.** Ogden *v.* Hall (1879), 40 L. T. 751. **Consd.** Hough *v.* Suart (1890), 7 T. L. R. 134, C. A. **Dbtd.** Brandt *v.* Morris, [1917] 2 K. B. 784, C. A. **Refd.** Hough *v.* Manzanos (1879), 4 Ex. D. 104; Royal Albert Hall Corpn. *v.* Winchilsea (1891), 7 T. L. R. 362, C. A.; Glover *v.* Langford (1892), 8 T. L. R. 628.

2546. —— **As acting "on account of"—Named principal.**]—Fruit brokers in Liverpool gave a fruit merchant the following sold note: "We have this day sold to you on account of M. & Co., Valencia, 2,000 cases Valencia oranges, of the brand M. & Co., at 12*s.* 9*d.* per case free on board . . ." & signed it without any addition. The purchaser having brought an action against the brokers for non-delivery of the oranges:—*Held:* (1) the words "on account of M. & Co." showed an intention to make the foreign principals, & not the brokers, liable; (2) the brokers were not liable upon the contract.—GADD *v.* HOUGHTON (1876), 1 Ex. D. 357; 46 L. J. Q. B. 71; 35 L. T. 222; 24 W. R. 975, C. A.

Annotations:—**Consd.** Hough *v.* Manzanos (1879), 4 Ex. D. 104. **Consd. & Folld.** Ogden *v.* Hall (1879), 40 L. T. 751; Pike *v.* Ongley (1887), 18 Q. B. D. 708, C. A. **Apld.** Hough *v.* Suart (1890), 7 T. L. R. 134, C. A. **Consd.** Royal Albert Hall Corpn. *v.* Winchilsea (1891), 7 T. L. R. 362, C. A. **Folld.** Hahn *v.* North German Pitwood Co. (1892), 8 T. L. R. 557. **Consd.** Glover *v.* Langford (1892), 8 T. L. R. 628; Harper *v.* Keller, Bryant (1915), 84 L. J. K. B. 1696; Miller, Gibb *v.* Smith & Tyrer, [1917] 2 K. B. 141, C. A.; Brandt *v.* Morris, [1917] 2 K. B. 784, C. A. **Refd.** Lovesy *v.* Palmer, [1916] 2 Ch. 233.

2547. —— **"As agent" for—Named principal.**]—K., by letter, entered into a contract with pltfs. for sale of 300 tons of muriate of potash. At commencement of the letter K. said he bought "as agent," for deft. Delivery at the rate of 50 tons per month, etc. Cash payment to be made by K. 14 days from receipt of bills of lading. A commission of 1 per cent. to be paid to K. The letter was not signed by him as agent:—*Held:* on the true construction of the contract, whatever K.'s position might be, deft. was the buyer, & liable to pltfs.—CONCORDIA CHEMISCHE FABRIK AUF ACTIEN *v.* SQUIRE (1876), 34 L. T. 824, C. A.

2548. —— **"As agents for charterers."**]—A charterparty was entered into between pltfs., shipowners, & defts. "as agents for charterers." It was signed by defts. without any qualification, but contained a clause that the ship was to load "from the agents of the freighters," & a cesser clause that, the charter being entered into on behalf of others, all liability of charterers should cease on completion of loading & payment of advance. In an action for breach of the charterparty, defts. by their statement of defence den ed their personal liability. On demurrer:—*Held:* defts. liable on the charterparty.—HOUGH & Co. *v.* MANZANOS & Co. (1879), 4 Ex. D. 104; 48 L. J. Q. B. 398; 27 W. R. 536.

Annotations:—**Refd.** Royal Albert Hall Corpn. *v.* Winchilsea (1891), 7 T. L. R. 362, C. A. **Mentd.** Brandt *v.* Morris, [1917] 2 K. B. 784, C. A.

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2549. —— "As agent."]—R., mtgee. of a farm belonging to B. & collector of the rents thereof for B., but not in possession of the land, entered into an agreement under seal, expressed to be made between R. "as agent, hereinafter called 'the landlord,'" & S., "hereinafter called 'the tenant,'" whereby R. let the farm to S. from year to year. The agreement provided that the tenant should consume on the premises all hay & fodder, spread upon the land all manure & compost produced on the farm, not sell off any hay or fodder, & at the end of the tenancy leave all manure & compost. R. sold & conveyed the farm to C., who brought an action to restrain S. from acting in contravention of the above-mentioned provision:—*Held:* (1) on the construction of the agreement, & having regard to the surrounding circumstances, the demise was by mtgee.; (2) in a demise under seal by a mtgee. the description of the person letting "as agent" was not sufficient to prevent the demise operating on the legal estate vested in him; (3) C., as assignee of the reversion, could enforce any covenant in the lease which ran with the reversion.—CHAPMAN *v.* SMITH, [1907] 2 Ch. 97; 76 L. J. Ch. 394; 96 L. T. 662; 51 Sol. Jo. 428.

2550. —— As "acting for the owners of"—Named ship.]—On June 24 defts., shipbrokers, wrote to pltfs. offering them "room" in a named ship for certain cement & stone from London to Callao. On June 25 defts. chartered the ship for the voyage, the charterparty providing, *inter alia*, that the whole ship should be at the disposal of the charterers, except the space necessary for the crew & stores; that the master & owners should give the same attention to the cargo, & in every respect be responsible to all whom it might concern, as if the ship were loaded at her berth by & for the owners independently of the charter; that the master was to sign bills of lading at any rate of freight the charterers might require without prejudice to the charterparty; & that the charterers' responsibility, except for freight, should cease on the vessel being loaded. On June 26 an agreement was made between defts., acting for the owners of the ship, & pltfs., that the former should receive on board cement & stone at certain freight from London to Callao, & sail on a certain day; freight to be paid one half on signing bills of lading, & the remainder on final discharge at Callao. The cement & stone were shipped, the half freight paid, & the master signed bills of lading making the remainder payable at Callao. On her voyage the ship, being damaged by bad weather, put into an intermediate port, where the vessel was condemned. The master being unable to forward pltfs.' goods to their destination, sold them. In an action against defts. for their value, the jury found that the sale was not justified:—*Held:* on the construction of the above documents, there was no contract between pltfs. & defts. for the carriage of the goods from London to Callao.—WAGSTAFF *v.* ANDERSON (1880), 5 C. P. D. 171; 49 L. J. Q. B. 485; 42 L. T. 720; 28 W. R. 856; 4 Asp. M. L. C. 290.

Annotations:—**Refd.** Herman *v.* Royal Exchange Shipping Co. & Patton (1884), Cab. & El. 413. **Mentd.** Rodoconachi *v.* Milburn (1886), 17 Q. B. D. 316; Kruger *v.* Moel Tryvan Ship Co., [1907] A. C. 272.

2551. —— "As solicitors to the assignees."]—The solrs. of the assignees of a bkpt. tenant, upon whose lands a distress had been put by the landlord, gave the following written undertaking: "We, as solrs. to the assignees, undertake to pay to the landlord his rent, provided it does not exceed the value of the effects distrained":—*Held:* they were personally liable.—BURRELL *v.* JONES (1819), 3 B. & Ald. 47; 106 E. R. 580.

Annotations:—**Distd.** Spittle *v.* Lavender (1821), 2 Brod. & Bing. 452. **Foll'd.** Iveson *v.* Conington (1823), 1 B. & C. 160. **Apld.** Kennedy *v.* Gouveia (1823), 3 Dow. & Ry. K. B. 503. **Foll'd.** Norton *v.* Herron (1825), 1 C. & P. 648. **Expld. & Distd.** Gaby *v.* Driver (1828), 2 Y. & J. 549. **Foll'd.** Hall *v.* Ashurst (1833), 1 Cr. & M. 714. **Distd.** Dewers *v.* Pike (1837), Murp. & H. 131. **Consd.** Harper *v.* Williams (1843), 4 Q. B. 219. **Distd.** Maybery *v.* Mansfield (1846), 9 Q. B. 754; Lewis *v.* Nicholson (1852), 18 Q. B. 503. **Refd.** Burton *v.* Langham (1848), 5 C. B. 92.

2552. —— As acting "for"—Named principal.—In *assumpsit* upon a contract to use a phaeton with due care, with an *indebitatus* count for hire, deft. at the trial produced an agreement in these terms: "B. [deft.] agrees to hire a phaeton, etc., for W. Provided W. should be disposed to buy it, the price is 59 guineas for the lot, as per agreement between B. & L. [pltf.]":—*Held:* B. was properly sued as principal.—LYELL *v.* BROWN (1848), 12 L. T. O. S. 146.

2553. —— As selling "to my principals."]—Deft., a broker, signed & sent to pltfs. a note of a contract in the following terms: "I have this day sold by your order & for your account to my principals 5 tons of . . . anthracene. . . . B." In an action for goods sold & delivered:—*Held:* in the absence of usage making deft. personally liable, deft. was not personally liable upon the contract.—SOUTHWELL *v.* BOWDITCH, No. 2583, *post*.

Annotation:—**Refd.** Miller, Gibb *v.* Smith & Tyrer, [1917] 2 K. B. 141, C. A.
For full anns., *see* S. C. No. 2583, *post*.

2554. —— As "three of the directors"—Loan "to the company."]—By agreement between the T. Co. & pltf., defts., describing themselves as "we the undersigned, three of the directors," agreed to repay £500 advanced by pltf. "to the co.," & assigned to pltf. as security for the advance certain "machines & tools," the property of the co. After hearing parol evidence to explain the ambiguity of the agreement:—*Held:* defts. were personally liable to repay the £500.—MCCOLLIN *v.* GILPIN, No. 2598, *post*.

2555. —— As selling for named foreign principal.]—Deft., agent for Russian timber merchants at Riga, signed a letter, addressed to pltf., saying, "My Riga shippers will supply the timber at, etc. [stating terms]. I enclose sale note, which, if you accept, please sign & return to me, & I will then send you sold note," & enclosing the contract note in this form: "L., Mar. 19, 1891, bought by C. G. & Co. of J. Y. & Co., of Riga, through the agency of Mr. L. [with particulars of goods]":—*Held:* L. had not contracted so as to be personally liable.—GLOVER *v.* LANGFORD (1892), 8 T. L. R. 628.

Annotations:—**Consd.** Harper *v.* Keller, Bryant (1915), 84 L. J. K. B. 1696. **Refd.** Mercer *v.* Wright, Graham (1917), 33 T. L. R. 343; Miller, Gibb *v.* Smith & Tyrer, [1917] 2 K. B. 141, C. A.

2556. —— As "trustees of" union—Authority to publish libel.]—Defts., trustees of a union, agreed

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2556 i. —— *As "trustees of" church.*]—In an action by a livery stable keeper for the amount of an account for hire of horse & buggy, the question was as to the personal responsibility of two defts., who were trustees of the Protestant Union Church & school house at C. The demand was based chiefly on the following letter written by defts. to pltf.: "By a motion passed at a meeting of the trustees of the Protestant Union Church & school house at C. it was proposed by A. [one of defts.], & seconded by B. [other deft.], that W. is hereby instructed to open an account with S. [pltf.] for hire of horse & buggy, S. being requested to include the account already incurred by W. in that against the trustees. In the face of that resolution we hereby request you will supply W. with a suitable horse & buggy at the rate already agreed upon, the payment of your account being made by the trustees next Sept." The letter was signed by defts. without any addition to their names:—*Held:* they were not personally responsible.—STARR *v.* MCDONALD (1881), 4 L. N. 301. —**CAN.**

m. —— *As "estate agent"—Indorsement that agent was "authorised agent" of named principal.*]—Pltfs. &

with B. that B. should print & publish in a newspaper certain articles to be sent by defts.' union to him. In the agreement defts. described themselves as trustees of the union, but signed without any limitation :—*Held :* they were personally liable for libels in the articles.

It is clearly decided law that where a person who is a party to a written contract is described therein as an agent, & it is signed by him not as agent, but in his own name without any further addition or limitation, he is personally liable under such contract. (LORD ESHER, M.R.).—RAPKINS *v.* HALL (1894), 10 T. L. R. 466, C. A.

2557. —— As agent—Principal "will send contracts."]—Deft., a cornbroker at Liverpool, sold pltfs. two cargoes of maize, & signed the following memorandum, addressed to pltfs. : "I have this day sold to you two cargoes of French maize, from the port of Bordeaux, at 33*s.* 3*d.* per 480 lb. cost & freight, payment in London, less 60 days' interest & £1 per cent. brokerage. W., London, will send contracts." W. sent contracts, omitting the stipulation for brokerage, & describing the maize as sold on behalf of T., of Bordeaux, the real owner & shipper. The maize was shipped, & pltfs., in order to get possession of it, were obliged to pay the full amount without deducting brokerage :—*Held :* (1) deft. personally liable on the memorandum signed by him ; (2) pltfs. were entitled to maintain an action for breach of the agreement that W. should send contracts in the terms of the memorandum.—REID & GLASGOW *v.* DREAPER (DRAPER) (1861), 6 H. & N. 813 ; 30 L. J. Ex. 268 ; 4 L. T. 650 ; 7 Jur. N. S. 1125 ; 158 E. R. 335.

2558. —— As agent for owners—Bill of lading incorporating charterparty.]—A charterparty provided that the captain should sign bills of lading at any rate of freight without prejudice to the charterparty. A cargo having been loaded, bills of lading, incorporating all the terms of the charterparty, were presented by the charterers, who were the shippers & also the consignees of the cargo, to the master for his signature & were signed by him :—*Held :* the master had signed the bills of lading merely as agent for the owners & could not maintain an action against the charterers, as receivers of the cargo, for freight.—REPETTO *v.* MILLAR'S KARRI & JARRAH FORESTS, LTD., [1901] 2 K. B. 306 ; 70 L. J. K. B. 561 ; 84 L. T. 836 ; 49 W. R. 526 ; 17 T. L. R. 421 ; 9 Asp. M. L. C. 215 ; 6 Com. Cas. 129.

ii. *Where Signature qualified by subsequent Words.*

2559. "Broker"—Described in document—As selling "for account of"—Named principal.]—Action for not accepting fifty casks of tallow, stated in the declaration to have been bought of pltf. The bought note put in evidence by pltf. was, "Bought this day for account of L., my principal, fifty casks, etc. (Signed) R., broker" :—*Held :* the action could not be maintained in the name of pltf., there being no note in writing to take the case out of Stat. Frauds, the note produced stating the tallow to be sold by pltf. as broker, & not, as averred in the declaration, by pltf. himself.—RAYNER *v.* LINTHORNE (1825), 2 C. & P. 145 ; Ry. & M. 325.

2560. —— —— As selling "on account of"—Named principal.]—A broker cannot sue in his own name upon contracts made by him as broker.

Pltf., a broker, signed & delivered to defts. a bought note for cotton in the following form : "I have this day sold you on account of T., etc. (Signed) F., broker" :—*Held :* he was not a contracting party, & could not sue defts. for breach of the contract in refusing to accept the cotton.—FAIRLIE *v.* FENTON, No. 2460, *ante*.

Annotations :—**Distd.** Paice *v.* Walker (1870), L. R. 5 Exch. 173. **Apprvd. & Distd.** Fleet *v.* Murton (1871), L. R. 7 Q. B. 126. **Consd.** Hutchinson *v.* Tatham (1873), L. R. 8 C. P. 482. **Distd.** Harper *v.* Vigers, [1909] 2 K. B. 549. **Refd.** Southwell *v.* Bowditch (1876), 1 C. P. D. 374, C. A. For full anns., *see* S. C. No. 2460, *ante*.

2561. —— —— As selling "to our principal."]—FLEET *v.* MURTON, No. 2579, *post*.

For full anns., *see* S. C. No. 2579, *post*.

2562. —— —— Without qualification.]—By a contract in writing, defts. "sold to" pltfs. a cargo of cotton seed cake of a specified quality. Defts. signed the contract with the addition of the word "brokers," & were acting as agents. Some time after the contract was signed, defts. named their principals. The cargo proved to be of inferior quality. It was alleged that a usage existed that a broker upon naming his principals ceased to be liable on the contract ; but the jury found the alleged usage did not exist :—*Held :* defts. were personally liable on the contract.

Where the contract is drawn up in this way & the

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deft. entered into a written agreement for the erection of a house for £1,400. The agreement was made between "H., estate agent, of the one part, & J. W. & A. W., contractors, of the other part." It was signed by the parties & duly witnessed. After the signatures there followed this statement : "I hereby declare that I am the authorised agent of P., upon whose land the above house is to be erected.—H." Pltfs., in a letter produced & alleged to have been sent to deft., made the following reference to this memorandum : "Referring to the memo. which we note you have written on the back of the agreement of contract, it is understood between us that you did this, as you explained when handing us our copy, to protect us, as we are building a house for you on land owned, we believe, by P." Deft. denied receipt of this letter. The subsequent dealings of the parties showed that deft. was treated as the principal :—*Held :* deft. liable as principal under the contract.—WILSON *v.* HARCOURT (1911), 31 N. Z. L. R. 316.—**N.Z.**

PART X. SECT. 1, SUB-SECT. 1.—B. (a) ii.

2561 i. "*Broker*"—*Described in document—As selling "to my principal"—Document indorsed "for principal.*"]—A gave to G. the following sold note: broker "Sold this day by order & for account of E. E. Gubboy, to my principal, G. P. Notes, for Rs.2,00,000 (two lakhs) at Rs.98-11. (Signed.) A. T. A., broker." This note was indorsed, "A. T. A., for principal." In a suit by G. against the broker for failure to take delivery :—*Held :* there was nothing in this contract to rebut the personal liability of the broker.—GUBBOY *v.* AVETOOM (1890), I. L. R. 17 Calc. 449.—**IND.**

2562 i. —— —— *Without qualification.*]—Pltf., who wished to buy certain shares, instructed P., a broker, to buy the shares for him. P. bought the shares from deft., who was also a broker acting for W., & deft. delivered him a sold note in these terms : "Sold to P. a 100 shares M. d. P. at 33*s.* £165 : less commission 16/6. £184 3*s.* 6*d.*," & signed "A. J. Gardiner broker" :—*Held :* deft. personally liable.—COOPER *v.* GARDINER (1902), 2 S. R. (N. S. W.) 67.—**AUS.**

2562 ii. —— —— ——.]—A broker, though acting as such, will be liable on a contract as a principal, unless it appears on the face of the contract not only that he is a broker, but that he was acting merely as a broker.—HAMILTON *v.* HULL, FENWICK *v.* HULL (1896), 19 N. Z. L. R. 49.—**N.Z.**

n. "*Agent of*" *principals—Described in document—Without qualification.*]—Pltf. in writing agreed to deliver goods to A. & Co. at a price, & by a writing signed by deft., "agent of A. & Co.," deft. agreed to pay by bill :—*Held :* deft. was personally liable on his undertaking, but the action should be for not furnishing the bill, & not for goods sold. — COUNTER *v.* ROEBUCK (1840), E. T. 3 Vict. ; Ont. Dig., vol. 3, 5645.—**CAN.**

o. "*By & on behalf of the owners*" *of named ship—Described in document—Without qualification.*]—Defts. let a ship to pltf. for a certain term, & signed a charterparty "by & on behalf of the owners of the ship." The names of the principals were not disclosed in the charterparty, but were verbally disclosed before it was signed. In an action against defts. for breach of it :—*Held :* the contract was not personally binding on defts. — SOOPROMONIAN SETTY *v.* HEILGERS (1879), I. L. R. 5 Calc. 71 ; 4 C. L. R. 377.—**IND.**

p. "*President*" *of company—Document setting out that work was for company.*]—A paper headed, "Memoranda of an agreement made & entered into this Mar. 23, 1854, between the directors of Victoria Bridge Co. of, etc., of the first part, & J. [pltf.] of," etc., contained an agreement by pltf. to do work for specified prices, which "the party of the first part hereby agree to pay," etc., & was signed by deft., describing himself as "Pres. V. B.," &

Sect. 1.—*In regard to contracts: Sub-sect.* 1, *B.* (*a*) *ii.* & (*b*) *i.*]

signature is of the name of the persons, with "brokers" added, & the contract is not signed "as brokers," they are personally bound; for it is a signature on their own behalf, & the word "brokers" is only description (BRETT, M.R.).—HUTCHESON *v.* EATON (1884), 13 Q. B. D. 861; 51 L. T. 846, C. A.

Annotations:—**Mentd.** *Re* Green & Balfour, Williamson (1890), 63 L. T. 325, C. A.; Larsen *v.* Sylvester (1908), 99 L. T. 94, H. L.; *Re* North Western Rubber Co. & Huttenbach, [1908] 2 K. B. 907, C. A.; May *v.* Mills (1914), 30 T. L. R. 287; *Re* Olympia Oil & Cake Co. & Produce Brokers' Co. (1914), 86 L. J. K. B. 421, C. A.; Produce Brokers' Co. *v.* Olympia Oil & Cake Co., [1916] 1 A. C. 314, H. L.; Produce Brokers' Co. *v.* Olympia Oil & Cake Co., [1917] 1 K. B. 320, C. A.

2563. "On account of" principal—Described in document—Without qualification.]—B. W. & Co., who had contracted with a colliery co. for 10,000 tons of coal to be delivered over a period of three months at a spout on the Tyne, "the turn to be mutually agreed upon," proposed to charter a foreign ship for conveyance of twenty-nine keels to Elsinore, & tendered to the master a charterparty which stipulated for demurrage in unloading the ship, but made no provision for detention in loading her. The master declined to sign such charter without an assurance that there should be no undue detention of his ship; & thereupon B. W. & Co. obtained from deft. (a clerk employed by several colliery cos. to arrange the turns for loading) the following undertaking: "I undertake to load the ship *V.* twenty-nine keels with B. coals in ten colliery working days, etc.—On account of B. Colliery, H." This memorandum (which made no mention of the person contracted with) was communicated by the charterers to the master of the *V.*, who thereupon accepted the charter. The vessel being detained in loading beyond the stipulated ten days, the master called upon deft. to pay him £45 for demurrage. Deft. repudiated all liability, but ultimately offered to pay the master £20. Deft. had no notice of the charter. In an action by the master to recover £45 for demurrage from deft.:—*Held:* (1) upon these facts a jury was warranted in finding that the undertaking to load within ten days was a contract between the master & deft.; (2) there was sufficient consideration for it; (3) the contract was with deft. personally & not as agent.—WEIDNER *v.* HOGGETT (1876), 1 C. P. D. 533; 35 L. T. 368.

2564. "For" principal—Described in document—Without qualification.]—A trader, carrying on business as M. & Co., ordered goods of pltf., & before their delivery executed an inspectorship deed, of which defts. were inspectors. Pltf. afterwards wrote a note, addressed to the debtor, informing him that the goods were ready for delivery, & defts. replied requesting him to send the goods, & signing "for M. & Co." Pltf. sent the goods, & default being made in payment, sued defts. for the price. The inspectorship deed gave debtor licence to carry on his business for 6 months under the control of the inspectors, who had power to put an end to the deed. The inspectors were to receive all the proceeds, pay current expenses (including salaries, rent, & plant & materials for the purposes of the business), & out of the surplus pay dividends to the creditors. They took no share of the profits, & had no power to take the management of the business to the exclusion of the debtor:—*Held:* (1) defts. having expressly signed the order "for M. & Co.," they could only be liable as the real principals for the time being; (2) the deed did not constitute them the masters or real principals of debtor in carrying on the business; (3) on the above facts, there was no evidence to go to the jury of their liability; (4) pltf. could only look for the payment to "M. & Co." & to the trust in the deed for the payment of current expenses.—REDPATH *v.* WIGG & O'BEIRNE (1866), L. R 1 Exch. 335; 4 H. & C. 432; 35 L. J. Ex. 211; 14 L. T. 764; 12 Jur. N. S. 903; 14 W. R. 866, Ex. Ch.

Annotations:—**Consd. & Expld.** Easterbrook *v.* Barker (1870), L. R. 6 C. P. 1. **Consd.** Nicholls *v.* Knapman (1909), 26 T. L. R. 72.

2565. "For owners"—Described in document—As acting "for owners of" named ship.]—Pltfs. & defts. entered into a charter of the ship *R.* to load a cargo of deals. In the body of the charter defts. were described as follows: "It is this day mutually agreed between H. & Co., of N., for owners of the good ship *R.*" Defts. signed the charterparty at the foot as follows: "For owners, H. & Co." A cargo was loaded on board the ship & the master signed a bill of lading for same, stating he had received it in good condition, etc. The cargo was ultimately delivered to pltfs., & was found on delivery to be injured to the extent of £50. In an action brought by pltfs. against defts. for the damage in a cty. ct. three letters which had passed between pltfs. & defts. & their solrs. were admitted in evidence, & the judge decided defts. were liable as principals:—*Held:* (1) there was evidence to support the decision of the cty. ct. judge that defts. were liable as principals; (2) the charterparty was to be construed as explained by the letters; (3) the letters were properly admitted in evidence.—ADAMS *v.* HALL (1877), 37 L. T. 70; 3 Asp. M. L. C. 496.

2566. "For" principal "as agents"—Described in document—"As agents to" principal.]—A charterparty, made in London, between pltfs., shipowner. & defts., "as agents to F., of A., merchants & charterers," was signed "for D. [pltf.] owner, H. G. as agent. For F., of A. G. Bros. [defts.] as agents." The charterparty was partly written & partly printed, the words "merchants" & "charterers" being printed, & in the plural, throughout it. Defts., merchants in London, acted in England as agents for F., a native of Africa & residing at A. in that country. By the charterparty pltf.'s ship was chartered for a voyage from London to Africa & back, & freight was made payable on delivery of the return cargo:—*Held:* defts. were not personally liable, as principals, on the charterparty.

The form of the charterparty & mode of signature, taken together, are decisive to show defts. did not bind themselves by the contract as principals. It would require extremely plain words in the body of the contract to control the effect of that mode of signature, & no such words are to be found there. The only argument that can be relied upon by applt. is that the words "merchants" & "charterers" are in the plural; but this evidently happened by mistake, & the words occur, moreover, in the printed part of the charterparty (WILLIAMS,

by pltf. The co. had been duly incorporated, & pltf. had received £350 from them on account of his work:—*Held:* deft. was not personally liable.—JOHNSON *v.* HAMILTON (1856), 13 U. C. R. 211.—**CAN.**

q. "*Superintendent for building gasworks*" *at city for principals—Described in document—As superintendent of city.*]—By a contract between "D., of the first part, & H., superintendent of the city of Winnipeg, of the second part," it was agreed that D. should build & set up the plant of a gasworks in Winnipeg. H. signed the contract & appended to his signature the words: "Superintendent for Building Gas Works at Winnipeg for W. Merrick, of Oswego, N.Y., & others":—*Held:* H. was personally liable upon the contract.—DOIG *v.* HOLLEY (1884), 1 Man. L. R. 61.—**CAN.**

r. "*Trustee*"—*Described in document—Without qualification.*]—An assignee of an insolvent estate signed an undertaking in his own name, writing after his name the word "trustee":—*Held:* he was personally bound, not having disclosed that he signed for a principal or for an estate bound by his signature.—COURT *v.* STEWART (1889), 3 L. N. 414.—**CAN.**

J.).—DESLANDES *v.* GREGORY (1860), 2 E. & E. 610 ; 30 L. J. Q. B. 36 ; 2 L. T. 634 ; 6 Jur. N. S. 651 ; 8 W. R. 585 ; 121 E. R. 230, Ex. Ch.

Annotations :—**Refd.** Hutchinson *v.* Tatham (1873), L. R. 8 C. P. 482. **Mentd.** Pearson *v.* Goschen (1864), 10 L. T. 758.

2567. "For" principal "agents"—Described in document—Without qualification.]—To a declaration on a charterparty alleging as a breach a refusal by defts. to load a cargo, defts. pleaded as an equitable defence that they entered into the charterparty solely as agents for D. & Co. ; & that when defts. signed the charterparty it was agreed & understood between pltf. & defts. that defts. were only to sign the charter as such agents, so as to bind D. & Co., & were not to make themselves liable as principals for the performance of the charter ; that they signed as follows : "For D. & Co. of M., H. & Co. agents,"—defts. & pltf. *bonâ fide* believing at the time the charter was made that defts., having so signed, would not be liable to be sued on the charter, notwithstanding the charter in the body thereof professed to be made between pltf. as owner of the one part, defts. as freighters of the other ; that defts. had power to bind D. & Co., & that pltf. was inequitably taking advantage of the mistake in drawing the charter :—*Held :* the plea showed a good equitable answer to the action. *Semble :* the plea was a good answer at law (WILLES, J.).—WAKE *v.* HARROP (1862), 1 H. & C. 202 ; 31 L. J. Ex. 451 ; 7 L. T. 96 ; 8 Jur. N. S. 845 ; 10 W. R. 626 ; 1 Mar. L. C. 247 ; 158 E. R. 859, Ex. Ch.

Annotations :—**Folld.** Cowie *v.* Witt (1874), 23 W. R. 76. **Refd.** Druiff *v.* Parker (1868), L. R. 5 Eq. 131 ; Nicoll *v.* Bell (1875), 32 L. T. 815. **Mentd.** Guardhouse *v.* Blackburn (1866), L. R. 1 P. & D. 109.

2568. "Agents"—Described in document—"As agents for" the charterers.]—By a charterparty, signed by defts., "agents," & entered into between pltfs. as owners of a ship, & defts. "as agents for" the charterers, who were resident in Spain, it was agreed that the ship should proceed to J. & there load in regular turn from the agents of the charterers a full & complete cargo. It was also agreed that all liability of defts. "in every respect & as to all matters & things, as well before & during as after the shipping of the cargo, shall cease as soon as they have shipped the cargo." The cargo was loaded & shipped, but not in regular turn. In an action brought for not so loading in regular turn :—*Held :* defts. were protected from liability by the clause above set out, they having loaded & shipped the cargo before the commencement of the action. —MILVAIN *v.* PEREZ (1861), 3 E. & E. 495 ; 30 L. J. Q. B. 90 ; 3 L. T. 736 ; 7 Jur. N. S. 336 ; 9 W. R. 269 ; 1 Mar. L. C. 32 ; 121 E. R. 528.

Annotations :—**Consd.** Bannister *v.* Breslauer (1867), L. R. 2 C. P. 497 ; Francesco *v.* Massey (1873), L. R. 8 Exch. 101 ; Kish *v.* Cory (1875), L. R. 10 Q. B. 553 ; French *v.* Gerber (1876), 1 C. P. D. 737. **Refd.** Christoffersen *v.* Hansen (1872), L. R. 7 Q. B. 509 ; Dunlop *v.* Balfour, Williamson, [1892] 1 Q. B. 507, C. A.

2569. "As agent"—Described in document—Without qualification.]—An agent is not liable on a contract when he signs "as agent," even when he signs "as agent" for a foreign principal.—HAHN *v.* NORTH GERMAN PITWOOD CO. (1892), 8 T. L. R. 557.

2570. ——— "As agent & on behalf of" principal.]—Where a contract in writing for the sale of goods is entered into by one who describes himself as agent, & as making the contract "as agent & on behalf of" his principal, naming him, the party so making the contract is not personally liable. In each case it is a question of intention, to be gathered from the terms of the contract ; & whether the principal be an Englishman resident in England or a foreigner residing abroad makes no difference.—GREEN *v.* KOPKE, No. 2694, *post.*

Annotations :—**Folld.** Deslandes *v.* Gregory (1860), 6 Jur. N. S. 483 ; Hahn *v.* North German Pitwood Co. (1892), 8 T. L. R. 557 ; Glover *v.* Langford (1892), 8 T. L. R. 628. **Refd.** Lindus *v.* Melrose (1858), 31 L. T. O. S. 36 ; Humfrey *v.* Dale (1858), 31 L. T. O. S. 328, Ex. Ch. ; Oglesby *v.* Yglesias (1858), E. B. & E. 930 ; Hutchinson *v.* Tatham (1873), 42 L. J. C. P. 260.

2571. "By authority of & as agents for" principal—Described in document—Without qualification.]—A charterparty stated that it was agreed between L., owner of the ship *N.*, then at Genoa, & "R. & F., of London, merchants," that the ship should proceed to T. & there load from the merchants' factors a cargo "to be brought to & taken from alongside at merchants' risk & expense, which the merchants hereby bind themselves to ship," & should proceed to Memel, & deliver on paying freight ; "thirty running days to be allowed the merchants" for loading & discharging & ten days for demurrage at £4 per day. The charterparty was signed "by authority of, & as agents for, S., of Memel," R. & F. In an action by L. against R. & F., the declaration set out the charterparty & averred that S. was a foreigner, not a British subject, residing beyond the seas, to wit at Memel, & claimed from defts. demurrage & damages for detention *ultra.* Plea that the agreement was entered into by defts. by the authority of, & for & on behalf of, & as agents for, S., & not otherwise ; that he was named to & known by pltf. as being defts.' principal at the time the agreement was made. On demurrer :—*Held :* pltf. entitled to judgment, the terms of the charterparty showing that defts. contracted personally.—LENNARD *v.* ROBINSON, No. 2695, *post.*

Annotations :—**Distd.** Oglesby *v.* Yglesias (1858), E. B. & E. 930 ; Deslandes *v.* Gregory (1860), 29 L. J. Q. B. 93 ; Reid *v.* Dreaper (1861), 30 L. J. Ex. 268. **Consd. & Distd.** Wake *v.* Harrop (1861), 6 H. & N. 768. **Consd.** Miller, Gibb *v.* Smith & Tyrer, [1917] 2 K. B. 141, C. A. **Refd.** Williamson *v.* Barton (1862), 7 H. & N. 899 ; Paice *v.* Walker (1870), L. R. 5 Exch. 173 ; Gadd *v.* Houghton (1876), 33 L. T. 811 ; Southwell *v.* Bowditch (1876), 45 L. J. Q. B. 374 ; Mercer *v.* Wright, Graham (1917), 33 T. L. R. 343.

2572. "By authority of our principals as agents"—Principal stated in document to "sell through the agency of" agents, "wood brokers."]—MILLER, GIBB *v.* SMITH & TYRER, No. 2585, *post.*

For full anns., *see* S. C. No. 2585, *post.*

2573. "Director of" company—Document setting out that goods were for company.]—P., a director of the M. Co., ordered goods for the co. & signed the order "P., director of the M. Co.," intimating at the same time that the goods were for the co. The Act under which the co. was incorporated enabled the co. to sue & be sued in respect of any contracts made by any individual director :—*Held :* P. was personally liable.—DEWERS *v.* PIKE (1837), Murp. & H. 131.

2574. Signature "p.p.a." principal—Described in document—As guarantor without qualification.]—YOUNG *v.* SCHULER, No. 2597, *post.*

2575. Auctioneer—Catalogue & conditions—Held to contract personally.]—WOOLFE *v.* HORNE (1877), 2 Q. B. D. 355 ; 46 L. J. Q. B. 534 ; 36 L. T. 705 ; 41 J. P. 501 ; 25 W. R. 728.

Annotations :—**Consd.** Wood *v.* Baxter (1883), 49 L. T. 45. **Folld.** Rainbow *v.* Hawkins, [1904] 2 K. B. 322. **Refd.** Manley *v.* Berkett, [1912] 2 K. B. 329.

See, further, AUCTION & AUCTIONEERS.

(b) Admissibility of Evidence of Custom or Usage to charge or discharge Parties.

i. To support Action by Third Party against Agent.

2576. Agent acting for unnamed charterer.]—Defts., acting as agents for L., chartered a ship for conveyance of a cargo of currants from the Ionian

Sect. 1.—*In regard to contracts: Sub-sect.* 1, *B.* (*b*) *i., ii., iii. & iv. & (c) i.*]

Islands. The charterparty was expressed to be made & was signed by defts. as "agents to merchants," the name of the principal not being disclosed:—*Held:* evidence was admissible, in an action by the shipowners against defts. upon the charterparty, of a trade usage by which, if the name of the principal was not disclosed within a reasonable time, the agents themselves were personally liable.—HUTCHINSON *v.* TATHAM (1873), L. R. 8 C. P. 482; 42 L. J. C. P. 260; 29 L. T. 103; 22 W. R. 18.

Annotations:—**Expld.** Pike *v.* Ongley (1887), 18 Q. B. D. 708, C. A. **Refd.** Southwell *v.* Bowditch (1876), 1 C. P. D. 374; Miller, Gibb *v.* Smith & Tyrer, [1917] 2 K. B. 141, C. A.

2577. Broker acting for undisclosed principal—Oil trade.]—D. & Co., brokers employed by S. to purchase oil, dealt with T. & M., brokers, employed by pltf. to sell oil, without either brokers disclosing the names of their principals. D. & Co. delivered to T. & M. a note as follows: "Sold this day for T. & M. to our principal ten tons of oil," specifying the terms & price. The note was signed "D. & Co., brokers." D. & Co. did not disclose the name of their principal S. till after the lapse of an unreasonable time, when S. had become insolvent. In an action by pltf. against D. & Co. for not accepting the oil, pltf. proved a usage in the trade that when a broker purchased without disclosing the name of his principal he was liable to be looked to as principal:—*Held:* (1) evidence of the usage was admissible as not contradicting the written instrument, but explaining its terms or adding a tacitly implied incident; (2) the action lay.—DALE *v.* HUMFREY (1858), E. B. & E. 1004; 6 W. R. 854; 120 E. R. 783; *sub nom.* HUMPHREY *v.* DALE & MORGAN, 27 L. J. Q. B. 390; 31 L. T. O. S. 328; 5 Jur. N. S. 191, Ex. Ch.

Annotations:—**Apld.** Field *v.* Lelean (1861), 6 H. & N. 617, Ex. Ch. **Foll.** Fleet *v.* Murton (1871), L. R. 7 Q. B. 126. **Apld.** Hutchinson *v.* Tatham (1873), L. R. 8 C. P. 482. **Consd.** Southwell *v.* Bowditch (1876), 1 C. P. D. 374. **Apld.** Pike *v.* Ongley (1887), 56 L. J. Q. B. 373. **Distd.** Miller, Gibb *v.* Smith & Tyrer, [1917] 2 K. B. 141, C. A. **Refd.** *Re* North Western Rubber Co. & Hüttenbach, [1908] 2 K. B. 907, C. A.

2578. —— Wool trade.]—A usage in the wool trade in Liverpool that, when a broker is employed to buy wool, he may either contract in the name of his principal, or, at the request of the seller (without communicating the fact to his principal), make himself personally responsible for the price:—*Held:* a good & reasonable usage.—CROPPER *v.* COOK (1868), L. R. 3 C. P. 194; 17 L. T. 603; 16 W. R. 596.

Annotations:—**Consd.** Mollett *v.* Robinson (1870), L. R. 5 C. P. 646. **Refd.** Calder *v.* Dobell (1871), L. R. 6 C. P. 486.

2579. —— Fruit trade.]—Defts., M. & W., fruit brokers in London, employed by pltfs., merchants in London, to sell for them, gave the following contract note addressed to pltfs.: "We have this day sold for your account to our principal" so many tons of raisins, "M. & W., brokers." Defts.' principal having accepted part of the raisins & not the rest, pltfs. brought an action on the contract against defts., & they sought to make defts. personally liable by giving evidence that in the London fruit trade, if brokers did not give the names of their principals in the contract, they were held personally liable, although they contracted as brokers for a principal, & evidence was also given of a similar usage in the London colonial market:—*Held:* (1) evidence of the usage in same trade was admissible as not inconsistent with the written contract; (2) evidence of a similar usage in the colonial market was admissible, being evidence in a similar trade in same place, & as tending to corroborate evidence as to existence of such usage in the fruit trade.—FLEET *v.* MURTON (1871), L. R. 7 Q. B. 126; 41 L. J. Q. B. 49; 26 L. T. 181; 20 W. R. 97.

Annotations:—**Foll.** Hutchinson *v.* Tatham (1873), L. R. 8 C. P. 482. **Distd.** Miller, Gibb *v.* Smith & Tyrer, [1917] 2 K. B. 141, C. A. **Refd.** Mollett *v.* Robinson (1872), L. R. 7 C. P. 84, Ex. Ch. **Mentd.** Southwell *v.* Bowditch (1876), 1 C. P. D. 100; Pike *v.* Ongley (1887), 56 L. J. Q. B. 373, C. A.; Sutton *v.* Grey, [1894] 1 Q. B. 285, C. A.; Thompson *v.* L. C. C., [1899] 1 Q. B. 840, C. A.; Gabriel *v.* Churchill & Sim, [1914] 1 K. B. 449.

2580. —— London dry goods market.]—According to the usage of the London drygoods market, a broker who contracts for the sale of goods without disclosing his principal is personally liable in default of the principal.—IMPERIAL BANK *v.* ST. KATHERINE'S DOCKS CO. (1877), 5 Ch. D. 195; 46 L. J. Ch. 335; 36 L. T. 233.

2581. —— Hop trade.]—Defts., hop brokers, gave pltfs. the following sold note: "Sold by O. & T. [defts.] to P., Sons & Co., for & on account of owner, 100 bales . . . hops. . . . O. & T." In an action for non-delivery of hops according to sample, pltfs. sought to make defts. personally liable on the above contract & tendered evidence to show that, by usage of the hop trade, brokers who did not disclose the names of their principals at the time of making the contract were personally liable upon it as principals, although they contracted as brokers for a principal. No request was made by pltfs. to defts. to name their principal:—*Held:* (1) the usage gave a remedy against the brokers as well as against the principals; (2) it was not in contradiction of the written contract; (3) evidence of the usage was properly admitted at the trial.—PIKE *v.* ONGLEY (1887), 18 Q. B. D. 708; 56 L. J. Q. B. 373; 35 W. R. 534; 3 T. L. R. 549, C. A.

Annotations:—**Consd.** Miller, Gibb *v.* Smith & Tyrer, [1917] 2 K. B. 141, C. A. **Refd.** Cooper *v.* Strauss (1898), 14 T. L. R. 233.

2582. —— Rice trade.]—A broker in the rice trade who does not disclose the name of the principal in the contract note, although he mentions it orally, is by usage personally liable on the contract.—BACMEISTER *v.* FENTON LEVY & CO. (1883), Cab. & El. 121.

2583. —— Custom must be proved.]—Pltfs. sought to make defts., as broker, liable upon the following sold note he had sent to them: "I have this day sold by your order, & for your account, to my principals about five tons of pressed anthracene. . . . B.":—*Held:* (1) as there was no usage proved which would govern such contract, it must be interpreted literally; (2) upon a strict interpretation of its terms the broker could not be held personally liable.—SOUTHWELL *v.* BOWDITCH (1876), 1 C. P. D. 374; 45 L. J. Q. B. 630; 35 L. T. 196; 24 W. R. 838, C. A.

Annotations:—**Distd.** Adams *v.* Hall (1877), 37 L. T. 70. **Apld.** Lovesy *v.* Palmer, [1916] 2 Ch. 233. **Refd.** Lamarc *v.* London & St. Katherine's Dock Co. (1873), 39 L. T. 330; Woodgate *v.* G. W. Ry. Co. (1884), 49 J. P. 196; Bristol Waterworks Co. *v.* Uren, Uren *v.* Bristol Waterworks Co. (1885), 15 Q. B. D. 637; *Re* North Western Rubber Co. & Hüttenbach, [1908] 2 K. B. 907, C. A.; Olympia Oil & Cake Co. *v.* Produce Brokers' Co. (1914), 112 L. T. 744, C. A.; Miller, Gibb *v.* Smith & Tyrer, [1917] 2 K. B. 141, C. A.

2584. —— Custom inconsistent with arbitration clause.]—A written contract made by brokers on behalf of undisclosed principals for sale of hides provided that, "if any difference or dispute shall arise under this contract, it is hereby mutually agreed between sellers & buyers that same shall be settled by selling brokers, whose decision in writing shall be final & binding on both sellers & buyers." In an action against the brokers in respect of inferior hides delivered under the contract, buyers claimed against the brokers as principals by usage of the trade:—*Held:* evidence of a usage of the trade that a broker, who did not disclose his prin-

cipal, was personally responsible for the performance of the contract & liable for the breach was rightly rejected, as such custom was inconsistent with the arbn. clause, which would, if the custom were incorporated, make the brokers judges in their own cause.—BARROW & BROTHERS *v.* DYSTER, NALDER & CO. (1884), 13 Q. B. D. 635; 51 L. T. 573; 33 W. R. 199, D. C.

2585. Broker acting for foreign principal—Custom inconsistent with contract.]—A contract for the sale of lumber was in the following form: "Contract by which our principals sell through the agency of S. & T., Ltd. [defts.], wood brokers, Liverpool, & M., G. & Co. [pltfs.], of Liverpool, buy, the wood goods specified below, foreign measure, of the usual manufacture & of the classification of the surveyors at the port of shipment." The price was to include freight & insurance to South Africa. Then followed clauses in which reference was made to the "seller" & the "buyer," & there was an arbn. clause by which the parties agreed to submit all disputes arising out of the contract to arbn. in England, & in case any action was brought it was to be brought in England & determined according to English law. The contract was signed "By authority of our principals, S. & T., Ltd., C. T., managing director, as agents." The contract was made by defts. on behalf of foreign principals, who had given defts. authority to make the contract on their behalf so as to pledge their credit, but whose names were not disclosed to pltfs. In an action to recover damages for breach of the contract pltfs. sought to make defts. personally liable thereon under a general custom of merchants that, when an agent contracts on behalf of a foreign principal, he undertakes the liability of the principal:—*Held:* (1) assuming that the custom still existed, it was one by which the agent alone was liable, to the exclusion of the foreign principal; (2) the custom did not apply where it was inconsistent with the contract; (3) the contract sued on was one upon which the foreign principals were directly liable to pltfs.; (4) the custom was inconsistent with the contract & was not applicable.—MILLER, GIBB & CO. *v.* SMITH & TYRER, LTD., [1917] 2 K. B. 141; 86 L. J. K. B. 1259; 116 L. T. 753; 33 T. L. R. 295; 22 Com. Cas. 320, C. A.

Annotation:—**Consd. & Apld.** Mercer *v.* Wright, Graham (1917), 33 T. L. R. 343.

ii. *As Defence to Action by Third Party against Agent personally.*

2586. Broker contracting so as to be personally liable.]—L. & Co., brokers at Liverpool, sold hemp by auction at their rooms, & gave an invoice describing the goods as "bought of L. & Co.," & received part of the price, but failed to deliver the goods. An action being brought against them by purchaser for non-delivery & for money had & received, evidence was given tending to show that they sold as agents & had intimated that fact before & at the time of sale, & the principals being indebted to L. & Co., the invoice had been made out in their names, according to a custom of brokers in Liverpool, to secure the passing of the purchase-money through their hands:—*Held:* L. & Co. had made themse ves responsible as sellers by the invoice.

Evidence is admissible, on behalf of one of the contracting parties, to show that the other was agent only, though contracting in his own name, & so to fix the real principal; but, if the agent contracts in such a form as to make himself personally responsible, he cannot afterwards, whether his principal was or was not known at the time of the contract, relieve himself from liability (LORD DENMAN, C.J.).—JONES *v.* LITTLEDALE, No. 2527, *ante*.

Annotations:—**Folld.** Higgins *v.* Senior (1841), 8 M. & W. 834. **Dbtd. & Distd.** Holding *v.* Elliott (1860), 5 H. & N. 117. **Refd.** Royal Exchange Assce. *v.* Moore (1863), 2 New Rep. 63; Fleet *v.* Murton (1871), L. R. 7 Q. B. 127; Southwell *v.* Bowditch (1876), 45 L. J. Q. B. 630, C. A.

For full anns., *see* S. C. No. 2527, *ante*.

2587. ——.]—MAGEE *v.* ATKINSON & TOWNLEY, No. 2526, *ante*.

For full anns., *see* S. C. No. 2526, *ante*.

2588. —— **Subsequently naming principal.**] —HUTCHESON *v.* EATON, No. 2562, *ante*.

For full anns., *see* S. C. No. 2562, *ante*.

Customs of Stock Exchange.]—*See* STOCK EXCHANGE.

iii. *As Defence to Action by Third Party against Principal.*

2589. Custom inconsistent with terms of contract.] —Evidence of a usage that in the case of a written contract in the name of a known agent the other contracting party may, when the principal is disclosed, reject the principal & elect to hold the broker responsible, is not admissible, since it varies a written contract.—TRUEMAN *v.* LODER, No. 2442, *ante*.

Annotation:—**Consd.** Humfrey *v.* Dale (1857), 7 E. & B. 266.

For full anns., *see* S. C. No. 2442, *ante*.

See, now, SALE OF GOODS ACT, 1893 (c. 71), s. 61 (2).

iv. *To support Action by Principal against Third Party.*

2590. Broker contracting as on behalf of unnamed principal.]—Where a broker had effected a sale on behalf of a principal & had sent to the buyer a bought note, describing the contract as on behalf of a "principal" not named, but who was named in the broker's book, & with a "sold" note sent to him:—*Qu.:* whether evidence of a usage in a particular trade, that in such cases the contract was not considered to be with the principal, was admissible; but even if it was, the question, on the whole of the evidence, would be, the bought note having been retained by the buyer, whether he adopted the contract it stated; & if so, then the principal's right to sue upon it could not be affected by any custom.—LAMING *v.* COOKE (1858), 1 F. & F. 9.

(c) *Admissibility of Parol Evidence to charge or discharge Parties.*

i. *To support Action by Third Party.*

2591. Against undisclosed principal]—Where there is a written agreement for the sale of goods it is competent to show that one or both of the contracting parties were agents for other persons & acted as such agents in making the contract, so as to give the benefit of the contract on the one hand to, & charge with liability on the other, the unnamed principals, & this whether the agreement

PART X. SECT. 1, SUB-SECT. 1.—B. (b) ii.

2. *Gomastah drawing bill — Custom of Dacca.*]—The drawers of a hundi in favour of pltf. at Dacca were held not liable, on proof that they were the gomastahs of the acceptor, that they had no interest in the hundi, & that, according to custom in Dacca, where the hundi was drawn & accepted, agents in such circumstances are not liable, although the agency does not appear on the hundi.—HARI MOHAN BYSAK *v.* KRISHNA MOHAN BYSAK (1872), 9 B. L. R. 1; 17 W. R. 442.—**IND.**

PART X. SECT. 1, SUB-SECT. 1.—B. (c) i.

2591 i. *Against undisclosed principal.*] —A tradesman having contracted with a builder to do the wright-work of a house by written contract, which referred to the builder alone & made no allusion to the owner of the house, & it appearing from written evidence that the builder had contracted with the owner to erect the house for a certain price, the ct. refused to allow the tradesman a parol proof in support of general allegations that the builder

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was required by law to be in writing or not. (PARKE, B.).—HIGGINS *v.* SENIOR, No. 2599, *post.*

Annotations:—**Apld.** Calder *v.* Dobell (1871), L. R. 6 C. P. 486. **Consd.** Armstrong *v.* Stokes (1872), L. R. 7 Q. B. 598. **Distd.** Pontifex & Wood *v.* Hartley (1893), 62 L. J. Q. B. 196, C. A. **Refd.** Fox *v.* Frith (1842), 10 M. & W. 131; Holding *v.* Elliott (1860), 5 H. & N. 117; *Re* Streatfield, Lawrence, *Ex p.* City Bank (1860), 3 L. T. 792; Wake *v.* Harrop (1861), 9 W. R. 788; Fawkes *v.* Lamb (1862), 31 L. J. Q. B. 98; Royal Exchange Assce. *v.* Moore (1863), 2 New Rep. 63; Fisher *v.* Marsh (1865), 6 B. & S. 411; Cropper *v.* Cook (1868), L. R. 3 C. P. 194; Fleet *v.* Murton (1871), L. R. 7 Q. B. 126; Browning *v.* Provincial Insce. for Canada (1873), L. R. 5 P. C. 263; Southwell *v.* Bowditch (1876), 45 L. J. Q. B. 630, C. A.
For full anns., *see* S. C. No. 2599, *post.*

2592. —— Effect of Statute of Frauds.]—Stat. Frauds does not exclude parol evidence that a written contract for sale of goods, purporting to be made between A., seller, & B., buyer, was, on B.'s part, made by him only as agent for C., for the purpose of charging C.—WILSON *v.* HART (1817), 7 Taunt. 295; 1 Moore, C. P. 45; 129 E. R. 118.

Annotations:—**Distd.** Graham *v.* Musson (1839), 3 Jur. 483. **Consd.** Higgins *v.* Senior (1841), 8 M. & W. 834; Beckham *v.* Drake (1841), 9 M. & W. 79. **Refd.** Marston *v.* Roe d. Fox, Roe d. Fox *v.* Marston (1838), 8 Ad. & El. 14; Taylor *v.* Salmon (1838), 4 My. & Cr. 134; Trueman *v.* Loder (1846), 11 Ad. & El. 589; Dale *v.* Humfrey (1858), E. B. & E. 1004; Armstrong *v.* Stokes (1872), L. R. 7 Q. B. 598; Maspons *v.* Mildred (1882), 9 Q. B. D. 530, C. A.

2593. —— Jointly with agent.]—Defts. W. R. P. & Co., managers of the L. S.S. Co., signed an agreement as follows: "We hereby assign to you the sum of £1,500 out of the freight of the *L.* to secure an advance of a similar sum made by you this day by your acceptance to our drafts due Jan. 19, 1896. Should this freight become due before the due date of these bills we undertake to retire the bills under rebate, thus entitling us to collect the freight. Whatever happens we hereby specially undertake to put you in funds to meet your acceptances at least two clear days before maturity. (Signed) W. R. P. & Co." In an action against W. R. P. & Co. & the s.s. co. on the above agreement:—*Held:* (1) evidence was admissible to show that W. R. P. & Co. acted in the transaction as agents for & with the authority of the s.s. co., & that plts. dealt with them as such & gave credit to the s.s. co.; (2) the latter were liable.—KILLICK & CO. *v.* PRICE (W. R.) & CO. & LINGFIELD S.S. CO., LTD. (1896), 12 T. L. R. 263.

Annotation:—**Refd.** Formby *v.* Formby (1910), 102 L. T. 116, C. A.

2594. —— Agent instructed not to disclose principal.]—Deft. commissioned C. to buy 100 bales of cotton, but particularly directed that his name should not be disclosed. C. bought the cotton for delivery on a future day of pltfs., who, unwilling to trust C., insisted on having the name of C.'s principal. C. having told pltfs. the cotton was for deft., but that deft. did not wish his name to transpire, pltfs. sold the cotton & delivered to C. a sold note, addressed to him personally, & received from him a corresponding bought note, signed by him personally, & not as agent. Pltfs. debited C. in their books. C. delivered to deft. an advice note, "Bought on your account of C. & D. one hundred bales," etc., which deft. accepted & retained without demur. Before the time for delivery cotton had fallen in price, & deft. settled differences with C. When the time for delivery arrived, cotton had still further fallen in price. Pltfs. called on C. to accept the cotton or pay the difference in price, threatening proceedings in case he failed to do so. On C.'s failure to do so pltfs. called on deft. to accept the cotton or pay the difference in price, & on his refusing to do so sold the cotton & brought an action to recover the difference between the contract price & the price realised:—*Held:* parol evidence was admissible to show that deft. was the principal in an action brought with a view to charging him as such; (2) the facts warranted the jury in finding pltfs. had never elected to treat C. as their debtor so as to preclude themselves from bringing the present action.—CALDER *v.* DOBELL, No. 2188, *ante.*

Annotations:—**Refd.** Fleet *v.* Murton (1871), L. R. 7 Q. B. 126; Browning *v.* Provincial Insce. for Canada (1873), L. R. 5 P. C. 263.
For full anns., *see* S. C. No. 2188, *ante.*

2595. —— Agent contracting as "proprietor."]—By a contract in writing made "between R., hereinafter called the proprietor," & pltfs., it was agreed pltfs. should build two houses for the "proprietor," that the "proprietor" should pay them the agreed price, & all work & materials brought upon the ground should "at once become the property of the proprietor." The "proprietor" was referred to throughout the contract, which was signed by R. after the words "signed by the proprietor":—*Held:* parol evidence was not admissible to prove this contract was made by R. as agent for an undisclosed principal for the purpose of charging the principal, as such evidence would contradict the written contract.—FORMBY BROTHERS *v.* FORMBY (1910), 102 L. T. 116; 54 Sol. Jo. 269, C. A.

2596. Against party signing as agent when in fact principal.]—Where a person describes himself in a written instrument as the agent of an unnamed principal, it is competent for the party with whom he contracts to show that, although described as agent, he is in fact the principal.—CARR *v.* JACKSON, No. 2536, *ante.*

Annotation:—**Refd.** Dale *v.* Humfrey (1858), E. B. & E. 1004, Ex. Ch.

2597. ——.]—By an agreement under seal between A. & Co. & Y. & Co., Y. & Co. agreed to erect a certain building, & A. & Co. agreed to pay for the work done by instalments. One clause of the agreement was, "It is understood between the parties to this contract that . . . S. guarantees payment to Y. & Co. of all moneys due to them under this contract." S. held a power of attorney from A. & Co. & signed the agreement as follows: "p.p.a., A. & Co. S.," & the attestation clause stated that the agreement was signed & delivered "by A. & Co." Y. & Co. sued S. as guarantor, & evidence was given at the trial of statements by S. at the time of execution that he intended to sign on his own behalf as well as on that of A. & Co. A verdict was found for pltfs. S. moved for a new trial on the ground that he had not signed the guarantee:—*Held:* (1) evidence was admissible to show that S. had signed on his own behalf as well as on behalf of A. & Co.; (2) he was personally liable on the guarantee.—YOUNG *v.* SCHULER (1883), 11 Q. B. D. 651; 49 L. T. 546, C. A.

ii. *As Defence to Action by Third Party against Agent personally.*

2598. Agent ex facie liable on contract—Loan to directors.]—An agreement between the T. Co. & M.

had truly acted, not as a principal contractor, but merely as factor for the owner.—ANDERSON *v.* GORDON (1830), 8 S. 304.—SCOT.

2591 ii. ——.]—Where a purchase was made by a person in his own name, but in reality for the benefit of another:—*Held:* parol evidence of the agency was admissible, & the purchaser who entered into the contract in his own name, & who was deft., was a good witness on behalf of pltf. against his co-purchaser, the other deft.—SANDERSON *v.* BURDETT (1871), 18 Gr. 417.—CAN.

2598 i. *Agent ex facie liable on contract—Promissory note.*]—Deft. signed a pro-

stated as follows: "In consideration for the advance of £500 paid by M. to the co., we the undersigned, three of the directors of the co., hereby agree to repay the sum of £500. We do hereby assign to M., as security for the advance of £500, the machines & tools. . . . As witness our hands, June 5, 1878. (Signed) A., B., C., directors; M." The machines & tools mentioned were the property of the co. In an action by M. against A., B., & C. to recover the £500:—*Held:* parol evidence was admissible to show whether it was intended defts. should be personally liable upon the above agreement.—MCCOLLIN *v.* GILPIN (1881), 6 Q. B. D. 516; 44 L. T. 914; 45 J. P. 828; 29 W. R. 408, C. A.

2599. —— Sale of goods.]—In an action on a written agreement purporting on the face of it to be made by deft. & subscribed by him for sale & delivery by him of goods above the value of £10, it is not competent for deft. to discharge himself, on an issue on the plea of *non assumpsit*, by proving that the agreement was really made by him by authority of, & as agent for, a third person, & that pltf. knew those facts at the time the agreement was made & signed.

Evidence cannot be given to show that the person who appears on the face of the instrument to be personally a contracting party is not such, since that would be to allow parol evidence to contradict the written agreement (PARKE, B.).—HIGGINS *v.* SENIOR (1841), 8 M. & W. 834; 11 L. J. Ex. 199; 151 E. R. 1278.

Annotations:—**Apprvd.** Holding *v.* Elliott (1860), 5 H. & N. 117; Calder *v.* Dobell (1871), L. R. 6 C. P. 486. **Distd.** Pontifex & Wood *v.* Hartley (1893), 62 L. J. Q. B. 196, C. A. **Refd.** *Re* Streatfield, Lawrence, *Ex p.* City Bank (1860), 3 L. T. 792; Wake *v.* Harrop (1861), 9 W. R. 788; Fawkes *v.* Lamb (1862), 31 L. J. Q. B. 98; Williamson *v.* Barton (1862), 7 H. & N. 899; Royal Exchange Assce. *v.* Moore (1863), 2 New Rep. 63; Fisher *v.* Marsh (1865), 6 B. & S. 411; Cropper *v.* Cook (1868), L. R. 3 C. P. 194; Fleet *v.* Murton (1871), L. R. 7 Q. B. 126; Browning *v.* Provincial Insce. for Canada (1873), L. R. 5 P. C. 263; Southwell *v.* Bowditch (1876), 45 L. J. Q. B. 630, C. A. **Mentd.** Fox *v.* Frith (1842), 10 M. & W. 131; Bristow *v.* Whitmore (1859), 4 De G. & J. 325; Armstrong *v.* Stokes (1872), L. R. 7 Q. B. 598.

2600. —— Sale of land.]—Parol evidence cannot be admitted to show that a person having agreed for purchase of an estate in his own name had purchased it on behalf of another person.—BARTLETT *v.* PICKERSGILL (1760), 1 Cox, Eq. Cas. 15; 1 Eden, 515; 4 East, 577 n.; 29 E. R. 1041.

Annotations:—**Expld. & Distd.** Heard *v.* Pilley (1869), 4 Ch. App. 548. **Expld.** James *v.* Smith, [1891] 1 Ch. 384. **Dbtd.** Rochefoucauld *v.* Boustead (1896), 66 L. J. Ch. 74, C. A. **Mentd.** A.-G. *v.* Woodhead (1815), 2 Price, 3.

2601. —— Acceptance of bill of exchange.]—Evidence cannot be admitted to show that the acceptor of a bill of exchange accepted the bill as agent for an undisclosed principal.—*Re* WAUD, *Ex p.* RAYNER (1868), 17 W. R. 64.

2602. —— ——.]—GOUPY *v.* HARDEN, No. 2644, *post*.

For full anns., *see* S. C. No. 2644, *post*.

2603. —— Mistake in charterparty.]—To a declaration for freight due on a charterparty made between pltf. as owner, & defts., W. & Co., as merchants & freighters, defts. pleaded as an equitable defence that they entered into the charterparty solely as agents for M., & that before they signed the charterparty it was agreed & understood by & between pltf. & defts. that defts. were only to sign the charter as such agents & were not to make themselves liable as principals for payment of the freight to become due under such charter; that defts. signed as follows: "for M., of C., W. & Co. agents," defts. & pltf. *bonâ fide* believing at the time the charter was made that defts. having so signed would not be liable to be sued on the charter; that defts. had power to bind M., & pltf. was inequitably taking advantage of their mistake in drawing the charter. At the trial deft. who signed the charterparty on behalf of defts.' firm, deposed to a conversation between himself & pltf. at the time of signing the charter which supported the plea; pltf. admitted that deft. had correctly testified to what he, deft., had said, but affirmed that he, pltf., had said nothing, or if he had made any remark he could not then, at the trial, remember what he had said. The judge directed the jury that, if they believed deft. had at the time of signing expressed his intention not to render his firm personally liable by so doing, they were to find for defts., which they did. On motion for a new trial on the ground of misdirection, in so much as the judge should have gone on to tell the jury that they must find pltf. was an assenting party to deft.'s expression of his intention not to render his firm liable by his signature to the charter:—*Held:* the whole of the facts having been before the jury, the judge's direction was sufficient to bring before them the issue they had to decide.—COWIE *v.* WITT (1874), 23 W. R. 76.

2604. —— ——.]—WAKE *v.* HARROP, No. 2567, *ante*.

For full anns., *see* S. C. No. 2567, *ante*.

2605. —— Effect of use of agent's invoice form.]—It is competent to a person, whose name appears at the head of an invoice as vendor of certain goods, to show that he was not the seller, & that the invoice was only made out in those terms, & included those goods, for convenience of the real parties to the contract. Generally speaking, an invoice is only evidence of a contract, & not a contract *per se*.—HOLDING *v.* ELLIOTT (1860), 5 H. & N. 117; 29 L. J. Ex. 134; 1 L. T. 381; 8 W. R. 192; 157 E. R. 1123.

iii. *To support Action by Principal against Third Party.*

2606. Agent contracting as "owner."]—The doctrine that a principal may come in & take the benefit of a contract made by his agent cannot be applied where the agent expressly describes himself as principal.

In *assumpsit* on a charterparty signed not by pltf. but by a third person, who in the contract described himself as "owner" of the ship:—*Held:* evidence not admissible to show such person contracted merely as pltf.'s agent.—HUMBLE *v.* HUNTER (1848), 12 Q. B. 310; 17 L. J. Q. B. 350; 11 L. T. O. S. 265; 12 Jur. 1021; 116 E. R. 885.

Annotations:—**Expld.** Schmaltz *v.* Avery (1851), 16 Q. B. 655. **Dbtd.** Killick *v.* Price & Lingfield S.S. Co. (1896), 12 T. L. R. 263. **Apprvd.** Formby *v.* Formby (1910), 102 L. T. 116, C. A. **Refd.** Muttyloll Seal *v.* Dent (1853), 5 Moo. Ind. App. 328, P. C.; *Re* Streatfield, Lawrence, *Ex p.* City Bank (1860), 3 L. T. 792; Wake *v.* Harrop (1862), 1 H. & C. 202, Ex. Ch.; British Waggon Co. *v.* Lea (1880), 5 Q. B. D. 149; Tolhurst *v.* Associated Portland Cement Manufacturers, Associated Portland Cement Manufacturers *v.* Tolhurst (1902), 87 L. T. 465, C. A.; Dunlop Pneumatic Tyre Co. *v.* Selfridge, [1915] A. C. 847, H. L.

2607. Agent signing as principal in error.]—Action by charterer on a charterparty. Defence that the charterparty was made between deft. & the T. Co.

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missory note, as maker, in his private capacity in favour of M., who indorsed it to pltf. In an action by pltf. on the note, deft. alleged that he made it as president of a co., & also that he had arranged with M. that he was not to be made personally liable thereon, & further, that there was no consideration:—*Held:* deft. was liable on the note, there being nothing to show that it was binding on the co. The plea that he made the note as president, on the understanding that there was to be no recourse against him, was bad, as it attempted to set up a verbal arrangement contrary to what the signature to the note would import. Such verbal understanding was inadmissible; otherwise there would be no safety in taking notes or bonds of parties.—EWART *v.* WELLER (1849), 5 U. C. R. 610.—**CAN.**

Sect. 1.—*In regard to contracts: Sub-sect.* 1, *B.* (*c*) *iii., iv. & v.; sub-sect.* 2, *A. & B.*]

& not pltf. Reply that the agreement was between pltf. & deft.; that in drawing up the charterparty one of the T. Co.'s printed forms was used, on which the name of the co. appeared as charterers; that by mistake of pltf. & deft. the co.'s name was omitted to be struck out & remained instead of pltf.'s name; that the charterparty was signed by pltf. & deft. & it was intended & agreed that pltf. should be liable & entitled under it. On demurrer:—*Held:* (1) it was unnecessary that the charterparty should be rectified; (2) the reply was good.—BRESLAUER *v.* BARWICK (1876), 36 L. T. 52; 24 W. R. 901; 3 Asp. M. L. C. 355; 3 Char. Pr. Cas. 56.

2608. Agent contracting as principal.]—An agreement was made in 1911 between pltfs., manufacturers of motor tyres, covers, & tubes, & D. & Co., by which, in consideration of pltfs. allowing them certain discounts off their list prices for their goods, D. & Co. agreed to purchase such goods to a certain value, & not to sell or offer them to any person at prices less than the list prices except to persons in the motor trade to whom D. & Co. might allow similar discounts, & from whom in case of any sale to them D. & Co. were to obtain an undertaking similarly to observe pltfs.' list prices in any resale by them. Subsequently, in 1912, an agreement on a printed form, described in its heading as a price maintenance agreement to be entered into by trade purchasers of pltfs.' goods, was signed by defts., who were engaged in the motor trade, & directed & sent by them to D. & Co., which agreement provided that in consideration of D. & Co. allowing defts. discounts similar to those above referred to off pltfs.' list prices defts. would not sell or offer any of pltfs.' goods to any person at prices less than those mentioned in pltfs.' price list, & that defts. would pay to pltfs. a specified sum for every article sold or offered in breach of the agreement as liquidated damages, but without prejudice to any other rights which D. & Co. or pltfs. might have thereunder. In pursuance of this latter agreement, D. & Co. supplied to defts. goods of pltfs.' manufacture. Defts. subsequently sold certain of these articles to customers of their own at prices less than pltfs.' list prices. Pltfs. brought an action against defts. for breach of the agreement of 1912, claiming damages & an injunction:—*Held:* (1) the agreement of 1912 was on the face of it an agreement between defts. & D. & Co. only, to which pltfs., notwithstanding that they might derive some benefit from it, were no parties; (2) pltfs. were not entitled to show that the agreement had been made by D. & Co. on behalf of pltfs. as undisclosed principals, inasmuch as such a contention was inconsistent with the express terms of the agreement; (3) pltfs. were not entitled to judgment.—DUNLOP PNEUMATIC TYRE CO. *v.* SELFRIDGE & CO., LTD., [1915] A. C. 847; 84 L. J. K. B. 1680; 113 L. T. 386; 31 T. L. R. 399; 59 Sol. Jo. 439, H. L.

2609. Agent contracting as "charterer."]—A charterparty provided that the charterers were to give the owners not less than ten days' written notice at which port & on about which day the steamer would be redelivered. It also provided that, if the charterers should have reason to be dissatisfied with the conduct of the master, they were to be entitled to ask the owners to investigate it. There was also a provision that if the steamer could not be delivered by the cancelling date the charterers should, if required, declare whether they would cancel or take delivery. The arbn. clause provided that any dispute arising under the charterparty should be referred to arbn., one arbitrator to be nominated by the owners, & another by the charterers. In the charterparty certain persons were named "as charterers":—*Held:* when the name of a person was inserted in a charterparty of that kind "as charterer," the statement that the person named was the charterer was a term of the contract, & not a mere description of the person of same character as the description "of the one part" or "of the other part."—ARGONAUT *v.* HANI (1917), 118 L. T. 176.

2610. Agent described as acting for "his clients."]—Correspondence & documents passed between H., solr. of pltf., & solrs. of defts., by which the terms of a lease to be granted by defts. were arranged. Pltf. alleged that the agreement was that the lease was to be granted to a co., to be formed by pltf., & that H. made the agreement on behalf of pltf. In the documents relied on by pltf. as constituting the memoranda of the alleged agreement, pltf. was not named or referred to as a contracting party, & the persons for whom H. purported to act were described as his "clients" (in the plural):—*Held:* (1) on the true construction of the documents & correspondence relied on, H. was not intended to be bound by the alleged contract; (2) parol evidence could not be given that pltf. was the principal of H., or that defts. knew him to be such.—LOVESY *v.* PALMER, [1916] 2 Ch. 233; 85 L. J. Ch. 481; 114 L. T. 1033.

iv. *As Defence to Action by Principal against Third Party.*

2611. Apparent principal in fact agent—Fraud.]—Pltf. purchased a quantity of bark, the property of the Crown, from C., Crown surveyor. He afterwards represented to defts. that he was employed by C., on behalf of the Crown, to sell the bark at the previous year's prices, plus expenses of carting & ricking, which would not, with the prices, exceed £5 5*s.* per ton, & C. would send a correct invoice of the amount. Pltf. offered the bark to defts. on these terms, & requested them to sign a bought note, stating the price at £6 per ton, with discount of £2 per cent., & stated that they would not be called upon to pay more than the actual amount of such prices & expenses. On the faith of such representations defts. agreed to buy the bark from pltf., as agent of the Crown, on these terms, & signed a bought note, as requested by pltf., in which pltf. was named as vendor. Pltf. requested defts. to pay a deposit of £20 per cent. on the amount stated in the bought note to C., which defts. paid. Communications afterwards passed between pltf. & defts. in which pltf. treated the sale of the bark as a sale made by him as principal & at the actual price of £6 per ton. A meeting took place between

PART X. SECT. 1, SUB-SECT. 1.—B. (c) iii.

2608 i. *Agent contracting as principal.*]—A marine policy was in this form: A. Insurance Co., of, etc., on account of C., loss, if any, payable to M., do make insurance, etc.:—*Held:* the contract on this policy was entered into with C., & M. was not insured, & could not sue on the policy. *Semble:* (1) the insertion in the policy of the words "for or in the name of all persons interested," etc., or "for whom it may concern," would have enabled M., on showing interest, to recover; (2) the words, "as broker" or "as agent," following after C.'s name, would have let in parol evidence to show the interest & right of an undisclosed principal, who could have sued on the policy.—MCCOLLUM *v.* ÆTNA INSURANCE CO. (1870), 20 C. P. 289.—CAN.

PART X. SECT. 1, SUB-SECT. 1.—B. (c) iv.

t. *Contract with agent as principal.*]—Deft. purchased lumber from D., who claimed to be the owner. In replevin by pltf., who owned the lumber:—*Held:* deft. could not set up as a defence that D. had authority from pltf. to sell the lumber for a certain price, deft. in purchasing having dealt with D. as the owner of the lumber, &

one of defts. & C., at which deft. told C. that the sale was made by pltf. as agent for the Crown, & the price inserted in the bought note was a nominal price only, & by the real arrangement defts. were to pay only the previous year's prices, plus the expenses. Upon this C. gave deft. a memorandum showing the price of the bark at the previous year's price, plus the expenses, & delivered the bark, receiving from defts. payment of the amount stated in the memorandum. In an action upon the contract embodied in the bought note, & also upon common counts, in which pltf. sought to recover the difference between the sum paid by defts. & the price according to the bought note:—*Held:* (1) parol evidence might be given to show that the verbal contract was the only real contract between the parties, & the bought note was not signed for the purpose of evidencing any contract; (2) even if pltf. was entitled to sue upon the written contract, that contract was voidable upon a plea of fraud; (3) the conduct of defts. did not amount to such adoption of the contract, after they knew the real facts of the case, as to estop them from setting up fraud; (4) payment to C. was a good defence under a plea of payment.—ROGERS *v.* HADLEY (1863), 2 H. & C. 227; 32 L. J. Ex. 241; 9 L. T. 292; 9 Jur. N. S. 898; 11 W. R. 1074; 159 E. R. 94.

Annotations:—**Consd. & Apld.** Bolckow *v.* Seymour (1864), 17 C. B. N. S. 107. **Apld.** Kempson *v.* Boyle (1865), 3 H. & C. 763; Clever *v.* Kirkman (1875), 33 L. T. 672.

v. *To support Action by Agent against Third Party.*

2612. Ostensible agent claiming to be real principal.]—Pltf. sued in *assumpsit* to recover from deft., an auctioneer, a deposit paid on the purchase of a ground rent. Pltf. signed a memorandum "J. B. for C. R." Pltf. was nonsuited on the ground that it was not competent for him to tender evidence that C. R. was only a nominal party & pltf. himself was the real principal. On a rule to set aside the nonsuit:—*Held:* pltf. was rightly nonsuited.—BICKERTON *v.* BURRELL, No. 2468, *ante*.

Annotations:—**Distd.** Rayner *v.* Grote (1846), 15 M. & W. 359; Schmaltz *v.* Avery (1857), 16 Q. B. 655. **Refd.** Bramble *v.* Spiller (1870), 18 W. R. 316.

SUB-SECT. 2.—CONTRACTS UNDER SEAL.

See, now, CONVEYANCING & LAW OF PROPERTY ACT, 1881 (c. 41), s. 46, & CONVEYANCING ACT, 1882 (c. 39), ss. 8 & 9.

A. In General.

2613. General rule.]—Those parties only can sue or be sued upon an indenture who are named or described in it as parties (PARKE, B.).—BECKHAM *v.* DRAKE (1841), 9 M. & W. 79; 11 L. J. Ex. 201; 152 E. R. 35; *revsd.* on another point *sub nom.* DRAKE *v.* BECKHAM (1843), 11 M. & W. 315, Ex. Ch.; *sub nom.* BECKHAM *v.* DRAKE (1849), 2 H. L. Cas. 579, H. L.

For full anns., *see* PARTNERSHIP.

2614. —— Evidence not admissible to show that agent contracted for principal.]—Pltf. & deft., neither of whom was a member of the Stock Exchange, instructed their respective brokers, the former to sell, & the latter to purchase, shares in a co. for the same settling day. Both brokers had dealings with the same jobber, who at deft.'s suggestion gave the name of C. as transferee of pltf.'s shares. A transfer of the shares was duly executed under seal by pltf. & C.; the co. having in the meanwhile been wound up under supervision of the ct., the liquidators refused to register the transfer. Pltf. being retained on the list of contributories, paid a call made upon him; he was unable to recover this amount from transferee & brought an action for indemnity against deft. as C.'s principal:—*Held:* (1) this was an attempt to make an undisclosed principal liable upon a contract under seal with the agent as principal; (2) there was no privity of contract between pltf. & deft.; (3) deft. could not be liable.

Where a contract has been made by a deed *inter partes*, one of the parties to that deed is not at liberty to show that the other executed it for an undisclosed principal (BRETT, J.).—TORRINGTON, (VISCOUNT) *v.* LOWE (1868), L. R. 4 C. P. 26; 38 L. J. 121; 19 L. T. 316; 17 W. R. 78.

Annotation:—**Dbtd.** Maxted *v.* Paine (1871), L. R. 6 Exch. 132.

B. Right to sue.

2615. Contract by agent—As such.]—Where the master of pltfs.' ship entered into a charterparty, under seal as agent for pltfs., with deft., a partner of M. & Co., for delivery of goods upon a stipulated freight, & the goods were delivered to M. & Co., the consignees named in the bill of lading:—*Held:* pltfs. could not maintain *assumpsit* against deft. for the freight.—SCHACK *v.* ANTHONY (1813), 1 M. & S. 573; 105 E. R. 214.

Annotations:—**Consd.** Gardner *v.* Lachlan (1836), Donnelly, 119. **Refd.** Middleditch *v.* Ellis (1848), 2 Exch. 623.

2616. —— "For & on behalf of" principal.]—Where an indenture was made between "A., for & on behalf of B., on the one part, & C., on the other part," A. being thereunto authorised by writing under B.'s hand, but not under seal, & A. executed the deed in his own name:—*Held:* B. could not maintain covenant on the deed, although the covenants were expressed to be made by C. to & with B.—BERKELEY *v.* HARDY (1826), 5 B. & C. 355; 8 Dow. & Ry. K. B. 102; 4 L. J. O. S. K. B. 184; 108 E. R. 132.

Annotations:—**Distd.** Cooch *v.* Goodman (1842), 2 Q. B. 580. **Consd.** Chesterfield & Midland Silkstone Colliery Co. *v.* Hawkins (1865), 3 H. & C. 677. **Apprvd.** Forster *v.* Elvet Colliery Co., Quin *v.* Elvet Colliery Co., Seed *v.* Elvet Colliery Co., Morgan *v.* Elvet Colliery Co., [1908] 1 K. B. 629, C. A. **Refd.** *Re* Smith & Laxton, *Ex p.* Cockburn (1863), 3 New Rep. 227. **Mentd.** Hall *v.* Bainbridge (1840), 1 Scott, N. R. 151; Hunter *v.* Parker (1846), 7 M. & W. 322; *Re* Milsted, *Ex p.* Josey (1868), 18 L. T. 156.

2617. Contract by master & governors of hospital —Position of successor in office.]—A deed was executed between D., described as master, & A., B. & two others, described as governors of a hospital, & deft. The parties signing on behalf of the hospital were deceased before action brought:—*Held:* governors, who were not parties to the deed, could not sue deft. on it, not on the ground of want of execution by them, but on the ground that the

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not as pltf.'s agent.—DAVIS *v.* CUSHING (1862), 5 All. 383.—CAN.

PART X. SECT. 1, SUB-SECT. 1.—B. (c) v.

2612 i. *Ostensible agent claiming to be real principal.*]—Parol evidence is inadmissible, on the part of a person pretending to be the real vendor & owner of the goods sold, to contradict a receipt signed by him in which another person is declared to be the owner of such goods.—HALL *v.* MCBEAN (1893), 3 S. 242.—CAN.

PART X. SECT. 1, SUB-SECT. 2.—B.

a. *Contract by president of company —"On behalf of" himself, directors & company.*]—An agreement was made between deft. & pltf., described as "President of Port Burwell Harbour Co. on behalf of the President, Directors, & Co. of Port Burwell Harbour," & under the seals of deft. & pltf.:—*Held:* pltf. entitled to sue in his own name.—SAXTON *v.* RIDLEY (1856), 13 U. C. R. 522.—CAN.

Sect. 1.—*In regard to contracts: Sub-sect.* 2, *B. & C.; sub-sect.* 3, *A.* (*a*).]

demise was apparently by a corpn., &, as the ct. could not take judicial notice of its non-existence, the action was brought by the wrong parties.—COOCH *v.* GOODMAN (1842), 2 Q. B. 580; 2 Gal. & Dav. 159; 11 L. J. Q. B. 225; 6 Jur. 779; 114 E. R. 228.

Annotations:—**Expld.** Doe d. Marlow *v.* Wiggins (1843), 4 Q. B. 367. **Consd.** Pitman *v.* Woodbury (1848), 3 Exch. 4. **Dbtd.** Wheatley *v.* Boyd (1851), 7 Exch. 20. **Consd.** Morgan *v.* Pike (1854), 14 C. B. 473. **Mentd.** Maugham *v.* Sharpe (1864), 17 C. B. N. S. 443.

2618. Lease by attorney — In own name — Covenant to pay rent to principal.]—If A., being seised of lands, gives a letter of attorney to B. to make leases, & he grants a lease to C. in his own name, in which C. covenants to pay rent to A.:—*Qu.*: whether A. can maintain an action of covenant against C. on this deed.—LOWTHER *v.* KELLY (1723), 8 Mod. Rep. 115; 88 E. R. 91.

2619. Lease by lessor—As attorney for another.]—A lease importing to be made by the lessor as attorney for another is void upon the face of it. The attorney cannot maintain an action upon it in his own right.—FRONTIER *v.* SMALL (1726), 2 Ld. Raym. 1418; 2 Stra. 705; 92 E. R. 423.

Annotations:—**Distd.** Berkeley *v.* Hardy (1826), 8 Dow. & Ry. K. B. 102. **Consd.** Cornish *v.* Searell (1823), 8 B. & C. 471. **Refd.** Cooch *v.* Goodman (1842), 2 Q. B. 580; Pitman *v.* Woodbury (1848), 3 Exch. 4.

2620. Lease by mortgagee — "As agent" — Demise binds legal estate.] — CHAPMAN *v.* SMITH, No. 2549, *ante*.

2621. Policies effected by manager & secretary — "For & on behalf of the society."]—Where policies under seal are effected by the manager & secretary of one assurance society in the office of another, being a mutual assurance society, although such policies are expressed to be effected "for & on behalf of the society," the secretary alone is thereby constituted a member, the sum secured being payable to him & "his successors in office."—*Re* SECURITY MUTUAL LIFE ASSURANCE SOCIETY, *Ex p.* ATHENÆUM LIFE ASSURANCE SOCIETY (1858), 6 W. R. 431.

C. Liability to be sued.

2622. Acknowledgment of receipt by agent.]—Where an agent acknowledged under seal the receipt of money for his master to be repaid on a named date:—*Held*: the servant was liable for the repayment.—TALBOT *v.* GODBOLT (1608), Yelv. 137, 147; 1 Brownl. 103; 80 E. R. 92.

Annotation:—**Folld.** Thomas *v.* Bishop (1733), Kel. W. 136.

2623. Contract by agent—"On behalf of" principal.]—A. articled on behalf of B. to purchase four houses in Jamaica, & to pay £800 for same, &, pending a suit to compel the seller to make out a good title, the houses were swallowed up by an earthquake:—*Held*: A. was liable to pay the £800 though he had not sufficient effects of B.'s in his hands.—CASS *v.* RUDELE (1692), 1 Eq. Cas. Abr. 25, pl. 8; 2 Vern. 280; 23 E. R. 781.

Annotation:—**Consd.** Burton *v.* Langham (1848), 5 C. B. 92.

2624. —— Signature "p.p.a." principal.] — YOUNG *v.* SCHULER, No. 2597, *ante*.

2625. —— For Crown.]—A servant of the Crown contracting by deed on account of the Govt. is not personally answerable.—UNWIN *v.* WOLSELEY (1787), 1 Term Rep. 674; 99 E. R. 1314.

Annotations:—**Consd.** Allen *v.* Waldegrave (1818), 8 Taunt. 566; Thompson *v.* Pearce (1819), 1 Brod. & Bing. 25; Gidley *v.* Palmerston (1822), 3 Brod. & Bing. 275. **Refd.** Grant *v.* Secretary of State for India (1877), 2 C. P. D. 445.

2626. —— ——.]—A person entering into a charterparty under seal in his own name on behalf of the Govt. is personally liable.—CUNNINGHAM *v.* COLLIER, No. 2722, *post*.

See, further, Sub-sect. 6, *post*.

2627. —— Guaranteeing performance of arbitrator's award.]—Pltf. & J. F. had a difference concerning a certain debt due from J. F. to pltf. on a bond for £800. G. F., deft., entered into a bond on behalf of J. F., whereby he covenanted to perform such award as the arbitrator should make by a certain day, J. F.'s bond to be avoided in that event. The arbitrator made an award for £298 in favour of pltf. In an action by pltf. against deft. for non-performance of the covenant to pay the sum awarded:—*Held*: pltf. entitled to judgment.—CAYHILL *v.* FITZGERALD (1744), 1 Wils. 28, 58; 95 E. R. 473, 491.

2628. Contract by chairman of directors—Position of succeeding chairman.]—Covenant does not lie against the chairman of the board of directors of a joint-stock co., not incorporated by Act of Parliament, upon a deed under the seal of a former chairman.—HALL *v.* BAINBRIDGE (1840), 1 Man. & G. 42; 1 Scott, N. R. 151; 9 L. J. C. P. 281; 133 E. R. 42.

2629. Contract by director—Company taking part in negotiations & acting on contract.]—The managing director of a co., who had power to enter into contracts on behalf of the co. & was bound to give the co. the benefit of all such contracts, entered into an agreement with P. by which, in consideration of certain assignments, he bound himself to pay P. a sum of money. No mention was made of the co. in the deed, but the directors took part in the negotiation, & P. was aware that the agreement was made on behalf, & for the benefit, of the co. The co. paid money to P. on account of the contract, & was afterwards ordered to be wound up:—*Held*: P. could not claim against the co. under the contract.—*Re* INTERNATIONAL CONTRACT CO., PICKERING'S CLAIM (1871), 6 Ch. App. 525; 24 L. T. 178.

2630. —— To pay "out of moneys to be raised by company."]—Defts., directors of a mining co., agreed by deed to purchase a mine of pltfs., the purchase-money to be paid within 12 months, by certain instalments "out of moneys to be raised by the co.," with a proviso that, in case they should not have received the deposits from the shareholders to enable them to pay the money by the time stipulated, the directors should be allowed a further six months; & defts. covenanted that they would "out of the payments so to be made by subscribers or shareholders in the co." pay the purchase-money, according to the terms & at the times before specified, subject to the above proviso:—*Held*: this was a personal undertaking on the part of defts. to pay at the expiration of the additional six months.—HANCOCK *v.* HODGSON (1827), 4 Bing. 269; 12 Moore, C. P. 504; 5 L. J. O. S. C. P. 170; 130 E. R. 770.

Annotation:—**Consd.** Bain *v.* Kirk (1849), 18 L. J. Q. B. 83.

2631. Contract by justices — Acting under statutory authority.]—Defts., JJ., acting under authority of an Act of Parliament empowering them to contract for the erection of a bridge, & enacting that in all actions they might sue & be sued in the name of the clerk of the peace, covenanted to pay pltf. the costs of erecting such bridge:—*Held*:

b. Contract by agent—In own name as agent of principal.]—Pltfs. declared upon a contract under seal made between them & M., whereby they agreed to erect a certain building for M.; it was further alleged that M. was authorised by defts. to make the contract for them in his own name as their agent; that pltfs. entered into the contract with M. as & being the duly authorised agent of defts.; that defts., duly authorised all the work & took the benefit of the contract & the work:—*Held*: defts. not liable upon the contract.—ASHDOWN *v.* MANITOBA LAND CO. (1886), 3 Man. L. R. 444.—**CAN.**

they contracted as agents for the county at large, & were not individually responsible.

It is a broad principle that when a person engages in a contract on behalf of the public, & in the performance of a public duty, such person shall not be personally responsible in an action on that contract.—ALLEN *v.* WALDEGRAVE (1818), 8 Taunt. 566; 2 Moore, C. P. 621; 129 E. R. 503.

Annotations:—**Distd.** Auty *v.* Hutchinson (1848), 6 C. B. 266. **Refd.** Parrott *v.* Eyre (1833), 3 L. J. C. P. 3.

2632. Covenant by agent—"For himself, his heirs," etc., "for the act of" principal.]—Where A. covenants for himself, his heirs, etc., & under his own hand & seal, for the act of B., A. is personally bound by his covenant, though he describes himself in the deed as covenanting for & on behalf of B.—APPLETON *v.* BINKS (1804), 5 East, 148; 1 Smith, K. B. 361; 102 E. R. 1025.

Annotations:—**Consd. & Apld.** Burrell *v.* Jones (1819), 3 B. & Ald. 47. **Distd.** Spittle *v.* Lavender (1821), 2 Brod. & Bing. 452. **Consd.** Kennedy *v.* Gouveia (1823), 3 Dow. & Ry. K. B. 503. **Distd.** Hall *v.* Ashurst (1833), 1 Cr. & M. 714; Downman *v.* Williams (1845), 7 Q. B. 103. **Consd.** Burton *v.* Langham (1848), 5 C. B. 92; Tanner *v.* Christian (1855), 24 L. J. Q. B. 91. **Distd.** Cooke *v.* Wilson (1856), 1 C. B. N. S. 153. **Refd.** Pell *v.* Stephens (1833), 2 My. & K. 334; Lindus *v.* Bradwell (1848), 5 C. B. 583.

2633. Submission by agent—"As attorney for" principal.]—A submission by A. as attorney for B. concerning accounts between B. & C. is good to bind A., but not B.—BACON *v.* DUBARRY (DEBARRY) (1697), 1 Salk. 70; Carth. 412; 12 Mod. Rep. 129; Comb. 439; Holt, K. B. 78; 1 Ld. Raym. 246; 3 Ld. Raym. 241; Skin. 679; 91 E. R. 65.

Annotation:—**Folld.** Cayhill *v.* Fitzgerald (1744), 1 Wils. 28, 58.

SUB-SECT. 3.—AGENT'S LIABILITY ON BILLS OF EXCHANGE, PROMISSORY NOTES, AND OTHER NEGOTIABLE INSTRUMENTS.

See, now, Bills of Exchange Act, 1882 (c. 61), s. 26.

A. Bills of Exchange.

(a) Where Agent signs without Qualification.

2634. Agent drawing bill.]—A. employed B. to sell goods for him; C., as B.'s broker, procured a purchaser, & drew a bill for the amount payable to A., which was accepted by purchaser, but dishonoured:—*Held:* C. was answerable to A. as drawer of the bill.—LE FEVRE (LE FEUVRE) *v.* LLOYD (1814), 5 Taunt. 749; 1 Marsh. 318; 128 E. R. 886.

Annotations:—**Distd.** Castrique *v.* Buttigieg (1855), 10 Moo. P. C. C. 94. **Refd.** Higgins *v.* Senior (1841), 11 L. J. Ex. 199.

2635. ——.]—An agent to a country bank, to whom pltf. sent a sum of money in order to procure a bill upon London, drew in his own name for the amount upon the firm in London, the two firms being the same:—*Held:* the agent was liable as drawer, although pltf. knew that he was agent, & supposed that the bill was drawn by him as such, & on account of the country bank, to which the agent paid over the money.—LEADBITTER *v.* FARROW (1816), 5 M. & S. 345; 105 E. R. 1077.

Annotations:—**Distd.** Castrique *v.* Buttigieg (1855), 10 Moo. P. C. C. 94. **Folld.** Courtauld *v.* Saunders (1867), 16 L. T. 562. **Refd.** Lindus *v.* Melrose (1858), 3 H. & N. 177, Exch.; Deslandes *v.* Gregory (1860), 2 E. & E. 602; Alexander *v.* Sizer (1869), L. R. 4 Exch. 102.

2636. —— **Principal not liable.**]—An agent for an assocn. who draws bills in his own name for the purposes of the co. does not bind the partners as drawers, though authorised to draw bills.—DUCARREY *v.* GILL (1830), 4 C. & P. 121; Mood. & M. 450.

2637. ——.]—A broker at N. shipped a cargo of coals, & drew a bill of exchange on the consignees in favour of the vendors. The bill being returned by the acceptor, in consequence of the shortness of the date, vendors, by the direction of the broker, drew another bill at a longer date. It was taken to the broker's counting-house for signature, but, the broker having left N. in consequence of embarrassments, deft., who had come there to investigate his affairs, at the request of vendors, & for their convenience, signed the second bill generally:—*Held:* he was personally liable on the bill.—SOWERBY *v.* BUTCHER (1834), 2 Cr. & M. 368; 4 Tyr. 320; 3 L. J. Ex. 80.

Annotations:—**Refd.** Easton *v.* Pratchett (1835), 1 Gale, 30; Higgins *v.* Senior (1841), 11 L. J. Ex. 199.

2638. Commissioners under Inclosure Act drawing drafts on bankers.]—An Inclosure Act empowered the comrs. to make a rate to defray the expenses of passing & executing the Act, & enacted that persons advancing money should be repaid out of the first money raised by the comrs. Expenses were incurred in the execution of the Act before any rate was made. To defray these expenses the comrs. drew drafts upon their bankers, requiring them to pay the sums therein mentioned on account of the public drainage, & to place same to their account as comrs. The bankers, during a period of six years, continued to advance considerable sums by paying these drafts:—*Held:* the comrs. were personally responsible to the bankers for the drafts so made.—EATON *v.* BELL (1821), 5 B. & Ald. 34; 106 E. R. 1106.

Annotations:—**Distd.** Sprott *v.* Powell (1826), 3 Bing. 478. **Consd.** Pell *v.* Stephens (1833), Coop. *temp.* Brough. 266. **Refd.** Burls *v.* Smith (1831), 7 Bing. 705; Cane *v.* Chapman (1836), 1 Nev. & P. K. B. 104. **Mentd.** Tildasley *v.* Stephenson (1834), 10 Bing. 545.

2639. Master of ship drawing bill.]—The master of a ship is personally liable as drawer upon a bill drawn by him on the owners for the price of coals supplied to the ship (GORELL BARNES, J.).—THE RIPON CITY, [1897] P. 226; 66 L. J. P. 110; 77 L. T. 98; 13 T. L. R. 378; 8 Asp. M. L. C. 304.

Annotations:—**Folld.** The Elmville, [1904] P. 319; Ceylon Coaling Co. *v.* Goodrich (1904), 73 L. J. P. 104. **Distd.** The Hopper No. 66, [1906] P. 34. **Refd.** The Snark, [1899] P. 74; The Marie Glaeser, [1914] P. 218. **Mentd.** The Sarpen, [1916] P. 306, C. A.

2640. —— **Words in body of bill no qualification.**]—In pursuance of a contract for the supply of bunker coal made between the owners of a steamship as buyers & the agents of the suppliers of coal as sellers, the master of the steamship drew a bill of exchange on the owners in favour of the suppliers, which concluded as follows: "Value received on three hundred tons coal & disbursements supplied to my vessel to enable her to complete her voyage, for which I hold my vessel, owners, & freight responsible." The bill having been dishonoured after acceptance:—*Held:* the master was liable as drawer, for the wording of the bill did not by implication exclude his personal liability.—THE ELMVILLE, [1904] P. 319; 73 L. J. P. 104; 91 L. T. 151; 9 Asp. M. L. C. 606.

2641. Agent accepting bill.—A bill drawn on a factor, & payable out of produce of goods in his hands, after discharging prior acceptances, & accepted by him generally, is chargeable on him, notwithstanding any balance then due to him in a running account with his principal.—MABER *v.* MASSIAS (1776), 2 Wm. Bl. 1072; 96 E. R. 631.

2642. Cashier accepting bill—Words in body of bill no qualification.]—A bill of exchange ran as follows: "At thirty days' sight pay S. the sum of £200, & place it to account of the Y. B. Co. as per advice

Sect. 1.—*In regard to contracts: Sub-sect.* 3, *A.* (*a*), (*b*) & (*c*), & *B.* (*a*) & (*b*).]

—M." The bill was directed to deft., cashier of the co., & he accepted it:—*Held:* (1) it was a general rule that an acceptor of a bill of exchange was personally liable; (2) the words "place it, etc., as per advice" made no difference; (3) deft. was personally liable.—THOMAS *v.* BISHOP (1733), 2 Barn. K. B. 320; Kel. W. 136; Lee *temp.* Hard. 1; 7 Mod. Rep. 180; Ridg. *temp.* H. 9; 2 Stra. 955; 94 E. R. 527.

Annotations:—**Apld.** Mare *v.* Charles (1856), 5 E. & B. 978; Herald *v.* Connah (1876), 40 J. P. 567.

2643. Partner accepting bill—Signing own name as well as firm's name.]—A bill of exchange was drawn against a firm of B. & Co. B., one of the partners, accepted the bill, signing the name of the firm, "B. & Co.," & adding his own underneath. B. died, & the holder of the bill took out an originating summons for the administration of B.'s estate, on which an order was made for the administration of the estate, distinguishing the separate from the partnership debts:—*Held:* the acceptance of the bill was the acceptance of the firm, & the addition of B.'s name did not make him separately liable.—*Re* BARNARD, EDWARDS *v.* BARNARD (1886), 32 Ch. D. 447; 55 L. J. Ch. 935; 55 L. T. 40; 34 W. R. 782, C. A.

2644. Agent indorsing bill.]—A. in London acted as agent of B. & Co. in Paris for a small commission upon their general business. B. & Co. requested A. to remit them a bill on Portugal, which A. did, & indorsed it. The bill was dishonoured by non-acceptance:—*Held:* (1) A. was bound by his unqualified indorsement; (2) evidence to show that A. was acting merely as B. & Co.'s agent was not admissible:—GOUPY *v.* HARDEN (1816), 7 Taunt. 159; 2 Marsh. 454; 129 E. R. 64.

Annotations:—**Expld.** Castrique *v.* Buttigieg (1855), 10 Moo. P. C. C. 94. **Refd.** Fry *v.* Hill (1817), 7 Taunt. 397.

2645. ——.]—CASTRIQUE *v.* BUTTIGIEG (1856), 10 Moo. P. C. C. 94; 4 W. R. 445; 14 E. R. 427, P. C.

Annotation:—**Consd. & Distd.** Abrey *v.* Crux (1869), L. R. 5 C. P. 37.

(*b*) *Where Agent qualifies his Signature.*

2646. Agent accepting bill — "On behalf of" company.]—A bill of exchange to pay to drawer's order at three months after date the sum of £137 10*s.*, value received in account (fire policy No. 597), was directed to C., general agent of the A. Co., 8, York Street, Manchester, who wrote upon it: "Accepted, payable at 8, York Street, Manchester, on behalf of the co.—C." In an action against C. on this bill:—*Held:* he was personally liable as acceptor.—HERALD *v.* CONNAH (1876), 34 L. T. 885; 40 J. P. 567.

2647. —— **"Per procuration" company—No authority to accept.**]—A bill of exchange was drawn by pltf. upon a mining co. & accepted by deft. in this form: "Accepted *per pro.* the A. Mining Co. Payable, U., London, manager." At the trial it was proved that the co. consisted of deft. & three other persons, who jointly had worked the mine. Deft. had no authority to accept bills on behalf of the co.:—*Held:* deft. was personally liable upon his acceptance to the bill.—OWEN *v.* VAN USTER (VON USTER) (1850), 10 C. B. 318; 20 L. J. C. P. 6; 16 L. T. O. S. 194; 138 E. R. 128.

Annotations:—**Distd.** *Re* Barnard, Edwards *v.* Barnard (1886), 32 Ch. D. 447, C. A. **Refd.** Mathews *v.* Marsland (1856), 27 L. J. Ex. 148.

2648. ——.]—A bill of exchange, directed to "D., purser, W. Mining Co.," was accepted by him as follows: "D., *per pro.* W. Mining Co." D. was a member of the co., which was not incorporated:—*Held:* D. was personally liable on this acceptance.—NICHOLLS (NICHOLS, NICOLLS) *v.* DIAMOND (1853), 9 Exch. 154; 23 L. J. Ex. 1; 22 L. T. O. S. 79; 2 W. R. 12; 2 C. L. R. 305; 156 E. R. 66.

Annotations:—**Apld.** Mare *v.* Charles (1856), 5 E. & B. 978. **Distd.** Mathews *v.* Marsland (1858), 27 L. J. Ex. 148. **Apprvd.** Jones *v.* Jackson (1870), 22 L. T. 828. **Refd.** Alexander *v.* Sizer (1869), 20 L. T. 38.

2649. —— **"For" company, "purser."**]—A bill of exchange, purporting to be "for value received in machinery supplied to the H. Mining Co.," was directed to deft. as an individual. Deft. wrote across the bill the words "Accepted for the co.—A. B., purser." Deft. was purser of the mine, but was not a member of the co.:—*Held:* he was personally liable as acceptor.—MARE *v.* CHARLES (1856), 5 E. & B. 978; 25 L. J. Q. B. 119; 26 L. T. O. S. 238; 2 Jur. N. S. 234; 4 W. R. 267.

Annotations:—**Apprvd.** Broom *v.* Batchelor (1856), 1 H. & N. 255. **Apld.** Penrose *v.* Martyr (1858), E. B. & E. 499. **Distd.** Richardson *v.* Williamson (1871), 40 L. J. Q. B.

PART X. SECT. 1, SUB-SECT. 3.—A. (b).

2646 i. *Agent accepting bill—"For" distinguished from "per pro."*]—An acceptance in the words "for R., T. P." is to be governed by the general rule of law applicable to principal & agent, & is not equivalent, according to the law merchant, to the form "*per pro.* R., T. P." The former expression does not, like the latter, import a special & limited authority to do a specific act, nor does it put the drawer of a bill accepted in that form upon discovery whether the agent has exceeded his authority.—O'REILLY *v.* RICHARDSON (1865), 17 I. C. L. R. 74.—**IR.**

c. *Agent drawing bill — "Agents."*]—M. & Brothers, acting as agents for L. T. & P., purchased coal, without stating to the vendor that they were acting as agents, & upon receipt of the coal sent in payment a draft drawn by them, & accepted by their principals, to which they signed their own names as drawers, adding the word "Agts.":—*Held:* they were personally liable as drawers.—REID *v.* MCCHESNEY (1858), 8 C. P. 50.—**CAN.**

d. —— *"Commissioner."*]—Deft., as comr. of a railway co., drew a bill of exchange on the co. to pay for work done on the railway, & signed it "R., comr." The payee knew for what purpose the bill was drawn, & that deft. was agent of the co. In an action by an indorsee:—*Held:* deft. personally liable.—PEELE *v.* ROBINSON (1860), 4 All. 561.—**CAN.**

e. *Factor accepting bill—"For behoof of" named principal.*]—C.'s factor accepted a bill "for behoof of C. for value received in meal":—*Held:* the factor was personally liable to summary diligence at the drawer's instance.—WEBSTER *v.* M'CALMAN (1848), 20 J. 417.—**SCOT.**

f. *President accepting bill—"President"—Bill drawn on "president" of railway company & not on company.*]—The charter of a railway co. gave power to the co. to become parties to bills, & enacted that any bill accepted by the president with the counter-signature of the secretary should be binding on the co., that the seal should be unnecessary, & the president, etc., so accepting any bill should not be personally liable. A bill addressed "To the president, Midland Railway" was accepted "For Midland Railway of Canada accepted R., Secretary; C., President":—*Held:* C., the president, was personally liable, the bill not being drawn upon the co.—MADDEN *v.* COX (1879), 44 U. C. R. 542; *affd.* 5 A. R. 473.—**CAN.**

g. *Secretary accepting bill — Company "per" secretary.*]—A bill of exchange addressed to "G., Secretary, Richardson Gold Mining Co., Belleville, Ontario," was accepted thus: "Richardson Gold Mining Co. *per* G., Secretary":—*Held:* it was not the acceptance of deft., & he was not personally liable.—ROBERTSON *v.* GLASS (1869), 20 C. P. 250.—**CAN.**

h. *Treasurer accepting bill—As "treasurer"—Bill drawn on "treasurer" company.*]—A. co. being indebted to H., deft., the co.'s treasurer, filled in one of the printed forms of bills used by him as such treasurer for the co.'s acceptances, the bill being stated to be drawn on deft. as, "T., Tr. C. S. Ry. Co., St. Thomas," & it was accepted by him as "T., Tr." The bill was received by H. as the co.'s acceptance, & he afterwards indorsed it for value to pltfs., who also took it believing it to be the co.'s acceptance:—*Held:* deft. was personally liable as acceptor, the bill being drawn on & accepted by him personally, & not by or for the co.—LAING *v.* TAYLOR (1876), 26 C. P. 416.—**CAN.**

k. —— *As "treasurer" company.*]—Deft. accepted a bill drawn upon him as treasurer of the Wolf Island Ry. & Canal Co., thus—"Accepted. G., Treas. W. I. R. & C. Co.," adding the co.'s seal:—*Held:* he was personally liable.—FOSTER *v.* GEDDES (1856), 14 U. C. R. 239.—**CAN.**

145. **Follď.** Herald *v.* Connah (1876), 34 L. T. 885. **Distd.** Atkins *v.* Wardle (1889), 58 L. J. Q. B. 377.

2650. Executors accepting bill—"As executors of" testator.]—Exors. carried on their testator's trade in that character, & in the ordinary course of the business accepted a bill of exchange, describing themselves in it simply as exors. of their testator: —*Held:* neither the above circumstances, nor the form of the acceptance, relieved the estate of one of the exors., who died in the lifetime of the other, from the ordinary equitable liability upon the bill.—LIVERPOOL BOROUGH BANK *v.* WALKER (1859), 4 De G. & J. 24; 45 E. R. 10.

For full anns., *see* BILLS OF EXCHANGE, PROMISSORY NOTES & NEGOTIABLE INSTRUMENTS.

2651. Managers accepting bill—"As joint managers of" association.]—A bill of exchange directed to defts. as follows: "To J. & S., joint managers of the R. Insurance Assocn.," was accepted by defts. thus: "Accepted, J., S., as joint managers of the R. Assocn." In an action by an indorsee against defts. as acceptors of such bill:—*Held:* (1) defts. were personally liable on the above acceptance; (2) the introduction of the word "as" in the acceptance, before "joint managers," made no difference with respect to such liability.—JONES *v.* JACKSON (1870), 22 L. T. 828.

(c) Where Agent signs Principal's Name.

2652. Agent drawing bill.]—A., B., & C. carried on business as partners under the name of B. & Son; A. & B. died, & C. employed deft., who had previously acted as clerk to the firm, to wind up affairs. In this character deft. attended the warehouse, & transacted business with different persons on account of the firm. In these circumstances deft., using & signing the name of the firm, drew upon H., a debtor to the firm, a bill of exchange, which H. accepted. In an action upon the bill:—*Held:* deft. was not liable as the drawer, his name not being affixed to it, without some proof that he had no authority to draw bills in the name of the firm, or that he had not acted *bonâ fide*. *Qu.:* whether, if it had been proved he had no such authority, he would have been liable in an action upon the bill.—WILSON *v.* BARTHROPE (1837), 2 M. & W. 863; Murp. & H. 81; 6 L. J. Ex. 251; 1 Jur. 949; 150 E. R. 1008.

Annotation:—**Expld.** Jenkins *v.* Hutchinson (1849), 13 Q. B. 744.

B. Promissory Notes.

(a) Where Agent signs without Qualification.

2653. Note made—"As secretary & by order of the committee of" society.]—Deft. signed a promissory note in the following terms: "I promise to pay, as secretary, & by order of the committee of the K. Society, to M. or order, the sum of £200 for value received":—*Held:* deft. personally liable on the note.—RICHARDS *v.* RUEGG (1856), 27 L. T. O. S. 184.

2654. —— By "two of the directors of" company "by & on behalf of" company—Note sealed with company's seal.]—A promissory note in the following terms, "Three months after date we, two of the directors of the O. Co., by & on behalf of the co. do hereby promise to pay to M. or order the sum of £67, value received," was signed by two directors of a registered joint-stock co. & sealed with the co.'s seal, but not countersigned by the secretary of the co.:—*Held:* the promissory note was binding on the co. & not on the directors who signed it.

Even if the note had been void against the co., it would not have been good against defts. (POLLOCK, C.B.).—AGGS *v.* NICHOLSON (1856), 1 H. & N. 165; 25 L. J. Ex. 348; 28 L. T. O. S. 66; 4 W. R. 776; 156 E. R. 1161.

Annotations:—**Distd.** Price *v.* Taylor (1860), 5 H. & N. 540. **Apld.** Alexander *v.* Sizer (1869), L. R. 4 Exch. 102. **Distd.** Dutton *v.* Marsh (1871), 19 W. R. 754. **Apld.** Herald *v.* Connah (1876), 34 L. T. 885. **Refd.** Lindus *v.* Melrose (1858), 27 L. J. Ex. 326, Ex. Ch.; Kelner *v.* Baxter (1866), 36 L. J. C. P. 94.

2655. —— "In account of" company.]—A promissory note was made in the following form: "three months after date we jointly promise to pay F. S. or order £600 for value received in stock in account of the L. Co., Ltd." It was signed by three directors of the co., a joint-stock co. incorporated with limited liability, & countersigned by the secretary of the co.:—*Held:* the directors who signed it were not personally liable on the note.—LINDUS *v.* MELROSE (1858), 3 H. & N. 177; 27 L. J. Ex. 326; 31 L. T. O. S. 36; 4 Jur. N. S. 488; 6 W. R. 441, Ex. Ch.

Annotations:—**Distd.** Bottomley *v.* Fisher (1862), 1 H. & C. 211. **Apld.** Alexander *v.* Sizer (1869), 38 L. J. Ex. 59; Dutton *v.* Marsh (1871), L. R. 6 Q. B. 361. **Distd.** Richardson *v.* Williamson (1871), 40 L. J. Q. B. 145; Chapman *v.* Smethurst, [1909] 1 K. B. 927, C. A. **Mentd.** Penrose *v.* Martyn (1858), 28 L. J. Q. B. 28; Kelner *v.* Baxter (1866), 36 L. J. C. P. 94.

2656. —— "As directors of" company—Countersigned by manager.]—A promissory note signed by defts., who described themselves on the note as directors of the F. Co., Ltd., & countersigned by the manager, was in these words: "three months after date we promise to pay the E. Bank, or order, the sum of £1,000, value received":—*Held:* (1) the note pledged the personal liability of the makers; (2) an equitable plea, alleging the form of the note to have been a mistake, & the intention to have been to make the co. only responsible, was not proved if payee maintained that he always intended to secure the makers' personal liability.—COURTAULD *v.* SAUNDERS (SANDERS) (1867), 16 L. T. 562; 15 W. R. 906.

2657. —— By "members of the executive committee on behalf of" industrial & provident society.]—Defts., members of an unregistered society enrolled & certified under Industrial & Provident Societies Act, 1851 (c. 31), gave a promissory note in the following form for a debt of the society: "twelve months after date we, the undersigned, being members of the executive committee, on behalf of the L. & S. W. Ry. Co-operative Society, do jointly promise to pay," etc.:—*Held:* they were personally liable.—GRAY *v.* RAPER (1866), L. R. 1 C. P. 694; Har. & Ruth. 794; 14 W. R. 780.

Annotations:—**Follď.** Courtauld *v.* Saunders (1867), 16 L. T. 562. **Mentd.** *Re* International Patent Pulp & Paper Co. (1876), 24 W. R. 535; R. *v.* London, *Ex p.* Boaler, [1893] 2 Q. B. 146.

(b) Where Agent qualifies his Signature.

2658. "Churchwardens & overseer"—Described in note—Without qualification.]—A parish vestry

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PART X. SECT. 1, SUB-SECT. 3.—B. (b).

l. *"President, secretary"—Described in note—Without qualification—Seal of company affixed to note.*] Upon a note signed "C., Pres't Gr. Trunk Telegraph Co.; W., Secretary Grand Trunk Telegraph Co." with the seal of the co. affixed:—*Held:* the makers were not personally liable.—CITY BANK *v.* CHENEY (1858), 15 U. C. R. 400.—**CAN.**

m. *"Secretary"—Described in note—Without qualification.*]—C., secretary of an insurance co., gave a note in the following terms: "£1000 currency—sixty days after date I promise to pay to the order of W. £1000 value received by O. M. & F. Insurance Co. payable at G. Bank in H." Signed "H. G., Secretary O. F. Co.":—*Held:* he was personally liable.—ARMOUR *v.* GATES (1859), 8 C. P. 548.—**CAN.**

n. *"Assignee" following firm name & own name—Described in note—Without qualification.*]—A. & B., who carried on business in partnership under the name of M. & Co., made an assignment to deft. L. A trust deed was afterwards executed under which L. had to carry on the business & had no authority to make promissory notes or accept bills of exchange on behalf of M. & Co. No payment was to be made on behalf of

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resolved to borrow money from N., who advanced it, & took promissory notes for the amount made by P., W., & F., churchwardens & overseer, who added to their signatures the titles of their respective offices. Interest was paid on the notes from the parochial funds, & the accounts containing the item were allowed by the vestry; & W., with other parishioners, signed the allowance in one instance. P., W., & F. resided constantly in the parish. In an action brought on the notes against P., W., & F., the jury found for pltf., & the ct. sustained the verdict.—REW *v.* PETTET (1834), 1 Ad. & El. 196; 110 E. R. 1181.

Annotations:—**Refd.** Furnival *v.* Coombs (1843), 6 Scott, N. R. 522; Jones *v.* Hughes & Evans (1850), 5 Exch. 104. **Mentd.** Dowling *v.* Ford (1843), 12 L. J. Ex. 342.

2659. "As directors"—Described in note—As promising "jointly & severally" to pay "on behalf of" association.]—Defts., directors of a joint-stock co., gave pltf. the following promissory note, in part payment of a debt of the co.: "We jointly & severally promise to pay H. or order the sum of £250 on behalf of the W. Assocn." The note was signed by defts. "as directors":—*Held:* (1) the words "jointly & severally" were equivalent to "jointly & personally"; (2) defts. were personally liable to pltf. on the note.—HEALEY (HEELEY) *v.* STORY (1848), 3 Exch. 3; 18 L. J. Ex. 8; 12 L. T. O. S. 131; 154 E. R. 731.

Annotations:—**Consd. & Distd.** Maclae *v.* Sutherland (1854), 3 E. & B. 1. **Expld. & Distd.** Lindus *v.* Melrose (1857), 5 W. R. 758. **Consd.** Alexander *v.* Sizer (1869), L. R. 4 Exch. 102. **Apld.** Allan *v.* Miller (1870), 22 L. T. 825. **Distd.** Dutton *v.* Marsh (1871), 19 W. R. 754. **Refd.** Gray *v.* Raper (1866), Har. & Ruth. 794.

2660. "Directors"—Described in note—As "the directors of" company, "for ourselves & the other shareholders of this company."]—Deft., a director & shareholder in a joint-stock co., together with three others, made the following promissory note:—"We, the directors of the Royal Bank of Australia, for ourselves & the other shareholders of this co. jointly & severally promise to W. or bearer, on etc., the sum of etc., for value received on account of the co. Signed A. B., C. D., E. F., directors." Deft. having been sued thereon in his individual character:—*Held:* he was personally liable.—PENKIVIL *v.* CONNELL (1850), 5 Exch. 381; 1 L. M. & P. 398; 19 L. J. Ex. 305; 15 L. T. O. S. 207; 155 E. R. 166.

Annotations:—**Apprvd.** Maclae *v.* Sutherland (1854), 3 E. & B. 1. **Refd.** Lindus *v.* Melrose (1858), 27 L. J. Ex. 326, Ex. Ch.

2661. "Trustees; secretary"—Described in note—Without qualification—Note headed with building society's name.]—A promissory note was made in the following form: "M. Building Society.—We promise to pay to P. £100 with interest, etc., for value received.—H. & T., trustees; F., secretary":—*Held:* the parties who signed the note were personally liable upon it.—PRICE *v.* TAYLOR & FISHER (1860), 5 H. & N. 540; 29 L. J. Ex. 331; 2 L. T. 221; 6 Jur. N. S. 402; 8 W. R. 419.

Annotations:—**Foll.** Bottomley *v.* Fisher (1862), 1 H. & C. 211; Allan *v.* Miller (1870), 22 L. T. 825. **Refd.** Courtauld *v.* Saunders (1863), 16 L. T. 562; Dutton *v.* Marsh (1871), 24 L. T. 470.

2662. ——— As acting "for" building society.]—The trustees of a building society signed a promissory note in the following terms: "We promise to pay A. £200 for the S. Building Society.—B. C. D., trustees; E., secretary":—*Held:* the trustees were personally liable.—ALLAN *v.* MILLER (1870), 22 L. T. 825.

Annotation:—**Consd.** Jones *v.* Jackson (1870), 22 L. T. 828.

2663. "Directors; secretary"—Described in note—Without qualification—Note headed with building society's name.]—Deft., secretary of a benefit building society, signed a promissory note in the following form: "M. Building Society, No. 3. Birmingham, Sept. 1, 1856. One month after demand we jointly & severally promise to pay J. B. the sum of £120, with interest thereon at the rate of £6 per cent. per annum (payable half-yearly), for value received.—W. H., S. B., directors; W. F., secretary":—*Held:* deft. personally liable on the note.—BOTTOMLEY *v.* FISHER (1862), 1 H. & C. 211; 31 L. J. Ex. 417; 6 L. T. 688; 27 J. P. 23; 8 Jur. N. S. 895; 10 W. R. 669.

Annotation:—**Refd.** Dutton *v.* Marsh (1871), L. R. 6 Q. B. 361.

2664. "For" company, "secretary"—Described in note—Without qualification.]—Deft. was secretary to a ry. co. not empowered by its Act to give bills & notes, &, the co. being in want of funds to complete its line, a sum of money was borrowed of pltfs., to whom the following promissory note, signed by deft., was given: "On demand I promise to pay to A. & Co. the sum of £1,500 with interest thereon until paid. Value received for the M., T., & W. Ry. Co.—S., secretary":—*Held:* (1) it appeared on the face of the note itself that it was signed by deft. as agent for & on behalf of the co.; (2) he was not personally liable thereon to pltfs.—ALEXANDER *v.* SIZER (1869), L. R. 4 Exch. 102; 38 L. J. Ex. 59; 20 L. T. 38.

Annotation:—**Distd.** Chapman *v.* Smethurst, [1909] 1 K. B. 73.

2665. "As chairman"—Described in note—"As directors"—Note sealed with company's seal.]—M. & others, directors of a joint-stock co., borrowed for purposes of the co. the sum of £1,600 from D. The instrument which they signed & gave as security was a promissory note, in which they described themselves, in the body of the instrument, as directors, & by the signature of M. as chairman, but did not express themselves as signing on behalf of the co. They, however, affixed thereto the corporate seal of the co., although that was not requisite to the validity of the note as a security for money borrowed for purposes of the co. The co. having become insolvent, D. sued M. & the other directors who signed the promissory note for the amount thereof on their personal liability:—*Held:* their description as directors & chairman in the body of & subscription to the note, & the presence of the corporate seal on the instrument, did not furnish sufficient evidence necessarily to exclude the inference that defts. borrowed the money & signed the note on their personal responsibility.—DUTTON *v.* MARSH (1871), L. R. 6 Q. B. 361; 40 L. J. Q. B. 175; 24 L. T. 470; 19 W. R. 754.

Annotations:—**Distd.** Atkins *v.* Wardle (1889), 58 L. J. Q. B. 377. **Consd.** Chapman *v.* Smethurst, [1909] 1 K. B. 73, 927, C. A. **Foll.** Landes *v.* Marcus & Davids (1909), 25 T. L. R. 478. **Refd.** Avery *v.* Charlesworth (1913), 30 T. L. R. 215.

2666. "Managing director" following names of company & director—Described in note—Without

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M. & Co. except through him. Pltfs., after L. became trustee, supplied goods to him for which a certain sum was due to them. L. wanted pltfs. to draw on M. & Co., which they refused to do, insisting that L. was the only person by whom a draft could be accepted. Afterwards L. gave them six promissory notes & signed them in the name of "M. & Co., Lortimer, assignee." Some of the bills remaining unpaid, pltfs. sued on them:—*Held:* the mere addition to his signature of words describing him as an agent, or as filling a representative character, did not exempt him from personal liability. In determining whether a signature on a bill is that of the principal, or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument shall be adopted, & L. was carrying on the business as a trustee, & while so carrying it on became personally liable to the creditors, & therefore became liable to pltfs. on the notes sued upon.—BOYD *v.* LORTIMER (1899), 30 O. R. 290.—CAN.

qualification—Qualification to signature stamped.] —A sum of £300 was borrowed for purposes of a co. & a promissory note given to the lender in the following form: "I promise to pay to C. the sum of £300 for value received." The signature was as follows: "J. H. S.'s Laundry & Dye Works, Ltd.—J. H. S., managing director," which was impressed by a rubber stamp belonging to the co., except the words "J. H. S.," which were written by the managing director. The co. had power to borrow money on promissory notes, & the managing director had authority to make notes on behalf of or in name of the co.:—*Held:* (1) the note was the note of the co.; (2) the managing director was not personally liable.—CHAPMAN *v.* SMETHURST, [1909] 1 K. B. 927; 78 L. J. K. B. 654; 100 L. T. 465; 25 T. L. R. 383; 53 Sol. Jo. 340; 14 Com. Cas. 94; 16 Mans. 171, C. A.

C. Cheques.

2667. Drawn by directors—In favour of one of themselves—Not described as directors or as acting for company.]—A., B., & C., three directors of a ry. co., in fraud of the co. drew a cheque upon the co.'s bankers in favour of one of their body. This cheque, though bearing the stamp usually impressed upon documents issued by the co. & countersigned by the secretary, did not upon the face of it purport to be drawn on behalf of the co., nor did the drawers describe themselves therein as directors:—*Held:* the co. not liable for the amount to a *bonâ fide* holder for value.—SERRELL *v.* DERBYSHIRE, STAFFORDSHIRE & WORCESTER JUNCTION RY. CO. (1850), 9 C. B. 811; 19 L. J. C. P. 371; 15 L. T. O. S. 254; 137 E. R. 1110.

For full anns., *see* COMPANIES.

2668. —— On behalf of company—Request to honour cheque.]—Directors of a co. are not personally liable to find cash for cheques drawn by them as officers of the co. upon the co.'s bank, & which the bank may choose to honour when the co. has no funds at the bank. A letter written by such directors, at a time when the co. has funds at the bank, requesting the bankers to honour cheques of the co. drawn in a particular manner, is only an intimation not to treat cheques as cheques of the co., unless signed in that manner; it is not any representation either of any authority in the directors to overdraw the account or that there will be funds forthcoming to answer the cheques, & it does not imply any undertaking on the part of any director signing it that he will personally pay or be answerable for any cheques, though drawn in that particular manner, if they should not be paid by the co. As neither the directors who signed such letter nor those who, by cheques drawn in conformity therewith, subsequently overdraw the account incur any personal liability, so neither do such directors as at subsequent meetings confirm the letter, or acquiesce in the cheques drawn in conformity with it.—BEATTIE *v.* EBURY (LORD) (1874), L. R. 7 H. L. 102; 44 L. J. Ch. 20; 30 L. T. 581; 38 J. P. 564; 22 W. R. 897, H. L.

Annotations:—**Apld.** M'Collin *v.* Gilpin (1880), 5 Q. B. D. 390. **Distd.** Yorkshire Ry. Waggon Co. *v.* Maclure & Cornwall Minerals Ry. Co. (1881), 45 L. T. 747; West London Commercial Bank *v.* Kitson (1884), 13 Q. B. D. 360, C. A. **Mentd.** Weeks *v.* Propert (1873), L. R. 8 C. P. 427; Halbot *v.* Lens, [1901] 1 Ch. 344.

2669. —— Cheque form headed with company's name—Not signed by secretary.]—A cheque drawn in favour of pltf. was stamped near the top with the words "B. M. & Co., Ltd.," & was signed by two defts. as follows: "B. M., director, S. H. D., director. —— secretary," the space for the signature of the secretary being left blank. The name of the co., did not appear anywhere except at the top of the cheque:—*Held:* defts. personally liable on the cheque.—LANDES *v.* MARCUS & DAVIDS (1909), 25 T. L. R. 478.

D. Statutory Requirements in Case of Companies.

See, now, Companies (Consolidation) Act, 1908 (c. 69), ss. 63 (3), 77.

2670. Liability where statute not complied with.] —P. directed a bill to a co. of limited liability by the name of the S. W. Steam Packet Co., its full name being the S. W. Steam Packet Co., Ltd. M., secretary to the co., wrote across it "Accepted, payable at Messrs. B. & Co.—M., secretary to the co." The bill was not honoured:—*Held:* M. was personally liable to P. under Joint Stock Companies Act, 1856 (c. 47), s. 31.—PENROSE *v.* MARTYR (1858), E. B. & E. 499; 28 L. J. Q. B. 28; 5 Jur. N. S. 362; 6 W. R. 603; 120 E. R. 595.

Annotations:—**Consd.** Atkins *v.* Wardle (1889), 58 L. J. Q. B. 377; Stacey *v.* Wallis (1912), 106 L. T. 544.

2671. Substantial compliance with statute.]—Where a bill, drawn upon a co. by its corporate name & sealed with its seal, having the name of the co. circumscribed, was accepted by two persons styling themselves directors of the co. appointed to accept that bill, & the acceptance was countersigned by the co.'s secretary:—*Held:* such acceptance was sufficiently expressed within 7 & 8 Vict. c. 110, s. 45.—HALFORD *v.* CAMERON'S COALBROOK STEAM COAL & SWANSEA & LOUGHOR RY. CO. (1851), 16 Q. B. 442; 20 L. J. Q. B. 160; 17 L. T. O. S. 25; 15 Jur. 335; 117 E. R. 948.

2672. ——.]—The directors of a joint-stock bank whose proper name was "The Union Bank of Calcutta," issued instruments in the following form: "We promise to pay on account of the proprietors of the Union Bank of Calcutta, to the order of C. I. & Co., the sum of 10,000 rupees. Value received. (Signed) J. R., W. G., directors." The directors had power to bind the shareholders by issuing instruments of that description:—*Held:* (1) they were in a form which bound the shareholders; (2) they were substantially made in the name of the partnership firm.—FORBES *v.* MARSHALL (1855), 11 Exch. 166; 24 L. J. Ex. 305; 25 L. T. O. S. 147; 3 C. L. R. 933; 156 E. R. 788.

Annotation:—**Apld.** Gordon *v.* Sea, Fire & Life Assce. Soc. (1857), 26 L. J. Ex. 202.

2673. ——.]—A bill directed to a co. was accepted thus: "Accepted payable at, etc.—C. & M., directors of" the co., such acceptance being countersigned by the secretary. The directors were in fact authorised to accept bills. In an action against C. & M. personally:—*Held:* the acceptance complied with the requirements of Cos. Act, 1862 (c. 89), s. 47, & bound the co.—OKELL *v.* CHARLES (1876), 34 L. T. 822, C. A.

Annotation:—**Refd.** Chapman *v.* Smethurst (1909), 78 L. J. K. B. 654, C. A.

2674. Name of company incorrectly stated.]—A co. was registered by the title of "The South Shields Salt Water Baths Co., Ltd." Pltfs. drew the following bill of exchange: "Six months after date pay to our order the sum of £125 for value received. —Salt Water Baths Co., Ltd., South Shields," which was accepted as follows: "Accepted payable H., B. & Co.'s Bank, South Shields.—J. P. W., chairman, T. S. B. & J. S. B., directors, South Shields Salt Water Baths Co." An action having been brought upon the bill by pltfs. against the chairman & directors:—*Held:* (1) the two variations from the proper designation of the co. were sufficient to bring defts. within Cos. Act, 1862 (c. 89), s. 42, the intention of which was to insure extreme strictness in regard to the use of the registered name of the co., not only in enforcing the use of the word "Limited," but in all other respects; (2) pltfs. were entitled to judgment.—ATKINS

Sect. 1.—*In regard to contracts: Sub-sect.* 3, *D.; sub-sect.* 4, *A. & B.* (*a*).]

(ATKIN) & Co. *v.* WARDLE (1889), 58 L. J. Q. B. 377; 61 L. T. 23; *affd.* 5 T. L. R. 734, C. A.

Annotation:—**Distd.** Stacey *v.* Wallis (1912), 106 L. T. 544.

2675. ——.]—Defts., two directors & the secretary of a co., the registered name of which was the B. Syndicate, Ltd., accepted a bill of exchange on behalf of the co., giving the name of the co. as "The O. P. & B. Syndicate, Ltd.":—*Held:* the name of the co. was not "mentioned" in the acceptance in accordance with Cos. Act, 1862 (c. 89), s. 41, & the co. not having paid the bill, defts. were under s. 42 personally liable thereon.—NASSAU STEAM PRESS *v.* TYLER (1894), 70 L. T. 376; 38 Sol. Jo. 363; 1 Mans. 459; 10 R. 582.

Annotations:—**Distd.** Dermatine Co. *v.* Ashworth (1905), 21 T. L. R. 519; Stacey *v.* Wallis (1912), 106 L. T. 544.

2676. "Limited" omitted from name of company.]—A bill of exchange, drawn upon a limited co. in the proper name, was accepted for the co. by two directors, but the word "limited" was omitted by accident from the acceptance. On the bill being dishonoured by the co.:—*Held:* the name of the co. was sufficiently mentioned in the bill within Cos. Act, 1862 (c. 89), ss. 41, 42; (2) the directors were not personally liable.—DERMATINE CO., LTD. *v.* ASHWORTH (1905), 21 T. L. R. 510.

Annotation:—**Distd.** Stacey *v.* Wallis (1912), 106 L. T. 544.

2677. "Ltd." for "Limited"—Company name not mentioned in acceptance.]—The provision in Cos. (Consolidation) Act, 1908 (c. 69), s. 63, that every limited co. shall have its name mentioned in all bills of exchange purporting to be signed by or on behalf of the co., is sufficiently complied with if the name of the co. upon whom a bill is drawn is correctly stated in the address without being also mentioned in the acceptance; & the name is sufficiently "mentioned" within the above sect., although the abbreviation "Ltd." is written after the name of the co. instead of the word "Limited."

Where a bill was drawn upon & addressed to a limited co., with the abbreviation "Ltd." after the name of the co., & accepted by "J. W., T. H. W. & H. B., secretary," J. W. & T. H. W. being directors of the co., but the name of the co. not being mentioned in the acceptance:—*Held:* the name of the co. was "mentioned" in the bill, & J. W., T. H. W., & H. B. were not personally liable on the bill.—STACEY & CO., LTD. *v.* WALLIS (1912), 106 L. T. 544; 28 T. L. R. 209.

2678. Equitable defence—Bill drawn by agent in own name on principals—Release of principals discharges agent.]—A banking co. made advances at request of M. & R. to C., agent of M. & R. in Australia, upon bills of exchange drawn by him upon M. & R. These bills were dishonoured by M. & R., who had entered into a deed of composition with their creditors, which was executed on behalf of the banking co. Dividends had been received under this deed by the banking co. An action having been brought in Australia against C. for the amount of their advances upon the bills, & damages for their non-acceptance:—*Held:* the action must be restrained, as the banking co. had been distinctly informed that the bills were drawn by C. as agent for M. & R., whom the co. had relieved by executing the deed & taking a dividend thereunder.—WALKER *v.* BROOKS (1856), 4 W. R. 347.

SUB-SECT. 4.—CONTRACTS ON BEHALF OF FOREIGN PRINCIPAL.

A. In General.

2679. Presumption that agent personally liable.]—Where a British agent is buying for a foreigner according to the universal understanding of all persons in trade, the credit is then considered to be given to the British buyer, & not to the foreigner (LORD TENTERDEN, C.J.).—THOMSON *v.* DAVENPORT, FYNNEY *v.* PONTIGNY, DAVENPORT *v.* THOMSON, NO. 2179, *ante*.

Annotations:—**Expld.** Schmalz *v.* Avery (1851), 20 L. J. Q. B. 228. **Distd.** Mahony *v.* Kekulé (1854), 14 C. B. 390. **Dbtd.** Gillett *v.* Offor (1856), 18 C. B. 905. **Apld.** Elbinger

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PART X. SECT. 1, SUB-SECT. 4.—A.

2679 i. *Presumption that agent personally liable.*]—In an action arising out of a commission to purchase hay:—*Held:* the factor or agent of a principal residing in a foreign country is alone personally responsible to third parties.—DIXON *v.* ETU (1884), 7 L. N. 213.—**CAN.**

2679 ii. ——.]—LEMIRE *v.* DIXON (1882), 11 R. L. 323.—**CAN.**

2679 iii. —— *Question of fact.*]—Whether an agent purporting to contract for a foreign principal is to be considered to have pledged his own credit or not is a question of fact depending on the intention of the contracting parties; in ascertaining his intention the character of the transaction & the subject-matter of the contract are material facts to be considered.—CHEONG *v.* LOHMANN (1907), V. L. R. 571.—**AUS.**

2679 iv. —— ——.]—Merchants in Leith, on behalf of C. & G., of Hamburg, sold to pursuers a cargo, & at the time of the transaction pursuers were aware that they acted as agents. The question being whether, there being a breach of the contract, the agents were personally liable:—*Held:* (1) in such circumstances, there was no rule of law in the matter, but merely a question for the jury; (2) where the principal was a foreigner, there might be a presumption in favour of the liability of the agent of a stronger kind than when he was not, but it was a presumption of fact, not of law, liable to be rebutted by other evidence in the case; (3) treating this case as a jury question, the agents were not liable.—MITCHELL, CADELL & CO. *v.* MILLAR (1860), 2 L. T. 60.—**SCOT.**

2679 v. —— *Presumption of law.*]—Although the personal liability of a factor is by law presumed when he acts for a foreign principal, yet he may always free himself from such liability by the contract itself, or destroy the legal presumption by the circumstances attending the transaction.—CRANE & NOLAN (1875), 19 L. C. J. 309.—**CAN.**

2679 vi. —— *Presumption of fact.*]—Where it is sought to make the agent of a foreign principal liable on a contract, there is no presumption of law, but the case must be determined by the particular facts. But in the absence of evidence to the contrary, it will be presumed, as a matter of fact, that credit was given to the agent.—MCGAVIN *v.* WILSON (1866), 1 Ind. Jur. N. S. 405.—**IND.**

2679 vii. —— *Question of intention.*]—Defts. instructed pltf. to make surveys for two foreigners, & showed him letters from them authorising him to get surveys made, but only on condition that payment should be made out of dividends to accrue to the foreigners on shares in a co. of which defts. was managing director. Pltf. did the work, & received from the secretary of the co. a payment on account, which, the secretary said, was charged to the two foreigners. Pltf. sued defts., as principal, for balance:—*Held:* defts. acted solely as agent & the fact that his principals were foreigners did not make him liable. The question is always one of intention, & defts. did not intend to bind himself. *Jenkins* v. *Hutchison*, 18 L. J. Q. B. 274, & *Lewis* v. *Nicholson*, 21 L. J. Q. B. 311, cited.—TAYLOR *v.* DAVENPORT (1910), 14 W. L. R. 257.—**CAN.**

2679 viii. —— *Limits of presumption.*]—Where a contract is made with the agent of a foreign principal the presumption that credit was given to the agent, & not to the principal, applies only to cases where the principal is undisclosed; it necessarily cannot apply where the agent expressly contracts as such.—GOLDSCHMIDT *v.* MACDONALD (1909), 9 S. R. (N. S. W.) 693.—**AUS.**

2679 ix. —— —— *Where principal described.*]—An agent is not liable on behalf of a disclosed foreign principal, except where he has acted without proper authority from the principal, or where he has expressly bound himself for the obligation of the principal.—FREEMANTLE *v.* MACKENZIE, S. A. L. R. (1915), C. P. D. 568.—S. **AF.**

2679 x. —— —— *Where liability expressly limited at time of contract.*]—An agent with power to raise money, whose principal resides abroad, is personally liable to an attorney retained by him to carry on suits for the principal, unless he limits his liability at the time.—JACK *v.* CLEWS (1848), 3 Kerr. 637.—**CAN.**

o. *Agent in fact sub-agent for foreign principal—Immediate principal disclosed but not foreign principal.*]—LEMIRE *v.* DIXON (1882), 11 R. L. 323.—**CAN.**

Act. *v.* Claye (1873), L. R. 8 Q. B. 313. **Consd.** Hough *v.* Suart (1890), 7 T. L. R. 134, C. A. **Refd.** Poirier *v.* Morris (1853), 2 E. & B. 89; Green *v.* Kopke (1856), 18 C. B. 549; Collen *v.* Wright (1857), 8 E. & B. 647; Miller, Gibb *v.* Smith & Tyrer, [1917] 2 K. B. 141, C. A.
For full anns., *see* S. C. No. 2179, *ante*.

2680. ——.]—By the usage of trade, credit is understood to be confined to the agent in the case of principals residing abroad.—PATERSON *v.* GANDASEQUI (1812), 15 East, 62; 104 E. R. 768.

Annotations:—**Distd.** Seymour *v.* Pychlau (1817), 1 B. & Ald. 14; Mahony *v.* Kekulé (1854), 2 C. L. R. 343; Pennell *v.* Alexander (1854), 23 L. J. Q. B. 171. **Consd.** Flinn, Malcolm *v.* Hoyle (1893), 63 L. J. Q. B. 1, C. A. **Refd.** Thomson *v.* Davenport (1829), 9 B. & C. 78; Green *v.* Kopke (1856), 18 C. B. 549; Risbourg *v.* Bruckner (1858), 27 L. J. C. P. 90. **Mentd.** Duclos *v.* Ryland (1821), 5 Moore, C. P. 518 n.; Robinson *v.* Gleadow (1835), 2 Bing. N. C. 156; Trueman *v.* Loder (1840), 4 Jur. 934; Higgins *v.* Senior (1841), 11 L. J. Ex. 199; Smyth *v.* Anderson (1849), 7 C. B. 21; Humfrey *v.* Dale (1857), 26 L. J. Q. B. 137; Bottomley *v.* Nuttall (1858), 5 C. B. N. S. 122; Reid & Glasgow *v.* Draper (1861), 4 L. T. 650; Wake *v.* Harrop (1861), 8 Jur. N. S. 845, Ex. Ch.; Calder *v.* Dobell (1871), L. R. 6 C. P. 486; Curtis *v.* Williamson (1874), L. R. 10 Q. B. 57.

2681. ——.]—Where a factor to one beyond the sea buys or sells goods for the person to whom he is factor, an action will lie against or for him in his own name, for the credit will be presumed to be given to him in the first case, & in the last the promise will be presumed to be made to him, & the rather so, as it is so much for the benefit of trade.—GONZALES *v.* SLADEN (1702), cited in Buller's Nisi Prius, 5th ed. p. 128.

Annotations:—**Consd.** Houghton *v.* Matthews (1803), 3 Bos. & P. 485. **Distd.** Mahony *v.* Kekulé (1854), 14 C. B. 390.

2682. ——.]—An agent in England for merchants in Russia who guarantees "the shipment shall be in conformity with revenue laws of Great Britain, so that no impediment shall arise upon importation thereof, or in default the consequence shall rest with the sellers," makes himself personally responsible to the buyer.—REDHEAD *v.* CATOR (1815), 1 Stark. 14.

2683. ——.]—*Semble*: an agent who sells goods for a foreign principal is responsible for a breach of contract by his principal in not delivering them.—PETERSON *v.* AYRE (1853), 13 C. B. 353; 138 E. R. 1235.

For full anns., *see* SALE OF GOODS.

2684. ——.]—Where an agent in England contracts on behalf of a foreign principal he is presumed to contract personally, unless a contrary intention plainly appears from evidence contained in the document itself or in the surrounding circumstances. If there is no such evidence, the presumption prevails that the agent has no authority to pledge the credit of the foreign principal in such way as to establish privity between such principal & the other party, & that he is personally liable on the contract.—HARPER & SONS *v.* KELLER, BRYANT & CO., LTD. (1915), 84 L. J. K. B. 1696; 113 L. T. 175; 31 T. L. R. 284; 13 Asp. M. L. C. 98; 20 Com. Cas. 291.

Annotations:—**Consd.** Mercer *v.* Wright, Graham (1917), 33 T. L. R. 343. **Apld.** Miller, Gibb *v.* Smith & Tyrer, [1917] 2 K. B. 141, C. A.

2685. ——.]—Where a written contract of sale is made by an agent on behalf of a foreign undisclosed principal, if the contract on its true construction plainly purports to create privity of contract between the foreign principal & the English buyer, the agent is not liable on the contract.—MERCER *v.* WRIGHT, GRAHAM & CO. (1917), 33 T. L. R. 343.

2686. Agent's right of stoppage in transitu.]—An agent who buys goods on commission for shipment to a principal abroad is to some extent in the position of a vendor, & has the vendor's right of stoppage *in transitu* (BLACKBURN, J.).—IRELAND *v.* LIVINGSTON (1872), L. R. 5 H. L. 395; 41 L. J. Q. B. 201; 27 L. T. 79; 1 Asp. M. L. C. 389, H. L.

Annotations:—**Consd. & Expld.** Jefferson *v.* Querner (1874), 30 L. T. 867. **Distd. & Extd.** Imperial Ottoman Bank *v.* Cowan (1874), 31 L. T. 336, Ex. Ch. **Expld.** *Ite* Tappenbeck, *Ex p.* Banner (1876), 24 W. R. 476, C. A. **Consd. & Distd.** Cassabogiou *v.* Gibb (1883), 11 Q. B. D. 797, C. A. **Expld. & Distd.** Lindsay, Gracie *v.* Barter (1885), 1 T. L. R. 568. **Consd.** Dufourcet *v.* Bishop (1886), 18 Q. B. D. 373. **Consd. & Expld.** Loring *v.* Davis (1886), 32 Ch. D. 625. **Expld. & Folld.** Swan *v.* Mellen (1892), 36 Sol. Jo. 668, C. A. **Consd. & Apld.** Furness, Withy *v.* White, [1894] 1 Q. B. 483, C. A. **Expld. & Folld.** Schofield *v.* Londesborough, [1896] A. C. 514, H. L. **Expld.** Dupont *v.* British South Africa Co. (1901), 18 T. L. R. 24. **Expld. & Extd.** Miles *v.* Haslehurst (1906), 23 T. L. R. 142. **Consd. & Expld.** Houlder *v.* Public Works Comr., Public Works Comr. *v.* Houlder, [1908] A. C. 276, P. C. **Expld. & Extd.** Kepitigalla Rubber Estates *v.* National Bank of India, [1909] 2 K. B. 1010. **Consd.** Landauer *v.* Craven & Speeding, [1912] 2 K. B. 94. **Consd. & Expld.** Karberg *v.* Blythe, Green, Jourdain, Schneider *v.* Burgett & Newsam (1915), 85 L. J. K. B. 665, C. A.; Weigall *v.* Runciman, [1915] W. N. 401. **Refd.** Bank of England *v.* Vagliano, [1891] A. C. 107, H. L.; Stroms Bruks Akt. *v.* Hutchinson, [1905] A. C. 515, H. L.; Biddell *v.* Clemens Horst, [1911] 1 K. B. 214; The Kronprinzessin Cecilie (1915), 32 T. L. R. 139; Groom *v.* Barber, [1915] 1 K. B. 316. **Mentd.** Macmillan *v.* London Joint Stock Bank, [1917] 2 K. B. 439, C. A.

B. Agent's Liability to be sued.

(*a*) *Where Agent signs without Qualification.*

2687. General rule—Letter from third party to principal not amounting to election.]—Pltfs. sent to deft., dealer in gelatine paper, over whose door was inscribed "Sole agent for K. & Co., of Vienna," a written order, addressed to him personally, for gelatine paper, to be delivered by monthly instalments. Deft. replied by letter: "I acknowledge with thanks receipt of your favour containing order for one hundred & fifty reams of gelatine, which I have forwarded to K. in Vienna, to be executed in monthly parcels of thirty reams each.—P." Some parcels of the ordered goods were sent by K. to England, invoiced to deft., & were by him delivered to pltfs. Delay occurred in sending the remainder, & pltfs., after pressing deft. to complete delivery, wrote at last to K.: "We gave your Mr. P. an order," etc. "We must fall back upon you in case of any claims, if the goods are not delivered." An action having been brought against deft. for breach of contract for non-completion of delivery, he denied his personal liability:—*Held*: (1) the order & acceptance formed a contract between pltfs. & deft. personally; (2) pltfs. had not by their subsequent letters to the manufacturers of the paper elected to treat them as principals.—DRAMBURG *v.* POLLITZER (1873), 28 L. T. 470; 21 W. R. 682.

2688. Agent described in contract—As acting "in behalf & representation of" named principal.]—The rule that a contract made in England by an agent on behalf of a foreign principal is to be considered the contract of the agent is not confined to the case of goods sold & to be delivered in England.

By an agreement made between deft., in behalf & representation of P., a foreign merchant at Havana, & pltf., who contracted to serve as stoker on board a steamship belonging to P., it was agreed that if pltf. was discharged before the vessel reached Havana, pltf. should be entitled to certain compensation, & after reaching Havana P. should be at liberty to confirm & continue the agreement for a longer period. Pltf. being discharged before the vessel reached Havana:—*Held*: (1) the agreement showed that, in the first instance, the intention was to give credit to deft.; (2) deft. was personally liable to pltf. for breach of the agreement.—WILSON *v.* ZULUETA (1849), 14 Q. B. 405; 19 L. J. Q. B. 49; 14 L. T. O. S. 251; 14 J. P. 23; 14 Jur. 366; 117 E. R. 159.

Annotations:—**Distd.** Mahony *v.* Kekulé (1854), 14 C. B.

Sect. 1.—In regard to contracts: Sub-sect. 4, B. (a) & (b), C. & D.]

390. **Expld.** Green *v.* Kopke (1856), 25 L. J. C. P. 297. **Refd.** Sharp *v.* Fields (1864), 10 L. T. 338.

2689. —— "As agents for" named principal.]—PAICE *v.* WALKER, No. 2545, *ante*.

For full anns., *see* S. C. No. 2545, *ante*.

2690. —— As acting "on account of" named principal.]—GADD *v.* HOUGHTON, No. 2546, *ante*.

For full anns., *see* S. C. No. 2546, *ante*.

2691. —— As acting "on behalf of" named principal.]—OGDEN *v.* HALL, No. 2538, *ante*.

2692. Contract stating goods sold "through the agency of" agent.]—GLOVER *v.* LANGFORD, No. 2555, *ante*.

For full anns., *see* S. C. No. 2555, *ante*.

(b) Where Agent qualifies his Signature.

2693. Agent signing—"As agent."]—HAHN *v.* NORTH GERMAN PITWOOD CO., No. 2569, *ante*.

2694. ——— Admissibility of usage.]—K., the London agent of R., a foreigner resident abroad, contracted expressly "as agent & on behalf of R.," by bought & sold notes, to sell to pltf. tar, to be shipped from a foreign port:—*Held:* K. was not liable on the contract. *Qu.:* whether evidence was admissible to show that by the usage of the Baltic trade an agent contracting in such circumstances was personally liable.—GREEN *v.* KOPKE, (1856), 18 C. B. 549; 25 L. J. C. P. 297; 27 L. T. O. S. 172; 2 Jur. N. S. 1049; 4 W. R. 598; 139 E. R. 1484.

Annotations:—**Distd.** Lindus *v.* Melrose (1858), 31 L. T. O. S. 36; Oglesby *v.* Yglesias (1858), E. B. & E. 930. **Apld.** Glover *v.* Langford (1892), 8 T. L. R. 628; Hahu *v.* North German Pitwood Co. (1892), 8 T. L. R. 557. **Refd.** Humfrey *v.* Dale (1858), 31 L. T. O. S. 328, Ex. Ch.; Deslandes *v.* Gregory (1860), 6 Jur. N. S. 483; Hutchinson *v.* Tatham (1873), 42 L. J. C. P. 260.

2695. —— "By authority of & as agents for" principal.]—By a charterparty purporting to be made in London, & to be entered into between pltf., owner of the ship *N.*, then at Genoa, & defts., of London, merchants, it was agreed the *N.* should proceed to Torrevieja & there load from the factors of defts. a full cargo of salt in bulk, cargo to be brought to & taken from alongside at defts.' risk & expense, which defts. thereby bound themselves to ship, etc., &, being so loaded, should therewith proceed to Memel, & deliver same, on being paid freight at a certain rate, etc.; & the charterparty, purported to be signed by defts. "by authority of, & as agents for, S., of Memel." On an action being brought against defts. on this charterparty:—*Held:* (1) defts. were personally liable, although they had signed the contract "by authority of, & as agents for," a foreign principal; (2) in determining the question whether defts. were personally liable, the whole of the charterparty must be looked at, & the intention of the contracting parties collected from the whole of the instrument.—LENNARD *v.* ROBINSON (1855), 5 E. & B. 125; 24 L. J. Q. B. 275; 1 Jur. N. S. 853; 3 C. L. R. 1303; 119 E. R. 428.

Annotations:—**Distd.** Oglesby *v.* Yglesias (1858), E. B. & E. 930; Deslandes *v.* Gregory (1860), 29 L. J. Q. B. 93. **Apld.** Wake *v.* Harrop (1861), 6 H. & N. 768. **Foll.** Paice *v.* Walker (1870), L. R. 5 Exch. 173. **Consd.** Miller, Gibb *v.* Smith & Tyrer, [1917] 2 K. B. 141, C. A. **Refd.** Reid *v.* Draper (1861), 30 L. J. Ex. 268; Williamson *v.* Barton (1862), 7 H. & N. 899; Gadd *v.* Houghton (1876), 33 L. T. 811; Southwell *v.* Bowditch (1876), 45 L. J. Q. B. 374; Mercer *v.* Wright, Graham (1917), 33 T. L. R. 343.

2696. —— "By authority of our principals as agents"—Admissibility of custom.]—MILLER, GIBB *v.* SMITH & TYRER, No. 2585, *ante*.

For full anns., *see* S. C. No. 2585, *ante*.

2697. —— "For" principal.]—V., a provision merchant in France, being in want of a person to act under him as preserver of provisions, applied to deft., a provision merchant in London, to recommend him a proper person. Pltf. being willing to go out, a written contract was prepared, which purported to be made between V. & pltf., by which pltf. agreed to serve for a stated time in France as preserver of provisions under V. on having a free passage out & 30*s.* a week as wages. This contract was signed in London by pltf., & was signed for V. by deft. thus, "For V., K." Pltf. sued deft. for his wages under the contract:—*Held:* deft. not personally liable.—MAHONY *v.* KEKULE (RUKULL) (1854), 14 C. B. 390; 23 L. J. C. P. 54; 22 L. T. O. S. 224; 18 Jur. 313; 2 W. R. 155; 2 C. L. R. 343; 139 E. R. 161.

Annotations:—**Foll.** Green *v.* Kopke (1856), 18 C. B. 549. **Apld.** Flinn *v.* Hoyle (1893), 63 L. J. Q. B. 1, C. A. **Refd.** Wake *v.* Harrop (1861), 6 H. & N. 768.

2698. —— —— Admissibility of parol evidence.] — On demurrer to a declaration on a charterparty, in the body of which deft. was described as being "agent of A. B. & Co." (foreign merchants), & which was signed by him "for" that firm, the question being whether deft. was personally liable upon the contract, deft. argued that, the contract being set out *in hæc verba* in the declaration, & no other agreement being alleged, pltf. had submitted the construction as a question of law to the ct., & could not adduce at the trial any other evidence of personal liability against deft.; whilst pltf. contended that the terms of contract were not conclusive to show deft. was not personally liable, & that upon the trial it would be competent to pltf. to establish by evidence that, though on the face of the contract he declared himself to be agent for A. B. & Co., the contract between him & pltf. was that he should be personally liable. The ct. suggested that the declaration might be amended so as clearly to let in such evidence at the trial, & gave leave to amend.—MORGAN *v.* GRAY (1857), 28 L. T. O. S. 269.

2699. —— "For" principal "as agents."]—DESLANDES *v.* GREGORY, No. 2566, *ante*.

For full anns., *see* S. C. No. 2566, *ante*.

2700. —— "On behalf of" company—Acceptance of bill of exchange.]—HERALD *v.* CONNAH, No. 2646, *ante*.

2701. Agent consignee — Named in bill of lading—Freight.]—Where cargo is deposited by a shipowner with a warehouseman under Merchant Shipping Act Amendment Act, 1862 (c. 63), subject to a stop for freight, a consignee depositing freight with the warehouseman, & taking delivery from him, is not personally liable for the freight. A consignee named in the bill of lading, but who has no property in the goods & takes delivery only as agent, cannot be sued for the freight.—WHITE & CO. *v.* FURNESS, WITHY & CO., LTD., [1895] A. C. 40; 64 L. J. Q. B. 161; 72 L. T. 157; 11 T. L. R. 129; 7 Asp. M. L. C. 574, H. L.; *revsg.* S. C. *sub nom.* FURNESS, WITHY & CO., LTD. *v.* WHITE, [1894] 1 Q. B. 483.

Annotations:—**Expld.** Euterpe S.S. Co. *v.* Bath (1897), 2 Com. Cas. 196. **Mentd.** Montgomery *v.* Foy, Morgan, [1895] 2 Q. B. 321, C. A.; McCheane *v.* Gyles (1902), 71 L. J. Ch. 446.

p. *Agent signing — "Agent for."*] — A contract for the sale of goods was contained in bought & sold notes, which were headed "order given through A. B. of Sydney for X. Y. of Berlin." The sold note was signed "A. B. agent for X. Y.":—*Held:* A. B. contracted as agent only, though in the bought note the goods were stated to have been "bought from A. B.," who was referred to as "the vendor."—GOLDSCHMIDT *v.* MACDONALD (1909), 9 S. R. (N. S. W.) 693.—AUS.

C. Principal's Liability to be sued.

2702. Principal undisclosed — Exclusive credit given to agent.]—There is a presumption that a foreign principal does not give the English commission merchant any authority to pledge his credit to those from whom the commission merchant buys on his account.

F. & Co. were merchants in London; deft. was a partner in the firm of B. & Co., carrying on business at Rangoon. Goods were supplied by pltf. to F. & Co., on their order given in consequence of an arrangement between the two firms, as disclosed in letters, that F. & Co. should "purchase" & send out goods on "the joint account" of the two firms, 2 per cent. to be charged on the invoice by the London firm, & 5 per cent. by the Rangoon firm, including guarantee. Pltf. had no knowledge of deft., or that the Rangoon firm were in any way interested in the transaction, until after the goods were supplied:—*Held:* deft. was not, as an undisclosed principal, a party to the contract under which the goods were supplied by pltf., for, on the true construction of the correspondence, the Rangoon firm did not give authority to the London firm to establish privity of contract & pledge their credit with the English suppliers of the goods.—HUTTON *v.* BULLOCK (1874), L. R. 9 Q. B. 572; 30 L. T. 648; 22 W. R. 956, Ex. Ch.

Annotations:—**Refd.** Maspons *v.* Mildred (1882), 47 L. T. 318, C. A.; Miller, Gibb *v.* Smith & Tyrer, [1917] 2 K. B. 411, C. A.

2703. Privity established between principal & third party.]—Defts., who carried on business in Australia, employed P. to buy goods for them in England. Defts.' name was placed up in P.'s office. The goods were ordered on forms bearing defts.' name, & invoices were made out to defts.:—*Held:* (1) P. was acting merely as buyer for defts.; (2) defts. were liable.—REYNOLDS & CO. *v.* PEAPES & SHAW (1889), 6 T. L. R. 49.

2704. ——.]—Defts., jute merchants at Calcutta, appointed L. & Co. their agents for the sale of jute in England at an agreed commission. L. & Co. afterwards entered into a contract in their own name for the sale of a quantity of jute to pltfs., & wrote to defts. informing them they had done so. Defts. wrote to pltfs. enclosing invoice of the goods & stating they had drawn upon them for the price. Pltfs. kept the invoice, accepted the draft, & obtained the bill of lading. The draft was duly taken up by pltfs. The goods arrived in a damaged condition. In an action by pltfs. against defts. for breach of contract:—*Held:* (1) the above circumstances excluded the application of the ordinary rule as to contracts between foreign & English principals, made through an agent in England; (2) privity was established between them; (3) the action was maintainable.—FLINN (MALCOLM) & CO. *v.* HOYLE (1893), 63 L. J. Q. B. 1, C. A.

Annotation:—**Expld.** Harper *v.* Keller, Bryant (1915), 84 L. J. K. B. 1696.

2705. Effect of third party taking agent's bill—Principal putting agent in funds to meet same.]—The right of the seller of goods to resort to an undisclosed foreign principal is barred by any circumstance which shows that the enforcement of that right would operate injustice.

A., as agent of B., a merchant residing abroad, bought goods of C. At the time of the purchase A. did not inform C. who was his principal; the invoices described the goods as "bought on account of B., per A." C. afterwards drew upon A. for the amount, at four & six months, but A. became insolvent before either of the bills arrived at maturity. B., after receiving advice of the purchase, & of the acceptance of the bills by A., made large remittances to A. on account of these & other goods; & A., at the time of his stoppage, was considerably indebted to B.:—*Held:* in these circumstances, it was not competent to C. to sue B. for the price of the goods; (2) the books of C. were not admissible for the purpose of showing that B. had been throughout debited by him as principal.—SMYTH (SMITH) *v.* ANDERSON (1849), 7 C. B. 21; 18 L. J. C. P. 109; 12 L. T. O. S. 450; 13 Jur. 211; 137 E. R. 9.

Annotations:—**Distd.** Mahony *v.* Kekulé (1854), 18 Jur. 313. **Expld. & Distd.** Heald *v.* Kenworthy (1855), 10 Exch. 739. **Apld.** MacClure *v.* Schemeil (1871), 20 W. R. 168. **Mentd.** Fish *v.* Kempton (1849), 13 L. T. O. S. 72; Yates *v.* Hoppe (1850), 14 Jur. 372; Schmalz *v.* Avery (1851), 20 L. J. Q. B. 228; Armstrong *v.* Stokes (1872), L. R. 7 Q. B. 598; Hutton *v.* Bullock (1873), L. R. 8 Q. B. 331; Irvine *v.* Watson (1880), 5 Q. B. D. 414, C. A.

D. Agent's Right to sue Third Party.

2706. For goods not duly delivered according to bill of lading—Agent shipping & paying freight.]—A person who ships goods in an English port, as agent of the owner of the goods resident abroad, & pays the freight for them, may maintain an action in his own name for not delivering them according

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PART X. SECT. 1, SUB-SECT. 4.—C.

2702 i. *Principal undisclosed — Presumption as to rights & liabilities.*]—A foreign principal is presumptively entitled to sue & be sued upon contracts made by his agent in Canada, although the name of the principal was not disclosed by the agent at the time of making the contract.—HARDY *v.* FAIRBANKS (1847), 2 N. S. R. 432.—**CAN.**

2702 ii. —— *No privity of contract.*]—A firm of grain merchants in Edinburgh were authorised by telegram in general terms from defender, who resided in B. C., to buy wheat. They accordingly contracted with pursuers in London as principals, though it was known that they were acting for a foreign principal. The written contract stipulated that for the purpose of proceedings, either legal or by arbn., the contract was to be deemed to have been made in England & to be performed there. Pursuers took a bill for the price, but on arrival of the cargo this was not met. Defender's name & address were then for the first time disclosed. Founding jurisdiction by arrestment, pursuers raised an action:—*Held:* (1) by agreeing that for all purposes the contract was to be treated as a contract made in England & to be performed there, the parties settled for themselves the *locus* of the contract; (2) independently of agreement it was an English contract; (3) by the law of England the order to purchase a cargo in the general terms there employed did not make the foreign principal a party to the English contract, & there was no privity of contract between pursuers & defender. *Hutton* v. *Bulloch* (1874), L. R. 9 Q. B. 572, cited.—GIRVIN, ROPER & CO. *v.* MONTEITH (1895), 3 S. L. T. 148.—**SCOT.**

2703 i. *Privity established between principal & third party—Facts not sufficient to establish privity.*]—A co. in N. Z. employed S., who went to London for the purpose, to sell goods for them there on commission, the co. drawing on S. through a bank, & the bills of lading being handed to S. by the London office of the bank on his taking up the drafts. Finding himself unable to meet the drafts, S. applied to applts., & they agreed to take up the drafts, receive the goods, & dispose of them in conjunction with S., sharing his commission with him, & charging him interest on the advances made. A consignment having been received by applts. in respect of which there was likely to be a deficiency of proceeds below the amount of the draft taken up by them, S. returned to N. Z., leaving it in their hands to dispose of. On arriving in N. Z. he informed the co. of the arrangement he had made with applts., &, there being some question as to whether applts. should hold the consignment for a better market, S. cabled them, at the co.'s request, to sell. They did so, & there was a deficiency. In the meantime S. had become bkpt:—*Held:* (1) the facts did not take the case out of the general rule applicable to the case of an agent of a foreign principal; (2) there was no privity of contract created between applts. & the co.; (3) applts. could not recover from the co., either on the ground of privity or as for money of applts. had & received by the co. *Reid* v. *Rigby*, [1894] 2 Q. B. 40, cited.—TRENGROUSE & CO. *v.* STEEDS, OFFICIAL ASSIGNEE (1896), 14 L. R. 636, C. A.—**N.Z.**

PART X. SECT. 1, SUB-SECT. 4.—D.

q. *On contract of hire — Replevin.*]—Deft. in writing acknowledged receipt from pltf., agent of a foreign co., of a sewing machine on hire, & agreed on non-fulfilment of certain conditions that pltf. or co. might resume possession, & deft. waived all right of action for trespass, damages, or replevin by reason of any action taken by pltf. or the co. in resuming possession:—*Held:*

Sect. 1.—*In regard to contracts: Sub-sect.* 4, *D. & E.; sub-sect.* 5.]

to the bill of lading.—JOSEPH *v.* KNOX (1813), 3 Camp. 320.

Annotation:—**Apld.** Dunlop *v.* Lambert (1839), Macl. & Rob. 663.

2707. On bill purchased but not paid for by other agents of same principal.]—A merchant in England, correspondent of a foreign house, is not, by mercantile usage, authorised on that ground only to pledge the credit of the foreign house for goods bought by him on their account in England.

A. & Co., American merchants, were indebted to B. & Co., of Paris, & C. & Co., of London, & being pressed for payment by B. & Co., remitted funds to C. & Co., who paid & overpaid them, with a direction to remit the balance to B. & Co. in Paris. In order to do so, C. & Co. bought in London, in the ordinary cause of business, a bill on Paris, drawn by D. & Co. to the order of C. & Co., to be remitted at once to Paris, but to be paid for by C. & Co. on the next foreign post-day. The bill was so remitted, but before the next foreign post-day C. & Co. failed, & thereupon D. & Co. refused to pay the bill. B. & Co. were afterwards paid by A. & Co. in full. In an action by B. & Co. on behalf of A. & Co. against D. & Co. on the bill:—*Held:* pltfs. entitled to recover; for if the action were to be considered personally theirs, they were holders for value of the bill; & if not theirs, but really the action of A. & Co., C. & Co. were only correspondents of A. & Co. to remit the bill, & not their agents to pledge their credit for the price of the bill.—POIRIER *v.* MORRIS (1853), 2 E. & B. 89; 22 L. J. Q. B. 313; 17 Jur. 1116; 1 W. R. 349; 1 C. L. R. 429; 118 E. R. 702.

For full anns., *see* BILLS OF EXCHANGE, PROMISSORY NOTES & NEGOTIABLE INSTRUMENTS.

2708. On contract "for & on behalf of" named principal—Signed without qualification.]—BRANDT *v.* MORRIS, No. 2542, *ante*.

E. Principal's Right to sue Third Party.

2709. Whether contract with principal or agent—Question for jury.]—Pltfs., a foreign co., entered into negotiations through S. & Co., London commission merchants, for the supply by C., deft., of certain ry. wheels & axles, & deft., in consequence, had an interview, on Jan. 29, at S. & Co.'s office, with S., one of the partners, & H., the managing director of pltf. co. Deft. signed in a diary of S. the following entry: "C. offers to supply one hundred & fifty sets of wheels & axles [describing them] at £31 per set, to be delivered free on board at Hull during Feb. & Mar. This offer to remain open until Feb. 3." On Feb. 3 S. & Co. telegraphed & wrote, "We confirm the order for one hundred & fifty sets of wheels & axles," repeating the terms of the offer. Some of the sets were delivered by deft., the invoices being made out to S. & Co., & they paid for them; but the delivery of most of the sets was after Mar., & pltfs. sued for a breach of the contract. At the trial it was objected that the contract was with S. & Co., & not with pltfs. The judge left it to the jury to say whether the contract was with S. & Co. or with pltfs. The jury found for deft.:—*Held:* the direction & verdict were right.—ELBINGER ACT. FÜR FABRIKATION VON EISENBAHN MATERIAL *v.* CLAYE (1873), L. R. 8 Q. B. 313; 42 L. J. Q. B. 151; 28 L. T. 405.

Annotations:—**Distd.** Maspons *v.* Mildred (1882), 9 Q. B. D. 530, C. A. **Apld.** Harper *v.* Keller, Bryant (1915), 84 L. J. K. B. 1696. **Consd.** Miller, Gibb *v.* Smith & Tyrer, [1917] 2 K. B. 141, C. A. **Mentd.** Hood *v.* Stallybrass, Balmer (1878), 3 App. Cas. 880, P. C.; Montgomerie *v.* United Kingdom Mutual S.S. Assocn., [1891] 1 Q. B. 370.

2710. Payment to agent in account no discharge.]—C., living in Canada, sent through X., a country stock broker in England, a power of attorney for sale of "£1,000 Goschens standing in the name of C." to defts., the London agents of X., with instructions to sell. Defts. sold the stock for £970, with which (less commission) they credited X. in his general account with them. The account between X. & defts. was ultimately balanced by subsequent entries, including two bills drawn by X. & accepted & paid by defts, but no payment expressly on account of the sale of consols. The fact of the sale of the stock was not discovered by C. for several months, when X. was insolvent, & no part of the proceeds of sale was received by C.:—*Held:* defts. were not relieved by the transactions between them & X., or by the fact that C. was a foreign principal from liability; & judgment must be given for the proceeds of the stock with interest at 4 per cent.—CROSSLEY *v.* MAGNIAC, [1893] 1 Ch. 594; 67 L. T. 798; 41 W. R. 598; 9 T. L. R. 126; 3 R. 202.

2711. Whether principal must sue in agent's name.]—Where a foreign principal orders goods of a broker in England, who buys them in his own name, though the vendor knows he is acting as agent, & the broker pays the vendor the purchase-money, which he afterwards receives from his principal, & it turns out that the goods were not in existence at the time of the contract, the principal cannot recover back the money paid from his agent, the broker, but must proceed against the vendor for it. *Qu.:* whether the action by the principal

pltf. under the agreement might maintain replevin in his own name for the machine, on non-fulfilment of the conditions.—COQUILLARD *v.* HUNTER, No. 2465 I., *ante*.—**CAN.**

r. On contract for disclosed principal—Contract by third party to pay agent damages.]—In a contract entered into by an agent for a foreign principal, who was disclosed, there was a clause by which the other contracting party bound himself to pay to the agent liquidated damages, in case of delay:—*Held:* the agent had a good title to sue for the damages.—LEVY & Co. *v.* THOMSONS (1883), 20 Sc. L. R. 753.—**SCOT.**

s. For goods sold — Invoices in principal's name.]—An action was brought against applt. for the balance of the price of books purchased by him from resp., acting as agent of a Paris book dealer. The subscription paper & the account rendered were both in the name of the principal:—*Held:* resp. was not a factor & had no right to sue in his own name.—DOUTRE *v.* DANSEREAU (1879), 3 L. N. 22.—**CAN.**

t. —— ——.]—The Montreal agent of a Paris firm sued to recover the price of books supplied by the firm through him. The agent had control of the goods, but delivered bills & invoices in the name of the principal:—*Held:* the action in the agent's name must be dismissed.—DANSEREAU *v.* KELLER (1880), 3 L. N. 240.—**CAN.**

PART X. SECT. 1, SUB-SECT. 4.—E.

u. Presumption as to undisclosed principal's right.]—The general rule is that an unnamed principal may declare himself & sue upon the contract made for him by his agent; no sound commercial principle will refuse redress against the seller to a foreign principal who purchases through an agent; nor is the agent presumptively the person to sue & be sued; so where the agent leaves his employer to seek out his own remedy no sound principle of law will exclude the latter from redress upon the ground only of his being a foreigner. — HARDY *v.* FAIRBANKS (1847), James, 432.—**CAN.**

2709 i. *Whether contract with principal or agent—Principal disclosed—Privity established between principal & third party.*]—WEBB *v.* SHARMAN (1874), 34 M. C. R. 410.—**CAN.**

2709 ii. —— *Presumption raised by usage—How rebutted.*]—In an action by a foreign principal on a contract by defts. in Scotland defts. pleaded "no title to sue," as the contract was entered into by them with commission merchants in London as principals; proof that pursuer had appointed commission merchants to be his agent:—*Held:* pursuer on disclosing himself as principal had title to sue.

Although there may be a general usage in the foreign trade which raises a presumption that a British commission merchant contracts as a principal, & not as an agent for a foreign trader, the presumption will give way to evidence that the agent is acting as agent for a foreign trader, & when this is so the law of principal & agent will apply.—BENNETT *v.* INVERESK PAPER Co. (1891), 28 Sc. L. R. 744.—**SCOT.**

against the vendor ought not to be brought in the name of the broker.—RISBOURG *v.* BRUCKNER (1858), 3 C. B. N. S. 812; 27 L. J. C. P. 90; 30 L. T. O. S. 258; 6 W. R. 215; 140 E. R. 962.

SUB-SECT. 5.—AGENT CONTRACTING AS SUCH FOR NON-EXISTENT PRINCIPAL.

2712. Contract signed—"On behalf of" inchoate company.]—Where a contract is signed by one who professes to be signing "as agent," but has no principal existing at the time, & the contract would be wholly inoperative unless binding upon the person who signed it, he is personally liable on it; a stranger cannot by a subsequent ratification relieve him from that liability.

A co. being projected for carrying on the business of an hotel, & purchasing the premises & stock of pltf., the following agreement was entered into: "Jan. 27, 1866. To A., B., & C., on behalf of the proposed G. Hotel Co., I hereby propose to sell the extra stock, as per schedule hereto, for the sum of £900, payable on Feb. 28, 1866" (signed by pltf.). "We have received your offer to sell the extra stock as above, & we hereby agree to accept the terms proposed." (Signed) "A., B., & C., on behalf of the G. Hotel Co." The goods were handed over to representatives of the proposed co., & were consumed in the business. The co. obtained a certificate of incorporation under Cos. Act, 1862 (c. 89), on Feb. 20, but collapsed before the money was paid:—*Held:* (1) A., B., & C. were personally liable on their agreement, as for goods sold & delivered; (2) no subsequent ratification by the co. could relieve them from that liability without the assent of pltf.; (3) parol evidence was not admissible to show that personal liability was not intended.—KELNER (KELMER) *v.* BAXTER (1866), L. R. 2 C. P. 174; 36 L. J. C. P. 94; 15 L. T. 213; 12 Jur. N. S. 1016; 15 W. R. 278.

Annotations:—**Apld.** Cullen *v.* O'Meara (1867), 15 W. R. 1174. **Consd.** Melhado *v.* Porto Alegre Ry. Co. (1874), L. R. 9 C. P. 503. **Distd.** Spilier *v.* Paris Skating Rink Co. (1878), 7 Ch. D. 368. **Consd.** Hollman *v.* Pullin (1884), Cab. & El. 254. **Distd.** Blyth *v.* Fladgate, Morgan *v.* Blyth, Smith *v.* Blyth, [1891] 1 Ch. 337. **Refd.** Scott *v.* Ebury (1867), L. R. 2 C. P. 255; McCaul *v.* Strauss (1883), Cab. & El. 106; *Re* Northumberland Avenue Hotel Co. (1886), 33 Ch. D. 16, C. A.; *Re* Patent Ivory Manufacturing Co., Howard *v.* Patent Ivory Manufacturing Co. (1888), 38 Ch. D. 156; Hume *v.* Record Reign Jubilee Syndicate (1889), 80 L. T. 404; Nichols *v.* Regent's Canal Co. (1894), 63 L. J. Q. B. 641; Thompson *v.* L. C. C., [1899] 1 Q. B. 840, C. A.; Keighley, Maxsted *v.* Durant, [1901] A. C. 240, H. L.; Natal Land & Colonization Co. *v.* Pauline Colliery & Development Syndicate, [1904] A. C. 120, P. C.; Hickman *v.* Kent or Romney Sheep Breeders' Assocn., [1915] 1 Ch. 881. **Mentd.** Hugill *v.* Masker (1880), 58 L. J. Q. B. 171, C. A.

2713. Cheque signed by promoters of company.]—J., acting as solr. & secretary of a projected ry. co., by authority of the promoters, & by means of a cheque signed by two of them, obtained from pltf. an advance of £500, to be applied in payment of parliamentary fees, upon an agreement expressing it was "to be repaid out of the calls on shares." An Act authorising the construction of the ry. passed, the promoters being named therein as the first directors; & at a meeting the directors passed a resolution that the acts of J. should be adopted & confirmed. No shares were allotted or calls made, & the undertaking was not proceeded with:—*Held:* (1) the advance was made upon the personal responsibility of those who signed the cheque; (2) the subsequent adoption of their acts by the directors did not alter their position.—SCOTT *v.* EBURY (LORD) (1867), L. R. 2 C. P. 255; 36 L. J. C. P. 161; 15 L. T. 506; 15 W. R. 517.

Annotations:—**Distd.** Coutts *v.* Irish Exhibition in London (1890), 63 L. T. 489; Blyth *v.* Fladgate, Morgan *v.* Blyth, Smith *v.* Blyth, [1891] 1 Ch. 337.

2714. Order signed "secretary pro tempore" of projected company.]—On the prospectus of a projected co., & at its office, deft. wrote an order for advertising it in pltf.'s newspaper, & signed himself "Secretary *pro tempore*." Two days afterwards the co. was registered:—*Held:* as the co. was not in existence when the order was signed, & as there was no evidence that deft. was acting for any other person, he was personally liable on the order.—HOPCRAFT *v.* PARKER (1867), 16 L. T. 561; 15 W. R. 842.

2715. Agreement for overdraft—Company subsequently formed.]—Six persons, being desirous of getting up an Irish exhibition in London, styled themselves the executive council of the exhibition & as such opened an account at Coutts' in the name of "the Irish Exhibition," & secured an overdraft on certain guarantees which proved worthless. Subsequently a co. was formed to run the exhibition, & on this co. being wound up the bank sued the six persons before mentioned for the overdraft:—*Held:* although in one sense the account was an impersonal one, it had not been made out that the bank were not to be creditors of anybody until the exhibition was formed, or that they had substituted the co. subsequently formed as their debtor in place of the six persons, & they were liable in respect of cheques drawn on the account in the form agreed upon.—COUTTS & CO. *v.* IRISH EXHIBITION IN LONDON (1891), 7 T. L. R. 313, C. A.; *revsg.* (1890) 63 L. T. 489.

2716. Work ordered by managing director of unregistered association—Before & after registration.]—Deft. was managing director of an assocn. registered in 1890 for purpose of holding an exhibition. Before registration deft. ordered certain work to be done by pltfs. for which he was debited in their books. After registration the accounts were altered, the assocn. being debited. The accounts not having been paid by the assocn., pltfs. sued deft.:—*Held:* (1) deft. was liable for work done before registration; (2) there was evidence as regards work done after registration that it was agreed by all the parties that credit should be given to deft.—DREW, WOOD & SON *v.* HEATH (1891), 8 T. L. R. 111.

2717. Work ordered by parliamentary agents of proposed company.]—An advertisement of an intended application to Parliament for the incorpora-

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PART X. SECT. 1, SUB-SECT. 5.

2712 i. *Contract signed—"On behalf of" inchoate company.*]—An agent who makes a contract on behalf of a corpn. which has no legal existence, is personally liable to the third party with whom he contracts.—PEARSON *v.* LIGHTHALL (1895), Q. R. 7 S. C. 201.—**CAN.**

a. *Agreement to transfer claims—In name of non-existent firm.*]—Where B., acting as principal & for himself only, signed a document containing the following provision: "We hereby agree to give F. one-half interest in the following claims [describing them] in the name of J. B. & Sons," without authority from the owners of two of the claims & without their knowledge, & subsequently these others transferred their interest to B.:—*Held:* although no such firm as J. B. & Sons existed, B. was personally bound by the agreement as to all three claims.—MCMEEKIN *v.* FURRY (1906), 13 B. C. R. 20; 39 S. C. R. 378.—**CAN.**

b. *Machinery ordered by agent of proposed company.*]—A firm acting in the interests of a co. about to be formed contracted with an engineering co. for the supply of machinery, to be used by the new co. when formed. The co. was incorporated while the machinery was being made, & subsequently, with the concurrence of those who had acted on their behalf, they brought an action of damages against the engineering co., on the ground that the machinery supplied was defective:—*Held:* they had no title to sue, seeing that the firm who had contracted with the engineers could not act as agents for a non-existent principal, & there was no privity of contract between pltfs. & defts., & concurring pursuer's title was unavailing because no damage to them was alleged.—TINNEVELLY SUGAR REFINING CO. *v.* MIRLEES, WATSON & YARYAN CO., LTD. (1894), 31 Sc. L. R. 823.—**SCOT.**

Sect. 1.—*In regard to contracts: Sub-sects.* 5 & 6, *A.* (*a*).]

tion of a proposed ry. co. was inserted in a newspaper on order of defts., the parliamentary agents acting on behalf of the proposed co.:—*Held:* the agents were personally liable.—WILSON & Co. *v.* BAKER, LEES & Co. (1901), 17 T. L. R. 473.

2718. Undertaking to pay account for company not yet formed.]—Messrs. C., acting as agent for a then unformed syndicate, the R. R. Syndicate, wrote to pltfs.: "We hereby undertake to pay you the sum of £225 within thirty days hereof in full settlement of the printing account of the R. R. Syndicate":—*Held:* (1) Messrs. C. were liable; (2) the R. R. Syndicate was not liable, though it had adopted the benefit of pltfs.' work.—HUME *v.* RECORD REIGN JUBILEE SYNDICATE (1899), 80 L. T. 404.

2719. Contract by chairman of non-existent medical association.]—Deft. entered into a contract of service, with a clause in restraint of practising his profession within a certain area, after the contract of service expired with pltf., who signed as chairman of a then non-existent medical assocn.:—*Held:* pltf. could not sue deft. personally for breach of the clause in restraint of practice.

There is no rule of law by which an agent professing to contract on behalf of a principal, non-existent or who proves to be *ipso facto*, is to be deemed himself the contracting party (WATKIN WILLIAMS, J.).—HOLLMAN *v.* PULLIN, No. 2466, *ante.*

Contracts with clubs.]—*See* CLUBS.

Contracts with exhibition committees, messes & other unincorporated bodies.]—*See* Part V., Sect. 3, Sub-sect. 12, B., *ante;* CLUBS; CONTRACT.

SUB-SECT. 6.—CONTRACTS MADE BY PUBLIC AGENTS.

See, further, PUBLIC AUTHORITIES & PUBLIC OFFICERS.

A. Actions against Crown Servants and British and Colonial Government Officials.

(a) Crown Servants and British Government Officials.

2720. General rule.]—An officer appointed by Govt., treating as agent for the public, is not liable to be sued upon contracts made by him in that capacity.—MACBEATH *v.* HALDIMAND (1786), 1 Term Rep. 172; 99 E. R. 1036.

Annotations:—**Apld.** Unwin *v.* Wolseley (1787), 1 Term Rep. 674; Bowen *v.* Morris (1810), 2 Taunt. 374, Ex. Ch. **Distd.** Thompson *v.* Pearce (1819), 1 Brod. & Bing. 25; Burrell *v.* Jones (1819), 3 B. & Ald. 47. **Consd.** Palmer *v.* Hutchinson (1881), 6 App. Cas. 619, P. C. **Refd.** Allen *v.* Waldegrave (1818), 8 Taunt. 566; Gidley *v.* Palmerston (1822), 3 Brod. & Bing. 275; Auty *v.* Hutchinson (1848), 6 C. B. 266; Grant *v.* Secretary of State for India (1877), 2 C. P. D. 445; Dunn *v.* Macdonald, [1897] 1 Q. B. 401. **Mentd.** Thomas *v.* R. (1874), L. R. 10 Q. B. 31.

2721. —— Contract under seal.]—A servant of the Crown contracting by deed on account of Govt. is not personally answerable.—UNWIN *v.* WOLSELEY, No. 2625, *ante.*

Annotations:—**Distd.** Thompson *v.* Pearce (1819), 1 Brod. & Bing. 25. **Consd.** Gidley *v.* Palmerston (1822), 3 Brod. & Bing. 275. **Apld.** Grant *v.* Secretary of State for India (1877), 2 C. P. D. 445. **Refd.** Allen *v.* Waldegrave (1818), 8 Taunt. 566.

2722. —— Agent contracting in own name.]—A person entering into a charterparty in his own name on behalf of Govt. is personally liable.—CUNNINGHAM *v.* COLLIER (1785), 4 Doug. K. B. 233; 99 E. R. 857.

2723. —— Applicable to action for breach of warranty of authority.]—The doctrine that an agent contracting on behalf of his principal is liable to the other contracting part for breach of implied warranty of authority to enter into the contract is not applicable to a contract made by a public servant on behalf of the Crown.—DUNN *v.* MACDONALD, [1897] 1 Q. B. 555; 66 L. J. Q. B. 420; 76 L. T. 444; 45 W. R. 355; 13 T. L. R. 292; 41 Sol. Jo. 348, C. A.

Annotation:—**Consd. & Distd.** Graham *v.* Public Works Comrs., [1901] 2 K. B. 781.

2724. Commissary—For goods supplied.]—In an action brought against a commissary for supply of forage for the army, & by whom pltf. had been employed in that service:—*Held:* the commissary was not liable.—LUTTERLOH *v.* HALSEY (undated), cited 1 Term Rep. 180; 99 E. R. 1040.

Annotations:—**Folld.** Macbeath *v.* Haldimand (1786), 1 Term Rep. 172. **Refd.** Palmer *v.* Hutchinson (1881), 50 L. J. P. C. 62, P. C.

2725. First Lord of Treasury—For expenses incurred in raising troops.]—S. brought an action

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PART X. SECT. 1, SUB-SECT. 6.—A. (a).

2720 i. *General rule.*]—An action cannot be maintained against an agent of Govt. who has entered into contracts by those who have supplied the agent with goods. An individual contracting in his official capacity or as the agent of Govt. is not personally liable on the contract so entered into. Such a rule arises from motives of public policy, for no prudent person would accept a public postion at the hazard of exposing himself to a multiplicity of private suits.—GREENE *v.* LEAMAN (1867), 5 Nfld. L. R. 181.—**NFLD.**

2720 ii. ——.]—Deft., a servant of Govt., having given orders for bricks, & pltf. being aware that deft. was a servant of Govt., & that the bricks were required for building bridges on account of Govt.:—*Held:* Govt. liable & not deft. personally.—SREENATH ROY *v.* ROSS (1865), 4 W. R. S. C. C. Ref. 13.—**IND.**

2720 iii. ——.]—Pltf. was employed by an agreement in writing for a certain length of time, the agreement being signed by deft., the principal of an Indian industrial school in the service of Govt. of Canada. A fire occurred in the premises where pltf. worked & he was thrown out of work. In an action for wrongful dismissal from service brought against deft.:—*Held:* pltf. from the commencement of his employment knew that deft. was a Govt. official acting in such capacity, & his salary was paid, not out of deft.'s private means, but from the public purse, & deft. was not personally liable.—BOCZ *v.* HUGONNARD (1899), 4 Terr. L. R. 69.—**CAN.**

2720 iv. —— *Agent contracting as principal.*]—Action for work & labour done for a public officer about the building in which the office was situated. Plea that the Govt. should pay:—*Held:* as pltf. had contracted solely with deft., deft. was liable.—VIEN *v.* SICOTTE (1879), 2 L. N. 270.—**CAN.**

2720 v. —— *Agent receiving funds wherewith to pay charges.*]—Where an agent acting for Govt. discloses his agency, he is not personally liable until he has received funds to pay the amount due or to pay accounts of that kind.—QUESNEL *v.* BÉLAND (1886), 9 L. N. 195; 12 Q. L. R. 129.—**CAN.**

2720 vi. —— *Agent acting within scope of authority.*]—An agent acting on behalf of Govt. is not personally bound, but it must be shown he is acting within scope of his authority. There is no presumption that a public officer is acting on behalf of Govt.—SECRETARY OF STATE FOR INDIA *v.* SUTEMARIJI MOOSIAJI (1902), I. L. R. 26 Bom. 801.—**IND.**

2723 i. —— *How far applicable to action for breach of warranty of authority.*]—By an agreement between pltf. & deft., described as Province Treasurer, for & on behalf of the Queen, pltf. agreed to procure a copper coin for the use of the Province. The Crown having refused to authorise the coining, pltf. received as compensation a grant of money "to reimburse him expenses incurred in endeavouring to execute a contract entered into with the Provincial Govt. for a supply of copper coin—the same to be in full." In an action against deft. for falsely representing that he had the authority of the Queen:—*Held:* deft., having acted under the direction of the Provincial Govt., which represented the Crown, had the authority of the Queen, & by accepting the grant of money pltf. had acknowledged the contract was made with the Provincial Govt., & therefore deft. was not liable.—SEARS *v.* ROBINSON (1859), 4 All. 366.—**CAN.**

2723 ii. —— ——.]—For acting without authority of law, or in excess of the authority conferred upon him, or in breach of the duty imposed upon him by law, an officer of the Crown is personally responsible to any one who sustains damage thereby.—BOYD & Co. *v.* R. (1894), 4 Ex. C. R. 116.—**CAN.**

against N., as First Lord of the Treasury, in order that he might be reimbursed expenses which he had incurred in raising a regiment for the service of Govt.:—*Held:* the action did not lie.—SAVAGE *v.* NORTH (undated), cited 1 Term Rep. 180; 99 E. R. 1040.

Annotations:—**Folld.** Macbeath *v.* Haldimand (1786), 1 Term Rep. 172. **Refd.** Palmer *v.* Hutchinson (1881), 50 L. J. P. C. 62, P. C.

2726. Public Works Commissioners—For breach of contract.]—An action will lie against H.M. Comrs. of Public Works & Buildings, who are incorporated by stat., for damages for breach of contract entered into by them with a firm of builders for the erection of a public building, because (1) the Comrs. must be taken to have made the contract specially themselves, & not as agents of the Crown (RIDLEY, J.); (2) the Comrs. are in the position of servants of the Crown who may be sued on their contracts for the purpose of obtaining a judgment declaratory of the right of the subject who has contracted with them (PHILLIMORE, J.).—GRAHAM *v.* PUBLIC WORKS COMRS., [1901] 2 K. B. 781; 70 L. J. K. B. 860; 85 L. T. 96; 65 J. P. 677; 50 W. R. 122; 17 T. L. R. 540; 45 Sol. Jo. 538.

Annotation:—**Folld.** Roper *v.* Public Works Comrs., [1915] 1 K. B. 45.

2727. Where Crown servants incorporated.] — Where servants of the Crown, being a corpn., became tenants of demised premises, & the landlord brought an action against them in their official capacity for breach of the agreement of tenancy & for trespass & nuisance, the points of law raised on the pleadings having been set down for hearing: —*Held:* as to the claims for trespass & nuisance, the action must be stayed, notwithstanding that as to the claim for breach of agreement it was on the authority of *Graham* v. *Public Works Comrs.*, No. 2726, *ante*, allowed to proceed.—ROPER *v.* PUBLIC WORKS COMRS., [1915] 1 K. B. 45; 84 L. J. K. B. 219; 111 L. T. 630.

2728. Secretary of Board of Trade—For damages for detention of ship.]—An action under M. S. Act, 1876 (c. 80), s. 10, against the Secretary of the Board of Trade, to recover damages for the detention of a ship for survey without reasonable & probable cause, is within Crown Suits Act, 1865 (c. 104), s. 46, & the A.-G. is entitled to demand as of right a trial at bar in such action, & the ct. is bound on his waiving that right to change the venue to any county wherein he elects to have the action tried.—DIXON *v.* FARRER (1886), 18 Q. B. D. 43; 56 L. J. Q. B. 53; 55 L. T. 578; 35 W. R. 95; 3 T. L. R. 35; 6 Asp. M. L. C. 52, C. A.

Annotation:—**Consd.** Graham *v.* Public Works Comrs., [1901] 2 K. B. 781.

2729. Secretary of State—On contract made in own name.]—An action will not lie against a public agent, such as a Secretary of State, upon a contract really made by him as agent on behalf of Govt., though in his own name.—GIDLEY *v.* PALMERSTON (LORD) (1822), 3 Brod. & Bing. 275; 1 State Tr. N. S. 1263; 7 Moore, C. P. 91; 129 E. R. 1290.

Annotations:—**Consd. & Folld.** The Athol (1842), 1 Wm. Rob. 374. **Consd.** *Re* Tufnell (1876), 3 Ch. D. 164; Palmer *v.* Hutchinson (1881), 6 App. Cas. 619, P. C.; R. *v.* Secretary of State for War, [1891] 2 Q. B. 326, C. A. **Consd. & Folld.** Dunn *v.* Macdonald, [1897] 1 Q. B. 401. **Consd. & Distd.** Graham *v.* Public Works Comrs., [1901] 2 K. B. 781. **Refd.** Anty *v.* Hutchinson (1848), 6 C. B. 266; Grant *v.* Secretary of State for India (1877), 2 C. P. D. 445.

2730. Secretary of State for India—For share of booty "granted in trust" for distribution.]—By royal warrant booty of war was expressed to be "granted" to the Secretary of State for India in Council "in trust" to be distributed by him or any person he might appoint amongst persons found entitled to share it by judgment of the Ct. of Admlty. The warrant authorised the Secretary of State, or referees nominated by him, to give a decision on any doubts that might arise, which was to be final, unless within three months the Queen should otherwise order:—*Held:* (1) the warrant did not operate as a transfer of property or create a trust; (2) the Crown still retained control of the booty; (3) the Secretary of State, being merely agent for distribution, could not be made to account by those found by the Ct. of Admlty. entitled to share.—KINLOCH *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL (1882), 7 App. Cas. 619; 51 L. J. Ch. 885; 47 L. T. 133; 30 W. R. 845, H. L.

Annotations:—**Folld.** R. *v.* Secretary of State for War, [1891] 2 Q. B. 326, C. A. **Apld.** Dunn *v.* Macdonald (1896), 66 L. J. Q. B. 209. **Consd.** Te Teira Te Paea *v.* Te Roera Tareha, [1902] A. C. 56, P. C. **Refd.** Bowie *v.* Ailsa (1887), 13 App. Cas. 371; Hollinshead *v.* Hazleton, [1916] 1 A. C. 428, H. L.

2731. —— For arrears of pension granted by East India Company.]—The East India Co., as representing the Crown, annexed the territory of a native State, & confiscated the State property, granting to the Maharajah, the ruler of the State, then an infant, a pension for life. The co. also assumed the custody of his person during his minority, & took possession of his private property. An action having been brought after his death by the trustees in bkpcy. of his residuary legatee against the Secretary of State for India, as the successor of the East India Co., for arrears of the pension, & for an account of the private property, alleging that the co. had undertaken the legal obligations of guardians of & trustees for the Maharajah in respect thereof: —*Held:* in the circumstances, the acts done by the co. as aforesaid were so clearly done by them as acts of State, in respect of which no action was maintainable, that the action should be summarily dismissed as frivolous & vexatious.—SALAMAN *v.* SECRETARY OF STATE FOR INDIA, [1906] 1 K. B. 613; 75 L. J. K. B. 418; 94 L. T. 858, C. A.

Annotations:—**Mentd.** Woods *v.* Lyttelton (1909), 25 T. L. R. 665, C. A.; *Re* Page, Hill *v.* Fladgate, [1910] 1 Ch. 489, C. A.

2732. —— For wrongful dismissal.]—No action will lie against the Secretary of State for India for alleged wrongful dismissal of an officer from the service.—GRANT *v.* SECRETARY OF STATE FOR INDIA (1877), 2 C. P. D. 445; 46 L. J. Q. B. 681; 37 L. T. 188; 25 W. R. 848.

Annotation:—**Refd.** Raphael *v.* Brandy (1911), 80 L. J. K. B. 1067, H. L.

2733. Secretary of State for War—For breach of contract—Defence admissible.]—A motion was refused to set aside as embarrassing a defence to an action for breach of contract that the contract was entered into solely in deft.'s public & official capacity as Secretary of State for War, & not otherwise, & not in his private or personal capacity, & that he never had, nor had he, any private, personal, or beneficial interest in the contract.—O'GRADY *v.* CARDWELL (1872), 20 W. R. 342.

2734. —— Mandamus.]—A mandamus will not lie against the Secretary of State for War to compel him to carry out the terms of a royal warrant regulating the pay & retiring allowances of officers & soldiers of the army, inasmuch as no legal duty in relation to such officers & soldiers is imposed upon the Secretary of State either by stat. or by common law.—R. *v.* SECRETARY OF STATE FOR WAR, [1891] 2 Q. B. 326; 60 L. J. Q. B. 457; 64 L. T. 764; 56 J. P. 105; 40 W. R. 5; 7 T. L. R. 579, C. A.

Annotation:—**Refd.** Dunn *v.* Macdonald (1897), 76 L. T. 434.

2735. Master of King's Buckhounds.]—Deft. had recovered against pltf., Privy Purse to James II. & Master of the Buckhounds, in *indebitatus assumpsit* for goods supplied for the King's hunt. Pltf.

Sect. 1.—*In regard to contracts: Sub-sect.* 6, *A.* (*a*) *& (b) & B.; sub-sect.* 7, *A.*]

sought to be relieved against this recovery on the ground that the debt was the King's & not his, he only acting in relation to his office & not as a private person. In answer, deft. pleaded the verdict & judgment & that pltf's. present proceeding was merely for delay. The Ct. of Ch. overruled deft.'s plea & ordered deft. to answer the bill. The bill was, however, after the hearing dismissed; & on appeal to the House of Lords the decree made by the Ct. of Ch. was affirmed.—GRAHAM (GRAHAME) *v.* STAMPER (1692), 2 Vern. 147; Prec. Ch. 45; 23 E. R. 701; *affd.* 15 Lords' Journal, 353.

(*b*) *Colonial Government Officials.*

2736. Agent-General—For goods supplied.]—A contract was made for supplying goods to New Zealand Govt. by the Agent-General for New Zealand in his official name. Pltfs. had made similar contracts previously:—*Held;* the Agent-General was not personally liable on the contract.—LANCASTER WAGON CO. *v.* BELL (1887), 3 T. L. R. 671.

2737. —— For money paid away by him.]—An action was brought against the Agent-General in England for a Colonial Govt., pltfs. being equitable assignees of persons who had entered into a contract with that Govt., claiming relief in respect of a sum of money which pltfs. alleged had been received by deft. from that Govt. as trustee for pltfs., & afterwards in breach of trust repaid by him to that Govt. The money in question was deposited in the personal name of the Agent-General, & pltfs. contended that on that ground he was personally responsible for it. The Govt. was not made a party to the action:—*Held:* (1) deft. was mere agent of the Govt., & could not constitute himself a trustee against his principals; (2) the question could not be tried in absence of the Govt., the foundation of pltfs.' case being there was a trust which the Govt. could not intercept.—WRIGHT & CO. *v.* MILLS (1890), 63 L. T. 186.

2738. Deputy Commissary-General—For hire & carriage of goods & damages.]—In a suit against H.M. Deputy Commissary-General for Natal, & as such representing H.M. Commissariat Department, to recover certain moneys as the price of hire of certain waggons & oxen, for the carriage of certain goods, for damages for illegal acts of deft. or his employees, & for general damage:—*Held:* (1) deft. could not be sued, either personally or in his official capacity, upon a contract entered into by him on behalf of the Commissariat Department; (2) there was no cause of action against him; (3) the Govt. revenue could not be reached by a suit against a public officer in his official capacity. *Qu.:* whether the ct. would have had jurisdiction if a petition of right had been presented & the Crown had ordered that right should be done.—PALMER *v.* HUTCHINSON (1881), 6 App. Cas. 619; 50 L. J. P. C. 62; 45 L. T. 180, P. C.

Annotations:—**Distd.** Hettihewage Siman Appu *v.* Queen's Advocate (1884), 9 App. Cas. 571, P. C. **Apld.** Bainbridge *v.* Postmaster-General, [1906] 1 K. B. 178, C. A. **Mentd.** Symons *v.* Baker, [1905] 2 K. B. 723.

B. Actions against other Public Agents.

Agent of foreign Government.]—*See* Nos. 2861, 2863, *post.*

2739. Army officer—For goods supplied—On order of servant.]—The captain of a troop, for which forage is furnished by the orders of a clerk appointed by such captain, is not liable in an action for money had & received for such forage, though present with the troop at the time, it not appearing that he had received any money for this purpose from the paymaster, to whom it is issued by Govt., & upon whom the captain is entitled to draw for a certain sum regulated by the returns of the preceding month.—RICE *v.* CHUTE (1801), 1 East, 579; 102 E. R. 224.

Annotations:—**Refd.** Thompson *v.* Pearce (1819), 1 Brod. & Bing. 25; Gidley *v.* Palmerston (1822), 7 Moore, C. P. 91.

2740. —— —— On order of officer commanding in absence.]—A captain of a troop during the time of his absence, & while another officer is in the actual command of it, & by whom the orders for subsistence are issued, & the subsistence money is received from Govt., is not liable to pay for subsistence furnished to the men, though he is still entitled to a profit upon the sum issued on that account, & the troop still continues under his military orders.—MYRTLE *v.* BEAVER (1800), 1 East, 135; 102 E. R. 53.

Annotation:—**Distd.** Auty *v.* Hutchinson (1848), 6 C. B. 266.

2741. —— ——.]—The liability of the colonel of a regiment for knapsacks furnished to the regiment by his order depends upon the question whether they were supplied upon his personal credit. Where the tradesman who furnishes necessaries to a regiment looks to the regimental fund as the medium

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PART X. SECT. 1, SUB-SECT. 6.—B.

c. *Agent for public.*] — PERRAULT *v.* BAILLARGI, SCOTT *v.* LINDSAY (1818), 2 R. L. 207.—**CAN.**

d. *Canal commissioners—For work done on canal.*]—*Assumpsit* does not lie against the comrs. of the St. Lawrence Canal, under 3 Will. 4, c. 17, for the work done on the canal on a contract made with them, unless it can be specially shown that they made themselves personally liable, as they must be considered merely as agents of Govt. —TAIT *v.* HAMILTON (1841), 6 O. S. 89. —**CAN.**

e. *Committee for erection of gaol—Signing as "a committee on behalf of the county."*]—Defts., under 7 Will. 4, c. 28, were appointed a committee of management for the erection of a new gaol, & in that capacity contracted with pltf., subscribing their names "a committee on behalf of the county":—*Held:* the committee were mere agents for the public, & not personally liable on the contract.—BLAIR *v.* ROBINSON (1847), 3 Kerr, 487.—**CAN.**

f. *Committee of health—For medical services during outbreak of smallpox.*] —At a meeting of the inhabitants of S. defts. were appointed a committee to act as a board of health, in consequence of an outbreak of smallpox. They were subsequently appointed as such board by the Lieutenant-Governor, & made a contract with pltf. for medical services while the disease should continue in the place. They dispensed with his services before the disease had been eradicated. In an action for wrongful dismissal:—*Held:* defts. were to be regarded as public agents, not individually liable on the contract which they had made on behalf of the public.—MCKAY *v.* MOORE (1883), 4 R. & G. 326. —**CAN.**

g. *Roadmaster—For work on public road.*]—L., a roadmaster, employed C. to do work on a public road, the agreement between them being that the work was to be paid for when L. collected the road moneys. L. went out of office before he collected the moneys. In an action brought by C. against L.:—*Held:* the credit was given to the fund & not to the personal liability of the roadmaster.—R. *v.* TAPLEY (1875), 3 Pug. 47.—**CAN.**

h. *Waterworks commissioners acting under statutory powers—For work on the waterworks.*]—37 Vict. c. 79 vested the management of the waterworks of the city of Windsor in a board of water comrs., who were empowered to carry out alterations & improvements. It was provided that the property in the works & all profits in excess of the comrs.' disbursements were to be vested in the municipal corpn., who were to have power to raise money for the carrying out of the waterworks purposes, but every bye-law for the raising of sums over a certain amount was to receive the assent of the electors. In an action against defts. for the price of work done by pltfs. as contractors in connection with the waterworks:—*Held:* (1) no valid contract for work in excess of the statutory limit could be entered into by defts. except under a bye-law assented to by the ratepayers, nor could any valid contract for work below that limit be entered into by them until after the passing of a bye-law passed by the council authorising such work; (2) the board were not paramount to the corpn. & could not compel the municipal council to pass a bye-law, but were the agents of the corpn.; (3) the corpn. ought to have been made necessary defts. if not sole defts., for the question raised was whether the corpn. were bound by the act of their agents, the water comrs.—MACDOUGAL *v.* WATER COMRS. (1901), 31 S. C. R. 326.—**CAN.**

through which he is to obtain payment, though by the colonel's assistance, the colonel is not personally responsible.—PROSSER *v.* ALLEN (1819), Gow, 117.

Annotation :—**Expld.** Cross *v.* Williams (1862), 6 L. T. 434.

2742. —— ——.]—*Re* GARLAND, No. 2515, *ante*.

2743. County court clerk—For work done to court house.]—Deft., clerk of a cty. ct. established under Cty. Cts. Act, 1846 (c. 95), employed pltf. to fit up a ct. house & offices. The question was left to the jury whether or not deft. contracted on the footing of personal liability, & the jury found for pltf. :—*Held :* deft.'s personal liability was not excluded by his position as clerk of the ct. or negatived by the nature or by the terms of the particular contract.—AUTY (AUTEY) *v.* HUTCHINSON (1848), 6 C. B. 266 ; 17 L. J. C. P. 304 ; 12 Jur. 962 ; 136 E. R. 1253.

2744. Justices acting under statutory powers—For breach of agreement.]—An Act of Parliament empowered JJ. in quarter session assembled, or at any adjournment of same, to build, or order to be built, a bridge, & enacted that they might contract for the building of same ; & that every contractor for such work should give sufficient security for the due performance of his contract to the clerk of the peace ; & that the JJ. at any general quarter session, or adjournment of same, might appoint such of the JJ. as they should think fit to superintend the building, etc. The expenses were to be provided for out of the county rate, & it was enacted that, in all actions or proceedings at law, the JJ. might sue or be sued in the name of the clerk of the peace, & that no action should abate by the death of any such clerk, but that the clerk of the peace for the time being should always be deemed pltf., etc., deft., or resp. in all such actions, etc., or proceedings at law respectively ; & it was provided that every such clerk of the peace should be reimbursed all damages, etc., & expenses which he should have paid, or be subject or liable to, on account thereof out of the money to be raised by virtue of the Act. Pltf. covenanted with defts., the superintending JJ., described in the indenture as the major part of the JJ. assembled at the general quarter sessions, to build the bridge, & defts. covenanted that they, or the treasurers for the county, should pay him a certain sum by instalments. Pltf. having declared in covenant against defts. for the non-payment of two instalments :—*Held :* (1) defts. were not liable ; (2) the remedy given by the Act was against the clerk of the peace.—ALLEN *v.* WALDEGRAVE, No. 2631, *ante*.

Annotations :—**Consd.** Parrott *v.* Eyre (1833), 3 L. J. C. P. 3. **Distd.** Auty *v.* Hutchinson (1848), 6 C. B. 266.

2745. Naval officer—For wages under contract made with seaman before joining service.]—Deft., captain of one of H.M. ships, offered to give pltf. wages beyond the usual pay from Govt., if he would come on board his ship as captain's cook. Pltf. agreed, & was by that designation (captain's cook) entered in the ship's books. The agreement was made before he joined the service, & when he was free to accept the proposal of the captain or to reject it. In an action afterwards brought by him against the captain for wages, deft. not having pleaded the illegality of the contract :—*Held :* (1) the ct. must look upon the contract as legal ; (2) the contract being made when each party was *sui juris*, there was no inconsistency in pltf.'s bargaining to receive the private pay of deft. for filling an office in respect of which he was also paid by Govt.—CLUTTERBUCK *v.* COFFIN (1842), 1 Dowl. N. S. 479 ; 3 Man. & G. 842 ; 4 Scott, N. R. 509 ; 11 L. J. C. P. 65 ; 6 Jur. 131 ; 133 E. R. 1379. *S. C.* at N. P. (1841), Car. & M. 273.

Annotation :—**Refd.** Shadwell *v.* Shadwell (1860), 7 Jur. N. S. 311.

2746. Volunteer officer—For goods supplied.]—Pltf., a tailor, sued deft., the commandant & a member of the committee of a volunteer rifle corps, for uniforms supplied to the corps. The evidence was conflicting. According to pltf.'s statement he attended a meeting of the committee when deft. used expressions which implied that he undertook to pay for the uniforms. This was denied by deft., who gave in evidence pltf.'s day-book & ledger, in which the uniforms were debited to the corps. Deft. admitted his liability to pay for his own uniform & those of the band, which he had ordered. The judge told the jury : (1) if the contract was with deft. alone for the whole corps, he was liable ; (2) if with deft. jointly with the committee (there being no plea in abatement), he was liable ; (3) so if with deft. jointly with the whole corps ; (4) if by deft. for his own uniform & those which he specially agreed to pay for, he was not liable :—*Held :* (1) the case was properly left to the jury ; (2) there was no foundation for a new trial on the ground of misdirection.—CROSS *v.* WILLIAMS (1862), 7 H. & N. 675 ; 31 L. J. Ex. 145 ; 6 L. T. 434 ; 26 J. P. 423 ; 10 W. R. 302 ; 158 E. R. 641.

2747. —— ——.]—An order for uniforms & equipments for a volunteer corps having been given by or on behalf of the commanding officer :—*Held :* upon the facts, (1) the orders were given so as to make the commanding officer personally liable upon them ; (2) upon his death his exors. were liable.—SAMUEL BROTHERS, LTD. *v.* WHETHERLY, [1908] 1 K. B. 184 ; 77 L. J. K. B. 69 ; 98 L. T. 169 ; 24 T. L. R. 160 ; 52 Sol. Jo. 112, C. A.

SUB-SECT. 7.—LIABILITY FOR BREACH OF WARRANTY OF AUTHORITY.

A. In General.

2748. General rule.]—*Semble :* a person professing to contract as agent only, not being liable on the contract, may, if he had no authority to contract as agent, be liable whether there is fraud or not in an action of *assumpsit*, brought, not upon the original contract, but upon an implied promise that he had warranted his authority to contract for the D. M. Co., & was liable to make good to pltf. what he had lost or failed to obtain by reason of the non-existence of the authority.—COTT *v.* DOWLING (1901), 4 Terr. L. R. 464.—**CAN.**

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2748 i. *General rule.*]—Whenever persons assume the character of duly authorised mandataries of another, they must prove their mandate or indemnify third parties against the consequence of its absence.—LETELLIÉR *v.* BOIVIN (1899), Q. R. 16 S. C. 428.—**CAN.**

2748 ii. ——.]—Deft. verbally agreed with pltf. for the supply by pltf. to the D. M. Co. of all the slack & coal required for their business ; the company was then unincorporated & could neither authorise deft. to contract on its behalf nor after incorporation ratify his action :—*Held :* deft. had impliedly warranted his authority to contract for the D. M. Co., & was liable to make good to pltf. what he had lost or failed to obtain by reason of the non-existence of the authority.—COTT *v.* DOWLING (1901), 4 Terr. L. R. 464.—**CAN.**

2748 iii. ——.]—An agent who exceeds his authority in contracting for a named principal, & whose contract is repudiated by the latter, is liable in damages to the other contracting party, on the ground that from his representation of authority a personal undertaking on his part is to be implied that his principal will be bound, & that, if not bound, the other party will be placed in as good a position as if he were.—BLOWER *v.* VAN NOORDEN (1909), T. S. 890 ; Leader Law Reports, 181.—**S. AF.**

2748 iv. ——.]—The secretary of a cinema co. entered into a contract with a plumber to execute plumbing work for the co. The co. had no assets & was unable to pay for the work. The plumber brought an action against the secretary for payment, in which he averred that defender had no authority to make the contract, although he fraudulently represented that he had authority :—*Held :* the averment was irrelevant in respect that, since the co. was unable to pay anything, the damage arising from the alleged breach of warranty of authority was *nil* ; (2) defender must be assoilzied.—IRVING *v.* BURNS (1914), 52 Sc. L. R. 189.—**SCOT.**

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authority to make the original contract.—LEWIS *v.* NICHOLSON (1852), 18 Q. B. 503; 21 L. J. Q. B. 311; 19 L. T. O. S. 122; 16 Jur. 1041; 118 E. R. 190.

Annotations:—**Distd.** Tanner *v.* Christian (1855), 4 E. & B. 591. **Apprvd.** Cherry *v.* Colonial Bank of Australasia (1869), 6 Moo. P. C. C. N. S. 235. **Refd.** Green *v.* Kopke (1856), 18 C. B. 549; Randall *v.* Trimen (1856), 18 C. B. 786; Parker *v.* Winlo (1857), 27 L. J. Q. B. 49; Collen *v.* Wright (1857), 8 E. & B. 647; Royal Albert Hall Corpn. *v.* Winchilsea (1891), 7 T. L. R. 362; Starkey *v.* Bank of England, [1903] A. C. 114, H. L.; Yonge *v.* Toynbee, [1910] 1 K. B. 215. **Mentd.** Bull *v.* Chapman (1853), 8 Exch. 444; Thöl *v.* Leask (1855), 1 Jur. N. S. 117.

2749. —— Belief in authority immaterial.]—A person, professing to contract as agent for another, impliedly undertakes to the person who enters into the contract on the faith of the professed agent being duly authorised that the authority he professed to have does in fact exist.

A person who induces another to contract with him as agent of a third party by an unqualified assertion of his authority to act as such agent is answerable to the person who so contracts for damages which he may sustain by the assertion of authority being untrue; it is immaterial that the professed agent honestly thinks he has authority—COLLEN *v.* WRIGHT, No. 2795, *post*.

Annotations:—**Expld.** Worthington *v.* Sudlow (1862), 31 L. J. Q. B. 131. **Consd.** Cherry *v.* Colonial Bank of Australasia (1869), 6 Moo. P. C. C. N. S. 235, P. C.; Beattie *v.* Ebury (1872), 7 Ch. App. 777. **Consd. & Expld.** Dickson *v.* Reuter's Telegraph Co. (1877), 3 C. P. D. 1, C. A. **Expld. & Apld.** Firbank *v.* Humphreys (1886), 56 L. J. Q. B. 57, C. A. **Consd.** Hammond *v.* Bussey (1887), 20 Q. B. D. 79, C. A. **Apld.** Cross *v.* Fisher (1892), 40 W. R. 265, C. A. **Consd. & Expld.** Dunn *v.* Macdonald, [1897] 1 Q. B. 401. **Consd. & Apld.** Halbot *v.* Lens (1900), 70 L. J. Ch. 125. **Expld.** Oliver *v.* Bank of England, Starkey, Leveson & Cooke, [1901] 1 Ch. 652. **Apprvd.** Starkey *v.* Bank of England, [1903] A. C. 114, H. L. **Consd.** Sheffield Corpn. *v.* Barclay, [1905] A. C. 392. **Expld. & Apprvd.** Salvesen *v.* Rederi Akt. Nordstjernan, [1905] A. C. 302. **Consd.** Yonge *v.* Toynbee, [1910] 1 K. B. 215, C. A. **Refd.** Randall *v.* Raper (1858), E. B. & E. 84; Robson *v.* Turnbull (1858), 1 F. & F. 365; Oxenham *v.* Smythe (1862), 3 F. & F. 85; Hughes *v.* Graeme (1863), 3 F. & F. 885; Mountstephen *v.* Lakeman (1871), L. R. 7 Q. B. 196; Weeks *v.* Propert (1873), L. R. 8 C. P. 427; Chapleo *v.* Brunswick Benefit Bldg. Soc. & Smith (1881), 50 L. J. Q. B. 372, C. A.; *Re* National Coffee Palace Co. (1883), 53 L. J. Ch. 57, C. A.; Hollman *v.* Pullin (1884), Cab. & El. 254; Gaskell *v.* Gosling, [1896] 1 Q. B. 669, C. A.; Bank of England *v.* Cutler, [1907] 1 K. B. 889; Fernée *v.* Gorlitz, [1915] 1 Ch. 177; Weigall *v.* Runciman (1916), 115 L. T. 61, C. A.

For full anns., *see* S. C. No. 2795, *post*.

2750. —— ——.]—If A. be indebted to B. & pay such debt to the attorney of a person suing A. in B.'s name, but without his authority, A. is, notwithstanding, obliged to pay B. again; & A.'s remedy is against the attorney, though such attorney conceived he was acting under the real authority of B.—ROBSON *v.* EATON (1785), 1 Term Rep. 62; 99 E. R. 973.

For full anns., *see* SOLICITORS.

2751. —— Basis of liability.]—Where a person expressly or by conduct invites another to negotiate with him upon assertion that he is filling a certain character, & a contract is entered into upon that policy, he is liable to an action if he does not fill that character; but liability arises, not from misrepresentation alone, but from invitation to act & acting in consequence of that invitation (BRETT, L.J.).—DICKSON (DIXON) *v.* REUTER'S TELEGRAM CO. (1877), 3 C. P. D. 1; 47 L. J. Q. B. 1; 37 L. T. 370; 42 J. P. 308; 26 W. R. 23, C. A.

Annotations:—**Consd. & Expld.** Cunnington *v.* G. N. Ry. Co. (1883), 49 L. T. 392, C. A.; Firbank's Exors. *v.* Humphreys (1886), 18 Q. B. D. 54, C. A.; Oliver *v.* Bank of England, [1902] 1 Ch. 610, C. A. **Refd.** Coventry, Sheppard *v.* G. E. Ry. Co. (1883), 49 L. T. 641, C. A.; Starkey *v.* Bank of England, [1903] A. C. 114.

2752. ——.]—To the general rule that an action for damages will not lie against a person who honestly makes a misrepresentation which misleads another, there is at least one well-established exception, namely, where an agent assumes an authority which he does not possess & induces another to deal with him upon the faith that he has the authority which he assumes (LINDLEY, L.J.).—FIRBANK'S EXECUTORS *v.* HUMPHREYS (1886), 18 Q. B. D. 54; 56 L. J. Q. B. 57; 56 L. T. 36; 35 W. R. 92; 3 T. L. R. 49, C. A.

Annotations:—**Distd.** Elkington *v.* Hurter, [1892] 2 Ch. 452. **Fold.** Oliver *v.* Bank of England, Starkey, Leveson & Cooke, [1901] 1 Ch. 652. **Apprvd.** Starkey *v.* Bank of England, [1903] A. C. 114. **Fold.** Yonge *v.* Toynbee, [1910] 1 K. B. 215, C. A. **Refd.** Brown *v.* Law (1894), 71 L. T. 770; Fernée *v.* Gorlitz, [1915] 1 Ch. 177.

2753. —— Not applicable to claim by principal against agent.]—SALVESEN & Co. *v.* REDERI AKTIEBOLAGET NORDSTJERNAN, [1905] A. C. 302; 74 L. J. P. C. 96; 92 L. T. 575, P. C.

2754. Rule in equity—Verbal contract—Part performance.]—Where a person assumes, without authority, to act as agent for sale of real estate, & the contract is verbal, the person injured by relying on his representations has no remedy in equity against him for damages on the ground of part performance; & there is nothing in Jud. Acts to alter this rule.—WARR *v.* JONES (1876), 24 W. R. 695.

2755. Absence of authority must be pleaded.]—A declaration in an action against an agent for breach of warranty of authority is bad, unless it distinctly & sufficiently states that deft. was not authorised by the supposed principal to act on his behalf.—OXENHAM *v.* SMYTHE (1861), 6 H. & N. 690; 31 L. J. Ex. 110; 158 E. R. 285.

B. Where Person professing to act as Agent never had any Authority as such.

2756. Person acting as attorney for another.]—Action on the case lies against one appearing as my attorney without my authority (CLENCH, J.).—BILFORD & DODDINGTON'S CASE (1587), Godb. 73; 78 E. R. 45.

2753 i. —— *Not applicable to claim by principal against agent.*]—An action for breach of warranty of authority lies only where a person having in fact no authority purports to bring his supposed principal into legal relations with pltf. If an agent alleges he has concluded a contract on behalf of his principal with a third party, & has not in fact done so, the principal's cause of action is for breach of duty by the agent, & not for breach of warranty of authority.—GOSMAN *v.* OCKERBY (1908), V. L. R. 298.—**AUS.**

2755 i. *Absence of authority must be pleaded—Burden of proof.*]—In a claim for damages for breach of warranty of authority to make a contract, a distinct averment of such want of authority is material & necessary, & it is incumbent on pltf. to prove such averment.—BROWN *v.* ROBERTSON (1891), 17 V. L. R. 324.—**AUS.**

2755 ii. —— ——.]—In order to make a broker liable on the ground of want of authority, the *onus* is upon pltf. affirmatively to prove such want of authority. *Downman* v. *Williams*, 7 Q. B. 103, Ex. Ch., cited.—BISSESSUR DASS *v.* JOHANN SMIDT (1906), 10 C. W. N. 14.—**IND.**

2755 iii. —— *Also representation as to authority.*] — DESROCHERS *v.* CRUMP (1911), 17 W. L. R. 47.—**CAN.**

i. *Onus of proof of third party's knowledge of lack of authority.*]—In an action for breach of an implied warranty of authority to make a contract pltf. launches his case by showing that he entered into the contract with deft. as agent, who so described himself, & that deft. had not the authority he professed to have. The *onus* of proving a defence that pltf. was aware, at the time, of the want of authority, will lie upon deft.—ADAMSON *v.* MORTON (1881), 7 V. L. R. 307.—**AUS.**

PART X. SECT. 1, SUB-SECT. 7.—B.

j. *Guarantor signing co-guarantor's name.*]—Pltfs. sued four defts. as guarantors of the indebtedness of S. & Co. to pltfs. Defts. were J., the president of the co., T., his wife, W., his father, & M., wife of W. When the instrument was produced, it appeared to be signed by J. & T. by their proper signatures, & by M. "per atty." W.—that is, W. had signed both names with the words "per atty." between

2757. Person accepting bill per procuration of another.]—A bill was presented for acceptance at the office of the drawee when he was absent. A., who lived in the same house with the drawee, being assured by one of the payees that the bill was perfectly regular, was induced to write on it an acceptance as by procuration of the drawee, believing the acceptance would be sanctioned, & the bill paid by the latter. The bill was dishonoured when due, & the indorsee brought an action against the drawee, & on proof of the above facts was nonsuited. The indorsee sued A. for falsely, fraudulently & deceitfully representing that he was authorised to accept by procuration, & on the trial the jury negatived all fraud in fact:—*Held:* (1) A. was liable, because making a representation, which a person knows to be untrue & which is intended or calculated, from the mode in which it is made, to induce another to act on the faith of it so that he may incur damages, is a fraud in law, & A. must be considered as having intended to make such representation to all who received the bill in the course of its circulation; (2) A. could not be charged as acceptor of the bill.—POLHILL *v.* WALTER (1832), 3 B. & Ad. 114; 1 L. J. K. B. 92; 110 E. R. 43.

Annotations:—**Expld. & Distd.** Freeman *v.* Baker (1833), 5 B. & Ad. 797. **Consd.** Wilson *v.* Barthorpe (1837), Murp. & H. 81. **Expld. & Apld.** Crawshay *v.* Thompson (1842), 4 Man. & G. 357. **Consd. & Distd.** Smout *v.* Ilbery (1842), 10 M. & W. 1. **Apld.** Davis *v.* Clarke (1844), 6 Q. B. 16. **Distd.** Rawlings *v.* Bell (1845), 1 C. B. 951; Murray *v.* Mann (1848), 17 L. J. Ex. 256. **Apprvd. but Distd.** Wilde *v.* Gibson (1848), 1 H. L. Cas. 605. **Distd.** Watson *v.* Poulsom (1851), 18 L. T. O. S. 126; Thom *v.* Bigland (1853), 8 Exch. 725. **Apld.** Eastwood *v.* Bain (1858), 28 L. J. Ex. 74. **Consd.** Dublin, Wicklow & Wexford Ry. Co. *v.* Slattery (1878), 3 App. Cas. 1155, H. L. **Apprvd. but Distd.** Derry *v.* Peek (1889), 14 App. Cas. 337. **Distd.** London & Southern Counties Investment Advance & Discount Co. *v.* Clamp (1890), 7 T. L. R. 131; Oliver *v.* Bank of England, [1901] 1 Ch. 652. **Refd.** Moens *v.* Heyworth (1842), 10 M. & W. 147; Fuller *v.* Wilson (1842), 3 Q. B. 58, Ex. Ch.; Gibson *v.* D'Este (1843), 2 Y. & C. Ch. Cas. 542; Wilson *v.* Fuller (1843), 3 Q. B. 68, Ex. Ch.; Collins *v.* Evans (1844), 5 Q. B. 820, Ex. Ch.; Freeman *v.* Cooke (1848), 18 L. J. Ex. 114; Milne *v.* Marwood (1853), 3 C. L. R. 228; Collins *v.* Cave (1859), 4 H. & N. 225; Udell *v.* Atherton (1861), 7 H. & N. 172; Sheen *v.* Bumpstead (1862), 1 H. & C. 358; Hollman *v.* Pullin (1884), Cab. & El. 254, N. P.; Yonge *v.* Toynbee, [1910] 1 K. B. 215, C. A.; Armstrong *v.* Jackson, [1917] 2 K. B. 822. **Mentd.** Tyrrell *v.* Woolley (1840), 1 Man. & G. 809; R. *v.* White (1847), 9 L. T. O. S. 475; Jenkins *v.* Hutchinson (1849), 13 Q. B. 744; Collen *v.* Wright (1857), 8 E. & B. 647.

2758. Broker acting for both parties—No authority from seller.]—Where a broker acts for both buyer & seller, the buyer may sue the broker for breach of warranty of authority as agent for the seller.—HUGHES *v.* GRAEME, No. 2803, *post.*

Annotations:—**Refd.** Godwin *v.* Francis (1870), L. R. 5 C. P. 295; *Re* National Coffee Palace Co. (1883), 53 L. J. Ch. 57, C. A.

2759. Seller giving purchaser's master of ship instructions as to destination.]—Resp.'s ship was in a port in Australia under orders to proceed to R. Resp. entered into a contract with applts. in the United Kingdom to purchase a cargo of coal to be loaded in Australia. Applts. telegraphed to their agents in Australia as to terms & conditions of sale, adding instructions as to the ship's destination. They had no authority from resp. to give orders as to destination. By a mistake of a telegraph clerk C. was given as the destination instead of R. Applts.' agents in Australia informed the master of the ship that they had instructions to direct him to proceed to C. The master hesitated to change his destination, & applts.' agents gave him a letter "to confirm our verbal instructions as to your destination"—naming C. as his destination—continuing, "this letter will be sufficient guarantee for proceeding on your voyage":—*Held:* (1) the letter amounted to a warranty to the master as resp.'s agent that applts. had resp.'s authority to order the ship to proceed, whereas they had not; (2) resp. could sue for the damages he had sustained through the ship proceeding to C. instead of to R.—BROWN *v.* LAW (1895), 72 L. T. 779; 11 T. L. R. 395; 8 Asp. M. L. C. 230, H. L.

2760. Person acting as agent but disclaiming authority to do so.]—A person who purports to contract as agent on behalf of an alleged principal, is liable on an implied warranty of his authority only if the other contracting party relied on the existence of authority. He is not liable if, at the time of purporting to contract, he expressly disclaimed any present authority.

L. signed an agreement for his "wife & C." without their authority, & they refused to concur in it. In the case of his wife, L. believed & represented that he had her authority. In the case of C. he stated, & the other party to the agreement was aware, that he had not his authority. In an action by the latter against L. to be indemnified by him for not procuring their concurrence:—*Held:* (1) to enable pltf. to maintain his action on an implied contract by L. that he had authority to sign for his wife & C., it was necessary to prove misrepresentation of fact by L., but not that the misrepresentation was due to any wrong or omission on his part; (2) L. was liable in damages to pltf. in respect of his signature on behalf of his wife, but not on behalf of C.—HALBOT *v.* LENS, [1901] 1 Ch. 344; 70 L. J. Ch. 125; 83 L. T. 702; 49 W. R. 214; 45 Sol. Jo. 150.

Annotation:—**Refd.** Oliver *v.* Bank of England (1901), 70 L. J. Ch. 377.

C. Where Agent continues to act after Authority determined.

2761. Authority determined by—Death of principal—Agent ignorant—Older rule.]—A., who had been in the habit of dealing with pltf. for meat supplied to his house, went abroad, leaving his wife & family resident in England, & died abroad. In an action against the wife for goods supplied after A.'s death, but before information of his death had been received:—*Held:* (1) the wife had originally full authority to contract & had done no wrong in representing her authority as continuing, or omitting to state any fact within her knowledge relating to it; (2) the revocation of her authority was by the act of God, & continuance of the principal's life was equally within the knowledge of both parties; (3) the wife was not liable.—SMOUT *v.* ILBERY

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the names:—*Held:* (1) upon the evidence, W. was not in fact authorised in any way to execute such an instrument for M., & she was not bound; (2) J. & W. were liable for breach of warranty of authority; (3) the representation that W. had authority from M. was one of fact, not of law.—GOLD MEDAL FURNITURE CO. *v.* STEPHENSON (1911), 19 W. L. R. 651.—**CAN.**

k. *Person acting for estate of deceased person.*] — Pltf. brought an action for the price of goods furnished to deft., who professed, but without any valid authority, to be acting for the estate of a deceased person named R. Pltf. & deft. were equally aware of the death of R., but yet the account was still kept in the name of R., who had in his lifetime had dealings of the same nature with pltf.:—*Held:* if pltf. could recover at all under the evidence, which was doubtful, he could only do so on a count for the breach of deft's. implied warranty of his authority to act for the estate.—OUTRAM *v.* DOYLE (1879), 1 R. & G. 1.—**CAN.**

PART X. SECT. 1, SUB-SECT. 7.—C.

l. *Authority determined by — Lapse of time—Knowledge of third party.*]—*Semble:* if an agent shows his authority to a purchaser, who thus becomes aware of its date, & it is subsequently held that the authority has ceased from lapse of time, the purchaser cannot maintain an action against the agent for breach of warranty of authority.—DILLON *v.* MACDONALD (1902), 21 N. Z. L. R. 45.—**N.Z.**

Sect. 1.—In regard to contracts: Sub-sect. 7, C. & D.]

(1842), 10 M. & W. 1; 12 L. J. Ex. 357; 152 E. R. 357.

Annotations:—**Expld.** Jenkins *v.* Hutchinson (1849), 13 Jur. 763. **Dbtd.** Campanari *v.* Woodburn (1854), 15 C. B. 400. **Distd.** Randell *v.* Trimen (1856), 18 C. B. 786. **Consd.** Collen *v.* Wright (1857), 8 C. & B. 647. **Distd.** Bradbury *v.* Morgan (1862), 7 L. T. 104. **Expld.** *Re* Oriental Bank Corpn., *Ex p.* Guillemin (1884), 28 Ch. D. 634. **Consd. & Expld.** Salton *v.* New Beeston Cycle Co., [1900] 1 Ch. 43. **Dbtd.** Halbot *v.* Lens, [1901] 1 Ch. 344. **Expld.** Oliver *v.* Bank of England, Starkey, Leveson & Cooke, [1901] 1 Ch. 652. **Consd. & Expld.** Yonge *v.* Toynbee, [1910] 1 K. B. 215, C. A. **Refd.** Weedon *v.* Woodbridge (1842), 13 L. T. O. S. 159; *Re* Pearce, Roberts *v.* Stephens (1894), 8 R. 805. **Mentd.** Read *v.* Teakle (1853), 1 C. L. R. 200.

2762. —— Dissolution of principal company—Agent ignorant.]—The principle laid down in *Smout* v. *Ilbery* (No. 2761, *ante*) as to responsibility of an agent whose agency has been determined by the principal's death, applies just as much in the dissolution of a legal entity, such as a corpn., as in the death of a living person.

Where pltf. had obtained judgment in an action against a co., & on proceeding to enforce judgment discovered, after the action had been set down for trial, but before the hearing, that the co. had been dissolved under Cos. Act, 1862 (c. 89), ss. 142, 143, the solrs., who appeared for the co. & who at the hearing did not know of its actual dissolution, were ordered to pay pltf. his costs as between solr. & client as from the date of the hearing only, on the ground that they had not at that date used due diligence to ascertain whether the co. was dissolved or not.—SALTON *v.* NEW BEESTON CYCLE CO., [1900] 1 Ch. 43; 69 L. J. Ch. 20; 81 L. T. 437; 48 W. R. 92; 16 T. L. R. 25; 7 Mans. 74.

Annotation:—**Dbtd.** Yonge *v.* Toynbee, [1910] 1 K. B. 215, C. A.

2763. —— Lunacy of principal—Agent ignorant—Modern rule.]—Where an authority given to an agent has, without his knowledge, been determined by the death or lunacy of the principal, &, subsequently, the agent has, in the belief that he was acting in pursuance thereof, made a contract or transacted some business with another person, representing that in so doing he was acting on behalf of the principal, the agent is liable, as having impliedly warranted the existence of the authority which he assumed to exercise, to that other person, in respect of damage occasioned to him by reason of the non-existence of that authority.

Solrs. were instructed by a client to conduct his defence to an action which was then threatened & was afterwards commenced against him. Before the commencement of the action the client became, & was certified as being, of unsound mind. In ignorance of his unsoundness of mind, & of his having been so certified, the solrs. entered an appearance for him in the action, & delivered a defence, to which pltf. replied, & other interlocutory proceedings took place in the action. Subsequently the action not then having come to trial, pltf.'s solr. was informed that deft. had been certified as being of unsound mind; & an application was made on behalf of pltf. at chambers for an order that the appearance & all subsequent proceedings in the action should be struck out, & that the solrs. who had assumed to act for deft. should be ordered personally to pay pltf.'s costs of the action up to date on the ground that they had so acted without authority. The master made an order that the appearance & subsequent proceedings in the action should be struck out, but refused to make an order for payment of pltf.'s costs by the solrs. personally, which refusal was on appeal affirmed by the judge at chambers. Pltf. having appealed to the C. A.:—*Held:* (1) the solrs. who had taken on themselves to act for deft. in the action had thereby impliedly warranted that they had authority to do so; (2) they were liable personally to pay pltf.'s costs of the action.—YONGE *v.* TOYNBEE, [1910] 1 K. B. 215; 79 L. J. K. B. 208; 102 L. T. 57; 26 T. L. R. 211, C. A.

Annotations:—**Refd.** *Re* Dunn, Simmons *v.* Liberal Opinion, [1911] 1 K. B. 966, C. A.; Haxby *v.* Wood Advertising Agency (1913), 109 L. T. 946; Fernée *v.* Gorlitz, [1915] 1 Ch. 177.

2764. —— Revocation by principal.]—A solr. assuming to act for one of the parties to an action warrants his authority, & is personally liable to the opposing party for costs, if it turns out that the client for whom he assumed to act is non-existing, or has revoked the authority.—*Re* DUNN, SIMMONS *v.* LIBERAL OPINION, LTD., [1911] 1 K. B. 966; 80 L. J. K. B. 617; 104 L. T. 264; 27 T. L. R. 278; 55 Sol. Jo. 315, C. A.

D. Where Agent acts in Excess of Authority.

2765. Third party in error as to actual scope of agent's authority.]—Directors of a shipping co. employed pltfs., shipbrokers, to procure a purchaser for all the co.'s ships. Pltfs. introduced C., but negotiations with C. went off upon an objection urged by C.'s solr. that the directors had no power to sell all the ships except in the event of the winding up of the co. with the consent of the shareholders which had not been obtained. In an action against the directors for breach of warranty of authority:—*Held:* (1) the proposed sale was within the directors' power & would have bound the co.; (2) the action was not maintainable.—WILSON *v.* MIERS (1861), 10 C. B. N. S. 348; 3 L. T. 780; 142 E. R. 486.

2766. ——.]—If there is no misrepresentation in point of fact as to the agent having power to bind his principal, but merely mistake or misrepresentation in point of law, *i.e.*, if the person who deals with the agent is fully aware in point of fact what is the extent of the agent's authority to bind his principal, but makes a mistake as to whether that authority is sufficient in point of law or not, the agent is not liable for breach of warranty of authority (MELLISH, L.J.).—BEATTIE *v.* EBURY (LORD) (1872), L. R. 7 Ch. 777; 41 L. J. Ch. 804; 27 L. T. 398; 20 W. R. 994, L.JJ.; *affd.* (1874), L. R. 7 H. L. 102, H. L.

Annotations:—**Consd.** Weeks *v.* Propert (1873), L. R. 8 C. P. 427. **Distd.** West London Commercial Bank *v.* Kitson (1883), 12 Q. B. D. 157. **Consd.** Robertson *v.* Harris (1900), 64 J. P. 565. **Refd.** Halbot *v.* Lens, [1901] 1 Ch. 344; Oliver *v.* Bank of England, Starkey, Leveson & Cooke, [1901] 1 Ch. 652. **Mentd.** Rainford *v.* Keith & Blackman Co., [1905] 1 Ch. 296.

2767. Agent's misrepresentation—One of law, not of fact.]—The secretary of a ry. co. stated to pltf., who was desirous of advancing money on debentures, that the co. would issue him a bond for £1,500, but the co. was not yet in a position to issue permanent debentures, though it expected to be able to do so in four or five months. Pltf. at same time received a prospectus, showing that the co. was incorporated by Act of Parliament, & that three persons named were directors. Pltf. advanced the money, & received in exchange a Lloyd's bond signed by the secretary whereby the co. purported to acknowledge the debt & to covenant to pay it with interest at 6 per cent. The co. having ceased to pay interest & being in difficulties, pltf. sued the

PART X. SECT. 1, SUB-SECT. 7.—D.

2767 i. *Agent's misrepresentation—One of law, not of fact.*]—A representation by the directors of a limited co., that they are authorised to buy & hold shares in another co., is a pure representation of law upon which, if untrue, they cannot be made personally liable.—MCINTYRE *v.* SWYNY (1893), 14 N. S. W. 436.—AUS.

directors :—*Held :* the principle of relief on the ground of misrepresentation did not extend to an incorrect statement of a matter of law.—RASHDALL *v.* FORD (1866), L. R. 2 Eq. 750 ; 35 L. J. Ch. 769 ; 14 L. T. 790 ; 14 W. R. 950.

Annotations :—Apprvd. Beattie *v.* Ebury (1872), 7 Ch. App. 777 ; Weeks *v.* Propert (1873), L. R. 8 C. P. 427. Distd. Hirschfeld *v.* L. B. & S. C. Ry. Co. (1876), 2 Q. B. D. 1 ; West London Commercial Bank *v.* Kitson (1884), 18 Q. B. D. 360, C. A.

2768. —— Arising from misinterpretation of ambiguous instructions.]—B. & Co., T.'s agents, acting upon ambiguous instructions from him, signed a charterparty with L. & Co. which T. repudiated. L. & Co. brought an action against B. & Co. for damages for breach of warranty of authority in them to enter into the charterparty. The jury found B. & Co. had put a construction on the instructions sent to them by T. which no reasonable man should have done :—*Held :* (1) the question of construction was one for the jury, as the instructions of defts. were contained in a commercial document ; (2) as pltfs. had only had to show that the construction of defts. was the less reasonable one, they were entitled to judgment in the action. —LINDSAY, GRACIE & Co. *v.* BARTER & Co. (1885), 2 T. L. R. 4, C. A.

2769. —— ——.]—Pltfs. brought an action against defts. for breach of warranty of authority to charter to pltfs. a ship belonging to A. The authority relied upon was given to defts. by A., a shipowner at Naples, who sent a telegram to defts. in the following words, "You authorise fix steamer prompt loading 3,000 tons coal Newport Cagliari Messina or Palermo twenty shillings. If cannot better wire immediately." A. refused to let a ship & repudiated the charter, his reason being that his authority to defts. was to hire a ship & not to let one :—*Held :* if the telegram was ambiguous defts. had acted *bonâ fide* & reasonably in interpreting it as they had done ; (2) the shipowner would have been responsible to pltfs. for the interpretation which his agents had *bonâ fide* & reasonably placed upon ambiguous instructions ; (3) the actual charterparty entered into was outside the authority in whatever way it was read, & pltfs. were entitled to judgment. — WEIGALL & Co. *v.* RUNCIMAN & Co. (1916), 85 L. J. K. B. 1187 ; 115 L. T. 61, C. A.

2770. No representation made by agent as to his authority.]—In order to make solrs. who had not authority to receive notice of an incumbrance personally liable for the consequences of a notice given to them by mistake, they must be proved to have represented that they had such authority.—SAFFRON WALDEN SECOND BENEFIT BUILDING SOCIETY *v.* RAYNER (1880), 14 Ch. D. 406 ; 49 L. J. Ch. 465 ; 43 L. T. 3 ; 28 W. R. 681, C. A.

For full anns., *see* CHOSES IN ACTION.

2771. ——.]—On Mar. 28, 1890, a co.'s board of directors offered to pay half the amount of the invoice for certain goods, supplied by E. & Co., by first mtge. 6 per cent. debentures, & half by the co.'s acceptance. This was accepted by E. & Co., & letters passed between their manager & the secretary of the co. completing the arrangements. Deft. H. was one of the directors of the co., & chairman of the meeting of Mar. 28, 1890. The amount required to be paid by debentures was £600. At the time of this agreement the co. had signed & sealed the whole of the first issue of debentures amounting to £70,000. All these debentures except £4,650 had been allotted ; & in Jan., 1890, £4,500 of these unissued debentures had been pledged with the co.'s bankers to secure a loan from them of £5,000. Only £150 of these debentures remained in the director's own hands. In Nov., 1890, the co. was ordered to be wound up. No debentures were ever given to E. & Co., & they brought an action against H., claiming he had represented that he had authority to agree to allotment of the debentures, & requiring him personally to make good the representation :—*Held :* (1) there was no legal ground upon which H. could be held personally liable ; (2) the action must be dismissed, but without costs.—ELKINGTON & Co. *v.* HURTER, [1892] 2 Ch. 452 ; 61 L. J. Ch. 514 ; 66 L. T. 764.

2772. ——.]—Pltf. sued for specific performance of a contract for sale of the M. estate. The property was placed by five of defts., sisters, taking in equal shares under a will, in the hands of sixth deft., G., an estate agent, for sale. G. wrote pltf. : "Although we can agree price now, we cannot make a formal contract until the will is proved." Later he wired he could close for £21,250, subject to more formal contract. Pltf. wrote accepting, & indorsing cheque for the deposit. A formal agreement was prepared, but the five first defts. refused to execute it. Pltf. claimed damages & specific performance against them, & against G. return of the deposit & damages for breach of warranty of authority. The action having been dismissed for want of a contract in writing to satisfy Stat. Frauds :—*Held* : (1) there was no authority to make a complete contract, & G. never represented he had such

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2770 i. *No representation made by agent as to his authority.*]—PICARD *v.* REVELSTOKE SAW MILL CO. (1913), 23 W. L. R. 50 ; 3 W. W. R. 777 ; 9 D. L. R. 580 ; on appeal, 25 W. L. R. 98 ; 12 D. L. R. 685.—**CAN.**

2770 ii. ——.]—P., tenant for life of an estate vested in trustees, with powers of sale, employed H. & S. to negotiate a sale, believing the trustees would ratify his act, but without authority from them ; & a rental & conditions of sale were prepared, in which the estate was mentioned as being vested in the trustees on trust for sale, & P.'s name was not mentioned. P., in correspondence with H. & S., treated himself as having authority to conclude a sale. M. offered H. & S. a sum of £7,000 for the estate, which offer was communicated to P., but refused by him ; P. subsequently wrote to D., his solr., that if M. offered £7,000 D. might accept the offer. M. shortly afterwards offered £7,250, & D. wrote a letter stating that on behalf of the trustees he accepted the offer, subject to the rental & conditions of sale. P. was subsequently offered £7,500 for the estate, upon which he & the trustees repudiated the act of D., & refused to complete with M. In order to provide himself with the necessary purchase-money, M. sold out certain bank shares, & thereby sustained loss. M. brought an action against P., alleging that P. had contracted & undertaken that he had authority from the trustees to sell, & alleging that P. had contracted & undertaken that D. had such authority :—*Held :* pltf. could not recover loss of bank shares, as P. had not so contracted & undertaken.—MAXWELL *v.* PARNELL (1866), I. R. 1 C. L. 234 ; 11 C. L. 554.—**IR.**

2770 iii. —— *Signature "agent" not such representation.*]—An agreement was made between pltfs. of the one part & a railway co., by their agent, of the other part, by which pltfs. contracted to furnish goods on the terms specified. The agreement was signed & sealed by pltfs., & by deft., styling himself "agent." No representation as to authority was shown to have been made by deft., but it was proved that after the co. had accepted & paid for a portion of the goods they refused to carry out the contract, & defeated pltfs. in an action upon it by setting up the want of their corporate seal :—*Held :* this evidence was insufficient to sustain an action against deft. for falsely representing to pltfs. that he had authority to bind the co.—MCDONALD *v.* MCMILLAN (1859), 17 U. C. R. 377.—**CAN.**

2770 iv. —— *Signature "as agent" not such representation.*]—Where the facts as to agency are within the knowledge of the ostensible agent, but not of the other contracting party, the fact that the former signs the contract "as agent" amounts to a representation that he has authority to contract. But where the other party knew that no authority to contract originally existed, & a document obtained at the instance of both to supply that authority was jointly interpreted & was read by both as authorising the ostensible agent to contract, & where although both were mistaken, yet both had exactly the same knowledge of the facts :—*Held :* a representation of agency could not be implied from the fact that the ostensible agent signed the contract "as agent."—BLOWER *v.* VAN NOORDEN, No. 2748 ii., *ante.*—**S. AF.**

Sect. 1.—*In regard to contracts: Sub-sect.* 7, *D.*]

authority; (2) the appeal must be dismissed. —COOK *v.* WILLIAMS (1897), 14 T. L. R. 31, C. A.

2773. Effect of notice of limited authority—Signature qualified—Admissibility of usage.]—Defts. signed a charterparty as follows: "By telegraphic authority of R., S., E. & Co., as agents." The freight agreed upon in the charterparty was 3*s.* 9*d.*, in accordance with telegraphic instruction. The figure really agreed to by the charterers was 3*s.* 4½*d.*, but a mistake was made by the telegraphic officials in transmitting the message:—*Held:* (1) defts. not liable for breach of warranty of authority; (2) evidence was admissible to prove the customary interpretation of this particular form of signature. —LILLY, WILSON & CO. *v.* SMALES, EELES & CO., [1892] 1 Q. B. 456; 40 W. R. 544; 8 T. L. R. 410.

2774. —— —— Qualification insufficient notice.] —Applt., a shipbroker, believing a telegram received from N. authorised him to do so, signed a charterparty on behalf of L. adding the words "as agent." It appeared that L. had not authorised the charterparty to be entered into. The signature of the charterparty was qualified by the words "by telegraphic authority of N.":—*Held:* (1) applt. liable to the shipowner for breach of warranty of authority; (2) the qualification was not sufficient to amount to notice that the charterparty was not intended in certain circumstances to be effectual.—STUART *v.* HAIGH (1893), 9 T. L. R. 488, H. L.

2775. —— Auctioneer—Reserve price.]—Where goods were offered for sale at an auction subject to an unnamed reserve price, & the auctioneer, upon discovering after the fall of the hammer that the highest bid was not up to reserve price, refused the bidder's request to sign a note or memorandum of contract, the sum offered being above £10:—*Held:* the auctioneer was not liable to an action at suit of the bidder for damages for refusing to sign any note or memorandum of contract, or for breach of warranty of authority.—MCMANUS *v.* FORTESCUE, [1907] 2 K. B. 1; 76 L. J. K. B. 393; 96 L. T. 444; 23 T. L. R. 292; 51 Sol. Jo. 245, C. A.

2776. Where absence of authority not ground of principal's repudiation.]—An auctioneer being instructed by the owner of a pony to sell it by auction, subject to a reserve price of £25, inadvertently stated at the auction that the sale was without reserve & knocked the pony down to pltf. for 15 guineas. On discovering his mistake the auctioneer put up the pony again, when it was bought in. No memorandum of sale to pltf. was made. In an action against the auctioneer:—*Held:* (1) deft. had an implied authority to sell without reserve; (2) the sale to pltf. was binding on the owner, though no action on it could be successfully brought against him, owing to absence of a written memorandum; (3) there was no breach of warranty of authority on deft.'s part. *Qu.:* whether pltf. had a cause of action against the auctioneer for failing to make a written memorandum of sale. —RAINBOW *v.* HOWKINS & SONS, [1904] 2 K. B. 322; 73 L. J. K. B. 641; 91 L. T. 149; 53 W. R. 46; 20 T. L. R. 508; 48 Sol. Jo. 494.

Annotation:—**Dbtd.** McManus *v.* Fortescue, [1907] 2 K. B. 1, C. A.

2777. Agent acting innocently under forged power.] —Where a person, proposing to act as agent of another, induces a third party to enter into a transaction with him on faith of such agency, whereas no such agency exists, he is liable for injury sustained by such third party in consequence of such untrue representation, whether or not he believed he was acting with the authority of the alleged principal.

One of two trustees of stock standing in the joint names in the books of the Bank of England sold it under a power of attorney, to which the signature of his co-trustee was forged, & the bank allowed a stockbroker who innocently acted under the power to transfer the stock to other persons, & was held liable to replace it:—*Held:* the stockbroker was liable to indemnify the bank upon the ground that

2773 i. *Effect of notice of limited authority.*]—M. & C. being co-owners in equal shares of a vessel which pltf. offered to purchase, C. wrote & wired to M. that he was willing to assign his interest provided pltf. paid cash, in which event he would go to Toronto to close the deal, & later at a meeting of the parties C. expressed his readiness to sell his interest on being paid half the price of the vessel in cash. Pltf. knew that M. had no authority from C. to sign the option of sale on C.'s behalf. M., however, signed an agreement to sell the vessel for half cash:—*Held:* C. & M. were not partners, &, as pltf. knew that M. had no authority from C. to sell on his behalf, M. was not liable for breach of warranty of authority. *Collen* v. *Wright*, 8 E. & B. 647, cited.—BENTLEY *v.* MURPHY (1902), 1 O. W. R. 273, 726, 845; 2 O. W. R. 1014.—**CAN.**

2776 i. *Where absence of authority not ground of principal's repudiation.*]—Pltf., acting as agent for his wife, agreed to sell to deft. a section of land, the price to be $4,000, payable $1,000 down & the balance by two instalments of $750 each & a mtge. for $1,500. There was no memorandum in writing sufficient to satisfy Stat. Frauds. Deft. entered into possession & paid certain instalments of purchase-money to pltf., as agent aforesaid. Six years subsequently the wife repudiated the contract. The cts. held pltf. had no authority to sell the land. For misrepresenting his position deft. claimed damages from pltf.:—*Held:* (1) the law was well settled that, where a person purports to make a contract as agent, he is deemed to warrant that he has the necessary authority, but to make the agent personally liable for making an unauthorised contract the contract must have been one which would have been enforceable against the principal if he had in fact authorised it; (2) the contract not being in writing was not enforceable against the principal; (3) in the circumstances deft. could not invoke the equitable doctrine of part performance to establish its enforceability, having suffered no legal damage from the breach of warranty by the agent, & the only damages to which a person dealing with an unauthorised agent is entitled being the amount which he could have recovered against the principal.—DUNCAN *v.* BECK (1914), 28 W. L. R. 571; 20 D. L. R. 682; 6 W. W. R. 1149; 7 Sask. R. 163.—**CAN.**

2776 ii. ——.]—Defts. made a parol offer to sell to pltf. certain lands, which defts. also by parol represented were listed with them for sale. Pltf. accepted this offer & paid a deposit. An agreement of sale was then signed & the balance of the first payment was paid to defts., who granted a receipt on behalf of their principal. The agreement was not, however, signed by defts. nor by any other person on behalf of the named principal. In an action against defts. as agents misrepresenting their authority:—*Held:* (1) on the evidence there had been no misrepresentation of authority but only of the ability of their principal to sell the land; (2) in any circumstances, before pltf. could recover upon a breach of warranty of authority he must show that defts. entered into a contract with him, which if they had had authority would be binding on their principal; this they had not done, not having signed any agreement to convey, &, only having signed a receipt in the name of their principal, defts. were not liable.—PEACOCK *v.* WILKINSON (1914), 29 W. L. R. 373; 18 D. L. R. 418; 7 W. W. R. 85; *affd.* 51 S. C. R. 319.—**CAN.**

2776 iii. ——.]—Where an agent, purporting to act for his principal, without authority borrowed money for such principal from a third party, & thereafter his principal became insolvent, & was unable to pay back the whole of the money so borrowed, & had been in no better position when the loan was contracted:—*Held:* in the absence of any proof of fraud, as the principal was never able to repay the balance of such loan, the loss occasioned to the third party was not due to the want of the agent's authority, & such agent was not liable in respect to same.—LANGFORD *v.* MOORE, 17 Supreme Court (Cape), 1; 9 Cape Times Reports, 405.—**S. AF.**

2776 iv. ——*Loss of commission caused to agent.*]—M., then a director of deft. co., in a conversation with pltf. assured him that if he, pltf., would procure a purchaser for certain property owned by the co., he felt sure the co. would quote the price at $550,000 &, in the event of a sale, would pay pltf. a commission of $50,000, but any abatement of the price down to $500,000 was to be borne by pltf. There was no evidence that M. had any authority to sell the property or employ an agent to find a purchaser. After M. became president of the co., the property was sold for exactly $500,000 by the co. to a purchaser to whom it had been introduced by pltf. to the knowledge of M.: —*Held:* M. not liable to pltf. for any misrepresentation of authority from the co., to enter into the alleged contract with pltf., or for failing to prevent the co. from selling the property for $500,000 or less.—BENT *v.* ARROWHEAD (1909), 18 Man. L. R. 632; 8 W. L. R. 594; 10 W. L. R. 339.—**CAN.**

he had impliedly warranted his authority to the bank.—STARKEY *v.* BANK OF ENGLAND, [1903] A. C. 114; 72 L. J. Ch. 402; 88 L. T. 244; 51 W. R. 513; 19 T. L. R. 312; 8 Com. Cas. 142, H. L.

Annotations :—**Expld.** Sheffield Corpn. *v.* Barclay, [1905] A. C. 392, H. L. **Consd.** Yonge *v.* Toynbee, [1910] 1 K. B. 215, C. A. **Refd.** Salvesen *v.* Rederi Akt. Nordstjernan, [1905] A. C. 302, H. L.; A.-G. *v.* Odell, [1906] 2 Ch. 47, C. A.; Bank of England *v.* Cutler, [1908] 2 K. B. 208, C. A.

2778. ——.]—A banker in good faith sent to a corpn. a transfer of corpn. stock which purported to be executed by T. & H., the two registered holders of the stock, with a request to the corpn. to register the stock in the name of the banker. The corpn. in good faith acted upon this request & granted a fresh certificate to the banker, who transferred the stock to third parties, & they were registered as holders. Afterwards it was discovered that T. had forged H.'s signature, & H. recovered against the corpn. judgment whereby they were compelled to buy equivalent stock & register it in H.'s name & to pay him the missing dividends with interest. Both parties had acted *bonâ fide* & without negligence :—*Held :* the banker was bound to indemnify the corpn. against the liability to H. upon an implied contract that the transfer was genuine.—SHEFFIELD CORPN. *v.* BARCLAY, [1905] A. C. 392; 74 L. J. K. B. 747; 93 L. T. 83; 69 J. P. 385; 54 W. R. 49; 21 T. L. R. 642; 49 Sol. Jo. 617; 10 Com. Cas. 287; 3 L. G. R. 992; 12 Mans. 248, H. L.

Annotations :—**Apld.** A.-G. *v.* Odell, [1906] 2 Ch. 47, C. A.; Moel Tryvan Ship Co. *v.* Kruger, [1906] 2 K. B. 792. **Consd.** Moel Tryvan Ship Co. *v.* Kruger, [1907] 1 K. B. 809, C. A.; Kruger *v.* Moel Tryvan Ship Co. (1907), 13 Com. Cas. 1, H. L. **Apld.** Bank of England *v.* Cutler, [1908] 2 K. B. 208, C. A.; Bamfield *v.* Goole & Sheffield Transport Co., [1910] 2 K. B. 94, C. A. **Distd.** Kirby *v.* Chessum (1913), 30 T. L. R. 15. **Refd.** Groves, Thomas *v.* Webb & Kenward (1915), 31 T. L. R. 548. **Mentd.** Ruben *v.* Great Fingall Consolidated, [1906] A. C. 439; *Re* Auchmuty (1908), 99 L. T. 462, C. A.; Morison *v.* London County & Westminster Bank, [1914] 3 K. B. 356, C. A.; Groves, Thomas *v.* Webb & Kenward (1916), 85 L. J. K. B. 1533, C. A.

2779. Agent acting fraudulently.]—*Semble :* one who contracts as agent for another, without having authority may, if he acts *malâ fide*, be liable to the person with whom he contracts, in an action on the case for falsely representing himself to have had authority.—JENKINS *v.* HUTCHINSON, No. 2479, *ante*.

For full anns., *see* S. C. No. 2479, *ante*.

2780. ——.]—A person who makes a contract, as agent only, for a principal, without authority, is liable, if there was fraud, in an action of deceit.—LEWIS *v.* NICHOLSON, No. 2748, *ante*.

Annotations :—**Distd.** Tanner *v.* Christian (1855), 4 E. & B. 591. **Apprvd.** Cherry *v.* Colonial Bank of Australasia (1869), 6 Moo. P. C. C. N. S. 235. **Refd.** Green *v.* Kopke (1856), 18 C. B. 549; Randell *v.* Trimen (1856), 18 C. B. 786; Parker *v.* Winlo (1857), 27 L. J. Q. B. 49; Collen *v.* Wright (1857), 8 E. & B. 647; Royal Albert Hall Corpn. *v.* Winchilsea (1891), 7 T. L. R. 362; Starkey *v.* Bank of England, [1903] A. C. 114; Yonge *v.* Toynbee, [1910] 1 K. B. 215.

For full anns., *see* S. C. 2748, *ante*.

2781. —— **Mere excess of authority not equitable fraud.**]—Pltf. having been struck off the register of a co. by order of the ct. on grounds of excess in the co.'s objects, as shown by the memorandum registered after he became a member, over those stated in a prospectus on faith of which he took shares, filed a bill for return of his deposit money against the directors, who issued the prospectus, & the co., not alleging fraudulent intention. On demurrer by the directors :—*Held :* (1) mere excess of authority by an agent did not constitute equitable fraud; (2) any relief in such case must be at law.—STEWART *v.* AUSTIN (1866), L. R. 3 Eq. 299; 36 L. J. Ch. 162; 15 L. T. 407; 15 W. R. 122.

Annotation :—**Apld.** Ship *v.* Croskill (1870), L. R. 10 Eq. 73.

2782. Company directors acting ultra vires—Acceptance of bill—Proof of actual damage necessary.]—In an action against directors of a co. for false representation that they had authority to bind the co. by their acceptance of a bill of exchange drawn on the co., it is incumbent on pltf. to show he has sustained damage; an action is not maintainable by the indorsee of such bill, unless he show he gave value for it, or was otherwise damnified.—EASTWOOD *v.* BAIN (1858), 3 H. & N. 738; 28 L. J. Ex. 74; 32 L. T. O. S. 109; 7 W. R. 90; 157 E. R. 665.

2783. ——.]—Two of the directors of a joint-stock co., by a letter to the co.'s bankers, notified that their manager had authority to draw cheques on account of the co. Such two directors did not form a majority of the directors of the co., as required by their Act of incorporation, so as to bind the co. Although the co.'s account was at the time overdrawn, & that fact was known to the two directors, the bankers honoured the manager's cheques on the authority so given to them. In an action brought by the bank against the two directors for advances made on account of the co. upon the faith of their letter :—*Held :* (1) there was an implied warranty on their part; (2) they were personally liable to the bank to the extent of the sums overdrawn by the manager subsequent to the date of their letter.—CHERRY *v.* COLONIAL BANK OF AUSTRALASIA (1869), L. R. 3 P. C. 24; 6 Moo. P. C. C. N. S. 235; 38 L. J. P. C. 49; 16 E. R. 714; *sub nom.* COLONIAL BANK OF AUSTRALASIA *v.* CHERRY & MCDOUGALL, 17 W. R. 1029.

Annotations :—**Distd.** Beattie *v.* Ebury (1874), L. R. 7 H. L. 102; Colonial Bank of Australasia *v.* Willan (1874), L. R. 5 P. C. 417. **Consd.** Lakeman *v.* Mountstephen (1874), L. R. 7 H. L. 17. **Refd.** Weeks *v.* Propert (1873), L. R. 8 C. P. 427. **Mentd.** Starkey *v.* Bank of England, [1903] A. C. 114.

2784. ——.]—Pltf. lent £70 to a benefit building society, & received a receipt signed by defts., as two directors of the society, certifying that pltf. had deposited £70 with the society for three months certain, to be repaid with interest after fourteen days' notice. The society was formed under 6 & 7 Will. 4, c. 32, & had no power to borrow money; & pltf., being unable to get her money back from the society, sued defts. On the above facts the ct. having power to draw inferences :—*Held :* defts. were liable to pltf. in damages for a breach of warranty of authority, they having, by signing the receipt, in effect represented that they had authority to make a binding contract of loan on behalf of the society, & so induced pltf. to part with her money.—RICHARDSON *v.* WILLIAMSON & LAWSON (1871), L. R. 6 Q. B. 276; 40 L. J. Q. B. 145; 35 J. P. 728.

Annotations :—**Consd.** Beattie *v.* Ebury (1872), 7 Ch. App. 777; Weeks *v.* Propert (1873), L. R. 8 C. P. 427. **Distd.** McCollin *v.* Gilpin (1880), 5 Q. B. D. 390; Chapleo *v.* Brunswick Permanent Bldg. Soc. (1881), 6 Q. B. D. 696, C. A.; Atkin *v.* Wardle (1889), 61 L. T. 23.

2785. —— **Issue of debentures.**]—The directors of a ry. co., which had fully exercised the borrowing powers conferred upon it by its special Act in Aug., 1864, advertised that they were "prepared to receive proposals for loans on mtge. debentures to replace loans falling due." W. (pltf.'s testator) offered a loan of £500; &, his offer being accepted, he in the same month sent his cheque for £500 to the directors, for which he requested that a debenture should be issued to him. In pursuance of a resolution of the directors to that effect, the cheque was handed to H., the contractor for the works, who had been (but had then ceased to be) the holder of seven debenture bonds for £500 each; & H. was requested to transfer one of them to W., & it was by the same resolution directed "that such bond be on Oct. 1 exchanged for a new one." H. kept the cheque (which was duly honoured), but

Sect. 1.—*In regard to contracts: Sub-sect.* 7, *D. & E.*]

was unable to transfer the debenture; &, in pursuance of a resolution of the directors of Oct. 5, a new debenture bond for £500 was sealed & sent to pltf. as executor of W. Deft., a director of the co., was a party to each of the above transactions. By a decree of the Ct. of Ch. of Feb. 14, 1868, the above-mentioned debenture was declared void as being for a sum in excess of the borrowing powers of the co.:—*Held:* (1) deft. was liable as for a breach of warranty; (2) the directors had power in the circumstances to issue a debenture which should be valid & binding upon the co.; (3) pltf. was entitled to recover as against him the £500 together with interest by way of damages.—WEEKS *v.* PROPERT (1873), L. R. 8 C. P. 427; 42 L. J. C. P. 129; 21 W. R. 676.

Annotations:—**Apld.** Firbank's Exors. *v.* Humphreys (1886), 18 Q. B. D. 54, C. A. **Refd.** Oliver *v.* Bank of England, [1902] 1 Ch. 610, C. A.

2786. ——.]—By the certified rules of an unincorporated building society the directors might borrow money not exceeding a prescribed amount. Loans were made to the society through its secretary in accordance with advertisements, issued with the authority of the directors, that such loans might be so made by bringing the money to the office of the secretary. In each case a receipt was given by the secretary for the money as a loan to the society, with a written undertaking by him "to procure the promissory note of the directors for the loan," & afterwards, in pursuance to such undertaking, the receipt was exchanged for such note, which always bore the date of the receipt. After an amount had been so borrowed exceeding the limit prescribed by the rules pltfs., who had on several previous occasions lent money to the society according to the above mode, paid a sum to the secretary as a loan to the society, & received from him the usual receipt & undertaking, but no promissory note of the directors was ever afterwards given, & the secretary absconded, appropriating that sum, with other moneys of the society, to his own use. In an action against the society & directors, the jury found that the society held out the secretary to pltfs. as having authority to receive the loan on their behalf on the terms on which it was received, & that the directors did the same:—*Held:* (1) such finding was bad in point of law against the society; (2) as the limit for borrowing prescribed by the rules had been exceeded when the loan was made by pltfs., the society, which had derived no benefit, was not liable for such loan; (3) (BRAMWELL, L.J., *doubting*), although there was no fraud on the part of the directors, they were personally liable to pltfs. for the money which had been so advanced.—CHAPLEO *v.* BRUNSWICK PERMANENT BENEFIT BUILDING SOCIETY (1881), 6 Q. B. D. 696; 50 L. J. Q. B. 372; 44 L. T. 449; 29 W. R. 529, C. A.

Annotations:—**Distd.** *Re* Sheffield Permanent Bldg. Soc., *Ex p.* Watson (1888), 59 L. T. 401, D. C. **Apld.** Cross *v.* Fisher (1891), 65 L. T. 114. **Distd.** Taff Vale Ry. *v.* Amalgamated Soc. of Railway Servants, [1901] A. C. 426, H. L. **Consd.** Moss S.S. Co. *v.* Whinney, [1912] A. C. 254, H. L. **Mentd.** Blackburn Bldg. Soc. *v.* Cunliffe, Brooks (1882), 22 Ch. D. 64 n.

2787. ——.]—Directors of a tramway co. accepted, as such directors, a bill of exchange, payable to order, by & on behalf of the co. The special Act under which the co. was incorporated gave them no power to accept bills:—*Held:* an action was maintainable against the directors who signed the acceptance for damages for falsely representing that they were authorised by the co. to accept bills, which was a false representation of fact & not of law.—WEST LONDON COMMERCIAL BANK, LTD. *v.* KITSON (1884), 13 Q. B. D. 360; 53 L. J. Q. B. 345; 50 L. T. 656; 32 W. R. 757, C. A.

Annotation:—**Distd.** Atkins *v.* Wardle (1889), 58 L. J. Q. B. 377.

2788. Joinder of claims—Alternative claim against—Agent.]—T., professing to act on behalf of a principal, L., contracted with pltfs., a limited co., to take up debenture stock of the co. Pltfs. sued L. for breach of contract, & L. set up as defence that the promise (if any) was made without his knowledge or consent by T. Pltfs. filed their statement of claim against L. & T., & claimed alternative relief against T. for breach of warranty of his authority to contract:—*Held:* T. might properly be added as deft. under R. S. C., O. 16, rr. 3, 6, as pltfs. claimed alternative redress against L. & T. in respect of same subject-matter, & no inconvenience would result.—HONDURAS INTER-OCEANIC RY. CO. *v.* LEFEVRE & TUCKER (1877), 2 Ex. D. 301; 46 L. J. Q. B. 391; 36 L. T. 46; 25 W. R. 310, C. A.

Annotations:—**Consd. & Apld.** Bennetts *v.* McIlwraith, [1896] 2 Q. B. 464, C. A. **Refd.** Child *v.* Stenning (1877), 5 Ch. D. 695; Thompson *v.* L. C. C., [1899] 1 Q. B. 840, C. A.; Sanderson *v.* Blyth Theatre Co., [1903] 2 K. B. 533, C. A.; Bullock *v.* London General Omnibus Co., Trollope & Colls (1906), 22 T. L. R. 244.

2789. —— —— **Principal.**]—In an action against defts. in London for breach of warranty of authority, it appeared they had assumed as agents for foreign principals to enter into a contract to be performed out of jurisdiction, & there had been a breach out of jurisdiction, the supposed principals having repudiated the contract as made without their authority:—*Held:* (1) the foreign principals were proper parties to the action within R. S. C., O. 11, r. 1 (g); (2) service on them out of jurisdiction of notice of the writ might be served.—MASSEY *v.* HEYNES (1888), 21 Q. B. D. 330; 57 L. J. Q. B. 468, 521; 59 L. T. 470; 36 W. R. 834, C. A.

Annotations:—**Folld.** Washburn & Moen, etc., Co. *v.* Cunard S.S. Co. & Parkes (1889), 5 T. L. R. 592. **Consd.** The Elton, [1891] P. 265; Indigo Co. *v.* Ogilvy, [1891] 2 Ch. 31, C. A. **Apld.** Witted *v.* Galbraith, [1893] 1 Q. B. 431. **Consd. & Folld.** Firth *v.* De la Rivas (1893), 69 L. T. 666, C. A. **Consd.** Bennetts *v.* McIlwraith, [1896] 2 Q. B. 464, C. A. **Folld.** Oesterreichische Export *v.* British Indemnity Insce., [1914] 2 K. B. 747. **Refd.** Burt *v.* Bowen (1891), 8 T. L. R. 28; Thompson *v.* L. C. C., [1899] 1 Q. B. 840, C. A.; The Duc d'Aumale, [1903] P. 18, C. A.; Sanderson *v.* Blyth Theatre Co., [1903] 2 K. B. 533, C. A.

2790. —— —— ——.]—In an action against defts. for breach of warranty of authority, it appeared they had assumed to act as agents in entering into a charterparty for loading pltfs.' vessel with a cargo which was not supplied. Pltfs., in doubt as to whether defts. had authority or not, applied to add alleged principals as defts.:—*Held:* pltfs. entitled to do so.—BENNETTS & CO. *v.* MCILWRAITH, [1896] 2 Q. B. 464; 65 L. J. Q. B. 632; 75 L. T. 145; 45 W. R. 7; 12 T. L. R. 616; 8 Asp. M. L. C. 176; 1 Com. Cas. 441, C. A.

Annotations:—**Consd.** Thompson *v.* L. C. C., [1899] 1 Q. B. 840, C. A. **Refd.** Sanderson *v.* Blyth Theatre Co., [1903] 2 K. B. 533, C. A.; Bullock *v.* London General Omnibus Co. & Trollope & Colls (1906), 22 T. L. R. 244.

E. Measure of Damages.

2791. Action brought without authority—Costs incurred in defence.]—A solr. having commenced an

2788 i. *Joinder of claims—Alternative claim against—Agent.*]—In an action for rectification of an agreement for sale of a certain lot, it developed that pltf. had dealt with L. assuming to act as agent for deft. corpn., who, on discovery, denied his authority to act as their agent:—*Held:* pltf. had a right to add L. as a deft., as, should it transpire that L. was not a duly authorised agent of the owners, pltf. might have a right of action against him personally.—BRADLEY *v.* YORKSHIRE GUARANTEE & SECURITIES CORPN. (1907), 13 B. C. R. 68.—CAN.

PART X. SECT. 1, SUB-SECT. 7.—E.

m. *General rule.*]—Where an agent, purporting to act for & on behalf of a principal, contracts with a third party without authority so to do, he is personally liable to put such party into as good a position as if due authority did exist.—LANGFORD *v.* MOORE, No. 2776 iii., *ante.*—S. AF.

n. —— *General limit of liability.*]—Where parties enter into contracts on behalf of a principal without authority to do so, their liability is limited to

action on behalf of an infant by her next friend, also an infant :—*Held :* personally liable as between solr. & client for costs which defts. had incurred in defending the action, including costs of the application to set the writ aside, but excluding costs of defts. who had put forward the next friend.—FERNEE *v.* GORLITZ, [1915] 1 Ch. 177 ; 84 L. J. Ch. 404 ; 112 L. T. 283.

Solicitor acting without authority.]—*See* SOLICITORS.

2792. Allotment of shares repudiated by allottee—Sum payable to company for shares allotted.]—L. instructed his brokers to apply for fifty shares at £1 each in a co. named. They by mistake applied for & obtained an allotment to L. in another co. L. repudiated the shares, but his name was placed on the register. The co. had a very large number of shares allotted, & in the opinion of the ct. the shares were unsaleable. The co. was soon afterwards wound up, & the name of L. removed on his application from the list of contributories. The official liquidator claimed £50 damages from the brokers for misrepresentation of authority :—*Held :* (1) the general rule as to measure of damages for breach of warranty of authority was applicable ; (2) the liquidator was entitled to recover from the brokers the amount lost by the co. in losing the contract with L. ; (3) as L. was solvent & the shares unsalcable, that loss was represented by the whole sum of £50 payable for the shares.—*Re* NATIONAL COFFEE PALACE CO., *Ex p.* PANMURE (1883), 24 Ch. D. 367 ; 53 L. J. Ch. 57 ; 50 L. T. 38 ; 32 W. R. 236, C. A

Annotation :—**Apld.** Meek *v.* Wendt (1888), 21 Q. B. D. 126.

2793. Charterparty repudiated by owner—Difference in freight—Larger ship.]—In an action against a broker who had professed on behalf of the owner of a ship to charter her to pltfs., not having authority to do so, & who had requested them to charter themselves some other ship, & they having chartered a much larger ship at a higher freight :—*Held :* they could not recover from the broker more than the difference of freight on the tonnage of the former ship if they could have procured one of similar size, or had neglected to give deft. notice of the substituted ship, so that he might use the surplus freight.—MITCHELL *v.* KAHL (1862), 2 F. & F. 709.

2794. Compromise of claim repudiated by debtor—Sum agreed to be paid.]—Pltf. brought an action in England against a marine insurance co. carrying on business in America, & obtained judgment in default of appearance for £1,000. Negotiations for settlement took place between pltf. & defts., agents of the co. in England, & defts. by mistake represented to pltf. in good faith that they were authorised by the co. to offer £300 in settlement of pltf.'s claim. Pltf., relying upon the accuracy of the representation, entered into agreement with defts. on behalf of the co. for settlement of his claim for £300, but it appeared defts. were not authorised to make the agreement, & he was unable to enforce performance of it. In an action against defts. to recover damages for breach of warranty of authority, defts. paid into ct. a sum representing the expenses incurred by pltf. in negotiating the compromise :—*Held :* (1) the measure of damages was the loss by pltf. of the gain which he would have derived from the contract defts. warranted should be made ; (2) as the judgment obtained by him was of no value (for the co. had no assets in England, & judgment could not in the circumstances be enforced in American cts.), & the value of pltf.'s remedy on the policy could not be estimated, pltf. was entitled to recover from defts. £300 in addition to the sum paid into ct.—MEEK *v.* WENDT (1888), 21 Q. B. D. 126 ; 59 L. T. 558 ; 4 T. L. R. 582 ; 6 Asp. M. L. C. 331 ; *affd.* [1889] W. N. 14.

2795. Lease repudiated by lessor—Costs of action against supposed principal.]—Where a suit in Chancery was brought by a third party against the supposed principal to enforce a contract made by the alleged agent, & the latter after notice said he would be held responsible if the suit failed for want of authority to contract, never withdrew the assertion that he was authorised to make the contract, & the bill was dismissed on the ground of such want of authority :—*Held :* the third party might in an action against the agent on the implied warranty of authority recover as damages his costs of the Chancery suit.—COLLEN *v.* WRIGHT (1857), 8 E. & B. 647 ; 27 L. J. Q. B. 215 ; 30 L. T. O. S. 209 ; 4 Jur. N. S. 357 ; 6 W. R. 123 ; 120 E. R. 241, Ex. Ch.

Annotations :—**Expld.** Worthington *v.* Sudlow (1862), 31 L. J. Q. B. 131. **Consd.** Cherry *v.* Colonial Bank of Australasia (1869), 6 Moo. P. C. C. N. S. 235, P. C. ; Beattie *v.* Ebury (1872), 7 Ch. App. 777. **Consd. & Expld.** Dickson *v.* Reuter's Telegraph Co. (1877), 3 C. P. D. 1, C. A. **Expld. & Apld.** Firbank *v.* Humphreys (1886), 56 L. J. Q. B. 57, C. A. **Consd.** Hammond *v.* Bussey (1887), 20 Q. B. D. 79, C. A. **Apld.** Cross *v.* Fisher (1892), 40 W. R. 265, C. A. **Consd. & Expld.** Dunn *v.* Macdonald, [1897] 1 Q. B. 401. **Consd. & Apld.** Halbot *v.* Lens (1900), 70 L. J. Ch. 125. **Expld.** Oliver *v.* Bank of England, Starkey, Leveson & Cooke, [1901] 1 Ch. 652. **Apprvd.** Starkey *v.* Bank of England, [1903] A. C. 114, H. L. **Consd.** Sheffield Corpn. *v.* Barclay, [1905] A. C. 392. **Expld. & Apprvd.** Salvesen *v.* Rederi Akt. Nordstjernan, [1905] A. C. 302. **Consd.** Yonge *v.* Toynbee, [1910] 1 K. B. 215. **Refd.** Randall *v.* Raper (1858), E. B. & E. 84 ; Robson *v.* Turnbull (1858), 1 F. & F. 365 ; Oxenham *v.* Smythe (1862), 3 F. & F. 85 ; Hughes *v.* Graeme (1863), 3 F. & F. 885 ; Spedding *v.* Nevell (1869), L. R. 4 C. P. 212 ; Richardson *v.* Williamson (1871), L. R. 6 Q. B. 276 ; Mountstephen *v.* Lakeman (1871), L. R. 7 Q. B. 196 ; Weeks *v.* Propert (1873), L. R. 8 C. P. 427 ; Chapleo *v.* Brunswick Benefit Bldg. Soc. & Smith (1881), 50 L. J. Q. B. 372, C. A. ; *Re* National Coffee Palace Co. (1883), 53 L. J. Ch. 57, C. A. ; Hollman *v.* Pullin (1884), Cab. & El. 254 ; Gaskell *v.* Gosling, [1896] 1 Q. B. 669, C. A. ; Bank of England *v.* Cutler, [1907] 1 K. B. 889 ; Fernée *v.* Gorlitz, [1915] 1 Ch. 177 ; Weigall *v.* Runciman (1916), 115 L. T. 61. **Mentd.** Henderson *v.* Squire (1865), L. R. 4 Q. B. 170 ; Agius *v.* Great Western Colliery Co. (1899), 68 L. J. Q. B. 312, C. A.

2796. —— Not costs of defending action of ejectment.]—A., professing to have authority from the owners of certain premises, granted a parol lease of them for seven years to B., & let him into possession. The owners, disavowing the authority of A., demanded possession of the premises from B., & on his refusal brought an ejectment against him. B. relying on a statement of A. that he had authority to act as he did, & that the ejectment would not be persevered in, & also on the advice of his own attorney, defended the ejectment, but unsuccessfully, & was turned out of possession. B. having brought an action against A. for this false assumption of authority, the jury found that A. had acted *bonâ fide* & without fraud, & through a misapprehension that he had authority :—*Held :* B. was not entitled to recover as damages against A. the costs incurred in defending the ejectment.—POW *v.* DAVIS (1861),

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what could have been recovered from the principal if he had authorised them to bind him. The fact that another party is jointly liable makes no difference.—HABONBHOY VISRAM *v.* CLAPHAM (1882), I. L. R. 7 Bom. 51.—**IND.**

o. *Liability repudiated by lessor — Recovery from agent.*] — An agent, with express authority to let, leased lands binding his principal to refund the lessee expenses incurred by him in certain events which happened. The condition was held to be outside the agent's authority, & the lessee recovered the amount from the agent personally.—KENNY *v.* MOOKTA SOONDEREE DABEE (1867), 7 W. R. 419.—**IND.**

p. *Contract repudiated by principal —Costs of action against supposed principal.*]—A person who induces another to contract with him as the agent of a third party by an unqualified assertion that he is such agent is answerable to the person who so contracts for any damages which he may sustain by reason of the assertion being untrue ; & costs incurred by such person in an action against the supposed principal for the recovery of damages may be recovered as damages.—ECKSTEIN *v.* WHITEHEAD (1860), 10 C. P. 65.—**CAN.**

Sect. 1.—In regard to contracts: Sub-sect. 7, E.; sub-sect. 8, A. (a).]

1 B. & S. 220 ; 30 L. J. Q. B. 257 ; 4 L. T. 399 ; 25 J. P. 662 ; 7 Jur. N. S. 1010 ; 9 W. R. 611 ; 121 E. R. 697.

Annotation :—**Distd.** Hughes *v.* Graeme (1864), 33 L. J. Q. B. 335

2797. —— Costs of action for specific performance —Not loss on resale.]—Pltf. being in occupation of a house & shop, as assignee of a term which would expire on Mar. 25, 1867, at a rent of £65 a year, deft. (who had for several years acted as agent for the freeholder in receipt of rents of the property) on Nov. 16, 1863, agreed in writing, "on behalf of his brother" (the freeholder), to grant pltf. at expiration of the existing term a renewed lease for twenty-one years, at a rent of £70 a year, & upon terms slightly varying from those of the former lease, pltf. contracting in the meantime to modernise the house by putting in a new shop-front at her own expense. Pltf. put in a new shop-front at an expense of £50, & expended £10 more in permanently improving the premises, & on June 28, 1865, contracted with B. to sell him all her interest in existing & future leases for a premium of £150, B. taking the shop fixtures & stock at a valuation. B. was let into possession under this agreement, & paid the premium, etc. Neither deft. nor his brother had notice of the agreement. Deft. had no authority from his brother to make the agreement of Nov. 16, 1863, & the latter refused to ratify it. Pltf., who had no notice of deft.'s want of authority to make the agreement, filed a bill (in conjunction with B.) against deft.'s brother for specific performance, which was dismissed with costs, paid by her. B., who had been turned out of possession, brought an action against pltf. upon her contract with him, & on a reference recovered damages to the amount of £280, made up as follows :—£205 assessed by the arbitrator as value of the lease ; £22 10*s.* for loss incurred by B. on resale of fixtures he had brought upon the premises ; £35 for loss of business by removal ; £17 10*s.* for solr.'s charges. These, together with costs of the action & reference, were paid by pltf. :—*Held :* pltf. was entitled to recover against deft. all costs paid & incurred by her in the Chancery suit, also value of the lease she had lost through non-performance of the agreement of Nov. 16, 1863 (assumed to be £205), but not damages & costs which arose out of her agreement for resale of the lease to B., these not necessarily or naturally resulting from the wrongful act of deft., & being too remote.—SPEDDING *v.* NEVELL (1869), L. R. 4 C. P. 212 ; 38 L. J. C. P. 133.

Annotations :—**Apld.** Meek *v.* Wendt (1888), 21 Q. B. D. 126. **Refd.** *Re* National Coffee Palace Co., *Ex p.* Panmure (1883), 24 Ch. D. 367, C. A.

2798. Liability repudiated by company—Costs of action brought against company.]—A surgeon brought an action against a manager of a branch line of ry. for breach of warranty of authority in representing to him that he had power to pledge the credit of the co. for medical attendance on a servant of the co. Pltf. had failed in a previous action in a cty. ct. against the co. to recover the amount of his bill, on the ground that the manager had no authority, & sought in this action to recover the costs of the cty. ct. action which he had had to pay. Deft. having paid the amount of the bill into ct. :—*Held :* the costs incurred in the cty. ct. could not be recovered. *Semble :* there was no warranty of authority.—ROBSON *v.* TURNBULL (1858), 1 F. & F. 365.

2799. Loan ultra vires lender—Money lent & interest.]—RICHARDSON *v.* WILLIAMSON & LAWSON, No. 2784, *ante*.

For full anns., *see* S. C. No. 2784, *ante*.

2800. —— ——.]—WEEKS *v.* PROPERT, No. 2785, *ante*.

For full anns., *see* S. C. No. 2785, *ante*.

2801. Purchase repudiated by purchaser—Value of goods sold—Costs of action against supposed purchaser.]—The declaration stated that deft. falsely & fraudulently represented to pltfs. that he was authorised by I. to order, & did order, certain quantities of stone for the building of a church to be charged to I. & others, & did falsely & fraudulently write to pltfs. a letter (set out) ; & that pltfs., relying on the representation of deft., supplied the stone, whereas deft. had no authority to order it, &, I. refusing to pay for it, pltfs. brought an action against him for the price & failed in it, & were obliged to pay I.'s costs :—*Held :* (1) the declaration was sufficient even if the letter set out did not itself show a false representation of authority ; (2) pltfs. were entitled to recover, by way of damages, not only the price of the stone supplied, but the costs which they had paid in the action against I.—RANDELL *v.* TRIMEN (1856), 18 C. B. 786 ; 25 L. J. C. P. 307 ; 139 E. R. 1580.

Annotations :—**Apld.** Collen *v.* Wright (1857), 7 E. & B. 301. **Folld.** Richardson *v.* Dunn (1860), 8 C. B. N. S. 655. **Distd.** Spedding *v.* Nevell (1869), L. R. 4 C. P. 212 ; Dickson *v.* Reuter's Telegraph Co. (1877), 2 C. P. D. 62.

2802. —— Difference between contract price & price on resale.]—Deft., as agent of R., entered into a contract with pltf. for purchase of a ship at a certain price & required extra work to be done. R. not having given deft. authority, repudiated the contract, & pltf. sold the ship at a lower price Both contract price & price on resale were fair market value of the ship. In an action against deft. for breach of his contract that he had authority as agent of R. :—*Held :* pltf. could recover as damages the difference between the prices, as well as cost of the extra work.—SIMONS *v.* PATCHETT (1857), 7 E. & B. 568 ; 26 L. J. Q. B. 195 ; 29 L. T. O. S. 88 ; 3 Jur. N. S. 742 ; 5 W. R. 500 ; 119 E. R. 1357.

Annotations :—**Apld.** Spedding *v.* Nevell (1869), L. R. 4 C. P. 212 ; *Re* National Coffee Palace Co., *Ex p.* Panmure (1883), 24 Ch. D. 367, C. A. ; Meek *v.* Wendt (1888), 21 Q. B. D. 126.

2803. Sale repudiated by sellers—Difference between contract & market price—Costs of action

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2803 i. *Sale repudiated by sellers—Expenses incurred—Loss of profit.*]—An agent who, by misrepresentation of his authority, procures a person to enter into an agreement with his principals for the purchase of land, will be personally liable to the intending purchaser for damages in an action for specific performance against himself & his principals, if they afterwards repudiate the agreement & prove that the agent had no authority to bind them. *Collen* v. *Wright* (1857), 8 E. & B. 647 ; *Halbot* v. *Lens*, [1901] 1 Ch. 344 ; & *Starkey* v. *Bank of England*, [1903] A. C. 114, cited. In such case, pltf. is entitled not only to expenses actually incurred, but also to loss of the profit he would have made if the bargain had been carried out. *Robinson* v. *Harman* (1848), 1 Exch. 850 ; *Engell* v. *Fitch* (1869), L. R. 4 Q. B. 659 ; & *Richardson* v. *Williamson* (1871), L. R. 6 Q. B. 276, cited.—MANEER *v.* SANFORD (1904), 15 Man. L. R. 181 ; 1 W. L. R. 128.—**CAN.**

2803 ii. —— *Deposit paid on contract.*] Deft. was authorised to sell a block of land for $37,000 cash. He made an agreement with pltf., which was reduced to writing & signed by him as agent on behalf of the owners, to sell the land to pltf. for $37,000, of which $1,000 was to be cash, & the balance was to be paid in a foreign country upon the delivery to a bank there of transfers & duplicate certificates of title. The cash payment was made to deft. The owners refused to ratify the contract & the sale fell through. Pltf. then brought an action for money had & received :—*Held :* treating the action as one of recovery of the money because of misrepresentation by deft. as to his authority to enter into the contract, or for damages for breach of warranty, deft. had in fact exceeded his authority, & by entering into & signing the agreement of sale he had represented to pltf. that he had the authority of his principals to the extent represented by the agreement, & pltf. was entitled to recover from him $1,000. *Cherry* v. *Colonial Bank of Australasia*, L. R. 3 P. C. 24, & *Beattie* v. *Ebury*, L. R. 7 H. L. 102, cited.—MCMANUS *v.* PORTER (1910), 15 W. L. R. 269.—**CAN.**

against supposed seller.]—Deft., acting as broker for both buyer & sellers, made a contract for sale of wool on certain terms. The sellers afterwards repudiated the contract, alleging (as was the fact) that they had not authorised deft. to sell on those terms. The wool had been imported from California, & could have been exported to America free of duty; there was no other wool similarly circumstanced in the market. Deft. persisting that he had authority, the buyer filed a bill in Chancery for specific performance against the sellers, & obtained an interim injunction; the bill was dismissed & the injunction dissolved, with costs, on the ground of deft.'s want of authority. In an action by the buyer against deft. for breach of his promise that he had authority:—*Held:* pltf. was entitled to recover, as damages, taxed costs of the Chancery suit & pltf.'s own costs taxed as between solr. & client; & also the difference between the contract price & the value of that or similar wool, taking into account that it could have been exported duty free to America, & all mercantile circumstances affecting value.—HUGHES *v.* GRAEME (1864), 4 New Rep. 190; 33 L. J. Q. B. 335; 12 W. R. 857.

Annotations:—**Refd.** Godwin *v.* Francis (1870), L. R. 5 C. P. 295; *Re* National Coffee Palace Co. (1883), 53 L. J. Ch. 57, C. A.

2804. —— —— —— Costs of investigating title.]—F. & four others were joint-owners of an estate, which they were desirous of selling & had advertised for sale. F., representing that he had authority from his co-owners, contracted to sell the estate to pltf. & sent him an abstract of title. The co-owners repudiated the contract, & concluded a sale at a higher price to another person. Pltf., conceiving the four owners had bound themselves by the terms of the advertisement, sued them for breach of contract, & continued his action after they had sworn in answer to interrogatories that F. had no authority to make the contract, & was nonsuited. In an action against F. for misrepresentation of authority:—*Held:* (1) the proper measure of damages was—(*a*) costs of investigating the title, (*b*) costs incurred & paid by pltf. in the action against the four down to the time when the answers to interrogatories had been received & considered by pltf.'s legal advisers, & (*c*) the difference between the contract price & market price of the estate, the sum for which it afterwards sold being *primâ facie* evidence of the latter; (2) pltf. could not recover for loss on resale of horses, etc., bought for stocking land, without notice to F., before the title had been investigated, or possession of land given.—GODWIN *v.* FRANCIS (1870), L. R. 5 C. P. 295; 39 L. J. C. P. 121; 22 L. T. 338.

Annotations:—**Apld.** McBlain *v.* Cross (1871), 25 L. T. 804; Williams *v.* Brisco (1882), 22 Ch. D. 441, C. A.; *Re* National Coffee Palace Co., *Ex p.* Panmure (1883), 24 Ch. D. 367, C. A.; Meek *v.* Wendt (1888), 21 Q. B. D. 126; R. *v.* Riley, [1896] 1 Q. B. 309, C. C. R.

2805. Transfer of stock repudiated by stockholder—Indemnity for loss incurred by bank transferring stock.]—STARKEY *v.* BANK OF ENGLAND, No. 2777, *ante*.

For full anns., *see* S. C. No. 2777, *ante*.

SUB-SECT. 8.—MONEY RECEIVED OR PAID BY AGENT.

A. Agent's Liability in respect of Money received from Third Party.

(*a*) *General Rule.*

2806. Agent not liable.]—An exor. cannot maintain an action for money had & received against a person who collected the debts of testator under an authority from a person appointed administrator before the will was found, & paid them over to the administrator.—POND *v.* UNDERWOOD (1705), 2 Ld. Raym. 1210; 92 E. R. 299.

Annotations:—**Apprvd.** Sadler *v.* Evans (1766), 4 Burr. 1984. **Distd.** Snowdon *v.* Davis (1808), 1 Taunt. 359. **Refd.** Baylis *v.* London, [1913] 1 Ch. 127, C. A.

2807. Money paid to agent in error.]—A person who has paid to an agent money which was not in fact due to the principal, cannot bring an action for money had & received against the agent.—SADLER *v.* EVANS, WINDSOR'S (LADY) CASE (1766), 4 Burr. 1984.

Annotations:—**Apld.** Greenway *v.* Hurd (1792), 4 Term Rep. 553. **Distd.** Miller *v.* Aris (1800), 3 Esp. 231; Hardacre *v.* Stewart (1804), 5 Esp. 103; Snowdon *v.* Davis (1808), 1 Taunt. 359. **Apld.** Whitehead *v.* Howard (1820), 5 Moore, C. P. 105. **Distd.** Steele *v.* Williams (1853), 8 Exch. 625. **Consd.** Baylis *v.* London, [1913] 1 Ch. 127, C. A. **Refd.** Stevenson *v.* Mortimer (1778), 2 Cowp. 805; A.-G. *v.* Thornton (1824), M'Cle. 600; Stephens *v.* Badcock (1832), 1 L. J. K. B. 75; Decharms *v.* Horwood (1834), 3 L. J. C. P. 198; Cranch *v.* White (1835), 4 L. J. C. P. 113; Parker *v.* Bristol & Exeter Ry. Co. (1851), 6 Exch. 702; East Lancashire Ry. Co. *v.* Ettenfield (1852), 18 L. T. O. S. 65; Taylor *v.* Metropolitan Ry. Co. (1906), 95 L. T. 149. **Mentd.** Munk *v.* Clark (1833), 2 L. J. C. P. 186; Sinclair *v.* Brougham, [1914] A. C. 398, H. L.

2808. Deposit on purchase price received by vendor's agent—Payment to principal.]—An attorney, who was also an auctioneer, received a deposit on property which he had sold by auction, & after queries raised on the title, & before they were cleared, paid over the deposit to his principal. On a demand of the deposit by the buyer he answered that his principal would not consent to return it, & would enforce the contract:—*Held:* the buyer might recover the deposit from the auctioneer as money had & received to pltf.'s use, (1) because deft., as attorney, had notice that the title had not been completed before he paid over the money, (2) because he misled pltf. to sue himself, by not saying he had paid it over.—EDWARDS *v.* HODDING (1814), 3 Taunt. 315; 1 Marsh. 377; 128 E. R. 913.

Annotations:—**Expld. & Distd.** Lee *v.* Munn (1817), 8 Taunt. 45; Horsfall *v.* Handley (1818), 8 Taunt. 136. **Consd.** Gray *v.* Gutteridge (1827), 3 C. & P. 40. **Distd.** Holland *v.* Russell (1861), 1 B. & S. 424. **Refd.** Edgell *v.* Day (1865), L. R. 1 C. P. 80.

2809. Deposit on sale—Vendor's agent—Agent not stakeholder.]—On sale of premises by auction, the memorandum of agreement to purchase & sell was signed by the auctioneer as agent for the purchaser, & by the vendor's attorney, subscribing himself as "agent for S.," the vendor. The purchaser paid his deposit to the attorney, who gave

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PART X. SECT. 1, SUB-SECT. 8.—A. (a).

2806 i. *Agent not liable.*]—An action does not lie against a person to recover back money received by him as agent for another, but lies only against the principal, & the ct. will not in such action go into the question of whether the agent paid over the money to the principal or not.—WILLIAMS *v.* WILSON & MORROW (1895), 3 B. C. R. 613.—**CAN.**

2808 i. *Deposit on purchase price received by vendor's agent.*]—Pltf., an infant, had, under contract of sale, paid part of the purchase-money to the vendor's agent, but had received no benefit under the contract:—*Held:* he could, on rescission of the contract, recover such money from the agent, the agent still having the money in his possession.—ENGLISH *v.* GIBBS (1888), 9 N. S. W. 455.—**AUS.**

2808 ii. ——.]—On a sale of land it was agreed that a deposit should be paid to A. "as agent for the vendor," & when the title was accepted the agent should pay the deposit to the vendor; the deposit was paid to A., & then the contract was cancelled by mutual consent, A. never having paid over the deposit:—*Held:* the purchasers entitled to recover the deposit from the vendor.—CHRISTIE *v.* ROBINSON (1907), 4 C. L. R. 1338.—**AUS.**

2809 i. *Deposit on sale—Vendor's agent—Agent not stakeholder.*]—Agents for a disclosed principal on sale of land, to whom the purchase-money is paid, as agents, are not stakeholders like auctioneers, & not bound in law to retain the purchase-money as between vendor & purchaser until the performance or rescission of the contract.—ATWOOD *v.* GILLIES, Mac. 190.—**N. Z.**

2809 ii. —— —— *What constitutes stakeholder.*] Deft., acting as agent for C., sold land to pltf. under an agree-

Sect. 1.—*In regard to contracts: Sub-sect.* 8, *A.* (*a*) & (*b*) *i.*]

a receipt, signed by himself as "agent for S." The sale going off through the vendor's default, & the deposit money not being returned:—*Held:* the purchaser could not bring an action of money had & received against the attorney, for he was not a stakeholder, but merely the vendor's agent, & payment of the deposit to him was payment to the vendor.—BAMFORD *v.* SHUTTLEWORTH (1840), 11 Ad. & El. 926; 113 E. R. 666.

Annotations:—**Distd.** Wakefield *v.* Newton (1844), 6 Q. B. 276. **Apld.** Edgell *v.* Day (1865), L. R. 1 C. P. 80; Ellis *v.* Goulton, [1893] 1 Q. B. 350, C. A.

2810. —— Part paid to principal—Part retained by agent.]—S., owner of a farm, orally employed deft. to sell it for him. Deft., without naming the seller, agreed by a written memorandum to sell the farm to pltf. for £2,700, & gave instructions to an attorney to prepare a contract of sale by S. to pltf. Pltf. paid deft. £100 deposit, & afterwards signed the contract for sale by S. to himself, by which contract he agreed to pay down immediately on its execution £100 as deposit, for which S. undertook to pay interest at £4 per cent. till completion of the purchase. The contract was afterwards rescinded for want of title in S. Deft., before he had notice of the rescinding, paid S. £50, & retained the other £50, without consent of S., under agreement by S. to give him one half of any amount above £2,600 which deft. might get for the farm:—*Held:* pltf. could not recover any part of the £100 from deft.—HURLEY *v.* BAKER (1846), 16 M. & W. 26; 16 L. J. Ex. 273; 153 E. R. 1083.

2811. —— Agent acting for both parties.]—A. acted as solr. for both parties in purchase of an estate, & received the purchase-money as agent of the vendor. The purchaser afterwards lost the estate, a mtgee. having a prior claim. The purchaser then presented a petition against A. praying payment out of the purchase-money in his hands of the loss he had sustained, or that he might indemnify him in respect thereof:—*Held:* as the purchase-money had come into the hands of the solr. as agent of the vendor, & not of petitioner, the ct. could not interfere.—*Re* HINTON (1851), 18 L. T. O. S. 37.

2812. —— Vendor's agent.]—On sale of premises by auction the purchaser paid a deposit to the vendor's solr. as agent for the vendor. The sale went off through default of the vendor, & the purchaser brought an action to recover the deposit from the solr.:—*Held:* (1) payment of the deposit to the solr. was equivalent to payment to the vendor; (2) the action could not be maintained.—ELLIS *v.* GOULTON, [1893] 1 Q. B. 350; 62 L. J. Q. B. 232; 68 L. T. 144; 41 W. R. 411; 9 T. L. R. 223; 4 R. 267.

2813. —— Paid over at request of vendor—Without concurrence of purchaser.]—On a contract for purchase, part of the purchase-money was paid as a "deposit" to the vendor's solr., who paid it away at the desire of the vendor, without concurrence of the purchaser. This created a difficulty in completing the purchase, as a mtgee. of the estate would not join in the conveyance without payment to him of the deposit. In a suit by the purchaser for specific performance:—*Held:* the solr. was liable to make good the money.—WIGGINS *v.* LORD (1841), 4 Beav. 30; 49 E. R. 248.

Annotation:—**Refd.** Edgell *v.* Day (1865), L. R. 1 C. P. 80.

2814. —— Agent entitled to part price as commission—Contract rescinded by mutual consent.]—Deft. was instructed by T. to sell certain premises, on the terms that anything he might obtain beyond £2,200 he might keep. Deft. sold to pltfs. for £2,600 & received from pltfs. £100 as a deposit. On discovering the circumstances, pltfs. & T. agreed to abandon the contract made by deft. & to divide the difference, *i.e.*, that pltfs. should pay T. £2,400 for the premises. In an action against deft. to recover the deposit as money had & received:—*Held:* the action was maintainable.—EAST LANCASHIRE RY. CO. *v.* ETTENFIELD (1852), 18 L. T. O. S. 65, 279.

2815. Agent receiving proceeds of forged bill—Agent holding himself out as principal.]—A bill-broker who discounts a bill with a money-dealer on behalf of a customer, but acts in the transaction as a principal, is liable, if the bill turns out to be a forgery, to repay the money received for the bill, although he was unaware of the forgery & did not indorse the bill.—GURNEY *v.* WOMERSLEY (1854), 4 E. & B. 133; 24 L. J. Q. B. 46; 24 L. T. O. S. 71; 1 Jur. N. S. 328; 3 C. L. R. 3; 119 E. R. 51.

Annotations:—**Refd.** Pooley *v.* Brown (1862), 11 C. B. N. S. 566; Kennedy *v.* Panama, New Zealand & Australian Royal Mail Co. (1867), L. R. 2 Q. B. 580. **Mentd.** *Re* Lawrence, Martimore *v.* Schrader (1861), 4 L. T. 184; Royal Exchange Assce. *v.* Moore (1863), 2 New Rep. 63; Azemar *v.* Casella (1867), L. R. 2 C. P. 677, Ex. Ch.

2816. Agent converting third party's property—Effect of waiver of conversion—Part payment over to principal.]—Where, in the case of a conversion by two joint tortfeasors, one of whom, as between themselves, has acted as principal & one as agent, the injured party elects to waive his remedy for damages against the agent & to proceed against him by way of account, the injured party is entitled

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ment which provided that 20 per cent. of the purchase-money should be paid into his hands as a deposit, & the balance by instalments. To secure payment pltf. executed a mtge. of land to deft. & afterwards instructed him to sell it. He sold it to D., & received a deposit. Pltf. then gave deft. notice that he did not intend to proceed further in the contract with C., & required payment of the deposit received from D. on his behalf. Deft. declined to pay it over, having, as he alleged, applied it, less his commission, in satisfaction of the amount due to C. An action was brought to recover the money, & pltf. obtained a verdict for the amount, less deft.'s commission. On a rule to show cause why judgment should not be entered for deft.:—*Held:* although there was no contract or privity between deft. & C. with respect to the money in question, deft. nevertheless held it as he would have done had it been paid to him by pltf. at the time of the contract with C., & as agent for C., & he was either agent both for pltf. & C., & therefore a stakeholder, or agent for C. only, & in either case pltf. was not entitled to recover unless he could set up good grounds for refusing to complete his contract with C.—DOUGLAS *v.* MATSON, 2 J. R. N. S. S. C. 158.—**N.Z.**

2809 iii. —— —— *Agent acting in unauthorised manner.*]—Deft.'s agent contracted in writing to sell to pltfs. all the pine timber on lands of deft., both standing timber & that cut after a date named, as to the latter of which his authority was undisputed. The agent received from pltfs. $75 on account, with the private understanding that in case deft.'s claim to logs cut before the date referred to could not be sustained, as turned out to be the case, the $75 should be returned. As soon as deft. was informed of the sale of the standing timber she repudiated it. It appeared pltfs. had been aware, when they entered into the agreement, that the agent had no authority to sell that timber. In an action against deft. to recover the $75 paid to her agent, which the latter retained in his hands:—*Held:* the contract was an entire one, & pltfs. could not recover against deft., their remedy, if any, being against the agent.—STRICKLAND *v.* VANSITTART (1868), 18 C. P. 463.—**CAN.**

2809 iv. —— ——.]—MESSIER *v.* CHENERY (1914), 21 R. L. N. S. 73.—**CAN.**

q. *Agent holding principal's property—Action by creditor of principal.*]—A creditor has a right of action against the agent of his debtor, in whose name real estate of the debtor is registered, to have it declared that such property really belongs to the debtor, but if it appears the action is unnecessary, the judgment maintaining it will be confirmed without costs in either ct.—SCHWOB *v.* BAKER (1886), M. L. R. 3, S. C. 19; 10 L. N. 372.—**CAN.**

r. *Promissory note payable to agent's own order.*]—A person dealing with an agent who gives him as payment a promissory note, payable to his (the agent's) order personally, without reference to his principal, has no recourse against the latter to recover the amount which the agent has appropriated after discounting the note.—BEAUDOIN *v.* CHARRUAN (1907), Q. R. 32 S. C. 361.—**CAN.**

to demand from such agent an account of so much of the converted property, or of its proceeds, as may still be actually remaining in the agent's hands at time of taking the account. But he is not entitled to demand an account of so much of the converted property, or of its proceeds, as such agent has duly handed over, in course of his agency, to his principal.—*Re* ELY, *Ex p.* TRUSTEE (1900), 48 W. R. 693; 44 Sol. Jo. 483, C. A.

2817. Effect of receipt given by agent.]—A receipt signed by an agent for principals is not evidence to support an action for money had & received against him to recover the money.—EDDEN *v.* READ (1813), 3 Camp. 338.

Annotation:—**Refd.** Bamford *v.* Shuttleworth (1840), 11 Ad. & El. 926.

(b) *Money paid by Mistake or in Consequence of Wrongful Act.*

i. *Not paid over to Principal.*

2818. Money placed to principal's credit in account.]—If money be paid by mistake to an agent, & placed by him to account of his principal, but not paid over, money had & received to the use of the person so paying it by mistake will lie against the agent. The mere passing of such money in account or making rest, without new credit given, fresh bills accepted, or further sum advanced for principal in consequence of it, is not equivalent to a payment of it over.—BULLER *v.* HARRISON, No. 2828, *post.*

Annotations:—**Distd.** Snowdon *v.* Davis (1808), 1 Taunt. 359. **Folld.** Cox *v.* Prentice (1815), 3 M. & S. 344. **Distd.** M'Carthy *v.* Colvin (1839), 9 Ad. & El. 607; Holland *v.* Russell (1861), 1 B. & S. 424. **Consd.** Newall *v.* Tomlinson (1871), L. R. 6 C. P. 405. **Distd.** Owen *v.* Cronk, [1895] 1 Q. B. 265, C. A. **Consd.** Continental Caoutchouc & Gutta Percha Co. *v.* Kleinwort (1904), 90 L. T. 474, C. A.; Kleinwort *v.* Dunlop Rubber Co. (1907), 97 L. T. 263, H. L. **Apld.** Kerrison *v.* Glyn, Mills, Currie (1909), 101 L. T. 675. **Refd.** Wetter *v.* Rucker (1820), 1 Brod. & Bing. 491; Baylis *v.* London, [1913] 1 Ch. 127, C. A.

2819. Overpayment for goods—Settlement in account with principal.]—Where deft. received from his principal abroad a bar of silver & took it to pltfs., who melted it & sent a piece to an assayer to be assayed at deft.'s expense, & paid a price for the bar to deft. as for the number of ounces of silver which by the assay it was calculated to contain, which number was afterwards discovered to exceed the true number:—*Held:* pltfs. might, after having offered to return the bar, have money had & received against deft. for the price thus paid to him under a mistake, although deft. had forwarded his account to his principal & in it had placed the price received to the credit of his principal.

An agent who receives money for his principal is liable as a principal so long as he stands in his original situation, & until there has been a change of circumstances by his having paid over the money to his principal or done something equivalent to it. Here it is admitted that no money has been paid over by deft. to his principal, nor has there been any other thing done by him to create a change of circumstances. The only question then is, whether the action lies against deft. considering it as if it were an action against the principal. Now this is a case of mutual innocence & equal error, which is not an unusual case for money had & received. Our decision will not clash with the rule *caveat emptor*, for here both parties were under a mutual error, neither of them being to exercise nor exercising any judgment upon the subject. This is the proper case for money had & received.—(LORD ELLENBOROUGH, C.J.).—COX *v.* PRENTICE (1815), 3 M. & S. 344, 348; 105 E. R. 641.

Annotations:—**Distd.** Bradbury *v.* Anderton (1834), 1 Cr. M. & R. 486. **Consd.** M'Carthy *v.* Colvin (1839), 9 Ad. & El. 607; Devaux *v.* Connolly (1849), 8 C. B. 640. **Distd.** Holland *v.* Russell (1861), 1 B. & S. 424. **Refd.** Pollard *v.* Bank of England (1871), L. R. 6 Q. B. 623; Beevor *v.* Marler (1898), 14 T. L. R. 239; Continental Caoutchouc & Gutta Percha Co. *v.* Kleinwort (1904), 90 L. T. 474, C. A.; Baylis *v.* London, [1913] 1 Ch. 127, C. A. **Mentd.** Aiken *v.* Short (1856), 1 H. & N. 210.

2820. Through unjustifiable refusal to desist from selling under mortgage.]—The solr. of a mtge. with a power of sale refused to desist from selling unless the mtgor. would pay expenses, with which he was not properly chargeable:—*Held:* money paid under such compulsion might be recovered back.—CLOSE *v.* PHIPPS (1844), 7 Man. & G. 586; 8 Scott, N. R. 381; 135 E. R. 236.

Annotation:—**Folld.** Fraser *v.* Pendlebury (1861), 31 L. J. C. P. 1.

2821. Through unjustifiable retention of deeds.]—A lease to which it was necessary C. should be a confirming party was about to be granted to pltf. The attorney of the lessors applied to C. for that purpose, & deft., as C.'s attorney, answered the application, requiring certain documents to be furnished, etc., for which business deft. had a claim on C. It was agreed that C. should concur in the lease on the terms, as deft. contended, that all past costs, as well as those to be occasioned by his joining in the lease should be paid by lessors, as pltf. contended, that the latter costs only should be paid. The lease, having been engrossed & executed by lessors, was sent to deft. to procure C.'s execution; deft. sent an account of his costs against C. to the attorney of the lessors, who complained of the amount, on which deft. said C. should not execute unless that amount was paid him; & when C. had executed, refused to deliver up the lease until the whole amount was paid. The attorney of the lessors, after tendering a smaller sum to deft., paid the larger sum under protest, for pltf.

PART X. SECT. 1, SUB-SECT. 8.—A. (b) i.

s. Overpayment for land — Induced by agent's misrepresentation—Excess retained by agent.]—A vendor of land having authorised his agent to sell land at £10 per acre, the agent induced pltf. to purchase it for £11 per acre by falsely representing that that was the lowest price his principal would accept. The agent having retained the extra £1 per acre for himself, pltf. brought an action against him to recover it:—*Held:* as it was not alleged that the agent made the false representation, knowing it to be untrue, he was not entitled to recover.—SMART *v.* LOBB (1890), 16 V. L. R. 496.—**AUS.**

t. Overpayment on cheque — Principal not benefited.]—In an action by a bank to recover £25, alleged to have been paid by their teller in excess of cheque drawn by the secretary of defts. & handed to their messenger:—*Held:* defts. were not liable for what was paid to their agent in mistake, unless they authorised their messenger to receive the amount or afterwards received & benefited by it.—CITY BANK *v.* HARBOR COMRS. OF MONTREAL (1857), 1 L. C. J. 288.—**CAN.**

u. Overpayment of contribution to average loss.]—Pltfs., consignees of goods shipped in a vessel for which defts. were agents, on asking for a delivery order, were required by defts. to pay a deposit of 25 per cent. on invoice value of goods & enter into a general average bond. This they did. On adjustment of average it was found that the proportion due by pltfs. was less than the amount deposited by them. On their demanding a repayment of the balance, defts. offered a less sum. Pltfs. then brought an action for money had & received. A verdict was, by consent, returned for pltfs., the point being reserved whether the action ought not to have been brought, not against the agents, but against their principals:—*Held:* the action would lie.—ABRAHAMS *v.* WATSON (1886), 7 N. S. W. 152. —**AUS.**

v. Money received by solicitor — Overpaid by debtor on solicitor's misrepresentation.]—S. obtained judgment against H. H. thereupon paid K., the attorney of S. in the action, a much larger sum upon K.'s representation the judgment & costs amounted to that sum. H. sought to recover the overplus from S.:—*Held:* as K. had authority to receive payment in satisfaction of the judgment on behalf of S., H. was entitled to recover the amount of the overpayment, which was made in error, from S.—HUGO *v.* STOCKHOLM, S. A. L. R. (1915), C. P. D. 720.—**S. AF.**

Sect. 1.—*In regard to contracts: Sub-sect.* 8, *A.* (*b*) *i. & ii.*]

to obtain possession of the lease:—*Held:* (1) an action to recover the overplus was rightly brought by pltf. against deft., although the latter merely acted as C.'s attorney; (2) such action was maintainable.—SMITH *v.* SLEAP (1844), 12 M. & W. 585.

For full anns., *see* CONTRACT.

2822. Money received by clerk of guardians—On compromise of proceedings made under mistake—Agent of third party in pari delicto.]—Guardians of a poor law union indicted pltf. for disobeying an order of sessions for maintenance of a bastard. Before trial, pltf. offered a compromise; & the clerk to the guardians, on their behalf, agreed with him for a sum on account of costs & maintenance, which he paid, & the indictment was dropped. Afterwards pltf. discovered that the order of sessions was defective & void, & he brought *assumpsit* against the clerk for money had & received:—*Held:* (1) the clerk was not liable, having done nothing in the prosecution beyond preferring the indictment; (2) if the compromise was illegal, pltf., being *in pari delicto* with the other parties offending, could not sue them for money which he had paid.—GODALL *v.* LOWNDES (1844), 6 Q. B. 464; 8 J. P. Jo. 771; 9 Jur. 177; 115 E. R. 173.

2823. Wrongful detention of deeds—Payment under protest.]—The mtgee. of lands handed over the deeds to his attorney. The mtgor. paid the principal & interest, & the lands were reconveyed to him:—*Held:* (1) the attorney could not retain the deeds against him as security for the expenses of the transaction due from mtgee. to the attorney; (2) mtgor., having, under protest, paid such expenses to the attorney in order to get the deeds back, might maintain *assumpsit* for money had & received against the attorney for the money so paid; (3) the attorney was a principal in the transaction, & could not allege that the action should have been brought against the mtgee.—WAKEFIELD *v.* NEWBON (1844), 6 Q. B. 276; 13 L. J. Q. B. 258; 3 L. T. O. S. 160; 8 Jur. 735; 115 E. R. 107.

Annotations:—**Apld.** *Re* Llewellin, [1891] 3 Ch. 145. **Mentd.** Phillips *v.* Broadley (1846), 11 Jur. 264; *Re* Mason & Taylor (1878), 48 L. J. Ch. 193.

2824. Overpayment of freight—Part received as agents for another company.]—The B. Ry. & G. W. Ry. were continuous lines, but worked by independent cos., & by their Acts of Parliament were bound to charge all persons equally in same circumstances for carriage of goods, etc. By the scale bills, issued by each co., certain sums were specified as charges for carriage of goods where goods were to be collected & delivered by the cos.; a smaller sum was specified as chargeable where goods were to be collected & delivered by parties themselves. Pltf., a carrier, sent certain goods he had undertaken to collect & deliver on his own account by B. Ry. Co., to be carried upon both lines of ry., but objected to the charges as being excessive, & paid the whole amount claimed under protest. The ct. having held that he was entitled to recover back the amount so paid in excess of what was a fair & reasonable charge in an action of money had & received:—*Held:* the whole sum so paid in excess was recoverable from B. Ry. Co., although the co. had received a portion of it as agents only of G. W. Ry. Co.—PARKER *v.* BRISTOL & EXETER RY. CO. (1851), 6 Exch. 702; 6 Ry. & Can. Cas. 776; 20 L. J. Ex. 442; 17 L. T. O. S. 202; 155 E. R. 726.

Annotation:—**Consd.** Taylor *v.* Metropolitan Ry. Co. (1906), 95 L. T. 149.

2825. Money received by solicitor of petitioning creditor—From debtor for procuring adjournment of hearing.]—Pending the hearing of a bkpcy. petition, & with notice of the act of bkpcy. on which it was founded, the solr. of petitioning creditor, as his agent, received from debtor various sums of money as consideration for successive adjournments of the hearing of the petition, & these sums he paid over, or accounted for, to his client (petitioning creditor). Afterwards an adjudication was made on the petition:—*Held:* the solr. having received the money with notice of the act of bkpcy. to which the title of the trustee related back, the payment by him was a wrongful act, & he was liable to repay the money to the trustee, & was not discharged by the payment to his own principal.—*Re* CHAPMAN, *Ex p.* EDWARDS (1884), 13 Q. B. D. 747; 51 L. T. 881; 33 W. R. 268; 1 Morr. 238.

Annotation:—**Distd.** *Re* Sinclair, *Ex p.* Payne (1885), 2 Morr. 255.

2826. Purpose becoming impossible.]—The position of a banker does not differ from that of any other recipient of money acting as factor or agent; & money paid to a banker under a mistake of fact can be successfully redemanded from him by the person who so paid it.

Applt., who lived in England, was English manager of a mine in Mexico. By a system of revolving credit, he agreed to pay to resps. moneys paid to New York bankers of the mine. For this purpose he had paid £500 to resps. The New York bank stopped payment, & applt. immediately demanded repayment of the £500. The New York bank was largely indebted to resps., who claimed to retain the £500:—*Held:* applt. was entitled to be repaid the £500.—KERRISON *v.* GLYN, MILLS, CURRIE & CO. (1911), 81 L. J. K. B. 465; 105 L. T. 721; 28 T. L. R. 106; 17 Com. Cas. 41, H. L.

2827. Money received by clerk—Acting as joint attorney with master.]—Deft.'s name had been inserted in a power of attorney jointly with his father, an attorney, whose clerk he was, for purpose of receiving from the Accountant-General of the Ct. of Chancery some money due to pltf.:—*Held:* as deft.'s name was inserted in the power of attorney, he must be taken to have received the money in his independent character, & not as clerk to his father.—BOULDY *v.* WELSH (1859), 33 L. T. O. S. 94.

ii. *Money paid over to Principal or equivalent Act.*

2828. Where money paid over to principal.]—In general the principle of law is clear that, if money be mispaid to an agent expressly for a principal, & the agent has paid it over, he is not liable in an action by the person who mispaid it, & the person who made the mistake is not without redress, but has his remedy over against the principal (LORD

PART X. SECT. 1, SUB-SECT. 8.—A. (b) ii.

2828 i. *Where money paid over to principal.*]—Deft. wrongfully seized goods of pltf., claiming to hold them for stumpage, & pltf., to obtain their release, paid the amount claimed:—*Held:* (1) the fact of deft. acting as agent of another, to whom he had paid the money before action, would not protect him, & he was liable for money had & received; (2) in such action it was necessary for pltf. to prove payment of the money, that it was paid under compulsion, & that it was received by deft. wrongfully.—LYNCH *v.* KEEGAN (1876), 3 Pug. 645.—**CAN.**

2828 ii.——.]—Deft. W., as liquidator of a partnership, collected certain moneys payable under an agreement between pltf. & the firm, & treated these moneys as moneys of the firm, accounting to the firm for them. As a matter of fact the firm had only a small interest in the moneys collected. In an action for the money on the ground that deft. W. was trustee for pltf. & responsible to him for payment:—*Held:* there never was any agreement or arrangement made between pltf. & deft. W., whereby the latter was to assume responsibility; there was no privity of contract between pltf. & deft. W.; deft. W. was not acting for pltf., but simply as the servant of S. & Co.; a claim for money received cannot in general be made against a sub-agent who receives it upon account of the agent without any privity or relation to the principal to whose use

MANSFIELD). — BULLER *v.* HARRISON (1777), 2 Cowp. 565 ; 98 E. R. 1243.

Annotations :—**Consd.** Cox *v.* Prentice (1815), 3 M. & S. 344 ; Holland *v.* Russell (1861), 1 B. & S. 424 ; Newall *v.* Tomlinson (1871), L. R. 6 C. P. 405 ; Continental Caoutchouc & Gutta Percha Co. *v.* Kleinwort (1904), 90 L. T. 474, C. A. **Refd.** Snowdon *v.* Davis (1808), 1 Taunt. 359 ; Wetter *v.* Rucker (1820), 1 Brod. & Bing. 491 ; M'Carthy *v.* Colvin (1839), 9 Ad. & El. 607 ; Owen *v.* Cronk, [1895] 1 Q. B. 260, C. A. ; Kleinwort *v.* Dunlop Rubber Co. (1907), 97 L. T. 263, H. L. ; Kerrison *v.* Glyn, Mills, Currie (1909), 101 L. T. 675 ; Baylis *v.* London, [1913] 1 Ch. 127, C. A.

2829. ——.]—*Assumpsit* for money had & received does not lie against an Excise officer to recover duties received by him after the Act imposing them is repealed, if he has paid them over to his superior.—GREENWAY *v.* HIND (1792), 4 Term Rep. 553 ; 100 E. R. 1171.

Annotations :—**Distd.** Morgan *v.* Palmer (1824), 2 B. & C. 729. **Consd.** Butler *v.* Ford (1833), 1 Cr. & M. 662. **Distd.** Charrington *v.* Johnson (1845), 4 L. T. O. S. 398. **Refd.** Ablee *v.* Backhouse (1838), 3 M. & W. 633. **Mentd.** Wallis *v.* Smith (1804), 1 Smith, K. B. 346 ; Waterhouse *v.* Keen (1825), 4 B. & C. 200 ; Calvert *v.* Moggs (1839), 10 Ad. & El. 652 ; Bradford Corpn. *v.* Myers, [1916] 1 A. C. 242, H. L.

2830. Insurance loss paid to agent—On fraudulent policy—Effect of payment to assured.]—Three underwriters on representation of a loss paid their subscriptions, amounting to £600, to the broker, who, by their joint authority, paid over £300. The loss turned out to be fraudulent, & one of the underwriters brought an action against the broker, to recover back his £200 :—*Held :* (1) the broker was entitled to set off the £300 paid over against this demand ; (2) the ct. could not enter into the account to see what each party was entitled to respectively ; (3) either the other underwriters should have joined in the action, or pltf. should have resorted to a ct. of equity.—SILVA *v.* LINDER (1816), 2 Marsh. 437.

2831. Proceeds of bill paid on unauthorised endorsement—Payment to principal.]—Bills of exchange drawn upon & accepted by pltf. co., in favour of H. in India, were afterwards indorsed to D. & C. by an agent for H. under a supposed authority given by a power of attorney, which was seen & inspected by the acceptors ; D. & C. indorsed the bills to B. & Co., their bankers, in order that the latter might, as their agents, present them for payment when due ; B. & Co. put their names on the back of the bills, presented them for payment, & received the amount, which they soon after paid over to their principals. It was afterwards discovered that the power of attorney given by H. did not authorise his agent to indorse the bills, & the administrator of H., in an action against the acceptors, recovered the amount of them. The acceptors then brought an action against B. & Co., & declared on a supposed undertaking by them that they, as holders, were entitled to receive the amount of the bills. The jury found that pltfs. paid the bills on faith of the power of attorney, & not of the indorsement by defts., & that defts. paid over the money before they had notice of the invalidity of the first indorsement :—*Held :* in these circumstances pltfs. could not recover against defts.—EAST INDIA CO. *v.* TRITTON (1824), 3 B. & C. 280 ; 5 Dow. & Ry. K. B. 214 ; 3 L. J. O. S. K. B. 24 ; 107 E. R. 738.

2832. Payment—Knowledge of principal's embarrassment.]—Deft., an auctioneer, employed by a person in embarrassed circumstances to sell his property, sold same, & paid proceeds to order of his employer, who shortly afterwards was declared insolvent, & pltf. was chosen assignee of his estate : —*Held :* deft. being agent merely for such employer, was justified in so paying over such proceeds to his order, although he was aware of his embarrassment.—WHITE *v.* BARTLETT (1832), 9 Bing. 378 ; 2 Moo. & S. 515 ; 2 L. J. C. P. 43 ; 131 E. R. 657.

Annotation :—**Distd.** Wainwright *v.* Clement (1838), 8 L. J. Ex. 25.

2833. —— Proceeds paid over to principal.]—An agent applied to a banking co. on several occasions to discount bills drawn by his principal, & at commencement of these transactions informed the co. who the drawer & acceptors were, & inquired whether the co. would discount the bill without requiring the agent to indorse it. The co. agreed to do so in this & other instances, but upon some of the bills required & obtained the agent's indorse-

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it is paid ; there must be a nonsuit.—ROSS *v.* WEBB (1913), 23 W. L. R. 254 ; 10 D. L. R. 85.—**CAN.**

2828 iii. ——.]—Where a person, dealing without authority, but acting as an agent, receives money from a third party, who supposes him to be an agent, & pays such money over to his principal, the principal will be liable to the third party to the extent to which he has been benefited by the payment.—PAARL BOARD OF EXECUTORS *v.* ESTATE LOTRIET 1912), C. P. D. 877.—**S. AF.**

2828 iv. —— *Money received by innocent agent through fraud of principal.*]—A Treasury officer, under the imposition of a gross fraud, paid money to deft., who was the innocent agent of the person who contrived the fraud. In paying the money the Treasury officer neglected no reasonable precaution, nor was he in any way guilty of carelessness :—*Held :* deft. was bound to repay the money received by him, & he could not defend himself by the plea that he had paid it to his principal.—SHUGAN CHAND *v.* GOVT., NORTH-WESTERN PROVINCES (1875) I. L. R. 1 All. 79.—**IND.**

2830 i. *Insurance loss paid to agent — On fraudulent policy — Effect of payment to assured.*] — Deft. was agent for the owners of a vessel, &, acting as such, had her insured with pltfs. in the sum of $800. On the vessel being lost pltfs. paid him the full amount, & then subsequently discovered that the policy had been void on the ground of over-insurance, the vessel being valued at $4,000 only, while she was insured in two other cos for $6,200 prior to being insured with pltfs., of which fact they had no knowledge when they insured her. When this became known to them they sought to recover back the amount paid deft. Deft. had not been aware of the over-insurance, & had acted in perfect good faith. Soon after receipt of the money & before notice from pltfs., he had accounted with his principals for the full amount in a settlement between them :—*Held :* deft. could not be compelled to refund the amount.—UNION MARINE INSURANCE CO. *v.* METZLER (1873), 9 N. S. R. 331.—**CAN.**

a. *Money paid on forged letter addressed to third party—Agent innocent.*]—Two letters were presented to M., one addressed to himself & the other to the manger of the M. Bank, both purporting to be written by K. In the first, M. was requested to deliver to the manager of the bank the letter addressed to him. In the latter letter the manager was asked to send Rs.2,500 in currency notes through M., payment being promised by a remittance through another bank or through M. M. delivered the letter to the manager, who upon the strength of it made over the notes to M., who gave a receipt for & on behalf of K., & afterwards handed the notes to the person who had brought him the letter. The letters were forgeries. In a suit against M. by the bank to recover the money paid to M. :—*Held :* in what he had done, deft. was in some sense an agent of K. ; but, inasmuch as the notes were given on the authority of the letter addressed to the manager himself, & not in consequence of any representation made by deft., the latter could not be held liable for the loss sustained by the former.—MOONEY *v.* MUSSOOREE SAVINGS BANK (1874), 6 N. W. 319.—**IND.**

b. *Money received as agent but without authority.*]—Where a person, dealing without authority, but acting as an agent, receives money from a third party, who supposes him to be an agent, & pays such money over to his principal, the principal will be liable to the third party to the extent to which he has been benefited by the payment. V., employed to sell certain movables & to obtain the sanction of the ct. to a loan to be raised upon mtge. of certain immovable property, forged the signatures of his principals to a power of attorney to pass a bond to pltfs. over the immovable property, & obtained an advance of £500 from pltfs., which he paid into his own banking account. After receiving the £500, V., who had never paid over the proceeds derived from the sale of the immovables, drew cheques in settlement of certain accounts against his principals & also in favour of his private creditors :—*Held :* in the absence of proof that V. in obtaining the £500 had acted as the agent of defts., or that the estate had received the benefit of the amount so obtained, the principals were not liable to refund such amount at the suit of pltfs.—PAARL BOARD OF EXECUTORS *v.* ESTATE LOTRIET, S. A. L. R. (1912), C. P. D. 877.—**S. AF.**

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ment. The acceptances turned out to have been forged by the principal, of which fact the agent was wholly ignorant. On the agent becoming bkpt., & there being nothing to show that he had not handed over proceeds of the bills to the principal, or that those proceeds were in such a position that they could be recalled:—*Held:* the co. could not prove upon the bills which the agent had not indorsed.—*Re* BOURNE, *Ex p.* BIRD (1851), 4 De G. & Sm. 273; 20 L. J. Bcy. 16; 17 L. T. O. S. 303; 15 Jur. 894; 64 E. R. 829.

2834. Settlement in account.]—A., as agent for the foreign owner, entered into a policy of insurance on a ship in the usual form. At the time of effecting the insurance A. was in possession of a letter from the captain, informing him that the ship had received injury, which fact he, without fraudulent intention to deceive, omitted to disclose to the underwriters. The ship was lost; B., one of the underwriters, paid A. his amount of insurance, but, having become acquainted with the above circumstances, brought an action for money had & received against him to recover it back. A., before he was aware of B.'s intention to dispute the policy, & acting *bonâ fide* throughout, transmitted to his principal the money he had received from various underwriters, with exception of a certain amount for which he had allowed the principal credit in a settled account, & of another which, with authority of the principal, he had expended in a suit brought by him on behalf of the principal against C., another underwriter on the policy:—*Held:* (1) A. being only agent, & having paid over to his principal the amount received from underwriters, B. was not entitled to recover back from A. his amount of insurance; (2) there was no difference in this respect between money actually paid over by A. to his principal & moneys which had either been allowed in account between them or expended in the suit against C.—HOLLAND *v.* RUSSELL (1863), 4 B. & S. 14; 2 New Rep. 188; 32 L. J. Q. B. 297; 8 L. T. 468; 11 W. R. 757; 122 E. R. 365, Ex. Ch.

Annotations:—**Distd.** Newall *v.* Tomlinson (1871), L. R. 6 C. P. 405. **Apld.** Pollard *v.* Bank of England (1871), L. R. 6 Q. B. 623; Bavins & Sims *v.* London & South Western Bank, [1900] 1 Q. B. 270, C. A.; Continental Caoutchouc & Gutta Percha Co. *v.* Kleinwort (1904), 90 L. T. 474. **Distd.** Morison *v.* London County & Westminster Bank, [1914] 3 K. B. 356, C. A. **Refd.** Baylis *v.* London, [1913] 1 Ch. 127, C. A.

2835. —— Ship's account settled.]—Cotton was shipped at Madras consigned to London for pltfs., merchants at Liverpool. The bills of lading expressed the freight to be "at the rate of £2 5*s.* per ton of fifty cubic feet as per margin." The margin contained a note of measurement of the cotton, & of amount of freight calculated accordingly. On arrival of the ship the cotton was bonded at a wharf in London, & pltfs.' brokers sent copies of the bills of lading to the wharfinger & to pltfs. at Liverpool. The wharfinger in the ordinary course of business measured the cotton & sent a note of measurement to defts., the ship's brokers, one of them being sole owner of the ship. Defts. made out a freight note, calculating freight according to London measurement which was larger than Madras measurement, & forwarded it to pltfs.' brokers, who paid the amount & were credited by pltfs., their principals, the latter having the bills of lading in their possession at the time. After lapse of nearly two years pltfs. settled their accounts with their agents at Madras, & the mistake was discovered. Pltfs. sued defts. for amount of freight overpaid. Defts. had settled the ship's account for the voyage with the owner. There was perfect *bona fides* on both sides:—*Held:* the money having been paid by pltfs. under a mistake, they were entitled to recover it back from the owner of ship, but not from defts., the ship's brokers.—SHAND *v.* GRANT (1863), 15 C. B. N. S. 324; 9 L. T. 390; 1 Mar. L. C. 396; 143 E. R. 809.

Annotation:—**Distd.** Newall *v.* Tomlinson (1871), L. R. 6 C. P. 405.

2836. —— ——.]—A. bought cotton of B., both being cotton brokers at Liverpool, & each acting for an undisclosed principal. Weight-lists of the cotton were in the usual course delivered to each from the warehouse-keeper at the dock; by a mistake made by a clerk of B. in adding up the figures, the quantity appeared to be 100 cwt. more than it really was, & A. in ignorance of the mistake paid B. £509 15*s.* too much. The mistake was not discovered by either party until several months afterwards. B. had allowed money so received by him to be settled in account between himself & his principals, to whom he had made advances; & at the close of the transactions between them there was a large balance owing by his principals to B.:—*Held:* A. was entitled to recover from B. the sum so overpaid to him, the case not falling within the rule by which an agent is relieved from responsibility where he has *bonâ fide* paid over moneys received by him on account of his principals.—NEWALL *v.* TOMLINSON (1871), L. R. 6 C. P. 405; 25 L. T. 382.

Annotations:—**Consd.** Kleinwort *v.* Dunlop Rubber Co. (1907), 97 L. T. 263, H. L. **Refd.** Baylis *v.* London, [1913] 1 Ch. 127, C. A. **Mentd.** Continental Caoutchouc & Gutta Percha Co. *v.* Kleinwort (1904), 90 L. T. 474, C. A.

2837. ——.]—Pltf. contracted with M. Ry. Co. for carriage of coke breeze from a station on M. Ry. to a station on defts.' ry. at a certain specified through rate per ton. The goods having been delivered, pltf. paid for carriage at the agreed rate to defts. as collecting agents of M. Ry. Co. Pltf. discovered that M. Ry. Co. had in their published book of rates a through rate between same stations charging a less sum per ton for coke breeze if used for fuel purposes. The coke breeze carried for pltf. was intended to be used for other than fuel purposes. Pltf. sought to recover from defts. the difference between the two rates upon the ground that differential charges for carriage of the same article according to purpose for which it was used was a breach of Railways Clauses Act, 1845 (c. 20), s. 90. Payments by pltf. to defts. had been made voluntarily & without compulsion. Before any notice to defts. of any claim by pltf. that he had been overcharged they had settled an account with M. Ry. Co. in respect of payments so received by them on M. Ry. Co.'s behalf:—*Held:* (1) even if there was a breach of the above Act, the money could not be recovered back from defts., who had received it as innocent agents & settled for it with their principals before any notice of overcharge; (2) this applied equally to that portion of the money received by them, which in the ordinary course under their traffic arrangement with M. Ry. Co. they would be entitled to retain to their own use as representing their share of the through rate for the portion of the transit over their ry., the money having been paid by pltf. as a lump payment under a contract to which defts. were not parties.—TAYLOR *v.* METROPOLITAN RY. CO., [1906] 2 K. B. 55; 75 L. J. K. B. 735; 95 L. T. 149; 22 T. L. R. 479, D. C.

Annotation:—**Refd.** Baylis *v.* London, [1913] 1 Ch. 127, C. A.

2838. Sale abortive through purchaser pleading contract void.]—Pltf. entered into a contract with deft., as agent of seller, to purchase certain shares, & paid a deposit. Pltf. failed to complete, &, the contract being void under Leeman's Act, sued deft. to recover the deposit:—*Held:* deft., having paid the deposit over to his principal, was not

liable.—GALLAND *v.* HALL (1888), 4 T. L. R. 761, C. A.

2839. Money not paid for use of principal.]—The action for money had & received lies to recover money obtained through compulsion, under colour of process, by excess of authority, although it has been paid over. To make it a defence to an agent that he had paid over the money, it is necessary that it should have been paid to the agent expressly for use of the person to whom he has so paid it over.

A sheriff issued a warrant on mesne process to distrain the goods of A.; the bailiff levied the debt upon goods of B. & paid it over:—*Held:* money had & received would lie against the bailiff. —SNOWDON *v.* DAVIS (1808), 1 Taunt. 359; 127 E. R. 872.

Annotations:—**Distd.** East India Co. *v.* Tritton (1824), 5 Dow. & Ry. K. B. 214. **Apld.** Smith *v.* Sleap (1844), 12 M. & W. 585. **Folld.** Valpy *v.* Manley (1845), 1 C. B. 594. **Apld.** Sharland *v.* Mildon (1846), 5 Hare, 469; Oates *v.* Hudson (1851), 6 Exch. 346. **Folld.** Parker *v.* Bristol & Exeter Ry. Co. (1851), 6 Exch. 702; Steele *v.* Williams (1853), 8 Exch. 625. **Refd.** Morgan *v.* Palmer (1824), 4 Dow. & Ry. K. B. 283; Atlee *v.* Backhouse (1838), 3 M. & W. 633; Taylor *v.* Metropolitan Ry. Co. (1906), 95 L. T. 149.

2840. Money not received as agent.]—Pltf.'s wife was devisee of certain freehold property. Testatrix had delivered title-deeds of this property to H. & had expressed an intention to make a will in H.'s favour, & H. had, in consequence, paid for medical attendance upon, & the funeral expenses of, testatrix. It was eventually found that the only will in existence was that by which the property was devised to pltf.'s wife; & on pltf. applying to H. for the title-deeds, she at first refused to give any information, unless paid the above expenses, & referred pltf. to deft., her solr., who also refused to give up the deeds unless the expenses were paid, & pltf., in order to obtain the deeds, paid the amount claimed:—*Held:* (1) this was not a voluntary payment to deft. in his character of agent; (2) he was liable in an action for money had & received, notwithstanding he had paid over the amount to H.—OATES *v.* HUDSON (1851), 6 Exch. 346; 20 L. J. Ex. 284.

2841. Money received as principal—Bishop.]—Where tithe rentcharge was paid by pltfs. under a mistake of fact to the sequestrator of a benefice appointed by an order made by the bishop under Bkpcy. Act, 1883 (c. 52), s. 52, was received & applied by the bishop, who had no notice of the mistake, first in providing for the spiritual needs of the benefice, & then in payment of the balance to the trustees in bkpcy. of the incumbent:—*Held:* the bishop, as between himself & pltfs., was in the position of a principal, & as such was liable to repay the amount so received & applied by him.—BAYLIS *v.* LONDON (BP.), [1913] 1 Ch. 127; 82 L. J. Ch. 61; 107 L. T. 730; 29 T. L. R. 59; 57 Sol. Jo. 96, C. A.

For full anns., *see* ECCLESIASTICAL LAW.

B. Agent's Liability in respect of Money received for Use of or directed to be paid to Third Party.

(a) General Rule—Agent not liable to Third Party.

2842. Bills remitted to agent with directions to pay.]—K., residing abroad, remitted bills on England to defts., his bankers in London, with directions in the letters inclosing such bills to pay the amount, in certain specified proportions, to pltf. & other creditors of K., who would produce their letters of advice from him on the subject, & desiring the amount paid to each person to be put on the back of their respective bills, & that every bill paid off should be cancelled. Pltf., before the bills became due, gave notice to defts. that he had received a letter from K. ordering payment of his debt out of that remittance, & offered them an indemnity if they would hand over one of the bills to him; but defts. refused to indorse the bill away, or to act upon the letter, admitting, however, that they had received the directions to apply the money. Defts. in fact afterwards received the money on the bills when due:—*Held:* (1) they did not by the mere act of receiving the bills, & afterwards the produce of them, with such directions, & without any assent on their part to the purport of the letter, & still more against their express dissent, bind themselves to pltf. so to apply the money in discharge of his debt due to him from K.; (2) pltf., between whom & defts. there was no privity of contract, express or implied, but on the contrary it was repudiated, could not maintain an action against defts. as for money had & received by them to his use; (3) the property in the bills & their produce continued in the remitter.—WILLIAMS *v.* EVERETT (1811), 14 East, 582; 104 E. R. 725.

Annotations:—**Folld.** Yates *v.* Bell (1820), 3 B. & Ald. 643. **Apld.** Gibson *v.* Minet (1824), 1 C. & P. 247. **Distd.** Fitzgerald *v.* Stewart (1828), 2 Sim. 333. **Folld.** Wedlake *v.* Hurley (1830), 1 Cr. & J. 83. **Consd.** Garrard *v.* Lauderdale (1831), 2 Russ. & M. 451. **Apld.** Baron *v.* Husband (1833), 4 B. & Ad. 611. **Distd.** Frühling *v.* Schroder (1835), 1 Hodg. 105. **Folld.** Brind *v.* Hampshire (1836), 1 M. & W. 365. **Consd.** *Re* Douglas, *Ex p.* Hankey (1838), 4 Deac. 1. **Consd. & Expld.** Thomas *v.* Tyler (1838), 3 Y. & C. Ex. 255. **Distd.** Cobb *v.* Becke (1845), 6 Q. B. 930. **Apld.** Robbins *v.* Fennell (1847), 11 Q. B. 243; Harland *v.* Binks (1850), 15 Q. B. 713. **Consd.** Liversidge *v.* Broadbelt (1859), 28 L. J. Ex. 332. **Distd.** Collins *v.* Brook (1860), 5 H. & N. 700, Ex. Ch. **Apld.** Fleet *v.* Perrins (1868), L. R. 3 Q. B. 536. **Distd.** New Zealand & Australian Land Co. *v.* Ruston (1880), 5 Q. B. D. 474. **Refd.** Rowe *v.* Young (1820), 2 B. & Ald. 391; Tibbitts *v.* George (1836), 2 Har. & W. 152; *Re* Douglas & Anderson, *Ex p.* Cotterill, Mill (1837), 3 Mont. & A. 376; Hutchinson *v.* Heyworth (1838), 9 Ad. & El. 375; Godts *v.* Rose (1855), 25 L. J. C. P. 61; Siggers *v.* Evans (1855), 5 E. & B. 367; Fleet *v.* Perrins (1869), L. R. 4 Q. B. 500. **Mentd.** R. *v.* Beaumont (1854), 18 J. P. 103, C. C. R.; Lizardi *v.* Pennell (1856), 2 Jur. N. S. 1227; Sloper *v.* Cotterell (1856), 27 L. T. O. S. 198; Browne *v.* Hare (1859), 4 H. & N. 822, Ex. Ch.; Conflans Stone Quarry Co. *v.* Parker (1867), 17 L. T. 283; Rustomjee *v.* R. (1876), 1 Q. B. D. 487; Prince *v.* Oriental Bank Corpn. (1878), 38 L. T. 41, P. C.

2843. Agent employed as bearer of money.]—A trader in prison employed an auctioneer to sell goods, who sent him the proceeds by the hands of deft.; the trader became bkpt. by lying two months in prison:—*Held:* his assignees could not recover from deft., who was a mere bearer, the money he had so received & paid over.—COLES *v.* WRIGHT (1811), 4 Taunt. 198; 128 E. R. 305.

Annotations:—**Apld.** Tope *v.* Hockin (1827), 7 B. & C. 101. **Consd.** Pearson *v.* Graham (1837), 6 Ad. & El. 899. **Distd.** Kynaston *v.* Crouch (1845), 14 M. & W. 266.

2844. Money remitted to be paid to third party.]—A general remittance to bankers, to whom the remitter is indebted, accompanied by a letter requesting them to pay certain specific sums to particular persons (not expressly out of the sum

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c. Amount loaned third party by principal—Remitted through agent.]—L. arranged with C. Assocn., an English co. investing money in Canada, & having deft. R. as their manager, & deft. H. as one of their local directors, for a loan of money. After paying off a prior mtge. on the lands of L., & the expenses, etc., the manager sent to his order a cheque for the balance of $89.95, signed by R. & H., defts. L. having made a claim for a larger amount brought an action against R. & H. to recover the amount he claimed to be due to him:—*Held:* (1) defts. not liable, as they never received any money to the use of pltf., having no control over the money except as manager & director of C. Assocn., & were in no wise acting as individuals on their own behalf, but solely as officers of the co.; (2) the evidence did not establish any privity between pltf. & defts. in respect of the money claimed, & without such privity the action would not lie.—HEWARD *v.* LOGAN (1864), 14 C. P. 592.—**CAN.**

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remitted) does not so fix the bankers as to give the persons, to whom such sums were so directed to be paid, a right of action against them for money had & received, without an assent on their part to such an appropriation of the money remitted. It is not necessary that the bankers should express a dissent from the required appropriation.—GRANT *v.* AUSTEN (1816), 3 Price, 58; 146 E. R. 191.

2845. Funds remitted to agent—To pay bill held by third party.]—A., an acceptor of a bill payable at his London bankers, remitted them funds to pay it, or take it up if overdue, which last being the case, the bankers, who were bankers in London, called on the holders, intending to take it up, but finding the bill was sent back to Ireland as dishonoured, they remitted the money back to the acceptor, &, upon a subsequent presentment of the bill, refused payment:—*Held:* this was not such specific appropriation of the money as to render the bankers liable to the holder for the amount remitted.—STEWART *v.* FRY & CHAPMAN (1817), 7 Taunt. 339, 1 Moore, C. P. 74; 129 E. R. 136.

2846. —— ——.]—Where a bill of exchange, payable at the house of A., had been there presented for payment & dishonoured, & the acceptor afterwards remitted to A. a sum of money for the purpose of enabling him to pay the dishonoured bill, & also another of less value, & A. in answer stated the fact of the bill having been dishonoured, but added that the money received should be carried to the acceptor's account, & did afterwards pay the smaller bill:—*Held:* the holder of the original bill could not maintain an action against A., there being no privity between them.—YATES *v.* BELL (1820), 3 B. & Ald. 643; 106 E. R. 796.

2847. Bill drawn on agent—Promise to pay.]—Deft., agent of A., had in his hands moneys & effects of A., & had written a letter to a creditor of A., in which he promised to honour on presentation certain bills of exchange drawn by that creditor, at A.'s request, upon deft. On general demurrer for want of equity to a bill praying deft. might be decreed to pay the bills of exchange out of the moneys & effects of A. in his hands, or otherwise out of his own moneys:—*Held:* (1) no assignment of specific property in hands of the agent was alleged; (2) the demurrer must be allowed.—BAILLET *v.* MITCHELL (1823), 1 L. J. O. S. Ch. 197.

2848. Agent not liable to account to third party.]—A creditor cannot file a bill for account against the agent of a principal against whom his claim is, unless he makes out a case of collusion between principal & agent.—JABAT *v.* CAMPBELL, No. 2849, *post.*

2849. Agent holding principal's property for particular purpose—Defence available in action by third party.]—Upon allegations that, under decrees of the Cortes & orders of the Spanish Govt., pltf. had a lien for payment of a debt due to him on a certain portion of stock, which, along with other stock, had been, by comrs. of the Spanish Govt., placed at disposal of, & sold by, certain agents in England, a bill was filed praying an account against the agents:—*Held:* (1) a good & complete defence might be made to such a bill by a plea stating matter, from which it appeared that the stock placed at disposal of these agents was intended for special purposes, unconnected with the satisfaction of pltf.'s demand, & did not include the stock specifically appropriated to meet his demand; (2) it was no objection to the plea that, after the special purposes were answered, there might be in the hands of the agents a surplus in which pltf. might have an interest.—JABAT *v.* CAMPBELL (1824) 3 L. J. O. S. Ch. 8.

2850. Agent collecting bill—Specially indorsed to third party.]—If A. remits a bill to B., having by indorsement directed proceeds to be paid to C.'s use, & B. receives proceeds & applies them otherwise:—*Held:* C. cannot maintain an action for money had & received against B., unless there has been actual assent on B.'s part to hold the money as agent for C.—WEDLAKE *v.* HURLEY (1830), 1 Cr. & J. 83; L. & Welsb. 330; 148 E. R. 1344.

Annotation:—**Distd.** Baron *v.* Husband (1833), 4 B. & Ad. 611.

2851. Money received by solicitor's clerk.]—STEPHENS *v.* BADCOCK (1832), 3 B. & Ad. 354; 1 L. J. K. B. 75; 110 E. R. 133.

Annotations:—**Apld.** Howell *v.* Batt (1833), 3 L. J. K. B. 49. **Consd.** Cranch *v.* White (1835), 1 Bing. N. C. 414. **Distd.** Tugman *v.* Hopkins (1842), 4 Man. & G. 389; Davies *v.* Vernon (1844), 6 Q. B. 443; Collins *v.* Brook (1860), 5 H. & N. 700, Ex. Ch.; Brook *v.* Collins (1860), 6 Jur. N. S. 999, Ex. Ch. **Apld.** Ellis *v.* Goulton (1893), 68 L. T. 144, C. A. **Reid.** Haigh *v.* Jones (1843), 5 Man. & G. 634; Ireland *v.* Thomson (1847), 4 C. B. 149; Hobart *v.* Butler (1859), 33 L. T. O. S. 62; Mildred *v.* Maspons (1883), 8 App. Cas. 874, H. L.; Monkwearmouth Flour Mill Co. *v.* Lightfoot (1897), 13 T. L. R. 327. **Mentd.** Litt *v.* Martindale (1856), 4 W. R. 465.

2852. Money received by solicitor's London agent.]—COBB *v.* BECKE (1845), 6 Q. B. 930; 14 L. J. Q. B. 108; 4 L. T. O. S. 394; 9 Jur. 439.

Annotations:—**Folld.** Robins *v.* Fennell (1847), 11 Q. B. 248. **Distd.** Collins *v.* Brook (1860), 5 H. & N. 700, Ex. Ch.; Colonial Bank *v.* Exchange Bank of Yarmouth (1885), 54 L. T. 256, P. C. **Reid.** Collins *v.* Brook (1859), 4 H. & N. 270. **Mentd.** Hobart *v.* Butler (1859), 33 L. T. O. S. 62.

See, further, SOLICITORS.

2853. Money received by sub-agent.]—SIMS *v.* BRITTAIN (BRITTEN) (1832), 4 B. & Ad. 375; 1 Nev. & M. K. B. 594; 110 E. R. 496.

Annotations:—**Expld.** Sims *v.* Bond (1833), 2 Nev. & M. K. B. 608; Elston *v.* Braddick (1834), 2 Cr. & M. 435. **Distd.** Walshe *v.* Provan (1853), 8 Exch. 843; Coulthurst *v.* Sweet (1866), L. R. 1 C. P. 649. **Reid.** Ireland *v.* Thomson (1847), 4 C. B. 149; Cooke *v.* Seeley (1848), 17 L. J. Ex. 286. **Mentd.** Bodenham *v.* Hoskyns (1852), 2 De G. M. & G. 903, L.JJ.; *Re* Gross, *Ex p.* Adair (1871), 24 L. T. 198.

See, further, Part VI., Sect. 3, Sub-sect. 3, *ante.*

2854. Money received to be paid over to third party.]—A party who in the character of agent to a debtor receives money from his principal to discharge the debt is not liable to be sued by the creditor as for money received to his use.—HOWELL *v.* BATT, No. 2855, *post.*

Annotations:—**Distd.** Cobb *v.* Becke (1845), 6 Q. B. 930. **Reid.** Lewis *v.* Campbell (1849), 8 C. B. 541.

2855. Agent collecting profits—Rights of third party interested therein.]—Deft. was office-keeper of an Exeter & London coach, & servant to C., proprietor at Exeter, where the office kept by deft. was. Deft. from time to time made up accounts of shares of profits due to several proprietors, & sent them to those parties, taking the money from a balance of C.'s which he had in hand. On one occasion deft. sent to pltf., a proprietor, a packet purporting to contain £23 due to him, but in reality containing £20 only. Pltf. sued deft. for £3 had & received to his use:—*Held:* (1) deft. was not liable, there being no privity of contract between him & pltf.; (2) he was not precluded from this defence by having told pltf. that he, deft., had had the £23 of C. & sent it to pltf. & debited C. with it.—HOWELL *v.* BATT (1833), 5 B. & Ad. 504; 2 Nev. & M. K. B. 381; 3 L. J. K. B. 49; 110 E. R. 877.

Annotations:—**Distd.** Cobb *v.* Becke (1845), 6 Q. B. 930. **Reid.** Lewis *v.* Campbell (1849), 8 C. B. 541.

2856. Money received for payment to third party—Effect of conditional offer to pay.]—The solr. to the assignees of a bkpt. received from them a sum of money to be applied in payment of the costs of petitioning creditor up to the time of the choice of assignees. The solr. offered to pay the money on condition that the bill should undergo a subsequent taxation, but to that petitioning creditor would not

assent :—*Held :* the latter could not maintain money had & received thereupon against the solr., though, after the above offer & refusal, he had authorised the solr. to pay over part of the money in discharge of the comr.'s fees.—BARON *v.* HUSBAND, (1833), 4 B. & Ad. 611 ; 110 E. R. 586.

Annotations :—**Folld.** Howell *v.* Batt (1833), 5 B. & Ad. 504. **Distd.** Cobb *v.* Becke (1845), 6 Q. B. 930.

2857. Executor's agent—Legatee—No agreement.]—Deft., as the agent of an exor., wrote to a legatee informing him of his legacy & its amount, & stating that he would remit it in any way the legatee might suggest. He transacted the business necessary for the transfer of the legacy, & remitted to the legatee the amount of the legacy, minus a sum deducted for expenses :—*Held :* deft. was not liable to the legatee, in an action for money had & received for the sum so deducted.—BARTON *v.* BROWNE (1846), 16 M. & W. 126 ; 16 L. J. Ex. 62 ; 153 E. R. 1127.

Annotation :—**Refd.** Monkwearmouth Flour Mill Co. *v.* Lightfoot (1897), 13 T. L. R. 327.

See, further, EXECUTORS & ADMINISTRATORS.

2858. Money directed to be held at disposal of third party—Acknowledgment—Revocation.]—A mercantile firm at Calcutta, by letter dated Jan. 16, 1841, requested defts., their correspondents in London, to hold a sum of money, payable on Nov. 19, following out of remittances & consignments on their general account, at disposal of pltf., a merchant at Liverpool & a creditor of the Calcutta firm. On same day the Calcutta firm wrote to pltf. informing him of directions they had given to defts. On Mar. 12, 1841, defts. wrote to pltf. " to advise " him of the request of the Calcutta firm, adding " at the present time we are considerably in cash advance for the firm, & the consignments & remittance hitherto advised will fall short of the engagements we are under on their account. We have registered the above, & should remittances or consignments come forward to enable us to meet their wishes, we shall lose no time in advising you." On Mar. 14, 1841, defts. wrote to the Calcutta firm in answer to their letter that the state of their account would not warrant defts. in meeting the requisition for the present, but should they be in a position to meet it before Nov. they would do so. By letter of Jan. 18, 1842, the Calcutta firm revoked their order for appropriation of the money :—*Held :* the correspondence did not create an absolute contract on part of defts. to pay to pltf. the amount in question out of remittances & consignments.—MALCOLM *v.* SCOTT (1850), 5 Exch. 601 ; 155 E. R. 263.

2859. Wages received by book-keeper.]—Pltf. & deft. were servants to D. & Co., pltf. as a stage-coach driver, deft. as clerk & book-keeper. Deft. usually paid pltf. his wages & made up all accounts, entering pltf.'s moneys in the books as being settled weekly ; deft. & D. & Co. settled monthly. Pltf. having as he alleged £38 due, applied to deft. for it, admitting he had retained certain moneys of D. & Co. Deft. sent him £20 on account, & promised to pay the balance on pltf.'s calling to adjust accounts. Pltf. afterwards wrote to D. for the balance, stating he should look to D. for payment. Pltf. brought an action for money had & received against deft. :—*Held :* the action could not be maintained.—GLOVER *v.* JONES (1852), 20 L. T. O. S. 113.

2860. Money received to take up bill.]—Where the acceptor of a bill paid money to his bankers, defts. (at whose correspondents' house it was payable), for the purpose of taking that & other bills up, & they promised him to apply it to such purposes & entered the particular bill to their credit in their books, but it did not appear that they had advised their correspondents to pay it :—*Held :* the drawer, the holder of the bill, could not sue the bankers for the amount of the bill, there being no privity to sustain the action.—MOORE *v.* BUSHELL (1857), 27 L. J. Ex. 3.

Annotation :—**Apld.** Hill *v.* Royds (1869), L. R. 8 Eq. 290.

2861. Fiduciary relationship between agent & third party must be alleged.]—Pltf. was holder of bonds issued by a foreign republic through defts., its agents in England, by which the foreign republic, upon the national faith, pledged the general revenue of the republic, especially the free proceeds of guano imported by the republic into the United Kingdom, after engagements contracted on them were covered, & bound itself in all contracts which it might enter into for sale of guano to set aside in each half-year a sum sufficient for service of the half-year, & after such service was secured to dispose freely of the surplus. Pltf. brought an action on behalf of himself & all other holders of the bonds, stating in his claim that the republic had from time to time forwarded to defts. large quantities of guano for purpose of paying interest on bonds which they refused to apply for that purpose, & threatened to apply in satisfaction of a lien claimed by themselves ; & he claimed a declaration that he & the other bondholders had a claim upon the proceeds of guano in priority to any claim by defts. He also alleged that the foreign republic made no claim to proceeds of guano, but offered to make it a party if it should so desire. Defts. demurred to the statement of claim, on the ground that pltfs. had no charge on proceeds of guano, & also on the ground of want of jurisdiction & want of parties :—*Held :* (1) no fiduciary relation was alleged between defts. & pltf. ; (2) the guano being the property of a foreign Govt., the ct. had no jurisdiction to attach it or proceeds of sale thereof ; (3) defts. being agents of the foreign Govt., could not be sued in absence of their principal.—TWYCROSS *v.* DREYFUS (1877), 5 Ch. D. 605 ; 46 L. J. Ch. 510 ; 36 L. T. 752, C. A.

2862. Solicitor taking up client's acceptances—Payment in spurious bank notes.]—Pltfs. held certain acceptances of A.'s, & deft. was acting as solr. to A. & to B. B. agreed to take up A.'s acceptances, & deft. cashed a cheque for B. at B.'s bank, & received two £100 Bank of England notes. On May 29 deft. sent a clerk to pltfs. with these two £100 Bank of England notes, which were paid to them, the clerk receiving three acceptances of A.'s & £63 15*s.* in cash. Deft. retained £13 15*s.* in payment of a bill of costs due from A. to himself, & paid £50 to B. On June 7 one of the notes which pltfs. had paid away was brought back to them as refused by the Bank of England, & with the words " Number & date of this note have been altered " written across it. On July 22 they demanded £100 of deft., who then had notice that the note was bad. All parties had believed the two notes to be good :—*Held :* (1) pltfs., in receiving the note from deft. & handing him the acceptances, were not dealing with him merely as agent for A. or B. ; (2) pltfs., having received a worthless document from deft., were entitled to recover the amount for which they had taken it as payment.—LEEDS BANK *v.* WALKER (1883), 11 Q. B. D. 84 ; 52 L. J. Q. B. 590 ; 47 J. P. 502.

For full anns., *see* BANKERS & BANKING.

2863. Money received for payment of interest on foreign loan—Payment of coupons advertised.]—A foreign Govt. issued a public loan under a decree & an agreement providing for a mtge. to defts. of certain estates on behalf of bondholders. Defts. received instructions to pay coupons for interest falling due on June 1, less 5 per cent. tax pursuant to a decree of the Govt., which was to take effect

Sect. 1.—*In regard to contracts: Sub-sect.* 8, *B.* (*a*), (*b*) & (*c*).]

subject to the promulgation of a decree modifying the law of liquidation. Defts., having received from the Govt. a sum of money to meet half-yearly interest less 5 per cent., advertised that they would make such payments. Defts. received £10,000, the amount of the 5 per cent., from comrs. of the Govt. who managed the mtged. estates; it did not appear that such comrs. were authorised to remit such sum. Defts. issued a further advertisement that coupons would be paid in full. Finally, they issued an advertisement that, in accordance with directions of the Govt., the coupons would be paid less 5 per cent., notwithstanding that the amount required to pay same in full had been duly remitted to them by the comrs. After such last advertisement the decree modifying the law of liquidation was passed. Pltf., a bondholder, brought an action claiming payment of his coupon in full by the agents pursuant to the second advertisement:—*Held:* (1) the second advertisement did not amount to an admission by the agents that they had money in their hands for use of pltf. & other bondholders to enable pltf. to maintain an action against them for money had & received; (2) the £10,000 was not remitted to the agents by persons who had authority to do so on behalf of the Govt.; (3) it was not impressed with a trust in favour of bondholders.—HENDERSON *v.* ROTHSCHILD & SONS (1887), 56 L. J. Ch. 471; 56 L. T. 98; 35 W. R. 485; 3 T. L. R. 364, C. A.

2864. In what capacity money received—Question of fact.]—W., being indebted to pltfs. & unable to pay them, agreed with defts. that they should discount bills to be drawn by W. & accepted by pltfs. for £2,500. Pltfs. handed the acceptances to defts. Defts.' manager asked pltfs. when they required the money. Pltfs. said they did not want the money until the next day, but afterwards said they would take £2,000 that evening. The manager said he would not hand the cheque for that amount to pltfs., but would give it to W.'s clerk, & that he should require W.'s order for payment of the balance. W.'s clerk got the cheque for £2,000, & handed it to pltfs., & pltfs. on same evening handed to defts. an order by W. for payment of the balance to pltfs.:—*Held:* it was a question for the jury whether from the time of lodging the order defts. held the money for pltfs. & not for W.—NOBLE *v.* NATIONAL DISCOUNT CO. (1860), 5 H. & N. 225; 29 L. J. Ex. 210.

See, further, CONTRACT; MASTER & SERVANT.

Auctioneer.]—*See* AUCTION & AUCTIONEERS.

Banker.]—*See* BANKERS & BANKING.

2865. Agent collecting duties—Rights of Crown.]—An extent lies against an insolvent agent of a fire insurance co., where it is found on inquisition he has received a sum due to the Crown for insurance duties, though the co. be also liable to the Crown.—R. *v.* WRANGHAM (1831), 1 Cr. & J. 408; 1 Tyr. 383; 9 L. J. O. S. Ex. 124; 148 E. R. 1481.

Annotation:—**Apld.** *Re* West London Commercial Bank (1888), 38 Ch. D. 364.

2866. Agent of Crown.]—GIDLEY *v.* PALMERSTON, No. 2729, *ante.*

Annotations:—**Apld.** The Athol (1842), 1 Wm. Rob. 374. **Distd.** Auty *v.* Hutchinson (1848), 6 C. B. 266. **Apld.** *Re* Tufnell (1876), 3 Ch. D. 164. **Consd. & Apld.** Grant *v.* Secretary of State for India (1877), 2 C. P. D. 445; Palmer *v.* Hutchinson (1881), 6 App. Cas. 619, P. C. **Apld.** R. *v.* Secretary of State for War, [1891] 2 Q. B. 326, C. A. **Consd.** Dunn *v.* Macdonald, [1897] 1 Q. B. 401; Graham *v.* Public Works Comrs., [1901] 2 K. B. 781.

2867. ——.]—R. *v.* SECRETARY OF STATE FOR WAR, No. 2734, *ante.*

Annotation:—**Apld.** Dunn *v.* Macdonald (1897), 76 L. T. 444, C. A.

2868. ——.]—KINLOCH *v.* SECRETARY OF STATE FOR INDIA, No. 2730, *ante.*

Annotations:—**Folld.** *Re* Banda & Kirwee Booty, Kinloch *v.* R., Kinloch *v.* R. & Secretary of State for India in Council, [1882] W. N. 164. **Consd. & Apld.** R. *v.* Secretary of State for War, [1891] 2 Q. B. 326, C. A. **Apld.** Dunn *v.* Macdonald (1896), 66 L. J. Q. B. 209. **Refd.** Hollinshead *v.* Hazelton, [1916] 1 A. C. 428, H. L.
For full anns., *see* S. C. No. 2730, *ante.*

2869. ——.]—SALAMAN *v.* SECRETARY OF STATE FOR INDIA, No. 2731, *ante.*

For full anns., *see* S. C. No. 2731, *ante.*

(b) Where Agent assents.

2870. Promise to pay—When funds received.]—When a bill is drawn on an agent & made payable out of a particular fund, & the agent says he will pay it when he gets money of the principal, this is binding on him, & if he gets money at any subsequent time he is bound to pay the bill.—STEVENS *v.* HILL (1805), 5 Esp. 247.

2871. ——.]—J. was indebted to pltfs. in an action for money had & received, & was also a creditor of S. & F. Co., Ltd., which was being wound up, & deft. was the official liquidator. J. signed the following document: "Isle of Man, July 15, 1865. On Aug. 1 next, please pay to [pltfs.] or order £600, on account of moneys advanced by me to S. & F. Co., Ltd. To [deft.] official liquidator of the co." This document, which was unstamped when produced at the trial, was sent by J. to pltfs. in England, & they forwarded a copy to deft., who was also in England, requesting to know whether he would honour the order, & he replied he would when funds came into his hands about Aug. 15. Funds came into his hands soon after that time, but owing to a dispute as to the amount remaining due to J. nothing was then paid; & after much correspondence, in which pltfs. continually demanded payment of the order, but never parted with it, action was brought:—*Held:* the evidence showed a contract binding on deft. within the principle of the decision in *Walker* v. *Rostron* (No. 2878, *post*).—GRIFFIN *v.* WEATHERBY (1868), L. R. 3 Q. B. 753; 9 B. & S. 726; 37 L. J. Q. B. 280; 18 L. T. 881; 17 W. R. 8.

Annotation:—**Refd.** Greenway *v.* Atkinson (1881), 29 W. R. 560, C. A.

2872. —— **Extent of liability.**]—Agents in England effected a policy of insurance for a correspondent abroad, on which a loss happened. He drew a bill upon them, which was presented to them for acceptance by the indorsee; they said they could not accept it, having no funds in hand, but that on a settlement with the underwriters it should be paid; the agents received from the underwriters a sum less than the amount of the bill:—*Held:* this might be recovered from the agents by the indorsee, as money had & received to his use.—LANGSTON *v.* CORNEY (1815), 4 Camp. 176.

2873. —— **What amounts to.**]—An infant entitled to certain personal property, on her coming of age, as a residuary legatee, joined her father in a bond to secure to pltf. a sum due to him for the

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PART X. SECT. 1, SUB-SECT. 8.—B. (b).

d. Agent accepting principal's order to pay third party — Action against principal & agent—Effect of discharging principal.]—In a suit for the value of articles sold to deft. A., who had given an order for payment, which deft. B., as his agent, had accepted by an indorsement, pltf. gave up the claim against deft. A., & sued deft. B. alone:—*Held:* in the circumstances, there could be no claim against deft. B.—KALEE MOHUN SIRCAR *v.* HUMAUN KADER MAHOMED ALI (1876), 25 W. R. 91.—IND.

rent of apartments occupied by her & her father, & after she became of age employed deft. to take out administration *de bonis non* of the assets of testator (his exor. being dead), which deft. accordingly did, & became possessed of the property. Afterwards she gave pltf. an order on deft. to pay the amount of her father's bills due to the former, which on being presented to deft. he acknowledged that he possessed adequate funds & that a person would be safe in advancing money on the security of the bond, but, before the order was executed or the sum paid under it by deft., the daughter countermanded it:—*Held:* as he had consented to appropriate a sum sufficient to pay pltf.'s demand, he was liable to an action for money had & received, in which pltf. might not only recover the amount of the bond, but an acceptance given by the father of the infant, before she became of age, & which she afterwards requested deft. to pay.—ROBERTSON *v.* FAUNTLEROY (1823), 8 Moore, C. P. 10; 1 L. J. O. S. C. P. 55.

Annotation:—**Distd.** Walker *v.* Rostron (1842), 9 M. & W. 411.

2874. —— Annuity—Conduct inferring obligation to continue to pay same.]—Where consignments have been made from abroad to answer an annuity which the owner of the property consigned is liable to pay, & a consignee in England gives notice of the arrangement to the annuitant & makes payments in pursuance of it, the consignee is not afterwards at liberty to discontinue such payments so long as he has any proceeds of the consignment in his hands. The circumstances of such a transaction constitute an implied trust, which the ct. will enforce against the consignee, for benefit of the annuitant.—FITZGERALD *v.* STEWART (1831), 2 Russ. & M. 457; 39 E. R. 467.

Annotations:—**Follid.** Kirwan *v.* Daniel (1847), 5 Hare, 493. **Refd.** Burns *v.* Carvalho (1839), 9 L. J. Ch. 65.

2875. —— Effect of.]—J. & Co., merchants at R., indebted to pltfs., merchants in L., consigned certain coffee, with bills of lading, to defts., residing at H., & desired them to realise the property as speedily as possible & remit proceeds to pltfs. Pltfs., apprised of the order, wrote to defts. & requested to know the probable amount of the remittance. In their answer defts. acknowledged they were ordered to remit proceeds of the coffee to pltfs., but stated that it was not yet sold:—*Held:* defts. were to be considered as having consented to appropriation of the coffee, as directed by their correspondents at R.—FRUHLING *v.* SCHROEDER (1835), 2 Bing. N. C. 77; 7 C. & P. 103; 1 Hodg. 105; 2 Scott, 135; 4 L. J. C. P. 169; 132 E. R. 31.

2876. Acknowledgment by agent.]—If a person who is not a general agent has money sent him to pay to a third party, & acknowledges he has received it for that purpose, the third party may maintain *assumpsit* for money had & received.—LILLY (LILLEY) *v.* HAYS (1836), 5 Ad. & El. 548; 2 Har. & W. 338; 1 Nev. & P. K. B. 26; 6 L. J. K. B. 5; 111 E. R. 1272.

Annotations:—**Distd.** *Re* Douglas, *Ex p.* Hankey (1838), 4 Deac. 1; Cobb *v.* Becke (1845), 6 Q. B. 930; Cumming *v.* Cox (1848), 11 L. T. O. S. 86; Moore *v.* Bushell (1857), 27 L. J. Ex. 3; Liversidge *v.* Broadbent (1859), 4 H. & N. 603; Cochrane *v.* Green (1860), 9 C. B. N. S. 448. **Follid.** Noble *v.* National Discount Co. (1860), 5 H. & N. 225. **Apld.** Monkwearmouth Flour Mill Co. *v.* Lightfoot (1897), 13 T. L. R. 327. **Mentd.** Robbins *v.* Fennell (1847), 17 L. J. Q. B. 77.

2877. Acts not constituting consent.]—A., resident abroad, remitted to B., his agent in England, a bill drawn by A. specially indorsed by him to C., with whom his children were at school, in payment of C.'s account for their board & education. B. got the bill accepted by drawees & sent a letter to C. stating he had received a commission from A. to pay her money on account of his children, & desired to be informed when & how it should be delivered. While the bill remained in B.'s hands, he received directions from A. to keep it, & the proceeds, in his hands, & to have a fair investigation into C.'s accounts, & after such investigation, to pay her what might be due to her. No such investigation took place, & B. detained the bill:—*Held:* C. could not recover it in trover.—BRIND *v* HAMPSHIRE (1836), 1 M. & W. 365; 2 Gale, 33; Tyr. & Gr. 790; 5 L. J. Ex. 197; 150 E. R. 475.

Annotations:—**Consd.** Marston *v.* Allen (1841), 8 M. & W. 494. **Refd.** Bank of Bengal *v.* Macleod (1849), 7 Moo. Ind. App. 1.

2878. Specific appropriation—Assent of agent.]—Pltf. sold goods to B., taking his acceptances for the price, & sent them to deft., B.'s agent, who consigned them to his partners abroad for sale. Pltf. doubting B.'s insolvency, required further security, whereupon, by agreement between pltf., B., & deft., B. handed to deft. a letter authorising him, out of any remittances he might receive against the net proceeds of the above assignments, to pay the acceptances as they became due, if not previously honoured by B. Deft. assented to the terms of the letter. Before the bills were due B. became bkpt., & deft., having received the net proceeds of goods, refused to pay any part thereof to pltf., but handed them over to B.'s assignees. In an action for money had & received:—*Held:* (1) there was an appropriation irrevocable except by the consent of all parties, for which the existing debt, though not then payable, was a good consideration; (2) pltf. was entitled to recover the amount of the acceptances from deft.—WALKER *v* ROSTRON (1842), 9 M. & W. 411; 11 L. J. Ex. 173; 152 E. R. 174.

Annotations:—**Distd.** Parsons *v.* Middleton (1847), 6 Hare, 261; Yates *v.* Hoppe (1850), 9 C. B. 541; Liversidge *v.* Broadbent (1859), 4 H. & N. 603. **Follid.** Noble *v.* National Discount Co. (1860), 5 H. & N. 225; Griffin *v.* Weatherby (1868), L. R. 3 Q. B. 753. **Refd.** Greenway *v.* Atkinson (1881), 29 W. R. 560, C. A.

2879. Direction of principal—Amounting to trust in favour of third party.]—Where money is placed in the hands of an agent, with direction, or, upon trust, to pay debts, that is a voluntary act, &, as such, revocable. But if there is an agreement between the person directing payment & the person directed to pay, it is not revocable, but becomes a trust.—LAWRENCE *v.* CAMPBELL (1859), 7 W. R. 170.

2880. Assent — Question of fact for jury.]—NOBLE *v.* NATIONAL DISCOUNT CO., No. 2864, *ante*.

2881. Agent of liquidator collecting trade debts—Rights of company.]—Where the agent of a liquidator on a voluntary winding up had agreed to hold money collected by him to the use of the co:—*Held:* (1) the agent was liable to account to the co.; (2) he was entitled to set off sums due to him for commission.—MONKWEARMOUTH FLOUR MILL CO. *v.* LIGHTFOOT (1897), 13 T. L. R. 327; 41 Sol. Jo. 407.

(c) Where there is an Assignment of the Money.

2882. Agent receiving goods—For sale & proceeds to be paid third party—Notice to third party.]—A firm indebted to pltf. shipped a quantity of copper ores to defts., & by letter directed them to sell the consignment, & out of proceeds to pay £400 to certain persons & the balance to pltf., & on same day communicated these instructions by letter to pltf.:—*Held:* the two letters operated as an assignment of balance to pltf.—ALEXANDER *v.* STEINHARDT, WALKER & CO., [1903] 2 K. B. 208; 72 L. J. K. B. 490; 8 Com. Cas. 209; 10 Mans. 2581.

Appropriation amounting to equitable or other assignment.]—*See* CHOSES IN ACTION.

Sect. 1.—*In regard to contracts: Sub-sect.* 8, *B.* (*d*), (*e*) & (*f*) & *C. D. E. & F.*]

(*d*) *Revocation of Authority.*

2883. Acts amounting to countermand.]—A. accepted a bill made payable at the house of defts., which was indorsed to pltfs., who discounted it. The bill was presented to defts., when due, & dishonoured. Two days afterwards the money to take up the bill was remitted to defts. & they were requested to follow it in whosesoever hands it might be. They tendered the money to pltfs. who had sent back the bill, the day before, to the drawers. Meantime, defts. received an order from the house (to which the letter inclosing the remittance referred them for advice) to hold the money to the credit of that house, as they had, by the desire of A., the acceptor, advanced him to the amount of the money then in defts.' hands for the purpose of taking up the bill:—*Held:* this was a sufficient countermand of the money on the part of A., & defts. were not liable to an action for money had & received, brought by pltfs., on their again getting back the bill into their possession.—STEWART *v.* FRY (1816), Holt, N. P. 372; *affd.* (1817), 7 Taunt. 339.

2884. Where creditor has not assented—Countermand valid.]—A. gave a sum of money into the hands of B. to pay to C. B. had not paid it over to C.:—*Held:* if C. had not consented to receive this sum of B., A. might countermand the authority & recover it back from B.—OWEN *v.* BOWEN (1829), 4 C. & P. 93.

2885. —— ——.]—MALCOLM *v.* SCOTT, No. 2858, *ante*.

2886. Countermand ineffectual—After agent's assent.]—A. & B., merchants in Australia, mutually agreed that each should buy gold-dust, each to have half the profit or to bear half the loss on the resale of the gold-dust to be bought by the other. In pursuance of this agreement A. bought 365 oz. & B. 728 oz. It was then agreed that each of them should consign his parcel to C. in London, for sale on the joint account, with instruction to C. to give A. & B. each credit of account for a moiety of the proceeds of each consignment. In pursuance of this last-mentioned agreement the gold-dust so bought was consigned to C., B.'s 728 oz. being invoiced as consigned on the "joint account," & accompanied by a letter from B. (dated Feb. 2, 1852) instructing C. to place the net profits to the respective accounts of A. & B. in equal moieties. A. likewise consigned his 365 oz. to C., but omitted to send C. instructions to place a moiety of the net proceeds to the account of B. On June 15, 1852, C. sent a letter to A., informing him that he would pass to his credit half the proceeds of the gold-dust, & thereby assented to obey the instructions he had received from B. On Feb. 4, 1852, B. wrote to C. as follows: "I have no doubt A. has written half the profits [net proceeds] of the 365 oz. of gold-dust shipped to you is to go to the credit of B. in the same way as half the profit of the 728 oz. is to go to his credit. If, however, he should not have done so, you will not pass the half profit of the 728 oz. to his credit." This letter was not received by C. at the time he wrote his letter on June 15. B. became bkpt., & C., having sold both parcels of the gold-dust, gave B. credit for the whole of the proceeds of the 728 oz. & for a moiety of the proceeds of the 365 oz.:—*Held:* a plea setting out these facts was a good plea of equitable set-off in an action for money lent, brought by C. against A.—ELKIN *v.* BAKER (1862), 11 C. B. N. S. 526; 31 L. J. C. P. 177; 8 Jur. N. S. 915; 142 E. R. 902.

Annotation:—**Consd.** Thornton *v.* Maynard (1875), L. R. 10 C. P. 695.

Revocability or irrevocability of direction to agent to pay.]—*See* Nos. 3046, 3049, 3055, 3056, 3061, *post*.

(*e*) *Other Matters.*

Novation.]—*See* CONTRACT.

Lien of agent.]—*See* Part VIII., Sect. 3, Sub-sect. 4, *ante*.

Set-off.]—*See* Nos. 2892-2899, *post*.

Trusts & trust money.]—*See* TRUSTS & TRUSTEES.

(*f*) *Agent of Executors, Administrators and Trustees.*

See EXECUTORS & ADMINISTRATORS; TRUSTS & TRUSTEES.

C. Money paid by Agent.

2887. Money paid in error.]—Where a person pays money by his agent which ought not to have been paid, either agent or principal may bring an action to recover it. The agent may, from authority of the principal, & the principal may, as proving it had been paid by his agent (LORD MANSFIELD, C.J.).—STEVENSON *v.* MORTIMER (1778), 2 Cowp. 805; 98 E. R. 1372.

Annotation:—**Apld.** Holt *v.* Ely (1853), 1 E. & B. 795.

2888. —— **Payee not prejudiced by mistake.**]—Applts. & B. & Co., both bankers, financed K., a merchant, making advances against goods. K. sold a parcel of goods to resps., & directed them to remit the price to B. & Co., who had an equitable mtge. on the goods. Resps. by mistake, but acting in good faith, paid the money to applts., who received it in good faith, believing it to represent the price of goods on which they had made advances to K. A jury found, in answer to a specific question, that they had not been led to alter their position for the worse as regarded K.:—*Held:* resps. were entitled to recover the money from applts. as being money paid under a mistake of fact.—KLEINWORT, SONS & CO. *v.* DUNLOP RUBBER CO. (1907), 97 L. T. 263; 23 T. L. R. 696; 51 Sol. Jo. 672, H. L.

Annotations:—**Apld.** Kerrison *v.* Glyn, Mills, Currie (1911), 81 L. J. K. B. 465, H. L. **Refd.** Baylis *v.* London, [1913] 1 Ch. 127, C. A.

2889. Agent paying deposit on purchase—Transaction not completed for lack of vendor's title—Repudiation by principal for lack of authority.]—A. purchased an estate sold by deft. at public auction, & signed a memorandum of agreement, in which he was described as agent of M. The supposed principal afterwards repudiated the contract; &

PART X. SECT. 1, SUB-SECT. 8.—B. (d).

2886 i. *Countermand ineffectual—After agent's assent.*]—In *assumpsit* for money had & received deft. pleaded he had received the money as agent of pltf., & had paid it over by his directions to a person to whom pltf. was indebted. Pltf. replied he countermanded the direction before payment. Deft. rejoined that before countermand or notice thereof he had given notice to pltf.'s creditor that he held the money for his use:—*Held:* the rejoinder was a good answer.—COATES *v.* LLOYD (1846), 3 U. C. R. 51.—**CAN.**

2886 ii. —— ——.]—F. died intestate, having insured his life in favour of E., his wife, pltf. She assigned the policies to deft. in trust for payment of the debts due by F., & for payment of the remainder to pltf. Two creditors were about taking steps to attach the policies in the United States, but, being informed by deft. of the assignment, took no further proceedings at his request. Before deft. had paid over any money pltf. signed a revocation, & demanded from deft. the amount received on the policies. Notwithstanding this, deft. distributed among the creditors what was necessary to discharge their claims. Pltf. sued deft. for the whole sum received from the insurance co.:—*Held:* the engagement entered into with the creditors who were about attaching the policies was binding, & pltf. could not recover the amounts paid over to them.—FROST *v.* KERR (1874), 2 Pug. 338.—**CAN.**

after notice of the fact to the agent of the vendor A. paid the deposit money, according to the conditions of sale. Upon its turning out the title was defective :—*Held :* A. entitled to recover the deposit in his own name.—LANGSTROTH *v.* TOULMIN (1822), 3 Stark. 145.

2890. Agent paying premium on unauthorised insurance.]—Pltf. without his father's knowledge or consent insured his father's life in defts.' office. The father becoming aware of the existence of the policies, objected to them, whereupon pltf. sought to recover from defts. the premiums paid :—*Held :* (1) as pltf. had represented himself the agent of his father to effect the insurances & had warranted his authority in that behalf, he could not now recover for his own breach of contract ; (2) the transaction having been in the nature of a wagering contract, no action was maintainable in respect of it.—HOWARD *v.* REFUGE FRIENDLY SOCIETY (1886), 54 L. T. 644 ; 2 T. L. R. 474.

Annotations :—**Distd.** Parr *v.* London, Edinburgh & Glasgow Assce. (1891), 8 T. L. R. 88. **Apld.** British Workman's & General Assce. *v.* Cunliffe (1902), 18 T. L. R. 425. **Expld.** Harse *v.* Pearl Life Assce. (1903), 72 L. J. K. B. 638, D. C. **Refd.** Stanley *v.* White (1892), 56 J. P. 264 ; Harse *v.* Pearl Life Assce., [1904] 1 K. B. 558, C. A.

2891. Agent induced to make payment by fraud of third party.]—H., an agent intrusted by A., his principal, with funds to arrange A.'s affairs with instructions to pay certain bills accepted by C., having been induced by fraud & false representations of deft. to pay him the amount of two bills, which deft. falsely alleged were accepted by C. :—*Held :* H., the agent, might maintain an action in his own name to recover the money so paid.—HOLT *v.* ELY (1853), 1 E. & B. 795 ; 17 Jur. 892 ; 1 C. L. R. 420 ; 118 E. R. 634.

D. Agent's Right to set off as against Third Party Debt due by Third Party to Principal.

2892. Insurance broker setting off loss due to principal against claim by underwriter for premium.]—In an action for premiums by an underwriter against an insurance broker, a loss may be set off that happened upon a policy subscribed by pltf. to deft., which the latter effected with a *del credere* commission.—WIENHOLT *v.* ROBERTS (1811), 2 Camp. 586.

Annotations :—**Distd.** Peele *v.* Northcote (1817), 1 Moore, C. P. 178. **Consd.** Luckie *v.* Bushby (1853), 13 C. B. 864.

2893. Consignee for sale setting off freight due to principal against claim by third party for proceeds.]—A. consigned goods to B. with directions to pay over the net proceeds to C., & B. employed D. to dispose of them. In an action by C. to recover proceeds from D. :—*Held :* D. was entitled to make same deductions for freight, etc., as B., who was owner of the ship in which the goods were brought, might have made. — BLACKBURN *v.* KYMER (1814), 5 Taunt. 584 ; 1 Marsh. 223 ; 128 E. R. 818.

2894. Agent real principal.]—S., an attorney, practised under the name of "S. & D." D., although an attorney, was not a partner of S., but only a clerk. C. was a client of the nominal firm, & owed a bill of costs ; & S. was personally liable to C. on a bill of exchange of less amount than the bill of costs. S., without joining D., sued C. for the amount of the bill of costs ; & C. pleaded never indebted, & set off the sum due on the bill of exchange. C. brought a cross-action on the bill of exchange, & S. set off the amount of the bill of costs. The two actions being tried together, it was found by the jury that D. had authorised S. to contract on behalf of himself & D. with C., & that S. had so contracted :—*Held :* S., being the real principal, might take the benefit of the contract with C. & sue alone, & set off the bill of costs in the action against him. —SPURR *v.* CASS, CASS *v.* SPURR (1870), L. R. 5 Q. B. 656 ; 39 L. J. Q. B. 249 ; 23 L. T. 409.

See, further, SET-OFF & COUNTERCLAIM.

E. Agent's Right to set off as against Third Party Debt due by Principal to Agent.

2895. Set-off by agent.]—K., an officer in the army, kept a current account with C. & Co., as his bankers. On K.'s retirement from the army the sum of £3,000, the value of his commission, was paid to C. & Co., as the army agents of his regiment, & was in due course carried to a deposit account kept by C. & Co. with the Army Purchase Comrs., there to remain till K.'s retirement was gazetted. At this time K.'s current account was overdrawn by £647. The day after K.'s retirement was gazetted C. & Co. received notice of a deed by which K. had mtged. the value of his commission to secure the repayment of £5,000. The mtgee. having claimed payment of the whole £3,000, C. & Co. claimed to deduct out of it the £647 :—*Held :* as soon as the retirement of K. was gazetted the £3,000 became in the hands of C. & Co. money received to the use of K., & independently of the question whether C. & Co. had a banker's lien, they had at common law the right to set off against such moneys the debt due to them.—ROXBURGHE *v.* COX (1881), 17 Ch. D. 520 ; 50 L. J. Ch. 772 ; 45 L. T. 225 ; 30 W. R. 74, C. A.

Annotations :—**Refd.** Johnstone *v.* Cox (1881), 19 Ch. D. 17, C. A. ; Webb *v.* Smith (1885), 30 Ch. D. 192, C. A. ; *Re* Dallas, [1904] 2 Ch. 385, C. A. **Mentd.** *Re* Gregson, Christison *v.* Bolam (1887), 36 Ch. D. 223.

See, further, SET-OFF & COUNTERCLAIM.

F. Third Party's Right to set off as against Agent Debt due by Principal to Third Party.

Action brought by auctioneer against purchaser.]—*See* AUCTION & AUCTIONEERS.

2896. Agent suing for price of goods—Sold under fraudulent misrepresentation as to identity of seller.]—Where an auctioneer sold to deft. goods of A. in a sale of goods of B. :—*Held :* this was such a fraud that deft. might set off a debt due to him from B. against the price of the goods of A.—COPPIN

PART X. SECT. 1, SUB-SECT. 8.—C.

e. *Agent induced to make payment by promise of third party.*]—A person receiving money from an agent on a promise to return it to him cannot, in an action by the agent to recover it back, set up as a defence that the money really belonged to a third party.—LISTER *v.* BURNHAM (1841), 1 U. C. R. 419.—**CAN.**

f. *Money paid under protest.*]—A ship having been stranded on a bank near D., A., as receiver of droits, & also acting as Lloyd's agent, assisted in getting the vessel off the bank, & employed tug-boats & men for that purpose, & to enable the vessel to be moved, a portion of her cargo was placed on board a tug-boat & conveyed to D. On the arrival of the goods at D., A. detained them under a claim for salvage, & also until he was paid fees claimed by him, as receiver of droits, for the time the goods were in his custody, which fees B., as agent of the shippers, paid under protest :—*Held :* an action was maintainable by B. to recover back the money so paid, he having been dealt with by A. as principal, & having paid the money out of his own pocket.—COATESWORTH *v.* WALSH (1853), 3 I. C. L. R. 93 ; 5 Ir. Jur. 254.—**IR.**

PART X. SECT. 1, SUB-SECT. 8.—F.

g. *Agent suing on bill—Third party setting up breach of contract on part of principal.*]—The agent for a disclosed foreign principal sold to a merchant in Scotland a cargo, payment to be by approved acceptance to seller's or agent's draft. The purchaser dishonoured his acceptance of the seller's draft on the ground that the goods did not conform to the contract. The agent had given value to his principal by accepting his draft, but not to a corresponding amount :—*Held :* the agent could not sue the third party on the dishonoured draft while his principal's contract remained unperformed. *Tye v. Gwynne* (1809), 2 Camp. 346, cited.—WALLACE & BROWN *v.* ROBINSON, FLEMING & CO. (1835), 22 Sc. L. R. 830. —**SCOT.**

Sect. 1.—*In regard to contracts: Sub-sect.* 8, *F. Sect.* 2: *Sub-sect.* 1, *A. & B.*]

v. CRAIG (1816), 7 Taunt. 243 ; 2 Marsh. 501 ; 129 E. R. 97.

Annotations :—**Distd.** Isberg *v.* Bowden (1853), 8 Exch. 852. **Expld.** Holmes *v.* Tutton (1855), 1 Jur. N. S. 975. **Consd.** Robinson *v.* Rutter (1855), 4 E. & B. 954.

2897. Agent suing on charterparty—Debts not mutual.]—To a declaration for freight under a charterparty, deft. pleaded that pltf. entered into the charterparty as master of the ship & as agent of W., owner; that pltf. had no interest in the charterparty or lien on freight, & brought the action solely as agent & trustee for W. It then stated W. was indebted to deft., & that deft. was willing to set off, etc. :—*Held :* (1) the person whom deft. agreed to pay was pltf., whilst pltf. was not the person who agreed to pay the debt sought to be set off ; (2) the debts were not mutual debts between pltf. & deft. ; (3) the plea was bad.—ISBERG *v.* BOWDEN (1853), 8 Exch. 852 ; 22 L. J. Ex. 322 ; 1 C. L. R. 722 ; 155 E. R. 1599 ; *sub nom.* DOWDEN *v.* ISBY, 1 W. R. 392.

Annotations :—**Folld.** Watkins *v.* Clark (1862), 12 C. B. N. S. 277. **Consd.** Christie *v.* Taunton, Delmard, Lane, [1893] 2 Ch. 175. **Refd.** Ould *v.* Harrison (1854), 10 Exch. 572 ; Wilson *v.* Gabriel (1863), 4 B. & S. 243 ; Stanger *v.* Miller (1865), L. R. 1 Exch. 58 ; Manley *v.* Berkett, [1912] 2 K. B. 329.

2898. Agent suing for trover—Debts not mutual.]—In action for trover & for goods sold & delivered deft. cannot set off a claim for unliquidated damages which he has against a third person on another transaction, although the third person happens to be pltf.'s principal.—TAGART & CO. *v.* MARCUS & CO. (1888), 36 W. R. 469.

2899. Agent suing to recover money—Set-off of counterclaim for damages.]—Where an action to recover a sum of money is brought by a person as agent for a third person, deft. can set up by way of set-off & defence to the agent's claim, but only to extent of such claim, a counterclaim for damages for a larger sum admitted to be due to deft. from the third person for whom the action is brought, & such counterclaim is a good answer to pltf.'s claim.—BANKES *v.* JARVIS, [1903] 1 K. B. 549 ; 72 L. J. K. B. 267 ; 88 L. T. 20 ; 51 W. R. 412 ; 19 T. L. R. 190.

Annotation :—**Consd.** Baker *v.* Adam (1910), 102 L. T. 248.

See, further, SET-OFF & COUNTERCLAIM.

SECT. 2.—IN REGARD TO TORTS.

SUB-SECT. 1.—RIGHTS AGAINST THIRD PARTIES.

A. Trover.

2900. Agent having possession.]—Possession under the rightful owner is sufficient title against a person having no colour of right. A factor may bring trover (CHAMBRE, J.).—SUTTON *v.* BUCK (1810), 2 Taunt. 302 ; 127 E. R. 1094.

Annotations :—**Consd.** Burton *v.* Hughes (1824), 2 Bing. 173 ; Dunwich Corpn. *v.* Sterry (1831), 1 B. & Ad. 831 ; The Winkfield, [1902] P. 42, C. A. **Mentd.** The Gas Float Whitton No. 2, [1895] P. 301, D. C.

2901. Agent having special property without possession.]—It is not true that in cases of special property the party must once have had possession in order to maintain trover ; for a factor, to whom goods have been consigned & who has never received them, may maintain such an action (EYRE, C.J.).—FOWLER *v.* DOWN (1797), 1 Bos. & P. 44 ; 126 E. R. 769.

Annotations :—**Consd.** Herbert *v.* Sayer (1844), 5 Q. B. 965. **Refd.** Webb *v.* Fox (1797), 7 Term Rep. 391 ; Eckhardt *v.* Wilson (1799), 8 Term Rep. 140 ; Kitchen *v.* Bartsch (1805), 3 Smith, K. B. 58 ; Clark *v.* Calvert (1819), 8 Taunt. 742 ; Drayton *v.* Dale (1823), 2 B. & C. 293. **Mentd.** Kinnear *v.* Tarrant (1812), 15 East, 622.

2902. Bank-note — Presentation by agent — Trover by agent for note—Note stolen.]—A foreign merchant being indebted to pltf., his correspondent in England, remitted to him a bank-note for a smaller sum than the debt. The note had been stolen, & when pltf. learnt this he had not made the foreign merchant any advance on the credit of it. Pltf. brought trover for the note against the bank, & obtained a verdict. Upon a rule *nisi* for a new trial :—*Held :* (1) pltf. & the foreign merchant were mutual agents, & pltf. could recover only upon the latter's title ; (2) it was incumbent to show that the foreign merchant had given full value for it, & there must be a new trial.—DE LA CHAUMETTE *v.* BANK OF ENGLAND (1829), 9 B. & C. 208 ; Dan. & Ll. 318 ; 7 L. J. O. S. K. B. 179 ; 109 E. R. 78. Subsequent proceedings (1831), 2 B. & Ad. 385.

Annotations :—**Consd.** *Re* Bentley, *Ex p.* Vere (1835), 4 Deac. & Ch. 295 ; Currie *v.* Misa (1875), L. R. 10 Exch. 153, Ex. Ch. **Distd.** Misa *v.* Currie (1876), 1 App. Cas. 554, H. L. ; M'Lean *v.* Clydesdale Banking Co. (1883), 9 App. Cas. 95, H. L. **Mentd.** Lang *v.* Smyth (1831), 5 Moo. & P. 78 ; Nash *v.* De Freville (1900), 69 L. J. Q. B. 484, C. A.

2903. —— —— —— Note obtained by fraud.]—Pltf., the agent of a corresponding house of business, received from the correspondents a letter containing a bank-note, & stating that they should draw upon him for the amount at some future period. On presenting the note at the bank, he was informed that it had been fraudulently obtained by someone, & pltf. wrote to the correspondents to learn how they came by it, but they in their reply did not properly account for their possession of it. The correspondents in another letter claimed that they should draw on pltf. for the amount, or he should return the note. The note was stated to have been received by pltf. in reduction of a balance due upon his correspondents' account. Pltf. brought trover for the note & was nonsuited. Upon a rule *nisi* to set aside the nonsuit :—*Held :* pltf. must be considered merely as the agent of the correspondents, & must fall by their title.—SOLOMONS *v.* BANK OF ENGLAND (1791), 13 East, 135 n. ; 104 E. R. 319.

Annotations :—**Consd.** Snow *v.* Peacock (1826), 3 Bing. 406. **Distd.** Davies *v.* Willats (1836), 5 L. J. K. B. 94. **Consd.** Currie *v.* Misa (1875), L. R. 10 Exch. 153. **Refd.** Lang *v.* Smyth (1831), 7 Bing. 284 ; Davis *v.* Willis (1836), 1 Har. & W. 679 ; Muttyloll Seal *v.* Dent (1853), 5 Moo. Ind. App. 328.

2904. Bill of lading—Bill of exchange drawn on consignee—Mate's receipt sent to consignee—Trover by consignee against wrongdoer.]—C., a manufacturer at Newcastle, consigned goods to E. & Co., his factors in London, specifically to meet a bill drawn upon them, transmitting to them a receipt signed by the mate of the vessel acknowledging the goods to have been received on board to be delivered to E. & Co. :—*Held :* E. & Co. had a sufficient property in the goods & right to possession to entitle them to maintain trover against a wrongdoer, the consignor not having repudiated the contract upon which they were sent.—EVANS *v.* NICHOL (1841), 3 Man. & G. 614 ; 4 Scott, N. R. 43 ; 11 L. J. C. P. 6 ; 5 Jur. 1110 ; 133 E. R. 1286.

Annotation :—**Refd.** Kerford *v.* Mondel (1859), 28 L. J. Ex. 303.

2905. —— Indorsement by consignor to agent—No transfer of property—No trover by agent.]—The indorsement of a bill of lading without consideration does not transfer any property in the goods ; & the mere indorsement of a bill of lading by the consignor to an agent, to authorise him to stop the

goods *in transitu* on account of his principal, will not enable such agent to maintain *assumpsit* or trover for the goods in his own name.—WARING *v.* COX (1808), 1 Camp. 369.

Annotations :—**Distd.** Morison *v.* Gray (1824), 2 Bing. 260. **Consd.** Burgos *v.* Nascimento (1908), 100 L. T. 71. **Mentd.** Thompson *v.* Dominy (1845), 14 M. & W. 403 ; Johnston *v.* Orr Ewing (1882), 7 App. Cas. 219.

2906. Goods shipped to order—Stoppage in transitu—Bill of lading indorsed to agent—Trover by agent against wharfinger.]—H. shipped goods at Dundee to the order of & for P. in London. H. having ascertained, shortly after the goods had been forwarded, that P. had stopped payment, indorsed & forwarded the bill of lading to pltf., who demanded the goods from defts., wharfingers, in whose custody they were. Defts. having refused to deliver the goods to pltf. :—*Held :* H. having a right to stop *in transitu* might for this purpose invest pltf. with a right to the goods, & pltf., by indorsement of the bill of lading to him, obtained a special property in the goods sufficient to maintain an action of trover.—MORISON *v.* GRAY (1824), 2 Bing. 260 ; 9 Moore, C. P. 484 ; 3 L. J. O. S. C. P. 261 ; 130 E. R. 305.

Annotation :—**Consd.** Burgos *v.* Nascimento (1908), 100 L. T. 71.

2907. Bill of lading indorsed by consignor to agent to sell goods—Bill of lading sent by agent to another agent to sell—Goods obtained by third party by foreign attachment—No trover by latter agent against third party.]—C., a merchant at Waterford, had been in the habit of consigning cargoes of grain to B., a corn factor in Bristol, who had been accustomed to accept bills on the faith of such consignments. C. wrote to B., stating that he was about to ship him a cargo of oats, & that he had drawn on him for £550 in anticipation of it, & desiring him to effect an insurance on the cargo. C. remitted the bill to B. & he accepted it. Before the vessel sailed C. stopped payment, & then sent the bill of lading indorsed in blank to H., another factor at Bristol, not informing him of his engagement with B. when the vessel arrived. H. for his own convenience transmitted the bill of lading to B., desiring him to act for him. B. paid the freight, & took possession of the cargo, as a security for his own claim on C. Defts., who were also creditors of C., claimed to take the cargo under a foreign attachment, & the officer of the ct. took possession of the cargo & delivered it to defts. :—*Held :* B. had no property in the goods, & he could not maintain trover for the goods, as they had been in his hands as the agent of H. only, not of C., & he had consequently had no lien on them. *Semble :* if C. had authorised H. to employ a broker for the sale of the goods, then B. might have succeeded in the action, although the parties did not intend that the particular broker employed should have a lien (PARKE, B.).—BRUCE *v.* WAIT (1837), 3 M. & W. 15 ; Murp. & H. 339 ; 7 L. J. Ex. 17 ; 150 E. R. 1036.

Annotations :—**Distd.** Bryans *v.* Nix (1839), 4 M. & W. 775 ; Evans *v.* Nichol (1841), 3 Man. & G. 614.

B. Negligence, etc., with respect to Goods.

2908. Negligent loss of goods—Action against carriers—Agent to book parcel—Instructions disobeyed.]—Pltf. received a parcel from G. to book for London at the office of defts., common carriers. Pltf., instead of obeying instructions, put the parcel into his bag, intending to take it to London himself. Defts. having lost the bag :—*Held :* pltf. could not recover damages in respect of the parcel. —MILES *v.* CATTLE (1830), 6 Bing. 743 ; L. & Welsb. 353 ; 4 Moo. & P. 630 ; 8 L. J. O. S. C. P. 271 ; 130 E. R. 1467.

2909. Assignor in possession of premises as agent of assignee—Action for wrongful distress.]—In an action for wrongful & excessive distress, it appeared pltf. had assigned her interest in the premises before the date of distress, but still remained upon them (the person to whom her interest was assigned not having entered) :—*Held :* (1) pltf. was there as agent of her assignee ; (2) she could not maintain an action for distress.—NASH *v.* LUCAS (1867), 16 L. T. 610.

2910. Agent held out as owning business—Action for damage to goods.]—Where the owner of a shop & goods allows A. to be at this shop, &, in his own name, to sell & dispose of the goods as he pleases, & a portion of them is destroyed by negligent driving of B.'s coachman while A.'s servant is carrying them, A. has such qualified property in the goods as will entitle him to maintain an action on the case against B.—WHITTINGHAM *v.* BLOXHAM (1831), 4 C. & P. 597.

2911. Bad stowage—Action by consignee on bill of lading—Assignee of charterer.]—A., as master, by charterparty between himself & B. agreed to receive a cargo of the agents & assigns of B., which B. agreed to procure. A. having received a cargo aboard, signed a bill of lading, stating the goods to have been shipped by order of C. & to be delivered to his order, & freight paid according to the charterparty. In an action for negligence in stowing the goods brought by C. against A. :—*Held :* C. was only an agent & must be nonsuited, & the action ought to have been brought in the name of B.—MOORES *v.* HOPPER (1807), 2 Bos. & P. N. R. 411 ; 127 E. R. 688.

2912. Agent for sale—Action for infringement of patent.]—A bill stated an agreement made between a general agent of patentees of an American invention to introduce & sell it in Great Britain & pltf., whereby pltf. was to have sole agency & control of the working of the patent in England, upon certain terms, including a share of royalties & profits, prayed for an account for damages, & an injunction to restrain future infringement. Defts. alleged to be using the invention demurred :—*Held :* pltf. was a mere agent for sale of the invention, & in no such position as gave him right to file a bill in the form of a patentee's bill for infringement.—ADAMS *v.* NORTH BRITISH RY. CO. (1873), 29 L. T. 367.

2913. —— Action for infringement of trade mark.]—A sole agent for sale of a foreign article in England cannot sue for infringement of trade mark. —RICHARDS & CO. *v.* BUTCHER & ROBINSON (1890), 62 L. T. 867 ; 6 T. L. R. 363 ; 7 R. P. C. 288.

Annotations :—**Consd.** Hirschler *v.* Hertz & Collingwood (1895), 11 T. L. R. 466. **Folld.** Dental Manufacturing Co. *v.* De Trey, [1912] 3 K. B. 76, C. A. **Mentd.** Stevens *v.* Chown, Stevens *v.* Clark, [1901] 1 Ch. 894.

2914. —— Action for passing off.]—The sole agent for sale of an article made by a particular manufacturer cannot maintain a passing-off action against a person, who passes off an article made by himself as made by that manufacturer, merely on the ground that his, the agent's, profits through sale of that article are thereby diminished.

A firm were sole agents for sale in England of an article made by a particular manufacturer in America. They sold the article just as it was made & got up by that manufacturer, & nothing in the

h. *Action for wrongly taking goods mortgaged.*]—The treasurer of an insurance co., for whom he has taken a mtge. in his own name, may sue a wrongdoer for taking the goods mtged., although he has no beneficial interest in them.—BRODIE *v.* BENJAMIN (1858), 16 U. C. R. 207 ; BALDWIN *v.* BENJAMIN (1858), 16 U. C. R. 52.—**CAN.**

Sect. 2.—In regard to torts: Sub-sect. 1, B. & C.; sub-sect. 2, A. (a), (b), (c), (d) & (e) & B. (a).]

" get-up " of the article as sold by them indicated any association of them or their business with that article. A co. having manufactured & sold articles of the same kind with a " get-up " alleged by the firm to be similar to that of the article supplied by the manufacturer in America, the firm sued the co. for passing off those articles as articles sold by the firm :—*Held :* they could not maintain such action against the co. *Semble :* if the firm had sold the article under any " get-up " of their own, which the co. had imitated, they might have maintained a passing-off action against the co.—DENTAL MANUFACTURING CO., LTD. *v.* DE TREY & CO., [1912] 3 K. B. 76 ; 81 L. J. K. B. 1162 ; 107 L. T. 111 ; 28 T. L. R. 498, C. A.

C. Other Cases.

2915. Receiving order—Cutting timber—Application to restrain—Agent of owner without interest.]—Where pltf. had obtained an order for a receiver, & was proceeding to cut timber upon the estates before the receiver had been appointed, the ct. refused to grant an injunction upon application of deft., it appearing that deft., the agent of the owner of the estates, had no interest in such estates, & no authority to make the application.—HUNTER *v.* NOCKHOLDS (1846), 15 L. J. Ch. 320 ; 7 L. T. O. S. 27, 41 ; 10 Jur. 771.

2916. Insurance—Resolution of companies not to pay commission to agent.]—The A. Society having decided to dispense with the services of an insurance broker & deal directly with the insurance cos. for the purpose of saving commission, the cos. resolved to pay no commission on the A. Society's insurances except to a broker who would undertake not to part with his commission to the A. Society. On the A. Society appointing the B. Society agent for purpose of insurances, the cos. passed a second resolution not to pay commission to the B. Society on insurances effected for the A. Society. The B. Society & W., its secretary, sued the cos., claiming an injunction & damages for unlawful combination to injure W. (& through him the B. Society) in his business as fire insurance agent :—*Held :* (1) as employment of professional brokers was to the advantage of the insurance cos. the resolutions were not wrongful ; (2) there was no cause of action, since pltfs. had suffered no damage, W. being merely a secretary of the B. Society, & the B. Society being a mere agent to account to the A. Society for commissions received.—WORKMAN & ARMY & NAVY AUXILIARY CO-OPERATIVE SOCIETY, LTD. *v.* LONDON & LANCASHIRE FIRE INSURANCE CO. (1903), 19 T. L. R. 360 ; 47 Sol. Jo. 405.

See, further, TROVER & DETINUE.

Auctioneer.]—*See* AUCTION & AUCTIONEERS.

Bailee.]—*See* BAILMENT.

SUB-SECT. 2.—LIABILITIES TO THIRD PARTIES.

See, also, AUCTION & AUCTIONEERS ; BAILMENT ; MASTER & SERVANT ; SOLICITORS.

A. In General.

(a) Not liable for Nonfeasance.

2917. Not chargeable for neglect.]—A servant or deputy, *quatenus* such, cannot be charged for neglect, but the principal only shall be charged for it ; but for a misfeasance an action will lie against a servant or deputy, not *quatenus* a deputy or servant, but as a wrongdoer.—LANE *v.* COTTON (1701), 12 Mod. Rep. 472, 488 ; 1 Com. 100 ; 1 Ld. Raym. 646 ; Carth. 487 Holt, K. B. 582 ; 1 Salk. 17 ; 88 E. R. 1458.

Annotations :—**Distd.** Nicholson *v.* Mouncey (1812), 15 East, 384. **Expld.** Woods *v.* Finnis (1852), 16 Jur. 936. **Consd.** Bainbridge *v.* Postmaster-General, [1906] 1 K. B. 178, C. A. **Refd.** Jones *v.* Hart (1697), 2 Salk. 441 ; Perkins *v.* Smith (1752), Say. 40 ; Whitfield *v.* Le Despencer (1778), 2 Cowp. 754 ; Laugher *v.* Pointer (1826), 5 B. & C. 547 ; Duncan *v.* Findlater (1839), 6 Cl. & Fin. 894, H. L. ; Hearn *v.* L. & S. W. Ry. Co. (1855), 24 L. J. Ex. 180 ; Bennett *v.* Bayes (1860), 5 H. & N. 391 ; Mersey Docks Trustees *v.* Gibbs, Mersey Docks Trustees *v.* Penhallow (1866), L. R. 1 H. L. 93, H. L. **Mentd.** R. *v.* Cotton (1751), Park. 112 ; Muspratt *v.* Gregory (1836), 1 M. & W. 633 ; Johnson *v.* Midland Ry. Co. (1849), 4 Exch. 367 ; R. *v.* Gibbs (1855), 6 Cox, C. C. 455, C. C. R. ; R. *v.* Kay (1857), 7 Cox, C. C. 289, C. C. R. ; R. *v.* Treasury Lords Comrs. (1872), 41 L. J. Q. B. 178 ; Clarke *v.* West Ham Corpn., [1909] 2 K. B. 858, C. A. ; Bamfield *v.* Goole & Sheffield Transport Co., [1910] 2 K. B. 94, C. A.

(b) Liable for Misfeasance.

2918. General rule.]—Whoever does an act by which another person receives an injury is liable in an action for the injury sustained.—WHITFIELD *v.* LE DESPENCER (1778), 2 Cowp. 754 ; 98 E. R. 1344.

Annotations :—**Refd.** Bainbridge *v.* Postmaster-General, [1906] 1 K. B. 178, C. A. **Mentd.** Tobin *v.* R. (1864), 16 C. B. N. S. 310 ; Mersey Docks Trustees *v.* Gibbs (1866), L. R. 1 H. L. 93, H. L.

(c) Acts done in Assertion of Rights of Principal.

See, also, MASTER & SERVANT ; TRESPASS ; TROVER & DETINUE.

2919. Blockade—Capture—Foreign Enlistment Act, 1819 (c. 69).]—Notwithstanding the above Act, a British subject who, in the service of a foreign State at peace with Great Britain, captures a British vessel lawfully condemned as a prize or breaking blockade, is not liable to an action at suit of the owner since his principal is protected by the condemnation of the prize in the foreign ct.—DOBREE *v.* NAPIER (1836), 2 Bing. N. C. 781 ; 3 State Tr. N. S. 621 ; 2 Hodg. 84 ; 3 Scott, 201 ; 5 L. J. C. P. 273 ; 132 E. R. 301.

Annotations :—**Apld.** R. *v.* Lesley (1860), Bell, C. C. 220. **Distd.** The M. Moxham (1875), 1 P. D. 43. **Apld.** Carr *v.* Fracis Times, [1902] A. C. 176. **Refd.** Ryan *v.* Clark (1849), 14 Q. B. 65 ; Philips *v.* Eyre (1870), 10 B. & S. 1004, Ex. Ch. ; Companhia de Moçambique *v.* British South Africa Co., [1892] 2 Q. B. 358, C. A.

See, now, Foreign Enlistment Act, 1870 (c. 90).

2920. Agent for infant freeholder—Agent sued in trespass.]—To a declaration in trespass *quære clausum fregit* deft. pleaded the close was the freehold of P. & justified as servant & by command of P. Replication traversing the command. P. was an infant & ward in Chancery, & deft. was receiver & general agent for the estate :—*Held :* (1) the jury might from this infer a general authority to do the act ; (2) if so, the jury ought to find for deft.—EWER (URE) *v.* JONES (1846), 9 Q. B. 623 ; 16 L. J. Q. B. 42 ; 8 L. T. O. S. 135 ; 10 Jur. 965 ; 115 E. R. 1412.

2921. Bailiff — Distress — Justification.] — The right of a person to do an act with regard to another's property depends upon the authority or right which he really has to do the act, & not upon that he says he has.

If a person, having authority to distrain for rent due to another, says at the time that he distrains for rent due to himself, he may yet justify as bailiff of the other.—TRENT *v.* HUNT (1853), 9 Exch. 14 ;

PART X. SECT. 2, SUB-SECT. 2.—A. (6).

k. Agent executing illegal orders.]—An agent who, in acting for his principal, causes damage to another, is directly & personally responsible to such injured party, even when executing in good faith the orders of his principal, if such orders are illegal.—HOLTON *v.* AITKINS (1875), 3 Q. L. R. 289—CAN.

22 L. J. Ex. 318 ; 22 L. T. O. S 23 17 Jur. 899 ; 1 W. R. 481 ; 1 C. L. R. 752 ; 156 E. R. 7.

Annotations :—**Distd.** Woolston *v.* Ross, [1900] 1 Ch. 788. **Mentd.** Jolly *v.* Arbuthnot (1859), 4 De G. & J. 224, L. C. ; Cadle *v.* Moody (1861), 30 L. J. Ex. 385 ; Snell *v.* Finch (1863), 13 C. B. N. S. 651 ; Christchurch Cathedral *v.* Buckingham & Chandos (1864), 17 C. B. N. S. 391 ; Kearsley *v.* Phillips (1883), 11 Q. B. D. 621, C. A. ; Reece *v.* Strousberg (1885), 54 L. T. 133 ; *Re* Roundwood Colliery Co., Lee *v.* Roundwood Colliery Co. (1896), 75 L. T. 508.

2922. —— —— Ratification.]—If one distrains as bailiff although he is not bailiff, if after he in whose right he does it assents to it, he shall not be punished as a trespasser, for assent shall have relation to the time of the distress taken.—ANON. (1586), Godb. 109 ; 2 Leon. 196 ; 78 E. R. 67.

Annotations :—**Apld.** Whitehead *v.* Taylor (1839), 10 Ad. & El. 210. **Consd.** Wilson *v.* Trumman (1843), 6 Man. & G. 236. **Apld.** Collier *v.* Clarke (1864), 5 L. T. O. S. 475. **Consd.** Durant *v.* Roberts & Keighley, Maxsted, [1900] 1 Q. B. 629, C. A. **Refd.** Britton *v.* Cole (1697), 12 Mod. Rep. 175 ; Lucas *v.* Lockells (1833), 10 Bing. 157 ; Trent *v.* Hunt (1853), 9 Exch. 14.

2923. Trespass—Setting fire to heather—Gamekeeper—Necessity.]—Pltf., a landowner, let shooting rights over part of his land to a sporting tenant. A serious heath fire having broken out on that part of pltf.'s land, deft., the bailiff & head gamekeeper of the sporting tenant, with the view of protecting his master's property, set fire to patches of heather between the main fire & a covert in which his master's pheasants were preserved, in order that the main fire when it reached the bare patches should have nothing to feed on & thus die out. The fire was extinguished independently of what deft. did. Pltf. having brought an action against deft. claiming damages for trespass & an injunction, the jury found in answer to questions left to them :—(1) the method adopted by deft. was not necessary for the protection of his master's property ; (2) it was reasonably necessary in the circumstances :—*Held* : the meaning of the findings of the jury was not merely that deft. *bonâ fide* believed what he did to be necessary, but, although in the result it turned out to have been unnecessary, it was, when deft. did it, reasonably necessary in the circumstances, & deft. was entitled to judgment.—COPE *v.* SHARPE, [1912] 1 K. B. 496 ; 81 L. J. K. B. 346 ; 106 L. T. 56 ; 28 T. L. R. 157 ; 56 Sol. Jo. 187, C. A.

Annotation :—**Distd.** Kirby *v.* Chessum (1913), 30 T. L. R. 15.

(d) Torts of Sub-agents.

2924. Negligence of employees—Damage.]—No action lies against a steward, manager, or agent, for damage done by the negligence of those employed by him in the service of his principal ; only the principal or those actually employed are liable. —STONE *v.* CARTWRIGHT (1795), 6 Term Rep. 411 ; 101 E. R. 622.

Annotations :—**Apld.** Bush *v.* Steinman (1799), 1 Bos. & P. 404. **Distd.** Wilson *v.* Peto (1821), 6 Moore, C. P. 47. **Consd.** Laugher *v.* Pointer (1826), 5 B. & C. 547. **Distd.** Bennett *v.* Bayes (1860), 5 H. & N. 391 ; Weir *v.* Bennett (1877), 3 Ex. D. 32.

2925. —— Paid manager of hotel—Loss of goods.]—Pltf. having lost his goods at a hotel, the property of a co., sought to recover against the paid manager, in whose name the JJ.'s licence had been granted : —*Held* : (1) the co. was the real innkeeper ; (2) the action was not maintainable.—DIXON *v.* BIRCH (1873), L. R. 8 Exch. 135 ; 42 L. J. Ex. 135 ; 28 L. T. 360 ; 21 W. R. 443.

(e) Contribution.

2926. Indemnity—Employment to do acts not unlawful in themselves.]—There is no contribution among defts. in tort. It is different in the case of a joint judgment against several defts. in an action of *assumpsit* : so, in cases of indemnity, where one man employed another to do acts not unlawful in themselves for the purpose of asserting a right (LORD KENYON, C.J.).—MERRYWEATHER *v.* NIXAN (1799), 8 Term Rep. 186 ; 101 E. R. 1337.

Annotations :—**Consd.** Powell *v.* Layton (1806), 2 Bos. & P. N. R. 365 ; Adamson *v.* Jarvis (1827), 4 Bing. 66. **Dbtd.** Betts *v.* Gibbins (1834), 2 Ad. & El. 57. **Consd.** Shackell *v.* Rosier (1836), 2 Bing. N. C. 634 ; Rodgers *v.* Maw (1846), 15 M. & W. 444. **Dbtd.** Palmer *v.* Wick & Pulteneytown Steam Shipping Co., [1894] A. C. 318, H. L. **Consd. & Expld.** The Engishman, The Australia, [1895] P. 212. **Consd.** Burrows *v.* Rhodes, [1899] 1 Q. B. 816. **Distd.** Moxham *v.* Grant, [1900] 1 Q. B. 88, C. A. **Dbtd.** S.S. Tongariro *v.* S.S. Drumlanrigg, The Drumlanrigg, [1911] A. C. 16, H. L. **Consd.** Newcombe *v.* Yewen & Croydon R. D. C. (1913), 29 T. L. R. 299. **Expld.** The Cairnbahn, [1914] P. 25, C. A. **Distd. & Dbtd.** Austin Friars S.S. Co. *v.* Spillers & Bakers, [1915] 3 K. B. 586, C. A. **Refd.** Farebrother *v.* Ansley (1808), 1 Camp. 343 ; Paddock *v.* Fradley (1830), 1 Cr.. & J. 90.

2927. No contribution—Trespass.]—What can be more hard than the common case in trespass, where a servant has done some act in assertion of his master's right, that he shall be liable not only jointly with his master, but, if his master cannot satisfy it, for every penny of the whole damage, & his person also shall be liable for it ; & what is still more, that he shall not recover contribution (LORD ELLENBOROUGH, C.J.).—STEPHENS *v.* ELWALL (1815), 4 M. & S. 259 ; 105 E. R. 830.

Annotations :—**Apld.** Stephenson *v.* Hart (1828), 1 Moo. & P. 357. **Consd.** Hutton *v.* Balme (1832), 2 Tyr. 620, Ex. Ch. ; Balme *v.* Hutton (1833), 9 Bing. 471 ; Hollins *v.* Fowler (1875), L. R. 7 H. L. 757, H. L. ; McEntire *v.* Potter (1889), 22 Q. B. D. 438. **Apld.** Winter *v.* Bancks (1901), 84 L. T. 504. **Refd.** Alexander *v.* Southey (1821), 5 B. & Ald. 247 ; Price *v.* Helyar (1828), 1 Moo. & P. 541 ; Cranch *v.* White (1835), 1 Bing. N. C. 414 ; Symonds *v.* Atkinson (1836), 1 H. & N. 146 ; Sharland *v.* Mildon, Sharland *v.* Loosemore (1846), 5 Hare, 469 ; Delaney *v.* Wallis (1884), 15 Cox, C. C. 525, C. A. ; Barker *v.* Furlong, [1891] 2 Ch. 172 ; Gordon *v.* London City & Midland Bank (1900), 83 L. T. 762. **Mentd.** Garland *v.* Carlisle (1833), 2 Cr. & M. 31, Ex. Ch. ; Kynaston *v.* Crouch (1845), 14 M. & W. 266 ; Fowler *v.* Hollins (1872), L. R. 7 Q. B. 616, Ex. Ch.

2928. No agency between wrongdoers.]—There is no agency between wrongdoers ; each of them is personally liable.—HEUGH *v.* ABERGAVENNY & DELVES, No. 2959, *post*.

B. Particular Torts.

(a) Conversion or Trover.

2929. Wrongful meddling with property by authorised agent.]—A person is guilty of a conversion who intermeddles with my property, & disposes of it, & it is no answer that he acted under authority from another who had himself no authority to dispose of it (LORD ELLENBOROUGH, C.J.).—STEPHENS *v.* ELWALL, No. 2927, *ante*.

For full anns., *see* S. C. No. 2927, *ante*.

2930. Agent selling third party's goods to principal's use.]—Trover lies against a servant who disposes of goods, the property of another, to his master's use, whether he has any authority or not from his master for so doing.—PERKINS *v.* SMITH (1752), 1 Wils. 328 ; Say, 40 ; 95 E. R. 644.

Annotations :—**Distd.** Alexander *v.* Southey (1821), 5 B. & Ald. 247. **Apld.** Cranch *v.* White (1835), 1 Bing. N. C. 414. **Consd.** Bennett *v.* Bayes (1860), 5 H. & N. 391. **Refd.** Garland *v.* Carlisle (1837), 11 Bli. N. S. 421 ; Davies *v.* Vernon (1844), 6 Q. B. 443.

2931. Bill of lading—Trover by consignee against agent of consignor.]—The property in certain goods consigned from abroad was, by the terms of the

—The principles of agency do not apply to torts, each wrongdoer being regarded as a principal.—ONTARIO, ETC. LOAN, ETC. CO. *v.* LINDSAY (1883), 4 O. R. 473.

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invoice & bill of lading sent to the consignee, vested in the consignee, subject only to the consignor's right of stoppage *in transitu*. The consignor's agent, having obtained possession of the goods under another bill of lading, refused to deliver them up unless the consignee would make immediate payment. This he declined to do, but offered his acceptances at three months, as originally stipulated between the parties :—*Held :* the consignee might maintain trover against the agent, who had possessed himself of the goods wrongfully. —WALLEY *v.* MONTGOMERY (1803), 3 East, 585 ; 102 E. R. 721.

Annotations :—**Distd.** Mitchel *v.* Ede (1840), 11 Ad. & El. 888 ; Wilmshurst *v.* Bowker (1841), 2 Man. & G. 792. **Refd.** Shepherd *v.* Harrison (1871), L. R. 5 H. L. 116.

2932. Selling goods after notice of third party's claim.]—A person who, employed as agent for another in the sale of property, has notice that what he is about to sell is not his principal's, & continues to sell, is personally liable in an action for produce of the sale.—HARDACRE *v.* STEWART (1804), 5 Esp. 103.

2933. Purchase by manager of business of goods from persons wrongfully selling them.]—Deft., clerk to H. in America, who had a house of trade in London, conducted the business of this house. Certain bkpts., being possessed of goods, sold them after their bkpcy. to D. to be paid for by bills on H. D. communicated to deft. information of the purchase on the day it was made, & the goods were afterwards delivered to deft., & he disposed of them by sending them to America to H. The assignees of bkpts. claimed the goods from deft. :—*Held :* deft. acted under an unavoidable ignorance & for his master's benefit when he sent the goods, but his acts amounted to conversion & he was liable.—STEPHENS *v.* ELWALL, No. 2927, *ante*.

For full anns., *see* S. C. No. 2927, *ante*.

2934. Bankruptcy of vendee's factor—Stoppage in transitu—Trover against assignee of bankrupt.]—The unpaid vendor may stop *in transitu* before the goods come to the hands of the vendee's factor, although the factor has the bill of lading, indorsed to order in his hands, & is under acceptance to the vendee on a general account ; wherefore in such case where the vendee became bkpt. & the factor also became bkpt., & the messenger under the factor's commission, upon the arrival of the ship, went on board, & seized the cargo, the agent of the vendor having previously given notice to the captain to deliver the cargo to him, & the captain having agreed thereto :—*Held :* trover would lie by the vendor against the assignee of bkpt. factor. —PATTEN *v.* THOMPSON (1816), 5 M. & S. 350 ; 105 E. R. 1079.

Annotation :—**Distd.** The Marie Joseph (1864), 5 New Rep. 96.

2935. Bill to be discounted—Wrongfully handed to clerk of creditor—Clerk liable for detention.]—R. being employed to procure a bill of exchange to be discounted for pltf., instead of doing so indorsed it, & placed it in the hands of deft., clerk to a creditor of R. Deft. carried the bill to R.'s account with his creditor, &, though apprised of the circumstances in which R. held the bill, refused to restore it :—*Held :* deft. liable to pltf. in trover.—CRANCH *v.* WHITE (1835), 1 Bing. N. C. 414 ; 1 Hodg. 61 ; 1 Scott, 314 ; 4 L. J. C. P. 113 ; 131 E. R. 1176.

Annotation :—**Apld.** Davies *v.* Vernon (1844), 6 Q. B. 443.

2936. Deeds deposited as security with solicitor—Death of depositor—Trover by party entitled.]—Title deeds were deposited by pltf.'s husband with defts., solrs., to secure a loan to him. On his death pltf., who was entitled to the title deeds, demanded them from defts., but defts. refused to hand them over unless the loan was repaid :—*Held :* (1) defts., though agents, were liable in trover, being in possession of the deeds at time of demand ; (2) there was sufficient evidence of conversion, the refusal not being put on the ground that defts., as agents, could not act without orders of their principal, & being accompanied by a condition they had no right to annex.—DAVIES *v.* VERNON (1844), 6 Q. B. 443 ; 14 L. J. Q. B. 30 ; 3 L. T. O. S. 300 ; 8 Jur. 871.

2937. Property in agent's hands for special purpose—Wrongful detention.]—On a motion for a rule *nisi* to set aside a verdict for deft., & for a new trial, on the ground that deft. was liable in an action of trover for unlawfully detaining property of pltf. placed in his hands for a special purpose, although he acted upon that occasion merely as agent of another person :—*Held :* (1) the judge had properly directed the jury to say whether they considered deft. acted upon that occasion on his own account or as agent of such third person ; (2) the rule must be refused.—PHILP *v.* NEELEY (1844), 2 L. T. O. S. 331.

2938. Bills of exchange—Notice of lawful holder—Delivery by agent to principal.]—Deft., acting on behalf of certain creditors of D., obtained from pltf., in circumstances not amounting to duress, certain bills of exchange which pltf. had received from D. Deft. was informed that pltf., as the fact was, was lawful holder of the bills, & his employers had no right to them, but deft. handed them over to his employers. The ct. having held that the original taking was not conversion :—*Held :* deft. was guilty of conversion by delivering the bills to his employers with notice of the facts.—POWELL *v.* HOYLAND (1851), 6 Exch. 67 ; 20 L. J. Ex. 82 ; 16 L. T. O. S. 369 ; 155 E. R. 456.

2939. Collector of commissioners wrongfully taking goods—Waiver of trespass.]—Comrs. of sewers had rated pltf. in respect of lands out of their jurisdiction. Pltf. sued the collector of the comrs. in case, with a count in trover ; it was objected the action should have been in trespass, not in case, & the comrs., & not the collector, should have been sued :—*Held :* pltf. entitled to sue the collector, since he might waive the trespass constituted by the taking & sue for it as a conversion.—MOSSOP *v.* JOHNSTONE (1844), 4 L. T. O. S. 116.

2940. Sale of goods obtained fraudulently.]—Any person who, however innocently, obtains possession of the goods of a person fraudulently deprived of them, & disposes of them, whether for his own benefit or that of any other person, is guilty of conversion.

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2937 i. *Property in agent's hands for special purpose—Wrongful detention.]*—H. shipped cases of be ef by rail addressed to M., who was at Halifax. The bill of lading for this shipment was sent to M., & provided that the goods were to be delivered at Pictou to the freight agent of the railway or his assigns, the freight to be payable in Halifax. M., the consignee, being on the verge of insolvency, indorsed the bill of lading to McM. to secure accommodation acceptances. H. drew on M. for the value of the consignment, but the draft was not accepted, & H. then directed the agent of the railway not to deliver the goods. The goods had been forwarded from Pictou, & the agent there telegraphed to the agent at Halifax to hold them. McM. applied to the agent at Halifax for the goods, & tendered the freight, but delivery was refused. In a replevin suit against the Halifax agent :—*Held :* (1) the goods were sent to the agent at Pictou to be forwarded, & he had no other interest in them, or right or duty connected with them, than to forward them to their destination, & could not authorise the agent at Halifax to retain them ; (2) whether or not a legal title to the goods passed to McM., the position of the agent in retaining the goods was simply that of a wrongdoer, & McM. had such equitable interest in the goods, & right to the possession thereof, as would prevent the agent from withholding them. — MCDONALD *v.* MCPHERSON (1886), 12 S. C. R. 416.—CAN.

Where B. had fraudulently obtained cotton from F., & H. (whose business was that of a cotton broker & who was ignorant of the fraud of B.) purchased it from B. in the belief that M., one of his ordinary clients, would accept it, & M. afterwards did so, though H. only received from M. a broker's commission & not a trade profit on the sale :—*Held :* in this instance H. had made himself a principal, & by transferring the cotton to M. had committed an act of conversion, which made him liable in trover to F., the real owner.—HOLLINS *v.* FOWLER (1875), L. R. 7 H. L. 757 ; 44 L. J. Q. B. 169 ; 33 L. T. 73 ; 40 J. P. 53, H. L.

Annotations :—**Distd.** Lindsay *v.* Cundy (1876), 1 Q. B. D. 348. **Apld.** Delaney *v.* Wallis (1884), 15 Cox, C. C. 525, C. A. **Distd.** Turner *v.* Hockey (1887), 56 L. J. Q. B. 301. **Consd. & Apld.** Barker *v.* Furlong, [1891] 2 Ch. 172. **Consd.** Consolidated Co. *v.* Curtis, [1892] 1 Q. B. 495. **Apld.** Winter *v.* Bancks (1901), 84 L. T. 504. **Refd.** Arnold *v.* Cheque Bank, Arnold *v.* City Bank (1876), 1 C. P. D. 587 ; Iredale *v.* Kendall (1878), 40 L. T. 362 ; Cochrane *v.* Rymill (1879), 40 L. T. 744, C. A. ; Glyn, Mills, Currie *v.* East & West India Dock Co. (1880), 5 Q. B. D. 129 ; McEntire *v.* Potter (1889), 22 Q. B. D. 438 ; New York Breweries Co. *v.* A.-G., [1899] A. C. 62 ; Didisheim *v.* London & Westminster Bank, [1900] 2 Ch. 15, C. A. ; Mansell *v.* Valley Printing Co., [1908] 1 Ch. 567 ; Morison *v.* London County & Westminster Bank, [1914] 3 K. B. 356, C. A.

2941. Stolen goods—Subordinate police officer—Wrongful delivery.]—When a subordinate police officer having the possession of stolen goods, after demand by the true owner for their delivery to him, delivers same to a person other than the true owner, he is liable in trover, although he acted upon the orders of a superior officer.

A. bought a gig. It was stolen from him, & afterwards found by the police in the possession of B. B. was indicted for larceny of the gig & acquitted. B. on his acquittal wrote to the police officer in possession of the gig demanding delivery of it to him, & A. afterwards by letter & personally applied for its delivery over to him. The police officer, acting on the instruction of his superior officer, after giving notice to A. of his intention to do so, delivered the gig to B. as the person from whom it had been taken by the police :—*Held :* the police officer so delivering it was liable in trover to A., the true owner of the gig.—WINTER *v.* BANCKS (1901), 84 L. T. 504 ; 65 J. P. 468 ; 49 W. R. 574 ; 17 T. L. R. 446 ; 19 Cox, C. C. 687.

2942. Packer obeying orders—Shipment of goods—No conversion.]—A packer having, in the exercise of business, shipped goods, under orders of a person employing him for that purpose, is not guilty of conversion.—GREENWAY *v.* FISHER (1824), 1 C. & P. 190.

Annotations :—**Distd.** Fowler *v.* Hollins (1870), 19 W. R. 180. **Consd. & Dbtd.** Fowler *v.* Hollins (1872), L. R. 7 Q. B. 616, Ex. Ch. **Consd.** Hollins *v.* Fowler (1875), L. R. 7 H. L. 757. **Dbtd.** Delaney *v.* Wallis (1884), 15 Cox, C. C. 525, C. A. **Refd.** Lee *v.* Bayes (1856), 18 C. B. 599 ; Arnold *v.* Cheque Bank, Arnold *v.* City Bank (1876), 1 C. P. D. 578.

2943. Bill of exchange due—Intrusted by indorsee to drawer—Bill discounted by drawer—Trover by indorsee against attorney.]—A., acceptor of a bill, agreed with his creditors to pay a composition partly in money & partly in notes. The bill having become due, the drawer was unable to take it up, but the indorsee intrusted it to the drawer to get the composition in money & notes for him. The drawer handed it to his attorney with other bills accepted by A. to get the composition for him, & at same time obtained an advance of £200 from the attorney. The attorney obtained the composition in money & repaid himself the £200, & carried balance to account of the drawer. For the composition in notes he took one note for the aggregate amount of the composition on several bills handed to him :—*Held :* the attorney was not liable to indorsee either in trover for the bill, or for money kept back by him to repay the advance to his client, the drawer.—SYMONDS *v.* ATKINSON (1856), 1 H. & N. 146 ; 25 L. J. Ex. 313 ; 27 L. T. O. S. 160 ; 156 E. R. 1153.

2944. Agent holding goods for principal—Qualified refusal to true owner.]—An agent who has received goods from his principal may, on a demand made by the true owner, give a qualified refusal to deliver them up without being liable to an action of trover.—LEE *v.* BAYES & ROBINSON (1856), 18 C. B. 599 ; 25 L. J. C. P. 249 ; 27 L. T. O. S. 157 ; 20 J. P. 694 ; 2 Jur. N. S. 1093 ; 139 E. R. 1504.

For full anns., *see* MARKETS & FAIRS.

2945. Broker—Unauthorised negotiation of sale of chattels.]—A broker who merely negotiates a sale of chattels without authority of the true owner commits no tort at all. The sale is a mere void act. It divests the true owner of no right & does not physically interfere with his control or possession of the goods. But if, in addition to negotiating a sale, the broker meddles with the goods & hands them to the buyer with the object & intention of transferring to him the property & possession in pursuance of the unauthorised sale, he makes himself liable in trover to the true owner, being guilty of an act in relation to the goods inconsistent with the rights of the true owner.

There is an essential difference between meddling with goods with intention of transferring a title which will be bad as against the true owner & assisting in perfecting a title which will be good as against the true owner. In the latter case no action lies against the person who gets the title, or, *semble*, against the broker who assists him to get it (BIGHAM, J.).—EDELSTEIN *v.* SCHULER, [1902] 2 K. B. 144 ; 71 L. J. K. B. 572 ; 87 L. T. 204 ; 50 W. R. 493 ; 18 T. L. R. 597 ; 7 Com. Cas. 172.

For full anns., *see* BILLS OF EXCHANGE, PROMISSORY NOTES & NEGOTIABLE INSTRUMENTS.

(*b*) *Fraud and Misrepresentation.*

2946. Fraud—Agent treated as principal.]—All persons directly concerned in the commission of a fraud are to be treated as principals. No party can be permitted to excuse himself on the ground that he acted as the agent or as the servant of another, & the reason is plain—for the contract of agency or of service cannot impose any obligation on the agent or servant to commit or assist in the committing of fraud (LORD WESTBURY, C.).—CULLEN *v.* THOMSON'S TRUSTEES (1862), 4 Macq. 432 ; 6 L. T. 870 ; 26 J. P. 611 ; 9 Jur. N. S. 85, H. L.

Annotations :—**Consd. & Distd.** Peek *v.* Gurney (1873), L. R. 6 H. L. 377. **Consd.** Weir *v.* Bell (1878), 3 Ex. D. 238, C. A. **Refd.** Swift *v.* Winterbotham & Goddard (1873), L. R. 8 Q. B. 244 ; Burdett *v.* Horne (1911), 27 T. L. R 402.

2947. —— Though committed for principal's benefit.]—An agent who commits fraud is answerable, as principal, to the person injured, who is not to be sent to seek the person benefited by the fraud.

V., agent for pltfs., having received bills from them, to be by him indorsed on their account as required, was, by menaces, compelled to indorse them to defts. for a debt of his own. The bill prayed a discovery of these matters & that the notes might be delivered up. Deft. D. in answer said he had only acted as agent for deft. E., & disclaimed having anything in the notes, & insisted on being struck out as a party, & only examined as a witness. On exceptions being taken to this answer :—*Held :* the exceptions must be allowed, as D., being charged with personal fraud, could not,

Sect. 2.—*In regard to torts: Sub-sect.* 2, *B.* (*b*), (*c*), (*d*) & (*e*); *sub-sects.* 3 & 4.]

by disclaiming interest, avoid answering fully.—BULKELEY *v.* DUNBAR (1792), 1 Anst. 37; 145 E. R. 793.

Annotation:—**Folld.** A.-G. *v.* Chesterfield (1854), 18 Beav. 596.

2948.——In equity.]—*Semble:* cases in which a mere agent may be made party to a suit, & costs prayed as a relief against him, are limited to cases of fraud in the sense in which fraud is understood in a ct. of equity, to which the agent is a party, & do not apply to a case in which, though erroneously, he acts openly & avowedly.—MARSHALL *v.* SLADDEN (1849), 7 Hare, 428; 19 L. J. Ch. 57; 14 Jur. 106; 68 E. R. 177.

Annotations:—**Folld.** Reynell *v.* Sprye (1849), 8 Hare, 222. **Expld.** Baker *v.* Loader (1872), L. R. 16 Eq. 49. **Distd.** Barnes *v.* Addy (1873), 28 L. T. 398; Tabor *v.* Cunningham (1875), 24 W. R. 153. **Refd.** A.-G. *v.* Chesterfield (1854), 18 Beav. 596; Weise *v.* Wardle (1874), L. R. 19 Eq. 171.

2949. Fraudulent transaction—Taking part in.]—An agent taking part in fraudulent transactions which his principal has entered into will be held responsible.—STAINBANK *v.* FERNLEY & ROBINSON (1839), 3 Jur. 262.

2950. Misrepresentations—Reckless.]—An agent employed to sell a business made reckless statements as to its value to the purchaser thereby induced to purchase:—*Held:* the agent liable in damages.—DAVIS *v.* CARTER (1886), 3 T. L. R. 88.

2951.—— As to credit.]—Where the manager of a bank, acting within scope of authority, wrote a letter containing a representation as to the credit of a customer of the bank, which representation was false to his knowledge:—*Held:* the manager personally liable for the false representation.—SWIFT *v.* JEWSBURY (JEWESBURY) & GODDARD (1874), L. R. 9 Q. B. 301; 43 L. J. Q. B. 56; 30 L. T. 31; 22 W. R. 319, Ex. Ch.

For full anns., *see* S. C. No. 88, *ante*.

2952.——Evidence of falseness.]—An agent, employed by the seller & purchaser on the purchase of a business, may be liable to purchaser for false representations as to its value, & if he declares he has personal knowledge of the facts, & his statements are found to be false, that is evidence they are false to his knowledge.—WRIGHT *v.* SELF (1859), 1 F. & F. 704.

2953.—— Corrupt motive.]—In order to maintain an action on the case by an indorsee of a bill of exchange against a party who represented that he had authority to accept, it is not necessary to prove that the false representation was made from a corrupt motive of gain to deft. or a wicked motive of injury to pltf. If the representation were untrue to deft.'s knowledge, the action will lie without any contract between the parties.—POLHILL *v.* WALTER, No. 2757, *ante*.

Annotations:—**Expld.** Freeman *v.* Baker (1833), 5 B. & Ad. 797. **Consd. & Distd.** Tyrrell *v.* Woolley (1840), 1 Man. & G. 809. **Expld.** Moens *v.* Heyworth (1841), H. & W. 138. **Expld. & Distd.** Crawshay *v.* Thompson (1842), 4 Man. & G. 357. **Consd.** Fuller *v.* Wilson (1842), 3 Q. B. 58; Gibson *v.* D'Esté (1843), 2 Y. & C. Ch. Cas. 542. **Expld.** Wilson *v.* Fuller (1843), 3 Q. B. 68. **Consd.** Rawlings *v.* Bell (1845), 1 C. B. 951. **Consd. & Distd.** Murray *v.* Mann (1848), 17 L. J. Ex. 256. **Distd.** Watson *v.* Poulsom (1851), 18 L. T. O. S. 126. **Consd.** Thom *v.* Bigland (1853), 8 Exch. 725; Collen *v.* Wright (1857), 8 E. & B. 647, Ex. Ch.; Collins *v.* Cave (1859), 4 H. & N. 225; Dublin, Wicklow & Wexford Ry. Co. *v.* Slattery (1878), 3 App. Cas. 1155, H. L.; Derry *v.* Peek (1889), 14 App. Cas. 337, H. L.; London & Southern Counties Investment Advance & Discount Co. *v.* Clamp (1890), 7 T. L. R. 131. **Expld.** Oliver *v.* Bank of England, [1901] 1 Ch. 652 **Consd.** Yonge *v.* Toynbee, [1910] 1 K. B. 215, C. A. **Refd.** Wilson *v.* Barthorpe (1837), Murp. & H. 81; Smout *v.* Ilbery (1842), 10 M. & W. 1; Collins *v.* Evans (1844), 5 Q. B. 820, Ex. Ch.; Freeman *v.* Cooke (1848), 18 L. J. Ex. 114; Wilde *v.* Gibson (1848), 1 H. L. Cas. 605; Udell *v.* Atherton (1861), 7 H. & N. 172; Hollman *v.* Pullin (1884), Cab. & El. 254. **Mentd.** Moens *v.* Heyworth (1842), 10 M. & W. 147; Davis *v.* Clarke (1844), 6 Q. B. 16; R. *v.* White (1847), 9 L. T. O. S. 475; Jenkins *v.* Hutchinson (1849), 13 Q. B. 744; Milne *v.* Marwood (1853), 3 C. L. R. 228; Eastwood *v.* Bain (1858), 28 L. J. Ex. 74; Sheen *v.* Bumpstead (1862), 1 H. & C. 358; Armstrong *v.* Jackson, [1917] 2 K. B. 822.

2954.—— Agent acting within authority.]—In absence of fraud, an agent acting within scope of his authority is not personally liable for a misrepresentation made by him on behalf of his principal.—EAGLESFIELD *v.* LONDONDERRY (MARQUIS) (1876), 4 Ch. D. 693; 35 L. T. 822; 25 W. R. 190, C. A.; *affd.* (1878), 26 W. R. 540, H. L.

Annotations:—**Folld.** Phosphate Sewage Co. *v.* Hartmont (1877), 5 Ch. D. 394, C. A.; Cargill *v.* Bower (1878), 10 Ch. D. 502. **Distd.** Deeley *v.* Lloyds Bank, [1912] A. C. 756.

2955.—— By insurance broker to underwriter.]—In ordinary circumstances an insurance broker effecting a contract of maritime insurance with an underwriter owes no duty to the latter in respect of erroneous but honest statements made by him.—GLASGOW ASSURANCE CORPN., LTD. *v.* SYMONDSON & Co. (1911), 104 L. T. 254; 27 T. L. R. 245; 11 Asp. M. L. C. 583; 16 Com. Cas. 109.

(*c*) *Trespass to Goods.*

2956. Distraint.]—A person committing an act, such as distraining on goods, without authority of the person entitled to do so, commits trespass & cannot excuse himself by saying he did it on the other's behalf.—ANON., No. 2922, *ante*.

For full anns., *see* S. C. No. 2922, *ante*.

2957. ——.]—Pltf. was tenant of a dwelling house, the rent of which was received by defts. for the landlord. Rent being in arrears, defts. signed as agents of the landlord & delivered to a broker a warrant of distress. Before it was executed pltf. tendered to defts. the amount of the rent, but they refused to receive it on the ground that the distress warrant had issued. Pltf. subsequently tendered this amount to the broker, who refused to receive it unless certain alleged costs were also paid. The broker afterwards distrained pltf.'s goods:—*Held:* the distress was illegal, & defts. were not mere agents conveying an authority from the landlord, but persons committing the wrongful act, & therefore liable in trespass for the damage sustained by pltf.—BENNETT *v.* BAYES, PENNINGTON & HARRISON (1860), 5 H. & N. 391; 29 L. J. Ex. 224; 2 L. T. 156; 24 J. P. 294; 8 W. R. 320; 157 E. R. 1233.

For full anns., *see* DISTRESS.

PART X. SECT. 2, SUB-SECT. 2.—B. (b).

2951 i. *Misrepresentations — As to credit.*]—The secretary of a cinema co. entered into a contract with a plumber to execute certain plumbing work for the co. The co. had no assets & was unable to pay for the work, & the plumber brought an action against the secretary for payment, in which he averred that he had been induced to enter into the contract by statements made to him by defender to the following effect: (1) that pursuer's money would be all right; (2) that the co. had plenty of money; (3) that £3,000 of the capital of the co. had been subscribed; & (4) that the directors of the co. would provide additional security, & that defender knew that statements (1), (2) & (3) were false. Pursuer admitted that he could not prove statements (1) (2) & (3) by writ subscribed by defender. The ct. assoilzied defender, holding (*a*) that in the absence of writ, in virtue of Mercantile Law Amendment Act (Scotland), 1856, s. 6, statements (1), (2) & (3) were of no effect, & (*b*) that statement (4) was irrelevant in respect that pursuer did not aver that defender knew it to be false.—IRVING *v.* BURNS (1914), 52 Sc. L. R. 189.—**SCOT.**

PART X. SECT. 2, SUB-SECT. 2.—B. (o).

m. *Instructions of principal — Effect of.*]—An agent who deals with another man's goods as if they belonged to his principal may be answerable to the true owner, notwithstanding that he acts by the command or direction of his principal.—WISE *v.* BURN, 4 W. R. Rec. Ref. 1.—**IND.**

(d) Trespass to Land.

2958. Agent of receiver—Restraint of proceedings against.]—Agents of the receiver in a cause, acting under leave of the ct., took forcible possession of a house occupied by a servant of one of defts. An order was made restraining that deft. from prosecuting an indictment against the agents.—TURNER *v.* TURNER (1851), 15 Jur. 218.

2959. Charge of intent.]—Where there was a dispute between pltf. & A. about a weir situate on pltf.'s land, & B. was charged with intending to enter forcibly on the land & destroy the weir :—*Held :* B. could not sustain a demurrer to a bill for an injunction on the ground that he had no interest in the subject-matter of the dispute, & was a mere agent acting on the orders of A.—HEUGH *v.* ABERGAVENNY (EARL) & DELVES (1874), 23 W. R. 40.

(e) Other Torts.

2960. Ancient lights—Injunction—Costs against agent.]—B. & Co. were builders employed by H. to build certain premises. T., the occupier of adjacent premises, sought an injunction to restrain B. & Co. & H. from interfering with his ancient lights. During the hearing the action was compromised, & pltf. claimed that B. & Co. ought to be made liable for costs. B. & Co. had joined in an appeal against an interlocutory order & in an undertaking directed by the C. A. to pull down the building if the final decision should be against them, & taken an active part in the trial :—*Held :* (1) by their conduct B. & Co. had identified themselves as principals in the action ; (2) they were jointly liable with H. for the costs of the action ; (3) in the circumstances, H. was to be primarily liable for costs, B. & Co. being ordered to pay them, if not paid by H.—TWINBERROW *v.* BRAID & Co., [1878] W. N. 169.

2961. Breach of injunction—Agent aiding & abetting—Committal.]—The lessee of certain floors of a house allowed M. to run a sporting club there, & the lessor obtained an injunction to restrain the lessee (only deft. in the action), his under-tenants, agents, & servants from doing or suffering to be done anything which might interfere with the lessor's quiet enjoyment of the adjoining premises. M. was committed to prison for contempt of ct. in aiding & abetting a breach of the injunction ; & the lessee & others were also committed. M. was described with another in the notice of motion for committal as " agents or servants " of the lessee, & was regarded in this light by the ct. On appeal : —*Held :* the committal was proper.—SEAWARD *v.* PATERSON, [1897] 1 Ch. 545 ; 66 L. J. Ch. 267 ; 76 L. T. 215 ; 45 W. R. 610 ; 13 T. L. R. 211, C. A.

Annotations :—**Consd.** Scott *v.* Scott, [1913] A. C. 417, H. L **Folld.** Hubbard *v.* Woodfield (1913), 57 Sol. Jo. 729. **Mentd.** Brydges *v.* Brydges & Wood, [1909] P. 187, C. A.; *Re* J. (1913), 108 L. T 554.

See, further, CONTEMPT OF COURT, ATTACHMENT & COMMITTAL ; INJUNCTION.

2962. Disturbance of easement.]—Disturbance of an easement, such as a right to light, is a tort for which the disturber, whether principal or agent, is liable to the dominant owner.—JORDESON *v.* SUTTON, SOUTHCOATES & DRYPOOL GAS CO., [1899] 2 Ch. 217 ; 68 L. J. Ch. 457 ; 80 L. T. 815 ; 63 J. P. 692 ; 15 T. L. R. 374, C. A.

Annotations :—**Distd.** Batcheller *v.* Tunbridge Wells Gas Co. (1901), 65 J. P. 680 ; Salt Union *v.* Brunner, Mond, [1906] 2 K. B. 822. **Apld.** English *v.* Metropolitan Water Board, [1907] 1 K. B. 588 ; Fletcher *v.* Birkenhead Corpn., [1907] 1 K. B. 205, C. A. **Mentd.** Goldberg *v.* Liverpool Corpn. (1900), 82 L. T. 362, C. A. ; Home & Colonial Stores *v.* Colls (1901), 85 L. T. 701, C. A.

See, further EASEMENTS & PROFITS À PRENDRE.

2963. Executor de son tort.]—The widow of a testator employed A. to collect some debts due to testator's estate, which A. accordingly collected & paid over to the widow believing that she was administratrix. On the widow's death without having taken out letters of administration :—*Held :* (1) A. having received moneys which he knew to be part of the estate of testator, & not having accounted for such moneys to the legal personal representative of testator, was liable to be sued as exor. *de son tort ;* (2) the liability was not avoided by the suggestion that A. acted as the agent of the widow, inasmuch as the acts of the widow & A. in reference to testator's estate were the acts of wrongdoers, & the law does not recognise the relation of principal & agent as existing amongst wrongdoers.—SHARLAND *v.* MILDON, SHARLAND *v.* LOOSEMORE (1846), 5 Hare, 468 ; 15 L. J. Ch. 434 ; 7 L. T. O. S. 223 ; 10 Jur. 771 ; 67 E. R. 997.

Annotations :—**Expld.** Thompson *v.* Harding (1853), 18 Jur. 58. **Consd.** Hill *v.* Curtis (1865), L. R. 1 Eq. 90 ; Sykes *v.* Sykes (1870), L. R. 5 C. P. 113 ; *Re* Lovett, Ambler *v.* Lindsay (1876), 3 Ch. D. 198 ; *Re* Chapman, *Ex p.* Edwards (1884), 13 Q. B. D. 747, C. A. **Apld.** A.-G. *v.* New York Breweries Co., [1898] 1 Q. B. 205, C. A. **Refd.** Lysley *v.* Clarke (1851), 18 L. T. O. S. 141.

See, further, EXECUTORS & ADMINISTRATORS.

2964. Infringement of copyright.]—Printers who infringe artistic copyright, though only as mere agents, are equally liable with their principals to penalties under Fine Arts Copyright Act, 1862 (c. 68), s. 6.—BASCHET *v.* LONDON ILLUSTRATED STANDARD CO., [1900] 1 Ch. 73 ; 69 L. J. Ch. 35 ; 81 L. T. 509 ; 48 W. R. 56 ; 44 Sol. Jo. 42.

For full anns., *see* COPYRIGHT & LITERARY PROPERTY.

See, further, COPYRIGHT & LITERARY PROPERTY.

Infringement of patent.] — *See* PATENTS & INVENTIONS.

Infringement of trade mark.] — *See* TRADE MARKS, TRADE NAMES & DESIGNS.

SUB-SECT. 3.—PUBLIC AGENTS.

See PUBLIC AUTHORITIES & PUBLIC OFFICERS.

SUB-SECT. 4.—AGENT'S LIABILITY FOR OFFENCES UNDER PARTICULAR ACTS.

See particular titles, *passim.*

PART X. SECT. 2, SUB-SECT. 2.—B. (d).

n. *Agent acting with principal's authority — Effect of.*]—A person may be liable for damage caused by his act, although done by order or authority of another. A pursuer alleged that defender's father, & defender acting with his father's authority, wrongfully made a cut in the bank of a watercourse on the father's property, whereby pursuer suffered damage. The father having died, & defender having been served heir to him :—*Held :* besides issues as to the liability of defender as representing his father, pursuer was entitled to an issue whether defender himself had wrongfully made the cut, to the damage of pursuer.—MACKENZIE *v.* GOLDIE (1866), 4 M. 277. —SCOT.

PART X. SECT. 2, SUB-SECT. 2.—B. (e).

o. *Agent illegally impounding stock.*]—An agent let land to pltf. to put turnips down, but pltf. put sheep on instead, which the agent impounded : —*Held :* the letting within his duty as agent & binding on his principal, but not so the impounding, for which he was personally liable to pltf.—DUNLOP *v.* RICHARDS (1824), Bluett (I. of M.), 404.—I. of M.

Part XI.—Duration and Termination of Agency.

SECT. 1.—IN GENERAL.

Termination by Act of Parties. *See* Sect. 2, *post.*

Termination by Operation of Law. *See* Sect. 3, *post.*

SECT. 2.—TERMINATION BY ACT OF PARTIES.

SUB-SECT. 1.—BY PRINCIPAL.

Remedies of agent on unjustifiable termination of his agency. *See* Part VIII., Sect. 3, Sub-sect. 3, *ante.*

A. In General.

2965. Authority primâ facie revocable.]—An authority is *primâ facie* revocable.—VYNIOR'S CASE (1609), 8 Co. Rep. 81 b; 77 E. R. 597.

Annotations:—**Apld.** Smart *v.* Sandars (1848), 5 C. B. 895; Toppin *v.* Healey (1863), 11 W. R. 466. **Refd.** *Re* Rouse & Meier (1871), L. R. 6 C. P. 212; Randall, Saunders *v.* Thompson (1876), 1 Q. B. D. 748, C. A.; Fraser *v.* Ehrensperger (1883), 12 Q. B. D. 310, C. A.; *Re* Heys, Walker *v.* Gaskell, [1914] P. 192, C. A. **Mentd.** Lyn *v.* Wyn (1665), O. Bridg. 122; Thomas *v.* Sorrell (1672), 3 Keb. 143; Londre *v.* Mohun (1672), Freem. K. B. 42; Marsh *v.* Bulteel (1822), 5 B. & Ald. 507; Brown *v.* Tanner (1825), 1 C. & P. 651; Warburton *v.* Storr (1825), 4 B. & C. 103; Livingston *v.* Ralli (1855), 5 E. & B. 132; Pestonjee Nussurwanjee *v.* Manockjee (1868), 12 Moo. Ind. App. 112.

2966. ——.]—Parties have generally a right to revoke the appointment of their agents.—THE HARE, No. 3063, *post.*

2967. ——.]—A retainer to sell goods on behalf of the owner is revocable by the principal at pleasure any time before sale.—CAMPANARI *v.* WOODBURN, No. 3000, *post.*

2968. ——.]—The general rule of law is that employment of a general character, *e.g.*, manager of an estate, can be terminated at the will of the employer (LORD ATKINSON).—FRITH *v.* FRITH, No. 3041, *post.*

2969. —— **Authority to sue—Authority to deliver goods.**]—POTTER *v.* TURNER (TURNOR) (1621), Win. 8; Palm. 176; 124 E. R. 7.

Annotations:—**N.F.** Morton *v.* Burn (1837), 7 Ad. & El. 19. **Refd.** Clypsam *v.* Morris (1668), 2 Keb. 453.

2970. —— **Power of attorney.**]—Powers of attorney are in general revocable from their nature (LORD KENYON, C.J.).—WALSH *v.* WHITCOMB (1797), 2 Esp. 565.

Annotations:—**Refd.** Gaussen *v.* Morton (1830), 5 Man. & Ry. K. B. 613; Smart *v.* Sandars (1848), 5 C. B. 895.

2971. —— ——.]—A power of attorney giving a naked authority is revocable at will.—R. *v.* WAIT, No. 2973, *post.*

2972. Revocation must be brought to agent's knowledge.]—The authority of an agent is not terminated unless the revoking principal advises the agent of the fact of revocation.—*Re* ORIENTAL BANK CORPN., *Ex p.* GUILLEMIN (1884), 28 Ch. D. 634.

B. Mode of Revocation.

2973. Parol—Power of attorney need not be revoked by deed.]—*Semble:* a power of attorney, giving a naked authority, need not be revoked by deed, but may be revoked by parol or by any act inconsistent with its continuance.—R. *v.* WAIT (1823), 1 Bing. 121; 7 Moore, C. P. 473; 11 Price, 518; 130 E. R. 50.

2974. —— ——.]—A power of attorney to sell a ship may be subsequently revoked by parol; & the attorney selling thereafter is guilty of a breach of trust.—THE MARGARET MITCHELL (1858), Sw. 382; 4 Jur. N. S. 1193.

2975. Order of court.]—D., the holder of a co.'s power of attorney, after the appointment of a receiver in a debenture-holder's action, took possession of the co.'s property in Peru on behalf of the receiver. The co. revoked D.'s power of attorney & granted a power of attorney to C., who, as agent of the co., ousted D. from possession of the property. D., though the holder of a power of attorney from the debenture-holders & the trustees of the debenture-trust deed, was unable to recover possession, as Peruvian law recognised only the co. as legally entitled. On motion:—*Held:* the co. must be ordered to revoke its power of attorney to C. & to execute a new power to the nominees of the debenture-holders, authorising them to take possession of the property on behalf of the receiver.—*Re* HUINAC COPPER MINES, LTD., MATHESON & Co. *v.* THE CO., [1910] W. N. 218.

2976. Conduct—Principal acting himself.]—If a man makes a feoffment of lands in two towns &

PART XI. SECT. 2, SUB-SECT. 1.—A.

2965i. *Authority primâ facie revocable.*]—The authority of an agent to sell land may be revoked at any time before a valid & binding contract has been entered into, even although he has already made a verbal bargain.—WEEKES *v.* DALE (1888), 14 V. L. R. 159.—**AUS.**

2965ii. ——.]—CANTLIE *v.* COATICOOK COTTON CO. (1887), 30 L. C. J. 135; 15 R. L. 524, Q. B.—**CAN.**

2965 iii. ——.]—GALIBERT *v.* ATTEAU (1902), 23 C. S. 427.—**CAN.**

2965 iv. ——.]—BAUGH *v.* PORCUPINE THREE NATIONS GOLD MINING CO. (1911), 17 R. de J. 415.—**CAN.**

2965 v. ——.]—A principal can determine the authority given to an agent.—BULAKEE LALL *v.* INDURPUTTEE KOWAR (1865), 3 W. R. 41.—**IND.**

2965 vi. —— *Subject to agent's right to damages.*]—An agreement whereby the owner of immovable property appoints another as his agent for a period of three years to effect the sale thereof, in consideration of a commission & expenses, is a contract of agency, & may be cancelled at any time subject to payment of damages if cancelled without sufficient reason.—HUDON *v.* COOL (1912), Q. R. 42 S. C. 228.—**CAN.**

PART XI. SECT. 2, SUB-SECT. 1.—B.

2976 i. *Conduct—General statement of law.*]—The principal may always revoke his agent's authority, even during the exclusive period reserved to the agent, & though there be a proviso that the recall should be in writing; it is sufficient, no matter what means are adopted, that the principal's wish to terminate the contract should be clearly comprehended by the mandatory.—CYR *v.* LECOURS (1914), Q. R. 47 S. C. 85.—**CAN.**

2976 ii. —— *Principal acting himself.*]—Pltf. having sued her husband for alimony, deft. proposed, on condition of the action being discontinued, to settle certain property on pltf., in consideration of her executing a deed of separation & undertaking to release all claims against him. Negotiations took place between the solrs. of the parties, & terms were agreed to by deft.'s solrs., but not before deft. had communicated directly with pltf. saying that, as the offers made by him had proved unsatisfactory, he had decided to change & make another offer. Pltf. sought to enforce the agreement entered into by deft.'s solrs.:—*Held:* deft.'s letter to pltf. would have put an end to his solrs.' authority.—VARDON *v.* VARDON (1883), 6 O. R. 719.—**CAN.**

2976 iii. —— ——.]—A person intending to take out letters of administration executed a power of attorney to a creditor of the intestate, authorising him to receive all moneys due to the intestate, & pay himself. The appointor afterwards revoked the power, & himself took out letters of administration:—*Held:* the power was not valid against the administrator.—SINCLAIR *v.* DEWAR (1872), 19 Gr. 59.—**CAN.**

2976 iv. —— *Notice amounting to revocation.*] — Defts. appointed pltf. jointly with L. as commission agents for the sale of wines & spirits. The agreement provided for payment of a fixed commision upon sales effected, & a weekly salary, besides travelling expenses & the rent of an office; further, the engagement was for six months, & was liable to be terminated by either party upon six months' notice. L. died shortly afterwards. Some weeks after his death defts. wrote to pltf.: "The death of Mr. L. alters our arrangements altogether. You are at liberty to throw up our agency if you wish it; &, to make all things in order, it would

grants a letter of attorney to make livery, but before livery by attorney the feoffor himself makes livery of the land in one town, that will operate as a countermand of the letter of attorney as a whole.—SMITH & JENNING'S CASE (1610), Lane, 97.

2977. —— ——.]—Action brought by principal against a third party revokes a letter of attorney to collect from that third party.—ANON. (1700), 12 Mod. Rep. 409; 88 E. R. 1414.

2978. —— ——.]—A proxy made by a canon to act for him in his absence in all corporate business is not revoked by the canon having in an intermediate period appeared & acted for himself.—EYRE *v.* LOWELL (1782), 3 Doug. K. B. 66; 99 E. R. 541.

2979. —— **Subsequent disposition of property by principal's orders.**]—A. accepted a bill, made payable at defts.' house, which was indorsed to pltfs., who discounted it. The bill was presented to defts., when due, & dishonoured. Two days afterwards money to take up the bill was remitted to defts., & they were requested to follow it in whosesoever hands it might be. They tendered the money to pltfs., who had sent back the bill the day before to the drawers. Defts. received an order from a house (to which the letter inclosing the remittance referred them for advice) to hold the money to the credit of that house, as they had, by desire of A. the acceptor, advanced to him the amount of money then in defts.' hands for purpose of taking up the bill:—*Held:* this was a sufficient countermand of the money on part of A.—STEWART *v.* FRY & CHAPMAN, No. 2845, *ante*.

2980. —— ——.]—H. & Co. consigned goods to B. with directions to sell & pay the proceeds to P. on account of a debt. B. undertook to do so, but notice was not given to P. H. & Co. afterwards wrote to B. requesting that the goods should be sent to America for disposition there. H. & Co. thereafter became bkpt.:—*Held:* the directions accompanying the consignment were revoked by the subsequent disposition of the property.—SCOTT *v.* PORCHER (1817), 3 Mer. 652; 36 E. R. 250.

Annotations:—**Distd.** Fitzgerald *v.* Stewart (1828), 2 Sim. 333; Bailey *v.* Culverwell (1828), 8 B. & C. 448. **Expld.** Garrard *v.* Lauderdale (1831), 2 Russ. & M. 451; Baron *v.* Husband (1833), 4 B. & Ad. 611; Brind *v.* Hampshire (1836), 1 M. & W. 365; *Re* Douglas & Anderson, *Ex p.* Cotterell, Hill (1837), 3 Deac. 12. **Distd.** Hutchinson *v.* Heyworth (1838), 9 Ad. & El. 375. **Refd.** Malcolm *v.* Scott (1843), 3 Hare, 39; Sims *v.* Brutton & Clipperton (1850), 5 Exch. 802; Frith *v.* Forbes (1862), 4 De G. F. & J. 409.

2981. —— **Principal staying suit instituted by agent.**]—A suit was instituted by A. in the name of B., under a power of attorney, & a decree was made. Deft., who was aware the suit was in fact prosecuted by the attorney, made an arrangement with B. that all proceedings should be stayed for 12 months; & this arrangement was embodied in an order made upon the application of deft., & by consent of B., but without the concurrence of the attorney. A petition was afterwards presented by the attorney, praying the order might be discharged for irregularity, & that the attorney might be at liberty to prosecute the suit without the interference of B.:—*Held:* no part of the prayer of this petition could be granted.—PENTLAND *v.* QUARRINGTON (1837), 3 My. & Cr. 249; 40 E. R. 920.

2982. —— **Additional instructions not revocation of original instructions.**]—A person purchased a ship of C. in consideration of three bills of exchange, which he indorsed & delivered to the vendor. About the same time he wrote an order to his agent, W., directing him to pay the amount of one of the bills, £750, to C., out of the freight of the ship. By a subsequent written order he directed W. to satisfy out of the freight the amount of any current bills given by him in payment for the vessel. W., after accepting both orders, discounted for C. the £750 bill. Upon construction of the orders & circumstances of the case generally:—*Held:* the second order was not a revocation of the first.—MILN (MILNE) *v.* WALTON (1843), 2 Y. & C. Ch. Cas. 354; 7 Jur. 892; 63 E. R. 156.

2983. —— **Correspondence not amounting to revocation.**]—In July, 1849, A. gave B., the secretary of a joint-stock co. in the course of formation, a power of attorney authorising him to execute the deed of settlement in the name of A. for five shares. In Aug. a correspondence passed between A. & B. to this effect:—A. desired to terminate all connection with the co.; B. requested A. to pay the calls; A. hoped the directors would excuse him, & B. stated the directors would not release him. Nothing further took place between A. & B. In Oct. the co. was completely registered & B. executed the deed of settlement in the name of A. The co. was wound up:—*Held:* (1) A. had not revoked the power of attorney; (2) he was properly placed on the list of contributories of the co., in respect of five shares. *Qu.:* whether A. could revoke the power of attorney.—*Re* SEA FIRE & LIFE ASSURANCE SOCIETY, *Ex p.* BURTON (1852), 21 L. J. Ch. 781; 19 L. T. O. S. 162; 16 Jur. 967

2984. —— ——.]—A cheque was drawn by T. in D.'s favour. D. authorised T. to pay the amount to H. The cheque not being paid, D.'s attorney wrote a letter to T. threatening an action, & afterwards T. paid the amount to H.:—*Held:* (1) the letter did not in law amount to a revocation of H.'s authority to receive; (2) it was a question of fact to be left to the jury.—DOLMAN *v.* TELT (1863), 2 New Rep. 29.

2985. —— **Mere intention to create new power.**]—In an action by the trustee of A. against the U. Bank for not paying over to A. certain dividends received by defts. under a power of attorney, it appeared that A., a married woman, being entitled for her separate use to the dividends of certain Govt. stock standing in the name of pltf. & another as her trustees, pltf. gave to defts. a power of attorney to receive the dividends, & at the same time directed them to pay the dividends to A. A. directed defts. to pay the dividends to B. & C., bankers at Brussels, to whom she had pledged them for advances made to her husband. Defts. for some time paid the dividends to B. & C., but at length A. wrote to defts., informing them that in consequence of the death of one of her trustees she had been obliged to have a new power of attorney made to receive her own dividends, & she would not have occasion to trouble them to do so; no new power was executed & defts. received the ensuing half-year's dividends & paid them over to B. & C.:—*Held:* (1) the authority given by pltf. to defts. to receive & apply the dividends had never been revoked; (2) the letter from A. to defts. did not amount to a revocation.—CLERK (CLARKE) *v.* LAURIE (LAWRIE) (1857), 2 H. & N. 199; 26 L. J. Ex. 317; 29 L. T. O. S.

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be as well that we hereby give you notice to terminate our agreement in six months from this date; this will give us the power to do so if we wish. We say not we shall do so; time & your own exertions will be the test":—*Held:* this letter was a notice sufficiently clear & specific to terminate the engagement.—KEON *v.* HART (1869), 17 W. R. 681, Ex. Ch.—**IR.**

2976 v. —— *Lapse of time—Laches.*]—If a considerable time has elapsed since the giving of authority to a land agent to sell land, & nothing has been done in the meantime, it will be assumed the agency has ceased but where authority was given in July, & communications passed in Oct. & Apr. on the basis of the agency continuing, & the agent effected a sale in the July following:—*Semble:* it could not be said the agent's authority had lapsed.—DILLON *v.* MACDONALD (1902), 21 N. Z. L. R. 45. —**N.Z.**

Sect. 2.—Termination by act of parties: Sub-sect. 1, B.; sub-sect. 2. Sect. 3: Sub-sects. 1 & 2.]

203; 3 Jur. N. S. 647; 5 W. R. 629; 157 E. R. 83, Ex. Ch.

Annotations:—**Distd.** Frith *v.* Frith, [1906] A. C. 254, P. C. **Refd.** Fitzmaurice *v.* Bayley (1857), 30 L. T. O. S. 230, Ex. Ch. **Mentd.** *Re* Hannan's Empress Gold Mining & Development Co., Carmichael's Case, [1896] 2 Ch. 643, C. A.

2986. ——Subsequent power executed by partner.]—A power of attorney to vote at the choice of assignees by one partner in a firm is revoked by a subsequent power executed by another partner.—*Re* DOBBS, *Ex p.* BANISTER & Co. (1866), 15 L. T. 53.

2987. ——Request for return of deeds lodged with agent to obtain loan.]—A wife, during the absence of her husband in India, delivered certain deeds to B. for the purpose of raising money on them. B., after some time, represented to her that he found it impossible to obtain a loan without the signature of the husband, but kept the deeds. She repeatedly asked for their return, but he from time to time made excuses, saying, finally, he had got into trouble, & her deeds, together with all his own papers, were in the hands of his solrs. He had, in the meantime, raised & used for his own purposes a sum of £1,200 by forging a mtge. in the husband's name:—*Held:* the wife having asked for the return of the deeds, had put an end to the agency of B., & was not bound by his dealings with the property.—FOX *v.* HAWKS, HAWKS *v.* FOX (1879), 13 Ch. D. 822; 49 L. J. Ch. 579; 42 L. T. 622; 28 W. R. 656.

Annotation:—**Distd.** *Re* Breton's Estate, Breton *v.* Woollven (1881), 17 Ch. D. 416.

Voluntary winding up of principal company.]—*See* Part VIII., Sect. 3, Sub-sect. 3, A. (c), *ante.*

Principal ceasing to carry on business.]—*See* Part VIII., Sect. 3, Sub-sect. 3, A., *ante.*

Principal dismissing agent.]—*See* Part VIII., Sect. 3, Sub-sect. 3, B., *ante.*

SUB-SECT. 2.—By AGENT.

2988. Agent firm dissolving partnership.]—BOVINE, LTD. *v.* DENT & WILKINSON (1904), 21 T. L. R. 82.

SECT. 3.—**TERMINATION BY OPERATION OF LAW.**

SUB-SECT. 1.—DEATH.

2989. General rule.]—In the case of principal & agent the death of either party puts an end to the relation (WILLES, J.).—FARROW *v.* WILSON (1869), L. R. 4 C. P. 744; 38 L. J. C. P. 326; 20 L. T. 810; 18 W. R. 43.

2990. ——.]—WATSON *v.* KING, No. 3033, *post.*

For full anns., *see* S. C. No. 3033, *post.*

2991. Death of principal—Power to collect wages.]—A. being indebted to B. makes a letter of attorney to him to receive all such wages as shall after become due to him, then goes to sea, & dies; this authority is determined, so that B. cannot compel an account of wages, if any due, at making the letter of attorney, much less of what after became due; but the administrator must pay according to the course of law.—MITCHELL *v.* EADES (EDES) (1700), Prec. Ch. 125; 2 Vern. 391; 24 E. R. 60.

Annotation:—**Apld.** Lepard *v.* Vernon (1813), 2 Ves. & B. 51.

2992. —— ——.]—Power of attorney to receive wages is revoked by death of the principal.—WALLACE *v.* COOK (1804), 5 Esp. 117.

2993. ——Agent chargeable as executor de son tort after.]—Although a person cannot be charged as exor. *de son tort* while he acts under a power of attorney, made to him by one of several exors. who has proved the will, yet if he continues to act after death of such exor. he may be charged as exor. *de son tort*, though he acts under advice of another exor. who has not proved.—COTTLE *v.* ALDRICH (1815), 1 Stark. 37; 4 M. & S. 175; 105 E. R. 799.

Annotations:—**Consd.** Sykes *v.* Sykes (1870), L. R. 5 C. P. 113; *Re* Lovett, Ambler *v.* Lindsay (1876), 3 Ch. D. 198.

2994. —— Insurance broker's authority to receive returns of premium.]—After the death of an underwriter a broker, who has an account open with him for premiums due to the underwriter & has had authority to receive returns of premium for him & place them to his credit, can no longer receive or retain any further returns of premium, but is bound to pay over to his exors. the amount of all premiums due at his decease without setting off the returns.—HOUSTOUN (HOUSTON) *v.* ROBERTSON (1816), 6 Taunt. 448; 2 Marsh. 138; 128 E. R. 1109.

PART XI. SECT. 2, SUB-SECT. 2.

a. *Assignment of agency agreement.*]—MCDONALD *v.* LEADLEY (1914), 27 W. L. R. 721; 20 D. L. R. 157.—**CAN.**

PART XI. SECT. 3, SUB-SECT. 1.

2991 i. *Death of principal—Power to transfer shares.*]—B. was the registered holder of shares in a co. Before his death his name was written by his wife at his request at the bottom of a blank form of transfer indorsed on the share certificate, the signature being witnessed by B.'s son:—*Held:* B.'s wife had acquired no property in the shares during his lifetime, the act of signing conferring on her no more than an authority to deal with the shares, which was revoked by B.'s death.—CASTLEMAN *v.* WAGHORN (1903), 41 S. C. R. 88.—**CAN.**

2991 ii. —— *Authority to buy.*]—An agent obtained on credit from persons, with whom his principal had been in negotiation, a supply of furniture for the house of the principal in which he had intended carrying on business, but before any binding agreement was concluded, or the furniture delivered, the principal died abroad. In an action for specific performance:—*Held:* (1) the authority of the agent was determined by the principal's death; (2) specific performance must be refused.—JACQUES *v.* WORTHINGTON (1859), 7 Gr. 192.—**CAN.**

2991 iii. —— *Transfer of deposit after.*]—M. indorsed a deposit receipt & delivered it to S., stating that it was for K.; S. indorsed the document, &, after M.'s death, presented it to the bank, who transferred the amount to S. without notice of M.'s death. In an action by the administratrix of M. against the bank:—*Held:* if the transaction constituted S. an agent of M., his authority was revoked by M.'s death.—MOORE *v.* ULSTER BANKING CO. (1877), I. R. 11 C. L. 512; 12 I. L. T. 5.—**IR.**

2991 iv. —— *Bill drawn after but before notice of death.*]—A mandatory or factor of a person abroad is entitled to act in that character, until he receive authentic intelligence of the death of his constituent, & may draw a bill after the death of his principal.—CAMPBELL *v.* ANDERSON (1829), 3 W. & S. 384; 5 S. 68; 4 Bli. N. S. 513; 5 E. R. 183.—**SCOT.**

2991 v. —— *Authority to agent creditor distinguished from equitable assignment.*]—Pending a suit on a mtge. for foreclosure & sale of the mtged. premises, the mtgor. executed & delivered a writing in favour of a creditor authorising him to collect, recover, & receive, & apply on account of his debt, any surplus from the sale, & declaring that the power should not be revoked by his death. The sale resulted in a surplus. Before the sale the mtgor. died:—*Held:* the writing was not an equitable assignment, but a power of attorney revocable by the grantor's death.—CHAPMAN *v.* GILFILLAN, 21 C. L. T. N. 96; 2 N. B. Eq. 129.—**CAN.**

2991 vi. —— *Sale effected after.*]—A testator devised his real estate in trust for sale. Shortly after his death a friendly suit was instituted in Ch. in England for administration of the estate. In this suit the trustee was deft., & an order was made for the appointment of a receiver to collect the assets in Canada, & sell the lands there. After the death of such receiver, the agents of the trustee in Canada, who had managed the estate for the deceased receiver, continued to collect the assets & make sales, with the knowledge & concurrence of the trustee & the parties in England:—*Held:* such sales were not void, & would be enforced or not, as, in the circumstances, seemed proper.—STICKNEY *v.* TYLEE (1867), 13 Gr. 193.—**CAN.**

2995. ——— ———.]—HOUSTOUN *v.* BORDENAVE (1816), 6 Taunt. 451; 2 Marsh. 141; 128 E. R. 1110.

2996. ——— **Contract for necessaries made after.**]—A., having for some years cohabited with B., who passed for his wife, went abroad, leaving B. & her family at his residence in this country, & died abroad:—*Held:* B. having the same authority to bind A. by her contracts for necessaries as if she had been his wife, A.'s exor. was not bound to pay for any goods supplied to B. after his death, although before information of his death had been received.—BLADES *v.* FREE (1829), 9 B. & C. 167; 4 Man. & Ry. K. B. 282; 7 L. J. O. S. K. B. 211; 109 E. R. 63.

Annotations:—**Consd.** Smout *v.* Ilbery (1842), 10 M. & W. 1. **Refd.** Bradbury *v.* Morgan (1862), 1 H. & C. 249; Salton *v.* New Beeston Cycle Co. (1899), 69 L. J. Ch. 20.

2997. ——— **Blank acceptance filled up afterwards.**]—CARTER *v.* WHITE, No. 3051, *post.*

For full anns., *see* S. C. No. 3051, *post.*

2998. ——— **Death of one of two joint principals.**]—*Semble:* a power of attorney by husband & wife, severally & respectively appointing an attorney to surrender the wife's customary tenement into the lord's hands, is revoked by the death of the wife, & a surrender subsequently made by the attorney is inoperative.—GRAHAM *v.* JACKSON (1845), 6 Q. B. 811; 14 L. J. Q. B. 129; 4 L. T. O. S. 331; 9 Jur. 275; 115 E. R. 306.

2999. ——— **Sale effected after.**]—A testator, resident in Jamaica, by his will made a specific bequest of half of certain stock, & afterwards directed his agents in London, who held a power of attorney from him, to sell out part of the whole. Testator died before the sale was made, & the agents, in ignorance of that fact, effected the sale as directed:—*Held:* the legatee was entitled to have the amount of half the stock which was standing in testator's name on the day of his death.—HARRISON *v.* ASHER (1848), 2 De G. & Sm. 436; 17 L. J. Ch. 452; 12 L. T. O. S. 25; 12 Jur. 833; 64 E. R. 196.

Annotation:—**Refd.** Thomas *v.* Thomas (1859), 1 L. T. 208.

3000. ——— ———.]—A. agreed with B. that he would endeavour to sell a picture belonging to B. & that if he did so B. should pay him £100. B. died before the picture was sold. In an action against B.'s administrator:—*Held:* the authority from B. to A. to sell the picture was revoked by B.'s death.—CAMPANARI *v.* WOODBURN (1854), 15 C. B. 400; 24 L. J. C. P. 13; 24 L. T. O. S. 95; 1 Jur. N. S. 17; 3 W. R. 59; 3 C. L. R. 140; 139 E. R. 480.

3001. ——— ——— **No ademption of specific legacy.**]—A testator was one of three part-owners of a ship & had specifically bequeathed his shares to certain persons. The managing owner in testator's lifetime had, as agent for the other part-owners, offered the ship for sale. This offer was validly accepted by a telegram, handed in subsequently to testator's death:—*Held:* there was no ademption by reason of there being no binding contract.—*Re* PEARCE, ROBERTS *v.* STEPHENS (1894), 8 R. 805.

3002. ——— **Death of partner of firm.**]—TASKER *v.* SHEPHERD (1861), 6 H. & N. 575; 30 L. J. Ex. 207; 4 L. T. 19; 9 W. R. 476; 158 E. R. 237.

Annotations:—**Consd. & Distd.** Phillips *v.* Alhambra Palace Co., [1901] 1 K. B. 59. **Refd.** Brace *v.* Calder, [1895] 2 Q. B. 253, C. A.; Friend *v.* Young, [1897] 2 Ch. 421.

3003. ——— **Renewal of lease not completed before.**]—After some negotiations a landlord, by his agent, stated in a letter to a tenant the terms on which he would renew his lease, but added he would expect an answer within a month. The landlord died 7 days afterwards & on the following day the tenant & agent, both of whom were then ignorant of the death, met, & the tenant signed his acceptance of the terms:—*Held:* there was no binding contract.—CARR *v.* LEVINGSTON (1865), 35 Beav. 41; 55 E. R. 809.

3004. Death of agent—Death of one of two joint-agents.]—If a letter of attorney is made to two, & one dies, the authority ceases.—ADAMS *v.* BUCKLAND (1705), 2 Vern. 514; 23 E. R. 929.

Annotations:—**Consd.** Hudson *v.* Hudson (1737), West *temp.* Hard. 155.

3005. ——— **Death of partner of firm.**]—Before 1895, manufacturers had employed F. & Co. to sell goods for them on commission. The course of business was for E. & Co. to send goods to F. & Co., who would forward them to the purchasers, receive the purchase-money, & after deducting their commission, account to E. & Co. for the balance. In Jan., 1895, one of the partners in F. & Co. died, & the business was then carried on by the surviving partner. Shortly before the death F. & Co. had procured an order for goods, none of which were delivered until after the death, when they were sent to the surviving partner, who forwarded them to purchaser & received the purchase-money, but did not account for it. In 1896 E. & Co. obtained judgment against the surviving partner for the balance of the account due to them from F. & Co., but nothing was recovered under that judgment. On a claim by E. & Co. to prove against the estate of the deceased partner, as to the transactions which took place after the death:—*Held:* (1) the contract of agency between F. & Co. & E. & Co. was determined by the death; (2) no "debt or obligation" within Partnership Act, 1890 (c. 39), s. 9, had been incurred while the deceased was a partner; (3) his estate was not liable.—FRIEND *v.* YOUNG, [1897] 2 Ch. 421; *sub nom. Re* FRIEND, FRIEND *v.* FRIEND (1897), 66 L. J. Ch. 737; *sub nom. Re* FRIEND, FRIEND *v.* YOUNG, 77 L. T. 50: 46 W. R. 139; 41 Sol. Jo. 607.

Annotations:—**Foild.** Bagel *v.* Miller, [1903] 2 K. B. 212. **Expld.** North American Land & Timber Co. *v.* Watkins, [1904] 1 Ch. 242. **Refd.** *Re* Boswell, Merritt *v.* Boswell, [1906] 2 Ch. 359. **Mentd.** Seymour *v.* Pickett, [1905] 1 K. B. 715, C. A.; Henry *v.* Hammond, [1913] 2 K. B. 515.

SUB-SECT. 2.—BANKRUPTCY OR WINDING-UP.

See, also, BANKRUPTCY & INSOLVENCY; COMPANIES; MASTER & SERVANT.

3006. General rule.]—Bkpcy. determines a power of attorney.—MARKWICK *v.* HARDINGHAM (1880), 15 Ch. D. 339; 43 L. T. 647; 29 W. R. 361, C. A.

For full anns., *see* BANKRUPTCY & INSOLVENCY.

2998 i. ——— *Death of one of two joint-principals.*]—One of a number of persons, who were to grant a bond as co-obligants, signed it & returned it to the agent for himself & his co-obligants. Before all had signed or any money had been advanced, & while the bond was yet in the hands of the agent, the person who had signed died:—*Held:* the implied mandate to deliver the deed after the other signatures had been obtained fell by the mandant's death, &, the deed being in fact undelivered, his exors. were not bound.—LIFE ASSOCN. OF SCOTLAND *v.* DOUGLAS (1886), 13 R. 910.—**SCOT.**

PART XI. SECT. 3, SUB-SECT. 2.

3006 i. *General rule.*]—B., entitled as one of the next of kin to a portion of a fund devised to trustees, joined with her husband A. in executing a power of attorney to S., empowering him to receive the money. S. received a sum of money under the power of attorney, but on the very day of its receipt this sum was attached in S.'s hands by one who had issued process against A. as an absent or absconding debtor. S., prior to his receipt of the money, had notice that A. had been adjudicated a bkpt. in England. In an action by B. claiming the money in her own right:—*Held:* A.'s bkpcy. determined the power of S. to receive the money, & as it had not been reduced into A.'s possession, it must be treated as if still remaining in the hands of the trustees.—ROPER *v.* SHANNON (1890), 8 N. S. R. 146.—**CAN.**

Sect. 3.—Termination by operation of law: Subsects. 2, 3, 4 & 5.]

3007. ——.]—A creditor went to Paris with the consent & approbation of the sureties to make the best terms he could with the principal debtor, whose solvency was doubtful. After the departure of creditor the sureties became bkpts. The creditor having no notice of the bkpcy. of the sureties, & relying on the authority given to him by them, effected a compromise with principal debtor:—*Held:* the authority was not determined by bkpcy. —*Re* MACDONNELL, *Ex p.* MACDONNELL (1819), Buck, 399.

3008. ——.]—A., having an interest in a fund, executed to the trustee of the fund a power of attorney to sue in respect of it, & afterwards took the benefit of the Insolvent Act:—*Held:* his interest in the fund was thereby divested out of him, & the power of attorney was recalled.—DAWSON *v.* SEXTON (1823), 1 L. J. O. S. Ch. 185.

3009. Formal act requisite to complete authority.]—M. & Co. made a mtge. of a ship at sea, & all the requisites required by the Navigation Acts respecting the transfer of the property in ships at sea were complied with. They also gave a power of attorney to A. to execute the indorsement upon the certificate of registry when the ship should return home. M. & Co. became bkpts. After the bkpcy. the ship returned home, & A. executed the proper indorsements upon the register within 10 days after the ship's return:—*Held:* the power of attorney was not revoked by the bkpcy.—DIXON *v.* EWART (1817), 3 Mer. 322; Buck, 94; 36 E. R. 123.

Annotations:—**Distd.** The John (1830), 2 Hag. Adm. 305. **Consd.** Boyson *v.* Gibson (1847), 4 C. B. 121. **Refd.** The Margaret Mitchell (1858), Sw. 382; De Wolf *v.* Pitcairn (1869), 17 W. R. 914.

3010. Decree of insolvency in colonial court.]—*Semble:* a power of attorney to sell a ship is not revoked by a decree of the grantor's insolvency in a colonial possession, so as to invalidate a *bonâ fide* exercise of the power before notice of the insolvency. —THE MARGARET MITCHELL, No. 2974, *ante*.

3011. Bankruptcy of agent not necessarily revocation.]—MCCALL *v.* AUSTRALIAN MEAT CO., LTD. (1870), 19 W. R. 188.

3012. ——.]—BAILEY *v.* THURSTON & CO., LTD., [1903] 1 K. B. 137; 72 L. J. K. B. 36; 88 L. T. 43; 51 W. R. 162; 10 Mans. 1 C. A.

3013. Bankruptcy of foreign company.] — A contract made between a co., carrying on business in England, & a foreign incorporated co., which had no place of business in England, contained a clause whereby the contract was to be construed according to English law, & the foreign co. agreed to submit itself to the jurisdiction of the English cts. & appointed R. in London as its agent, on whom any writ or other legal process might be served, & such appointment was not to be revocable unless some other agent was appointed, & service of any writ or other process upon such agent was to be deemed good service on the foreign co., which, for this purpose, elected domicil at the office of R. in London. No other agent was appointed, & the foreign co., having become bkpt., refused to carry out the contract, whereupon an action was brought against it & the writ in the action was personally served on R. at his office in London, according to the terms of the contract. An application was made by defts. to set aside the writ as not being properly served according to R. S. C., O. 9, r. 8:—*Held:* (1) it was competent for the parties to agree to a particular mode of service & to appoint a particular person as agent to accept service; (2) the authority of such agent to accept service was not revoked by the bkpcy. of the foreign co.; (3) the service of the writ was good, although not in accordance with the rule.—THARSIS SULPHUR & COPPER CO. *v.* SOCIÉTÉ INDUSTRIELLE ET COMMERCIALE DES METAUX (1889), 58 L. J. Q. B. 435; 60 L. T. 924; 38 W. R. 78; 5 T. L. R. 618.

For full anns., *see* COMPANIES.

Effect of compulsory or voluntary winding up of English companies. *See* COMPANIES; MASTER & SERVANT.

SUB-SECT. 3.—DISSOLUTION OF PARTNERSHIP.

See, also, MASTER & SERVANT.

Death of partner.]—*See* Nos. 3002, 3005, *ante*.

3014. Retirement of partner.]—BRACE *v.* CALDER, [1895] 2 Q. B. 253; 64 L. J. Q. B. 582; 72 L. T. 829; 59 J. P. 693 11 T. L. R. 450; 14 R. 473.

SUB-SECT. 4.—LUNACY.

See, also, LUNATICS & PERSONS OF UNSOUND MIND; MASTER & SERVANT.

3015. General rule.]—*Qu.:* whether an attorney can act under a power of attorney during the mental incapacity of the principal.—BEAUFORT (DUKE) *v.* GLYNN (1856), 3 Sm. & G. 213; 25 L. T. O. S. 171; 1 Jur. N. S. 888; 3 W. R. 463; 65 E. R. 630; *affd.* on another point, 3 W. R. 562, C. A.

3016. —— **Inquisition not conclusive as to date of lunacy.]**—A. granted B. a power of attorney, dated July 4, 1834; in 1837 A. was found by inquisition to have been lunatic from July 1, 1834:—*Held:* the power of attorney was valid notwithstanding.—*Re* WALDEN, *Ex p.* BRADBURY (1839), 4 Deac. 202; Mont. & Ch. 625; 9 L. J. Bcy. 7; 3 Jur. 1108, C. of R.

3017. ——.]—The lunacy of a principal, if so great as to render him incapable of contracting for himself, puts an end to an authority to contract for him previously given to his agent.—DREW *v.* NUNN (1879), 4 Q. B. D. 661; 48 L. J. Q. B. 591; 40 L. T. 671; 43 J. P. 541; 27 W. R. 810, C. A.

Annotations:—**Apld.** Chili Republic *v.* London & River Plate Bank (1894), 10 T. L. R. 658, C. A.; Willis, Faber *v.* Joyce (1911), 104 L. T. 576. **Refd.** Burke *v.* Amalgamated Soc. of Dyers, [1906] 2 K. B. 583.

SUB-SECT. 5.—OTHER CAUSES.

3018. Attainder of principal for treason.]—In a marriage settlement there was a power for D. (who was thereby made tenant for life) to make leases for three lives or 21 years. D. made a lease not by virtue of his power to trustees for 99 years, if he should so long live, in order for the payment of his debts, & in the same deed he constituted the trustees his attorneys to make leases for three lives or 21 years, pursuant to the power in the settlement. D. was outlawed for high treason, & the A.-G. then sought to compel the trustees to execute the power vested in them, by making leases for 21 years or three lives to such nominees as the Crown should appoint:—*Held:* the authority given to the trustees to act as attorneys was destroyed by the

b. Authority of partnership to draw money out of court—Payment to partner after dissolution.]—Pltf., by power of attorney, authorised a firm to draw out money lodged in ct. by deft., &, after the dissolution of the firm, the money was paid by the master to a member of the former firm, upon a receipt signed by him in his own name only, & certified by pltf.'s attorney:—*Held:* the money was properly paid out.—SIEBOLD *v.* CONOLLY (1873), I. R. 8 C. L. 119.—**IR.**

attainder of D.—A.-G. *v.* GRADYLL (1721), Bunb. 92; 145 E. R. 607.

3019. Object of power accomplished—Broker to sell having sold.]—If a man sells goods acting as a broker, the moment the sale is completed he is *functus officio*. The terms of the contract cannot be altered except by the authority of the principal. (LORD ELLENBOROUGH, C.J.).—BLACKBURN *v.* SCHOLES (1810), 2 Camp. 341.

For full anns., *see* S. C. No. 724, *ante*.

3020. —— Agent to effect bill of sale—On bill being executed.]—A bill of sale in its operative part was stated to be given "in consideration of the sum of £10 now paid by H. to C." In the preparation of the bill of sale D. acted as solr. for both H. & C., & on execution of the deed retained with C.'s consent £9 out of the £10 in payment of his bill of costs in the matter, & only handed C. the balance of £1:—*Held:* on execution of the deed, D. no longer held the money as agent for H. or had any duty to perform towards him, but held it as C.'s agent & could with C.'s consent retain the amount of his bill of costs.—*Re* CANN, *Ex p.* HUNT (1884), 13 Q. B. D. 36.

3021. —— Power to act during principal's absence—After principal's return.]—A power of attorney contained a recital that the donor was about to return to Australia, & was "desirous of appointing an attorney or attorneys to act for him during his absence from England." The operative part of the deed, which gave the attorney large powers of antging. the donor's property, contained no mention of the duration of those powers:—*Held:* charges effected by the attorney upon the property of the donor while he was in England were invalid as against him.—DANBY *v.* COUTTS, No. 2435, *ante*.

For full anns., *see* S. C. No. 2435, *ante*.

—— Solicitor.]—*See* SOLICITORS.

3022. Custom.]—By custom of the Irish provision trade, the authority of a broker to sell goods of his principal (in the absence of special authority to the contrary) expires with the day on which it is given. —DICKINSON (DICKENSON) *v.* LILWAL (1815), 4 Camp. 279; 1 Stark. 128.

Annotations:—**Expld.** Trueman *v.* Loder (1840), 11 Ad. & El. 589. **Consd.** Sievewright *v.* Archibald (1851), 17 L. T. O. S. 264.

3023. Destruction of subject-matter.]—By the rules of a mutual assurance assocn., of which both the assured & insurer were members, the policies were to commence on the day the ship was accepted & to continue in force for 12 months from that time. The ship was accepted on Feb. 15, 1829, & in June suffered an average loss. On Oct. 21, 1829, one of the committee, who had a power of attorney to execute policies on behalf of the members, signed a policy on the ship on behalf of the assurer, the fact of the loss being at that time known to all parties: —*Held:* the fact of the loss having occurred before the policy was executed was no revocation of the power of attorney.—MEAD *v.* DAVISON (1835), 3 Ad. & El. 303; 4 Nev. & M. K. B. 701; 1 Har. & W. 156; 4 L. J. K. B. 193; 111 E. R. 428.

3024. ——.]—Where a Scotchman resident out of the jurisdiction was sued *in personam* on the Admlty. side of a cty. ct. for a collision, & his agent in England was served under Cty. Cts. Admlty. Jurisdiction Act, 1868 (c. 71), s. 21:—*Held:* the ct. had no jurisdiction, because at the time of commencement of proceedings deft.'s vessel, to which the cause related, had been lost, & the agency in respect of such vessel had ceased.—THE AGRA CITY (1898), 79 L. T. 307.

Expiration of time.]—*See* Part VIII., Sect. 3, Sub-sect. 1, L. (c).

3025. Appointment of receiver by court.]—The appointment of a receiver & manager of the business of a co. by the ct. in a debenture-holder's action operates as a dismissal of the agents & servants of the co.—REID *v.* EXPLOSIVES CO., LTD. (1887), 19 Q. B. D. 264; 56 L. J. Q. B. 388; 57 L. T. 439; 35 W. R. 509; 3 T. L. R. 588, C. A.

Annotations:—**Consd.** De Grelle, Houdret *v.* Bull (1894), 1 Mans. 118; Midland Counties District Bank *v.* Attwood, [1905] 1 Ch. 357. **Distd.** Measures *v.* Measures, [1910] 1 Ch. 336. **Dbtd.** Whinney *v.* Moss S.S. Co., [1910] 2 K. B. 813, C. A. **Distd.** Parsons *v.* Sovereign Bank of Canada, [1913] A. C. 160, P. C. **Mentd.** Turner *v.* Goldsmith (1891), 60 L. J. Q. B. 247, C. A.; Robinson Printing Co. *v.* Chic, [1905] 2 Ch. 123.

See, further, COMPANIES; RECEIVERS.

3026. Agent of revolutionary Government—Suppression of revolution.]—During a revolution in Sicily the revolutionary Govt. sent two of defts. as envoys to England, & afterwards remitted to them moneys contributed by inhabitants of Sicily with directions to purchase a ship therewith, & defts. applied the moneys accordingly. The lawful sovereign of Sicily after he had re-established his authority filed a bill claiming the ship, which still remained in the port of London. Defts., in their answer, admitted the possession of documents relating to the matters in the bill, but said they held them as the agents & on behalf of the persons who intrusted them with the moneys, & submitted that in the absence of such persons they ought not to be ordered to produce the documents:—*Held:* (1) pltf. represented the contributors of the moneys; (2) the revolutionary Govt. being at an end, defts. had either ceased to be agents or trustees for anyone, or become agents or trustees for pltf.—TWO SICILIES (KING) *v.* WILLCOX (1851), 1 Sim. N. S. 301; 7 State Tr. N. S. 1049; 20 L. J. Ch. 417; 15 Jur. 214; 61 E. R. 116.

Annotations:—**Consd.** U. S. A. *v.* Prioleau (1865), 2 Hem. & M. 559; U. S. A. *v.* McRae (1867), 3 Ch. App. 79. **Expld.** Hennessy *v.* Wright (1888), 4 T. L. R. 597. **Reid.** Austria *v.* Day (1861), 3 De G. F. & J. 217.

Principal ceasing to carry on business.]—*See* Part VIII., Sect. 3, Sub-sect. 3, A., *ante*.

3027. Relation of principal & agent becoming illegal—Outbreak of war—Agent interned.]—In July, 1914, pltf. & defts. entered into a contract by which pltf. became London agent for defts. & was to receive a commission. Pltf. was born in Germany, & after the outbreak of the European war he was interned in Sept., 1914, but as he was an Alsatian of French extraction with anti-German sympathies he was released in Oct., 1914. In an action to recover damages for breach of contract to pay commission:—*Held:* (1) the contract was not dissolved by the outbreak of war, nor was its basis destroyed either by the outbreak of war or by pltf.'s temporary internment; (2) pltf. was entitled to maintain the action. — NORDMAN *v.* RAYNER & STURGES (1916), 33 T. L. R. 87.

Annotation:—**Expld. & Distd.** Marshall *v.* Glanville, [1917] 2 K. B. 87.

3028. —— —— Principal alien enemy.]—An agreement provided that pltfs., a British co., should be sole agents of defts., a German co., for

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PART XI. SECT. 3, SUB-SECT. 5.

3028 i. *Relation of principal & agent becoming illegal—Outbreak of war—Principal alien enemy.*]—A person who had received a foreign postal money order presented it for payment after hostilities had broken out with the country where the order had been purchased, & payment was refused:—*Held:* the outbreak of war revoked the authority of the post office as agent of the foreign State to pay the order.—COLLISON & Co. *v.* COLONIAL GOVT. (1900), 17 Supreme Court (Cape); 186; 10 Cape Times Reports, 249.—**S. AF.**

c. *Misconduct of agent—Disobedience.*]—Pltf. brought an action to recover $500 intrusted to deft. to purchase 500 shares of mining stock. This deft. failed to do, but bought 2,000 shares of pooled stock in same co. in his own name:—*Held:* deft. did not buy any shares for pltf., & in not carrying out his instructions exactly his authority was revoked, & pltf. was

Sect. 3.—Termination by operation of law : Sub-sect. 5. Sect. 4: Sub-sect. 1.]

Great Britain & the British Colonies for the sale of certain machines made by defts., at a commission on machines sold through their agency :—*Held :* (1) the agency constituted by the agreement was terminated by the outbreak of the European war ; (2) defts. were entitled to such sum in respect thereof as was due to them from pltfs. on that date, & also to such further sum in respect thereof as had since become due & to the return of all unsold machines, if any.—STEVENSON (HUGH) & SONS, LTD. *v.* AKT. FÜR CARTONNAGEN-INDUSTRIE, [1917] 1 K. B. 842 ; 86 L. J. K. B. 516 ; 115 L. T. 594 ; 33 T. L. R. 84 ; 61 Sol. Jo. 146, C. A.

Annotation :—**Distd.** Tingley *v.* Muller, [1917] 2 Ch. 144, C. A.

3029. —— —— —— **Power irrevocable.**]—An irrevocable power of attorney to sell land & give receipts for the purchase-money is not avoided by the donor of the power subsequently becoming an alien enemy.

Deft., a German by birth but for many years resident in England, although never naturalised, being about to proceed to Germany, executed a power of attorney on May 20, 1915, by which he appointed his solr. his attorney to sell his leasehold house & to execute such transfer & deeds as were necessary. The power of attorney was made irrevocable for 12 months. On May 26, deft. obtained a Govt. permit from the police to travel to Tilbury with the object of embarking for Germany by way of Flushing, & started on that day. On June 2, 1915, the leasehold premises were sold to pltf. by public auction, & a deposit was paid & an agreement signed by him. There was no evidence as to the date when deft. reached Germany, but it was some time between May 26 & June 11, 1915. In an action brought by pltf. for a declaration that the agreement for sale had been dissolved by the act of deft. in becoming an alien enemy :—*Held :* (1) the proper inference to be drawn from the facts was that at the date of the sale deft. had arrived & was resident in Germany & was therefore an alien enemy ; (2) the power of attorney having been given by deft. at a time when he was not an alien enemy, & being irrevocable for a year, was not avoided by his subsequently becoming an alien enemy ; (3) the agreement entered into by the attorney in execution of the power did not involve any intercourse with the enemy, & was not within the mischief of the common law or of the Trading with the Enemy Proclamation of Sept. 9, 1914, or of the Trading with the Enemy Acts, & was accordingly valid ; (4) the sale could legally be carried out by the attorney &, if necessary, be completed by a vesting order under Trustee Act, 1893 (c. 53), or with the assistance of the custodian under Trading with the Enemy Amendment Act, 1916 (c. 32), s. 4 ; (5) pltf. was not entitled to have the agreement rescinded.—TINGLEY *v.* MÜLLER, [1917] 2 Ch. 144 ; 86 L. J. Ch. 625 ; 116 T. L. R. 482 ; 33 T. L. R. 369 ; 61 Sol. Jo. 478, C. A.

See, further, ALIENS ; CONTRACT ; INSURANCE ; SALE OF GOODS ; SHIPPING & NAVIGATION.

3030. Effect of subsequent legislation—Military Service Acts.]—Defts., a firm of drapers, appointed pltf. as their representative for a certain district. He was to have "a commission of 7½ per cent. on the net amount of trade done on these grounds direct or indirect." All accounts opened by him on such grounds were to be retained by him as long as he continued to represent defts., but "should any alteration be made in representation on part of these grounds" pltf.'s consent in writing was to be obtained before relinquishing any particular accounts. The agreement was terminable by 6 months' notice on either side. Upon his employment ceasing by operation of the Military Service Acts pltf. sued for commission :—*Held :* pltf. not entitled to commission upon trade done after the termination of his employment.—MARSHALL *v.* GLANVILL (GRANVILLE), [1917] 2 K. B. 87 ; 86 L. J. K. B. 767 ; 116 L. T. 560 ; 33 T. L. R. 301.

SECT. 4.—IRREVOCABLE AUTHORITY.

SUB-SECT. 1.—AUTHORITY COUPLED WITH INTEREST.

3031. General rule.]—An authority coupled with an interest in the appointee cannot be counter-

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entitled to judgment with costs.—JOHNSON *v.* BIRKETT (1910), 16 O. W. R. 445 ; 21 O. L. R. 319 ; 1 O. W. N. 917. —**CAN.**

d. —— *Offer to purchase.*]—Pltf. entered into an arrangement with defts. to sell a mine on commission, the relation between the parties being practically that of principal & agent. Pltf. subsequently wrote defts. that he had failed to bring about a sale, & making an offer in connection with another person whose name was mentioned to purchase the property for a specified sum :—*Held :* the relation established under the first arrangement was terminated by the offer to purchase.—FLEMING *v.* WITHROW (1906), 38 N. S. R. 492 ; 1 E. L. R. 6.—**CAN.**

e. —— ——.]—Pltf. was not a land broker or agent. Deft. asked him to sell land & promised him a commission. Pltf. offered to buy himself at deft.'s price :—*Held :* the offer to purchase on his own behalf was inconsistent with the continuance of the relation of principal & agent, & upon the offer being made the agency was determined. —WESTERGAARD *v.* WEYL (1912), 21 W. L. R. 403 ; 7 D. L. R. 847.—**CAN.**

f. —— *Failure to give proper accounts.*]—Pltfs., stockbrokers carrying on business in Belfast, employed agents at a fixed rate of commission to deal for them upon the London & Glasgow Stock Exchanges. Deft., one of their clients, knew that they employed such agents, but did not know on what terms. Pltfs., in buying & selling for deft., charged him commission at a special rate upon the "net" price, which was composed of the price paid on the London & Glasgow Stock Exchange, with the addition of their agent's commission, but there was nothing to show that deft. knew how the price was made up. Deft., having refused to pay the stockbrokers the balance due on account between them :—*Held :* such course of dealing did not put an end to the relations of principal & agent, but was solely a breach of the contract of agency which could be rectified by taking a new account between the parties. *Johnston* v. *Kearley*, [1908] 2 K. B. 514, cited.—HENDERSON & BOYLE *v.* MARTIN (1911), 46 I. L. T. 13.—**IR.**

g. —— *Removal by court.*]—An agent imposed by will upon the devisee of an estate may be removed by the ct. if he conduct himself improperly.—LAWLESS *v.* SHAW (1835), Lloyd & G. *temp.* Sugd. 154 ; Lloyd & G. *temp.* Plunk. 558 ; Craw. & D. Abr. 480, H. L.—**IR.**

h. *Effluxion of time.*]—Deft., A.'s agent to find a purchaser for land, induced pltf., who to his knowledge had little available cash, to enter into a contract to buy the land. This contract was dated Sept. 13, 1907, & provided for payment of a deposit of £100 on Oct. 1, 1907, & that time should be the essence of the contract. A cheque given by pltf. to deft. before the latter date was not met, & of this A. was informed. On Oct. 12 A. wrote to deft. that he hoped pltf. had attended to same by that time. On Dec. 3 deft. took from pltf. a promissory note & undertook to fix up the deposit with A., & on the following day deft. wrote to A., enclosing what purported to be the deposit, less his commission on the sale. Before receipt of deft.'s letter, however, A. wrote cancelling the contract on account of non-payment of the deposit : *Held :* (1) apart from the provision in the contract as to time, A. was entitled to decline to receive the deposit on Dec. 4 ; (2) no express revocation of the authority to receive the deposit was necessary in the circumstances ; (3) it required some new authority or a recognition of the old authority to render valid the payment to deft. on Dec. 4.—WALDER *v.* CUTTS (1909), V. L. R. 261.—**AUS.**

PART XI. SECT. 4, SUB-SECT. 1.

3031 i. *General rule.*]—BOUCHARD *v.* WEEKS (1915), 21 R. L. N. S. 310.—**CAN.**

manded.—GIBSON *v.* MINET (1824), 2 Bing. 7; 9 Moore, C. P. 31; 2 L. J. O. S. C. P. 99; 130 E. R. 206.

Annotation :—**Refd.** Rodick *v.* Gandell (1852), 1 De G. M. & G. 763.

3032. ——.]—Where an agreement is entered into upon a sufficient consideration, whereby an authority is given for the purpose of securing some benefit to the donee of the authority, the authority is said to be coupled with an interest & is irrevocable. —SMART *v.* SANDARS, No. 3042, *post.*

Annotations :—**Expld.** Taplin *v.* Florence (1851), 10 C. B. 744; The Margaret Mitchell (1858), Sw. 382. **Apprvd.** De Comas *v.* Prost (1865), 3 Moo. P. C. C. N. S. 158, P. C. **Distd.** Frith *v.* Frith, [1906] A. C. 254, P. C. **Refd.** Yates *v.* Hoppe (1850), 14 Jur. 372; Read *v.* Anderson (1882), 10 Q. B. D. 100.
For full anns., *see* S. C. No. 3042, *post.*

3033. Effect of death.]—A power of attorney, though coupled with an interest, is instantly revoked by the death of the grantor, & an act afterwards *bonâ fide* done under it by the grantee, before notice of the death of the grantor, is a nullity.—WATSON *v.* KING (1815), 4 Camp. 272; 1 Stark. 121.

Annotations :—**Consd.** Smart *v.* Sandars (1848), 5 C. B. 895. **Distd.** Carter *v.* White (1882), 20 Ch. D. 225; **Refd.** Gaussen *v.* Morton (1830), 5 Man. & Ry. K. B. 613. **Mentd.** Rundle *v.* Beaumont (1828), 1 Moo. & P. 396; Doe d. Knight *v.* Nepean (1833), 5 B. & Ad. 86; Gillett *v.* Abbott (1838), 7 Ad. & El. 783.

3034. —— **Vested interest in agent.**]—M., being owner in her own right of a sum of stock standing in her name, shortly before her death executed a power of attorney in the ordinary form recognised by the bank for transfer of the sum of stock into the name of her sister E. M. died on the following day, & 2 days after her death the sum was transferred into the name of E. under the power. Evidence was given of the intention of M. to make over all her property at her death to E. The next of kin of M. contended that by the death of M. the power which was a revocable instrument in her lifetime was actually revoked, & that the transfer was made without any valid authority & the stock formed part of M.'s personal estate. On the evidence :—*Held :* (1) everything necessary to vest in E. the legal interest in the stock had been done by M.; (2) the gift to E. was valid as against M.'s next of kin.—KIDDILL *v.* FARNELL (1857), 3 Sm. & G. 428; 26 L. J. Ch. 818; 29 L. T. O. S. 324; 3 Jur. N. S. 786; 5 W. R. 324; 65 E. R. 723.

Annotations :—**Folld.** Dilrow *v.* Bone (1862), 31 L. J. Ch. 417. **Mentd.** Bromley *v.* Brunton (1868), L. R. 6 Eq. 275.

See also, Nos. 3050, 3051, 3053, *post.*

3035. Agent must have interest in subject-matter.]—A., being indebted to B., on going abroad left a general power of attorney with him, & sent an order to C., to whom he had consigned goods for sale, to remit proceeds to B. on his account. C. sold the goods & remitted proceeds to B. afterwards, & before the money was received by B. A. committed an act of bkpcy. :—*Held :* B. might apply proceeds in satisfaction of the debt due to him from A.

When the order was given bkpt. had a power to give it, &, being coupled with an interest, it was not countermanded by his subsequent bkpcy. This money was subject to deft.'s claim before it could vest in the assignees (LORD ELLENBOROUGH, C.J.).—ALLEY *v.* HOTSON (1815), 4 Camp. 325.

3036. —— **Authority to collect partnership debts on dissolution.**]—B. & P. dissolved partnership & appointed C., B.'s brother, agent to receive the joint debts due to the partnership for the benefit of the joint-creditors. Notice of this arrangement was given to T., who agreed to it & promised to pay his debt to C. Afterwards P. countermanded the authority given to C. & ordered T. to pay the money to him, P. T. did so & received a receipt from P. in the joint names of B. & P. B. afterwards sued T. for the money & joined P. in the action. The ground for the action was that, as T. knew the partnership was dissolved & that C. had been appointed agent to receive the partnership debts, T. was not justified in paying the money to P. :—*Held :* (1) since C. had an authority but not coupled with any interest, that authority was revocable; (2) it was competent to either B. or P. to countermand the authority & to demand the debt, before C., their agent, had done any act which in point of law would preclude a revocation.—BRISTOW & PORTER *v.* TAYLOR (1817), 2 Stark. 50.

Annotation :—**Refd.** Nottidge *v.* Prichard (1834), 2 Cl. & Fin. 379.

3037. —— **Authority to sell in discharge of debt.**]—A. being indebted to B., in order to discharge the

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3035 i. *Agent must have interest in subject-matter.*]—Pltf. received instructions by letter from defts. to purchase cotton on their behalf. This letter was received by pltf. before a telegram sent by defts. next day revoking the order reached him. Pltf. replied by letter stating that the telegram had arrived too late, & that the purchase had already been made. Pltf. had merely appropriated to defts. a contract entered into by himself with a third party the day before defts.' order reached him :—*Held :* pltf. had no such interest in the subject-matter of the agency as to prevent its revocation.—LAKHMICHAND RAMCHAND *v.* CHOTOORAM MOTRAM (1900), I. L. R. 24 Bom. 403.—**IND.**

3035 ii. —— *Authority to sell on commission.*]—Deft. covenanted to give J., as trustee for pltf., a mtge. for $5,000, & to furnish pltf. all the goods manufactured at his factory & to manufacture same to satisfaction of pltf., & to ship same to him as pltf. directed, & to pay pltf. a *del credere* commission of 7½ per cent. for selling same & interest on all moneys advanced. Pltf. covenanted to advance in cash to deft. "75 per cent. of the wholesale trade value of such goods, & for that purpose the goods were to be invoiced to him at a certain value." It was also mutually agreed between the parties that all the goods manufactured at the factory were to be sold only by or through pltf., & that the agreement was to be in force for two years unless terminated by notice in writing, which either party might give in default of manufacturing for three months or of making such advances, such notice to be made by a month's notice in writing, & that the mtge. should become payable at the time the agreement was terminated, although the two years had not expired : —*Held :* the making of such an arrangement was a good consideration to make the authority to sell irrevocable.—MITCHELL *v.* SYKES (1883), 4 O. R. 501. —**CAN.**

3035 iii. —— *Unlimited authority to sell—Attempt to substitute limited authority.*]—Deft. consigned goods to a firm in L. for sale, & in respect of each consignment he received an advance from pltf., agent of the L. firm, & signed a consignment note, which contained the following passage : "I hereby authorise you to sell the above goods at the best price obtainable without reference to me, & I give you full discretion & power to act on my behalf to the best of your judgment in regard to such sale & in all matters connected with the management of this consignment. Should there be any short fall after realisation of the above consignment, I hereby authorise you to draw on me for the amount, & I engage to honour such draft & to pay it on presentation." Pltf. guaranteed the payment of the redrafts to the L. firm, on whose account he made the advances to deft. Short falls having occurred on certain consignments & the L. redrafts having been dishonoured, pltf. paid them, & sued to recover the amount from deft. Consignments had been sold at prices less than certain limits which had been fixed by deft. subsequent to the receipt of the advances & the signature of the consignment note :—*Held :* deft. had no right (having regard to the terms of the consignment note & the course of dealing between the parties) so to impose limits of price, & pltf. was entitled to recover.—KONDAYYA CHETTI *v.* NARASIMHULU CHETTI (1896), I. L. R. 20 Mad. 97.—**IND.**

3035 iv. —— *Authority to settle action.*]—D., in security of a loan, gave W. written authority to settle an action which D. had against M. :—*Held :* an authority coupled with an interest which could not be revoked except by consent.—DWYER *v.* HERMAN (1881), 2 N. S. W. 280.—**AUS.**

Sect. 4.—Irrevocable authority: Sub-sects. 1, 2, 3 & 4.]

debt authorised him by power of attorney to sell certain lands:—*Held:* this, being an authority coupled with an interest, could not be revoked.—GAUSSEN *v.* MORTON (1830), 10 B. & C. 731; 5 Man. & Ry. K. B. 613; 8 L. J. O. S. K. B. 313; 109 E. R. 622.

Annotations:—**Consd.** Smart *v.* Sandars (1848), 5 C. B. 895. **Refd.** *Re* Hannan's Empress Gold Mining & Developing Co., *Ex p.* Carmichael (1896), 65 L. J. Ch. 902, C. A.

3038. —— Authority to receive rent.]—Deft. leased a farm to pltf., reserving rent payable quarterly. The deed contained the following clause: "The landlord further agrees & orders that R. K., or his appointed agent, is to receive all rents from the tenant at all times when it becomes due during the term hereby granted, & his receipt to be a full & sufficient discharge from all liability thereof";—*Held:* the agreement or authority for R. K. to receive the rent was revocable, since he had no interest therein.—VENNING *v.* BRAY (1862), 2 B. & S. 502; 31 L. J. Q. B. 181; 6 L. T. 327; 26 J. P. 364; 8 Jur. N. S. 1039; 10 W. R. 561; 121 E. R. 1159.

3039. —— Authority to obtain ship's papers—Authority to collect debts on commission.]—Pltfs. had been appointed managers of a ship for five years with authority to apply for the ship's papers, etc., which were in defts.' hands, & in case of a refusal to hand them over to take proceedings to obtain them. Within the period the authority was revoked & shortly afterwards a writ was issued claiming from defts. possession of the papers:—*Held:* such authority was not an authority coupled with an interest & could be revoked at pleasure.

I cannot accede to the proposition that if a man authorises an agent to collect debts for him at a commission for 5 years that authority cannot be revoked (VAUGHAN WILLIAMS, J.).—DOWARD, DICKSON & Co. *v.* WILLIAMS & Co. (1890), 6 T. L. R. 316.

3040. —— Authority to apply for shares.]—P. promoted a co. for the purpose of purchasing from him & working a mining property. On Feb. 21, 1896, C. signed an underwriting letter addressed to P., by which he agreed in consideration of a commission, to subscribe for 1,000 shares in the co., such number to be reduced according to the number of shares taken by the public. C. further agreed that the agreement & application should be irrevocable &, notwithstanding any repudiation by him, should be sufficient to authorise P. to apply for shares on behalf of C., & the co. to allot them. P. by letter accepted these terms. The co. was incorporated on Mar. 24, & the subscription list was advertised to open on Mar. 27, & closed on the 30th. On Mar. 27 C., who had applied for 1,000 shares, stopped the cheque which he had given for the deposit, & on the 30th wrote to P., & to the secretary of the co., repudiating the agreement. P., on Apr. 2, applied on behalf of C. for 980 shares, which, in the events which had happened, was the number he was bound to take according to the terms of the letter, & the co. allotted these shares to C., & put him on the register in respect of them:—*Held:* C. was rightly placed on the register & was not entitled to have his name removed, for the authority given to P., by the underwriting letter to apply for shares on behalf of C., was an authority coupled with an interest & not revocable.—*Re* HANNAN'S EMPRESS GOLD MINING & DEVELOPMENT CO., CARMICHAEL'S CASE, [1896] 2 Ch. 643; 65 L. J. Ch. 902; 75 L. T. 45, C. A.

Annotations:—**Folld.** *Re* Consort Deep Level Gold Mines, *Ex p.* Stark, [1897] 1 Ch. 575, C. A. **Distd.** Frith *v.* Frith, [1906] A. C. 254, P. C.

3041. —— Agent employed at salary.]—The ordinary case of an agent employed at a salary is not within the rule as to an authority coupled with an interest being irrevocable.—FRITH *v.* FRITH, [1906] A. C. 254; 75 L. J. P. C. 50; 94 L. T. 383; 54 W. R. 618; 22 T. L. R. 388, P. C.

3042. Effect of advances by agent.]—The authority of a factor to sell goods consigned to him for sale does not become, by reason of the factor making subsequent advances, an authority coupled with an interest, so as to make the authority to sell irrevocable; there is an independent authority, & an interest subsequently arising. The making of a subsequent advance may be a good consideration for an agreement that the authority to sell shall be no longer revocable; but such effect will not arise independently of agreement, express or implied from usage.—SMART *v.* SANDARS (1848), 5 C. B. 895; 17 L. J. C. P. 258; 11 L. T. O. S. 178; 12 Jur. 751; 136 E. R. 1132.

Annotations:—**Apld.** De Comas *v.* Prost (1865), 3 Moo. P. C. C. N. S. 158, P. C.; Read *v.* Anderson (1882), 10 Q. B. D. 100. **Distd.** Frith *v.* Frith, [1906] A. C. 254, P. C. **Refd.** Taplin *v.* Florence (1851), 10 C. B. 744. **Mentd.** Yates *v.* Hoppe (1850), 14 Jur. 372; Clerk *v.* Laurie (1857), 2 H. & N. 199, Ex. Ch.; The Margaret Mitchell (1858), Sw. 382.

3043. ——.]—Mere advances made by a factor, whether at the time of his employment as such, or subsequently, cannot have the effect of altering the revocable nature of an authority to sell, unless the advances are accompanied by an agreement that the authority shall not be revocable. Whether such agreement has been made, or may be properly inferred, is a question for the jury.—DE COMAS *v.* PROST (1865), 3 Moo. P. C. C. N. S. 158; 12 L. T. 682; 11 Jur. N. S. 417; 13 W. R. 595; 16 E. R. 59, P. C.

3044. Effect of satisfaction of agent's interest.]—J. S. agreed to put a miscellaneous collection of property into the hands of agents for sale, from the proceeds of which they were to retain money previously advanced by them to him. Part of the property was delivered & sold, but it realised less than the sum advanced. J. S. refused to part with the remainder of his collection:—*Held:* (1) J. S., if he satisfied the claims of his agents, was at liberty to countermand the sale of his property; (2) the advance of the money to J. S. was not made on the security of the property mentioned in the contract.—CHINNOCK *v.* SAINSBURY (1860), 30 L. J. Ch. 409; 3 L. T. 258; 6 Jur. N. S. 1318; 9 W. R. 7.

SUB-SECT. 2.—POWERS AMOUNTING TO EQUITABLE ASSIGNMENT OR SPECIFIC APPROPRIATION.

See BANKRUPTCY & INSOLVENCY; CHOSES IN ACTION; TRUSTS & TRUSTEES.

3042 i. *Effect of advances by agent.*]—A factor, after countermand of his authority to sell, is not at liberty to sell goods in his possession to recoup himself advances previously made to the owner; & if he does sell, the measure of damages in an action for the conversion will be the value of the goods, free from any deduction on account of the debt.—OSBORNE *v.* SYNNOT (1877), 3 V. L. R. 148.—**AUS.**

3042 ii. ——.]—An authority is revocable even where advances have been so made, unless the advances are made upon the footing of an agreement rendering the authority irrevocable. Such agreement may be express or may be inferred from the circumstances. *Smart* v. *Sandars* (1848), 5 C. B. 895, & *De Comas* v. *Prost* (1865), 3 Moo. P. C. C. N. S. 158, cited.—*Re* M. (1909), 10 S. R. (N. S. W.) 175.—**AUS.**

SUB-SECT. 3.—POWERS GIVEN FOR CONSIDERATION.

3045. General rule.]—A power of attorney is a revocable instrument, unless given for valuable consideration (LORD ELDON, C.).—BROMLEY *v.* HOLLAND (1802), 7 Ves. 3, at p. 28 ; 32 E. R. 2, at p. 12.

For full anns., *see* DEEDS & OTHER INSTRUMENTS.

3046. Authority to pay over proceeds of sale of principal's property.]—A direction to an agent to pay over the proceeds of a sale is not revocable, if founded upon a valuable consideration.

The estate of T., which was in mtge. to pltf., being advertised for sale by pltf., the following letter was written by T. to deft. : "I, the undersigned T., authorise & empower C. to enter upon my lands, & to seize my coombs & farming stock, & sell & dispose of same, without being deemed a trespasser, which entry & sale I declare to be for the benefit of myself & M." (pltf.). The sale was put off. Afterwards T. wrote to deft. a letter, in which he said, "having seen an advertisement of the sale of my property I give you notice not to pay over to M., but to keep the money in your hands for my use." In an action for money had & received :—*Held :* pltf. entitled to recover.

Upon the true construction of this document, it is an authority to deft. to pay over the money to pltf., & not merely the expression of an intention so to apply it. Pltf. held a mtge. upon T.'s land, the sale of which was postponed in consequence of this arrangement. The postponement may have been for a fortnight, or till some purchaser had been treated with. Verdict for pltf. (LORD TENTERDEN, C.J.).—METCALFE (METCALF) *v.* CLOUGH (1828), 2 Man. & Ry. K. B. 178 ; 6 L. J. O. S. K. B. 281.

3047. Effect of failure of consideration.]—A creditor at the solicitation of a certificated bkpt. executed a power of attorney to A. to receive the dividends on his debt for bkpt.'s use, bkpt. undertaking to pay the debt in full, & for that purpose giving creditor a bill of exchange, which, however, was never paid. A second commission issued against bkpt., under which the assignees claimed to be entitled to the dividends under the first commission by virtue of the power of attorney :—*Held :* the power of attorney was revocable by the creditor, the consideration failing for which it was given.—*Re* GOWETT & LEIGH, *Ex p.* SMITHER (1836), 1 Deac. 413, C. of R.

3048. Consideration must be pleaded.]—An action was brought by the assignees of a bkpt., charging deft. with having been guilty of improper conduct in selling certain goods consigned to him by bkpt. before bkpcy. for purposes of sale by deft. at not less than invoice prices. After the bkpcy. pltfs. gave deft. notice not to sell under invoice prices without further order. Deft. pleaded that bkpt. had given him an authority which rescinded the original contract, under which he received the goods to sell them at a certain price, & that, in consideration of certain advances made by him, he had authority to sell the goods at such prices as he should consider best, & that he sold the goods accordingly :—*Held :* the plea was bad for not stating any sufficient consideration for any agreement depriving bkpt. or the assignees of their right to revoke the authority to deft. to sell.—RALEIGH *v.* ATKINSON (1840), 6 M. & W. 670 ; 9 L. J. Ex. 206 ; 151 E. R. 581.

Annotation :—**Consd.** Smart *v.* Sanders (1848), 5 C. B. 895.

3049 Money paid to agent for specific purpose.]—Where money is paid by A. to B., to be applied by B. pursuant to a binding contract between them, A. cannot revoke its destination.

A., the drawer of an accommodation bill, shortly before its maturity handed over money to B., the acceptor, for the purpose of meeting the bill. A. having become bkpt. before the bill matured :—*Held :* the money having been handed over to B. in pursuance of a binding contract, upon a good consideration, namely, an implied contract of indemnity, the bkpcy. of A. was no revocation of B.'s authority to apply the money in satisfaction of the bill.—YATES *v.* HOPPE (1850), 9 C. B. 541 ; 19 L. J. C. P. 180 ; 15 L. T. O. S. 25 ; 14 Jur. 372 ; 137 E. R. 1003.

3050. Authority to fill up blank acceptance given for value.]—Where value is given for a blank acceptance, the authority to fill it up, being coupled with an interest, is not revoked by death ; but where there is no such interest, the authority to fill up & negotiate is terminated by the death of the acceptor.—HATCH *v.* SEARLES, STANWAY'S CASE, CONWAY'S CASE (1854), 2 Sm. & G. 147 ; 22 L. T. O. S. 280 ; 2 W. R. 242 ; 65 E. R. 342 ; *affd.* 24 L. J. Ch. 22.

Annotations :—**Apld.** Carter *v.* White (1882), 20 Ch. D. 225. **Distd.** France *v.* Clark (1884), 26 Ch. D. 257, C. A. **Refd.** Faulks *v.* Atkins (1893), 10 T. L. R. 178.

3051. ———.]—A person to whom an acceptance, blank as to the drawer's name, is delivered for value can complete the bill by filling in his own name as drawer even after the acceptor's death.

The right to complete the bill is not a mere authority, but a right founded on a contract, & being a contract, it does not come to an end by the death of the acceptor (FRY, L.J.).—CARTER *v.* WHITE (1883), 25 Ch. D. 666 ; 54 L. J. Ch. 138 ; 50 L. T. 670 ; 32 W. R. 692, C. A.

Annotations :—**Folld.** *Re* Wolmershausen, Wolmershausen *v.* Wolmershausen (1889), 62 L. T. 541. **Mentd.** Barber *v.* Mackrell (1892), 68 L. T. 29, C. A. ; Chamberlain *v.* Young, [1893] 2 Q. B. 206, C. A.

SUB-SECT. 4.—AUTHORITY FORMING PART OF SECURITY.

3052. General rule.]—There is a difference in cases of powers of attorney ; in general they are revocable from their nature, but there are these

PART XI. SECT. 4, SUB-SECT. 3.

3045 i. *General rule.*]—Pltfs. were real estate agents in whose hands deft. placed land for sale on commission. Pltfs. found a purchaser, but deft. declined to sell, settled with the purchaser for his trouble, & made with pltfs. an agreement under which, if deft. sold the land himself, he was to pay pltfs. their usual commission. Pltfs. thereafter found another purchaser, but again deft. declined to sell, whereupon pltfs. made no more efforts to find a purchaser. After the time limit fixed in the agreement had expired deft. sold the land & offered pltfs. a sum by way of commission, which was refused as being insufficient. In an action for damages for breach of the agreement :—*Held :* pltfs. had under the agreement foregone the commission they were then entitled to in consideration that they should have the sole right to sell the land within the time limit mentioned ; their agency was therefore not an ordinary agency revocable at will of the principal, but one based on a valuable consideration, & on deft. refusing the second purchaser he became liable to pltfs. for breach of contract.—RICHARDSON *v.* MCCLARY (1906), 3 W. L. R. 141 ; 16 Man. L. R. 69.—**CAN.**

3045 ii. ——— *Qualifications on.*]—A power of attorney, purporting to be irrevocable, authorising the agent "forthwith" to sell the principal's assets, & pay proceeds to his creditors, who agree not to sue him until after the distribution of such assets, but containing no formal assignment of such assets or release of the principal after distribution of such assets, may be revoked by the principal after the lapse of a reasonable time for such realisation, if such revocation does not prejudice the agent.

To make a power irrevocable there must be consideration for the undertaking (DE VILLIERS, C.J.).—KOCH *v.* MAIR, 11 Supreme Court, 71 ; 4 Cape Times Reports, 88.—**S. AF.**

PART XI. SECT. 4, SUB-SECT 4.

3052 i. *General rule.*]—An authority to an agent to receive purchase-money of an estate sold by him is revocable, not-

Sect. 4.—Irrevocable authority: Sub-sects. 4, 5 & 6. Sect. 5.]

exceptions. Where a power of attorney is part of a security for money, there it is not revocable: thus where a power of attorney was made to levy a fine as part of the security, it was held not to be revocable; & the principle is applicable to every case where a power of attorney is necessary to effectuate any security; such power of attorney is not revocable.—WALSH *v.* WHITCOMB, No. 2970, *ante*.

Annotations:—**Consd.** Smart *v.* Sandars (1848), 5 C. B. 895. **Refd.** Gaussen *v.* Morton (1830), 5 Man. & Ry. K. B. 613.

3053. Authority to take possession of property & collect rents thereof.]—A., having joined as a surety for B. in a bond to C. for securing the payment of interest of a principal sum secured by a mtge. from B. to C., & having also executed a warrant of attorney as a collateral security with the bond, afterwards executed to C. a letter of attorney authorising C. to take possession of certain freehold lands & hereditaments of which he was seised in fee-simple, & to hold such possession, & receive & take rents & profits thereof, until he should be paid the interest secured by the bond & warrant of attorney: —*Held*: (1) the letter of attorney operated not merely as a letter of attorney, but also as a charge on the freehold estates; (2) C. was entitled to retain possession of the freehold estates until, by means of rents & profits, all arrears of interest should be satisfied, notwithstanding the death of A. & the revocation by that event of the power of attorney.—SPOONER *v.* SANDILANDS (1842), 1 Y. & C. Ch. Cas. 390; 62 E. R. 939.

Annotations:—**Apld.** Cradock *v.* Scottish Provident Institution (1893), 63 L. J. Ch. 15. **Consd.** Matthews *v.* Usher (1899), 68 L. J. Q. B. 988; Frith *v.* Frith, [1906] A. C. 254, P. C.

3054. Principal may be restrained from revoking authority.]—Deft., a retired officer in the army, having received a pension assigned same to pltf. to secure an annuity for him. He also executed a power of attorney in the form employed by the War Office, empowering pltf. to receive the pension & pay himself the annuity. After two payments of the pension deft. revoked the power by personally going to the office & receiving the pension. Deft. was ordered to execute a proper power of attorney to enable pltf. to receive the pension, & an injunction was granted against deft.'s revoking the power or doing any act whereby pltf.'s right might be interfered with.—KNIGHT *v.* BULKELEY (1859), 33 L. T. O. S. 7; 5 Jur. N. S. 817.

Annotations:—**Consd.** Dent *v.* Dent (1867), L. R. 1 P. & D. 366. **Apld.** Willcock *v.* Terrell (1878), 3 Ex. D. 323, C. A.; Crowe *v.* Price (1889), 58 L. J. Q. B. 215, C. A.

SUB-SECT. 5.—AGENT BECOMING PERSONALLY LIABLE.

3055. General principle.]—Where a principal directs his agent to pay a sum of money to a third person upon certain terms, & suffers the agent to make himself personally responsible for it, he cannot afterwards retract the authority & maintain an action against the agent for the money, if the terms upon which he was to pay it were complied with.—STEDMAN *v.* BYWATER (1844), 3 L. T. O. S. 22.

3056. *S. P.* HODGSON *v.* ANDERSON (1825), 3 B. & C. 842; 5 Dow. & Ry. K. B. 735; 107 E. R. 945.

Annotations:—**Consd.** Crowfoot *v.* Gurney (1832), 9 Bing. 372. **Apld.** Hutchinson *v.* Heyworth (1838), 9 Ad. & El. 375. **Expld.** Walker *v.* Rostron (1842), 9 M. & W. 411. **Foll.** Hamilton *v.* Spottiswoode (1849), 4 Exch. 200.

3057. By usage of trade.]—The employment of an agent to make a bet in his own name on behalf of his principal may imply an authority to pay the bet if lost, & on the making of the bet that authority becomes irrevocable, if the agent becomes liable as a matter of business to make good a lost bet at the risk of losing his character & customers.

If, as part of the contract of employment between principal & agent, the principal has expressly or impliedly bargained not to revoke the authority, & to indemnify the agent for acting in the ordinary course of his trade & business, he cannot be allowed to break his contract (BOWEN, L.J.).—READ *v.* ANDERSON (1884), 13 Q. B. D. 779; 53 L. J. Q. B. 532; 51 L. T. 55; 49 J. P. 4; 32 W. R. 950, C. A.

Annotations:—**Expld.** Bridger *v.* Savage (1885), 15 Q. B. D. 460. **Foll.** Seymour *v.* Bridge (1885), 14 Q. B. D. 460. **Distd.** Perry *v.* Barnett (1885), 14 Q. B. D. 467; Thomas *v.* Hawkins (1889), 5 T. L. R. 551; The Vindobala (1889), 37 W. R. 409. **Consd. & Dbtd.** Cohen *v.* Kittell (1889), 22 Q. B. D. 680. **Distd.** Coates, Son *v.* Pacey (1892), 8 T. L. R. 474. **Expld.** Knight *v.* Lee (1892), 5 R. 54 **Consd. & Dbtd.** Tatam *v.* Reeve (1892), 57 J. P. 118. **Consd. & Expld.** Harvey *v.* Hart (1894), 38 Sol. Jo. 418; Burge *v.* Ashley & Smith, [1900] 1 Q. B. 744, C. A. **Expld.** Davis *v.* Stoddart (1902), 18 T. L. R. 260. **Consd. & Expld.** Lemox *v.* Stoddart, Davis *v.* Stoddart, [1902] 2 K. B. 21. **Distd.** Frith *v.* Frith, [1906] A. C. 254. **Refd.** Leigh *v.* Dickeson (1884), 15 Q. B. D. 60; North *v.* Walthamstow U. D. C. (1898), 62 J. P. 836; Reuton *v.* King (1905), 49 Sol. Jo. 552.

See, further, GAMING & WAGERING.

3058. ——.]—Where a principal gives his agent authority to enter into a contract on the principal's behalf, upon which the agent is by usage personally liable, the principal cannot revoke the authority after the liability has been incurred; & it is immaterial that the liability is not a legal liability, but arises merely under the rules & regulations of a particular business.—SEYMOUR *v.* BRIDGE (1885), 14 Q. B. D. 460; 54 L. J. Q. B. 347; 1 T. L. R. 236.

Annotations:—**Consd. & Expld.** Perry *v.* Barnett (1885), 14 Q. B. D. 467. **Refd.** North *v.* Walthamstow U. D. C. (1898), 62 J. P. 836.

See, further, STOCK EXCHANGE.

SUB-SECT. 6.—AUTHORITY EXERCISED BY AGENT.

3059. Credit given in account, but money not paid over.]—Credit having been given by insurance brokers in an account delivered by them to an underwriter for the premiums of reassurances declared illegal by Marine Insurance Act, 1745 (c. 37), the assured gave notice to the brokers not to pay the money over & indemnified them for withholding it:—*Held*: as the transaction was illegal, & as the money had not been actually paid, but only credit given for it on account, the assured withstanding the agent's commission may be unpaid, unless it appears that the authority was intended to secure to the agent his commission.—KJER & HANSEN *v.* HAWKES (1888), 6 L. R. N. Z. 224.—**N.Z.**

PART XI. SECT. 4, SUB-SECT. 5.

3055 i. *General principle.*]—To make a power irrevocable it must be shown that the agent has done such acts under the power that its revocation would be to his prejudice (DE VILLIERS, C.J.).—KOCH *v.* MAIR, No. 3045 ii., *ante*.—**S. AF.**

PART XI. SECT. 4, SUB-SECT. 6.

k. *Agent appropriating to principal's order goods already purchased.*]—Where an agent on receiving an order to purchase merely appropriates to his principal a contract entered into between himself & a third party previous to receiving the principal's instructions, such appropriation is not an exercise of his instructions such as will prevent the principal revoking same, no contractual relation with any third party having been created before revocation. —LAKHMICHAND RAMCHAND *v.* CHOTOORAN MOTRAM, No. 3035 i., *ante*.—**IND.**

l. *Instructions to pay creditors acted on.*]—FROST *v.* KERR (1874), 2 Pug. 358.—**CAN.**

was entitled to countermand payment.—EDGAR *v.* FOWLER (1803), 3 East, 222 ; 102 E. R. 582.

Annotations :—**Refd.** Taylor *v.* Chester (1869), L. R. 4 Q. B. 309 ; Universo Insce. of Milan *v.* Merchants Marine Insce., [1897] 2 Q. B. 93, C. A.

3060. Sale of goods—Sale note not delivered.]—Deft. had authorised a broker to sell some brimstone for him at a certain price, & the broker had agreed to sell it to pltf. at that price ; but before the sale note was made out, deft. countermanded the authority of the broker, & said pltf. should not have the goods. In an action for not delivering the brimstone :—*Held :* in these circumstances the contract could not be enforced.—FARMER *v.* ROBINSON (1805), 2 Camp. 339.

For full anns., *see* SALE OF GOODS.

3061. Money voluntarily paid to agent & not dispensed by him.]—A. voluntarily offered to pay a sum of money for the use of the poor of the parish, in order to avoid a prosecution by a magistrate upon a charge of having instigated the escape of a prisoner in custody for a misdemeanour. The offer was consented to by the magistrate, & the money was paid by A. to the master of the workhouse for use of the poor :—*Held :* A. might countermand the application of the money before it was so applied & recover it back in an action for money had & received.—TAYLOR *v.* LENDEY (1807), 9 East, 49 ; 103 E. R. 492.

Annotations :—**Refd.** Cotteen *v.* Missing (1815), 1 Madd. 176 ; *Re* Thomas, Jaquess *v.* Thomas (1894), 70 L. T. 567, C. A.

3062. Insurance broker—Slip signed, policy not subscribed.]—The authority of a broker to effect a policy of insurance may be revoked after the underwriters have signed the slip till such time as they have actually subscribed to the policy.—WARWICK *v.* SLADE (1811), 3 Camp. 127.

Annotations :—**Distd.** Mead *v.* Davison (1835), 3 Ad. & El. 303. **Apprvd.** The Vindobala (1889), 37 W. R. 409, C. A. **Refd.** Xenos *v.* Wickham (1867), L. R. 2 H. L. 296. **Mentd.** Cory *v.* Patton (1872), L. R. 7 Q. B. 304.

3063. Naval agent after registering his power & intermeddling.]—A naval agent who has duly registered his power, & has actually intermeddled with the business & conducted it practically to a considerable extent, is not removable at the mere caprice of the party by whom he was appointed.—THE HARE (1815), 1 Dods. 471.

3064. Instructions to repair ship acted on.]—Pltf., a ship's husband, being authorised by deft., a part-owner, to repair & lengthen the ship, contracted with a shipbuilder to do so. Afterwards he received notice from deft. that he would not be answerable. The work was then completed, & pltf. paid for it :—*Held :* (1) the authority to make the alterations could not be revoked after it was acted on ; (2) it was for deft. to prove that his notice was given before the work was begun.—CHAPPELL *v.* BRAY (1860), 6 H. & N. 145 ; 30 L. J. Ex. 24 ; 3 L. T. 278 ; 9 W. R. 17 ; 158 E. R. 60.

For full anns., *see* SHIPPING & NAVIGATION.

3065. Agent receiving money before due date.]—If, before revocation of an agent's authority to receive payment, he has received payment in the ordinary course of business, & the debtor has altered his position relying on that authority, a revocation will be too late. It is not in the ordinary course of business that an agent should receive money before it is due for his own accommodation, taking a bill & allowing discount. If the debtor chooses to make a payment by anticipation, he does it at his own risk if there be a revocation of the agent's authority before the money was due.—BREMING *v.* MACKIE (1862), 3 F. & F. 197.

3066. Charterparty signed by charterers, but not by agent of shipowners.]—The managing owner of the ship *V.*, with the authority of his co-owners, entered into negotiations abroad with the view of chartering the ship. These negotiations were carried on by an agent abroad. On July 17, 1884, a form of charter, signed by the managing owner, was offered to the proposed charterers. They objected to certain provisions in it, to which objections the agent, with the managing owner's authority, assented. On July 19 the charterers signed the charter, having previously introduced into it certain further alterations which had never been suggested to the managing owner's agent. On the same day certain of the co-owners gave notice to the managing owner that they refused to be bound by any charter. The managing owner, considering himself bound to sign the charterparty, signed it on July 22. The performance of the charterparty was prevented by the arrest of the *V.* by the dissentient owners, & damages resulted therefrom. In a co-ownership action :—*Held :* (1) there was no binding contract until the managing owner signed the charter on July 22 ; (2) up to signing of same any of the owners could revoke the managing owner's authority ; (3) as the dissenting owners had revoked their authority on July 19, they were not bound by the charter.—THE VINDOBALA (1889), 14 P. D. 50 ; 58 L. J. P. 51 ; 60 L. T. 657 ; 37 W. R. 409 ; 6 Asp. M. L. C. 376, C. A.

SECT. 5.—NOTICE OF TERMINATION, WHEN NECESSARY.

Relation between principal & third parties arising out of acts of agent after revocation of authority. *See* Part IX., Sect. 6, Sub-sect. 3, *ante*.

Relation between agent & third parties arising out of agent's warranty of authority after revocation thereof. *See* Part X., Sect. 1, Sub-sect. 7, C., *ante*.

AGISTMENT.

See ANIMALS.

AGREEMENTS.

See CONTRACT, and various titles in connection with which they occur.

END OF VOL. I.

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